INTEGRITY OF THE PERSON

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SUMMARY

This chapter examines the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment and the right to life. These are fundamental rights which stem from the concepts of human dignity and the integrity of the person, both foundational principles of human rights law. Following explanations of both these principles, the chapter sets out the meaning and content of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. It then explains the right to life, analysing similarly the content of the right and its limitations and how it has been interpreted in recent jurisprudence and treaty body commentaries.*

1. INTRODUCTION

1.1 RESPECT FOR HUMAN DIGNITY

Human dignity is central to the Universal Declaration of Human Rights (UDHR),[1] numerous human rights treaties,[2] international humanitarian law,[3] international criminal law,[4] and national constitutions worldwide.[5] It recognizes that each human being has intrinsic worth by virtue of their humanity, implies respect for the autonomy and the equality of each person, and requires that all persons have access to the basic conditions for life.

The link between indignity and torture was clear from the time of drafting the UDHR.[6] Human dignity continues to influence jurisprudence on torture and inhuman or degrading treatment. In *Pretty v UK*, the European Court of Human Rights noted that '[w]here treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of [torture or other prohibited ill-treatment].'[7] The Inter-American Court of Human Rights has likewise recognized certain acts as

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* This chapter takes inspiration from the text prepared by Sir Nigel S Rodley for prior editions of this book. Errors and omissions remain my own.

[1] Preamble and Arts 1, 22, and 23(3).

[2] International Covenant on Civil and Political Rights (ICCPR), preamble and Art 10; International Covenant on Economic, Social and Cultural Rights (ICESCR), preamble and Art 13; Convention on the Rights of the Child (CRC), preamble and Arts 23, 28, 37, 39, and 40; Convention on the Rights of Persons with Disabilities (CRPD), preamble and Arts 1, 3, 8, 16, 24, and 25; Protocol No 13 to the European Convention on Human Rights (ECHR), preamble; Charter of Fundamental Rights of the European Union (CFREU), preamble and Arts 1, 25, and 31; African Charter on Human and Peoples' Rights (ACHPR), preamble and Art 5.

[3] Geneva Conventions, Common Art 3(1)(c); Additional Protocol I, Art 75(2)(b).

[4] ICC Statute, Arts 8(2)(b)(xxi) and 8(2)(c)(ii).

[5] Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 370–96.

[6] CHR, Drafting Committee, Draft Outline of International Bill of Rights, E/CN.4/AC.1/3 (4 June 1947) Art 4.

[7] (2002) 35 EHRR 1, para 52.

inhuman treatment because they fail to respect human dignity,[8] similar to the African Commission on Human and Peoples' Rights.[9]

The right to life encompasses the right to enjoy a life with dignity.[10] The connections between human dignity and the right to life have influenced, though not always consistently, debates around reproductive rights,[11] bioethics,[12] end of life,[13] and what constitute acceptable punishments,[14] among other issues.

1.2 INTEGRITY OF THE PERSON

Integrity of the person encompasses the right to be treated humanely and in a manner that preserves a person's physical and mental integrity,[15] which incorporates notions of well-being, autonomy, and privacy. It protects individuals from unjustifiable attacks or restrictions on physical or mental integrity and obligates states to positively protect against such attacks.

The Convention on the Rights of Persons with Disabilities (CRPD) makes clear that persons with disabilities have the right to have their physical and mental integrity respected on an equal basis with others.[16] Forced medication, seclusion, restraint, and non-consensual sterilization are all practices which have been applied to persons with disabilities, children, the elderly, and other marginalized or vulnerable persons. These practices can violate personal integrity, the prohibition of torture and ill-treatment, and, depending on the context, the right to life.

2. THE RIGHT TO BE FREE FROM TORTURE AND ILL-TREATMENT

In the face of medical experiments by the Nazis in concentration camps, the drafters of the UDHR were mindful of the need to outlaw specifically inhuman acts.[17] Thus from the outset, torture was about unnecessary cruelty on the powerless.

Torture has been nearly universally outlawed, yet the practice continues. This incongruity persists in part because of some states' efforts to restrict the definition of torture to a narrow subset of prohibited behaviour, to characterize certain individuals or groups as unworthy of protection, and to justify acts which could amount to torture by their necessity to protect other interests such as national security. Some states have sought to introduce exceptions to certain aspects of the torture prohibition such as the prohibition on refoulement when there are national security considerations.[18] For the most part, courts have resisted such attempts.

2.1 SOURCES

Several specialist conventions guarantee the right to be free from torture and ill-treatment, notably the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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[8] *De la Cruz-Flores v Peru*, Merits, Reparations and Costs, IACtHR Series C No 115 (18 November 2004) para 128.

[9] 97/93, *Modise v Botswana* (2000) AHRLR 30, para 91.

[10] HRC, General Comment 36, CCPR/C/GC/36, para 3.

[11] See Dixon and Nussbaum, 'Abortion, Dignity, and a Capabilities Approach' in Baines, Barak-Erez, and Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (CUP, 2012) 64.

[12] Deryck, *Human Dignity in Bioethics and Biolaw* (OUP, 1993).

[13] CESCR, General Comment 14, HRI/GEN/1/Rev.9 (Vol I) 78, para 25.

[14] ICCPR-OP2, preamble; Protocol 13 to the ECHR, preamble.

[15] ACHR, Art 5.

[16] Art 17.

[17] Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1997) 42–3.

[18] *Chahal v UK* (1997) 23 EHRR 413; *Saadi v Italy* (2004) 49 EHRR 30.

(UNCAT), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention to Prevent and Punish Torture. Soft law standards which address torture specifically include the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNDAT) (1975), the Code of Conduct for Law Enforcement Officials (1979), the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (2000), the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (2002), and the revised Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (2015).

The prohibition of torture and other ill-treatment has also been incorporated into general human rights treaties and standard-setting texts, including the International Covenant on Civil and Political Rights (ICCPR),[19] the European Convention on Human Rights (ECHR),[20] the American Convention on Human Rights (ACHR),[21] the African Charter on Human and Peoples' Rights (ACHPR),[22] the Arab Charter on Human Rights (Arab Charter),[23] and the Association of Southeast Asian Nations Declaration on Human Rights (ASEAN Declaration),[24] as well as into standards protecting children,[25] women,[26] persons with disabilities,[27] and migrant workers.[28]

Torture and other forms of ill-treatment are also outlawed by international humanitarian law. Common Article 3 of the four Geneva Conventions of 1949, various other provisions in those conventions, and the two Additional Protocols of 1977 prohibit cruel treatment and torture as well as outrages upon personal dignity, in particular humiliating and degrading treatment, of civilians and persons taking no active part in the hostilities.[29] Finally, torture and inhuman treatment may amount to war crimes[30] and crimes against humanity, that is, international crimes that may be prosecuted by the International Criminal Court or other international criminal tribunals.[31]

2.2 LEGAL STATUS

The prohibition of torture and other ill-treatment is non-derogable, meaning that there can be no circumstances when such practices are justifiable.[32] No person can be tortured, regardless of who they are: a non-citizen, a suspected terrorist, a convicted criminal, or a person suspected to have vital

[19] Arts 7 and 10.

[20] Art 3.

[21] Art 5.

[22] Art 5.

[23] Art 8.

[24] Art 14.

[25] CRC, Art 37(a).

[26] Declaration on the Elimination of Violence against Women, GA Res 48/104 (20 December 1993) Art 3(h).

[27] CRPD, Art 15.

[28] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 10.

[29] Geneva Convention I, Art 12(2); Geneva Convention II, Art 12(2); Geneva Convention III, Arts 13, 17(4), 87(3), and 89; Geneva Convention IV, Arts 27 and 32; Protocol I, Art 75(2); Protocol II, Art 4(2). See Chapter 25.

[30] Torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health constitute grave breaches of the Geneva Conventions. Geneva Convention I, Art 50; Geneva Convention II, Art 51; Geneva Convention III, Art 130; Geneva Convention IV, Art 147; Additional Protocol I, Art 11.

[31] See eg ICC Statute, Arts 7(1)(f) and (k), 8(2)(a)(ii) and (iii), 8(2)(c)(i) and (ii). See Chapter 26.

[32] ICCPR, Art 4; ECHR, Art 15; ACHR, Art 27. See Chapter 7.

information about planned crimes.[33] Nor can the prohibition be balanced against other state interests such as national security or the need to locate evidence that may help protect others.[34] The prohibition of torture is also recognized as a principle of customary international law binding on all states, and as a *jus cogens* norm, a peremptory norm of international law which cannot be modified even by treaty.[35]

Whereas the status of the prohibition of torture is clear, certain aspects of the status of the prohibition of cruel, inhuman, or degrading treatment or punishment are subject to debate. Treaties such as the ICCPR and the ECHR, which prohibit torture and other ill-treatment as part of a single provision, recognize the non-derogable status as applicable equally to both prohibitions. In contrast, UNCAT, which treats the prohibitions separately, stipulates that the torture prohibition is non-derogable,[36] but is silent on the status of the prohibition of other ill-treatment. The UN Committee Against Torture has clarified in its General Comment 2 that 'the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable'.[37] Similarly, the UN Special Rapporteur on torture has asserted that *both* the prohibitions of torture and other ill-treatment enjoy 'the enhanced status of a *jus cogens* or peremptory norm of general international law.'[38]

There is also debate about whether the *jus cogens* status of the norm applies only to the prohibition of the *commission* of torture, or also to the range of associated positive and negative obligations set out in UNCAT.[39]

2.3 DEFINITION

Torture is the calculated infliction of severe pain or suffering for a specific purpose such as coercion, punishment, intimidation, or discrimination. What makes it so horrible is the abuse of power – the intentional infliction of cruelty by those with the power and responsibility to protect. Torture can forever change its victims; it causes shame and stigma and affects belief systems. Beyond the physical impacts, it can result in long-term psychological consequences.[40]

Building on the definition contained in the UNDAT of 1975, Article 1(1) of UNCAT defines 'torture' as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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[33] *Ireland v UK* (1979–80) 2 EHRR 25; *Chahal v UK*; *Tomasi v France* (1993) 15 EHRR 1; *Selmouni v France* (2000) 29 EHRR 403.

[34] *Gäfgen v Germany* (2011) 52 EHRR 1.

[35] eg ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 99; ICTY, *Prosecutor v Furundžija,* Trial Judgment, 10 December 1998, IT-95-17/1, paras 153–7; HRC, General Comment 29, HRI/GEN/1/Rev.9 (Vol I) 234, para 3; CAT, General Comment 2, HRI/GEN/1/Rev.9 (Vol I) 376, para 1.

[36] Art 2(2).

[37] Para 3.

[38] Report of the Special Rapporteur on torture, A/HRC/25/60 (10 April 2014) para 40.

[39] Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *EJIL* 815, 836–7.

[40] Reyes, 'The Worst Scars Are in the Mind: Psychological Torture' (2007) 89 (867) *IRRC* 591.

As compared to the Declaration definition, the UNCAT definition does not describe torture as an 'aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. It also broadens the purposes of torture to include 'any reason based on discrimination of any kind'. The definition does not include a finite list of acts amounting to torture. Instead, the definition is set out broadly, relying on the nature, purpose, and severity of the treatment applied. Whether conduct will amount to torture 'will depend on the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'[41] Acts which do not satisfy the torture definition can amount to cruel, inhuman or degrading treatment or punishment if inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity (Article 16(1)). To constitute cruel, inhuman or degrading treatment, the ill-treatment must (like torture) reach a minimum level of severity or intensity. Unlike torture however, there is no need for such acts to be committed for a prohibited purpose. Thus, acts committed for apparent lawful purposes (such as the use of force or detention) can amount to cruel, inhuman or degrading treatment or punishment where the conduct exceeds what is permissible under law or where the pain or suffering is not proportionate or justifiable.

There are four main elements in the UNCAT torture definition. The interpretation of each of these elements and the extent to which they feature in other treaties and soft-law standards is considered in turn.

2.3.1 Severe pain or suffering, whether physical or mental

'Severity' is the threshold of the intensity of pain or suffering required (i) to determine whether a given treatment amounts to inhuman or degrading treatment or punishment, and (ii) to distinguish between torture and other forms of ill-treatment. This threshold of intensity exists under human rights law, humanitarian law, and international criminal law frameworks though the meaning of 'severity' is ambiguous and value-laden, and subject to myriad interpretations. It is a relative consideration that will depend on both circumstances and context.

With respect to (i), there is no reference to 'severity' in Article 16 UNCAT, which requires states parties to prevent acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture. Nevertheless, courts and other adjudicative bodies considering the meaning of 'inhuman or degrading treatment' have recognized such a threshold. For instance, in the *Greek case*, the European Commission of Human Rights held that inhuman treatment covers 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.'[42] Similarly, in *Ireland v UK*, the European Court of Human Rights held that ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of Article 3 ECHR.[43] The meaning of 'severity' has been interpreted flexibly and 'depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim'.[44]

With respect to (ii), 'severity' is one of several factors taken into account to distinguish between torture and others forms of ill-treatment. Evans emphasizes that it is 'only one element of an increasingly complex matrix.'[45] It has also been recognized that the classification of acts as ill-treatment or torture might change over time, owing to changing standards and values.[46]

In *Aksoy v Turkey*, the European Court of Human Rights determined that 'Palestinian hanging' (tying a person's hands behind the back and stringing them up by the arms) and other ill-treatment was 'of such a serious and cruel nature that it can only be described as torture'.[47] In *Aydin v Turkey*, it found

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[41] *Selmouni v France*, para 100.

[42] *The Greek case* (1969) 12 YB 1, 186.

[43] Para 162.

[44] *Brough v Australia*, CCPR/C/86/D/1184/2003 (17 March 2006) para 9.2. See similarly, *Huri-Laws v Nigeria* Comm no 225/1998 (ACommHPR, 6 November 2000) para 41.

[45] Evans, 'Getting to Grips with Torture' (2002) 51 *ICLQ* 365, 372–3.

[46] *Selmouni v France*, para 101.

[47] (1997) 23 EHRR 553, para 64.

that 'the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture.'[48] The African Commission on Human and Peoples' Rights has likewise required acts to meet a certain threshold of severity to be considered torture. *Abdel Hadi, Ali Radi and Others v Sudan* concerned 'severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their [the victims'] bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment,'[49] which resulted in serious physical injuries and psychological trauma. The Commission found this to amount to torture.[50]

Despite clear instances of torture, courts and commentators alike have long struggled with determining whether an act is sufficiently severe to constitute torture. There is debate whether the assessment is purely subjective or should include also objective elements which reflect what would ordinarily be understood as causing, or being capable of causing, severe pain or suffering.[51]

An objective approach to severity is problematic as the experience of pain and suffering will necessarily be different from each victim's point of view. However, a subjective approach can be problematic as it decides whether torture has occurred on the basis of the victim's relative resilience. Furthermore, assessments about 'severity' may come down to the consideration of a victim's credibility. These can be arbitrary, often dependent on judges' predispositions or backgrounds. Decision-makers tend to privilege physical forms of harm over psychological suffering. For instance the use of beatings and hangings are routinely recognized as torture whereas total sensory deprivation or prolonged or indefinite solitary confinement are often characterized as other forms of ill-treatment. With respect to rape as the apex of gender-based violence, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) recognizes that *obviously* all acts of rape will satisfy the severity requirement for torture.[52] This approach avoids the need for potentially retraumatising questioning of rape victims about their suffering. However, it has been argued that it 'essentializes' women's experiences of rape and reinforces 'the understanding that women are not capable of not being victimized by rapes'.[53] Regardless of the merits of that argument, this 'essentializing' is likely to produce the opposite effect for gender-based crimes other than rape by underplaying the suffering that such crimes can cause through extreme forms of mental anguish.[54]

2.3.2 Specific purpose

The requirement that the act be carried out for a specific purpose is central to the UNCAT definition. The UN Special Rapporteur on torture has noted that 'the decisive criteria for distinguishing torture from [cruel, inhuman, or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.'[55]

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[48] (1998) 25 EHRR 251, para 86.

[49] 368/09 (5 November 2013) para 71.

[50] Para 73.

[51] Reyes, 595–98.

[52] *Prosecutor v Kunarac*, Appeals Judgment, IT-96-23&23/1, 20 June 2002, paras 150–51.

[53] Engle, 'Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *AJIL* 778, 813.

[54] See ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Warrant of Arrest, ICC-01/05-01/08, 10 June 2008, paras 39, 40.

[55] Report of the Special Rapporteur on torture, E/CN.4/2006/6 (23 December 2005) para 39.

Purpose has been interpreted broadly and non-exhaustively. International jurisprudence has recognized self-incrimination,[56] intimidation of the population,[57] humiliation,[58] and discrimination[59] as relevant qualifying purposes.

While the requirement of a specific purpose has been incorporated into international criminal law jurisprudence,[60] it does not feature in the definition of torture as a crime against humanity in the ICC Statute,[61] though it is incorporated in the Statute as a war crime.[62] Sometimes a prohibited purpose has been implied. The suggestion that the rape by a person wielding power or authority took place for simple private gratification purposes has not been accepted. The ICTY has held that rape by a person of authority inherently involves punishment, coercion, discrimination, or intimidation.[63]

2.3.3 Public official

Article 1(1) UNCAT specifies that for conduct to constitute torture it must have been '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'. Rodley and Pollard indicate that 'the prohibition is not concerned with private acts of cruelty: international concern arises only where cruelty has official sanction.'[64]

Nevertheless, the public official requirement has been critiqued by feminist scholars who argue that it maintains an artificially narrow lens on men subjected to ill-treatment in detention. The prohibition of torture should be capable of addressing a much wider spectrum of violence, including violence occurring in the private sphere, especially when there has been a failure of the state to exercise due diligence to protect persons from prohibited treatment.[65] This argument has only indirectly impacted the anti-torture framework. Efforts to better account for harms perpetrated by non-state actors have consisted of broadening what is understood as 'other person acting in an official capacity' to recognize regimes which take on state-like functions in what would otherwise be a power vacuum. For instance, in *Elmi v Australia*, the UN Committee Against Torture determined that, where state authority was wholly lacking (Somalia had no central government at the time), acts by groups exercising quasi-governmental authority could fall within the definition.[66] In *R v Reeves Taylor (Appellant)*, the UK Supreme Court has gone further, holding that the words 'person acting in an official capacity' included 'conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control', irrespective of whether a central state authority was present or lacking.[67]

Due diligence requirements have also been used to prevent and respond to torture and other ill-treatment perpetrated by non-state actors.[68] For instance, disappearances which are not directly imputable to a state (because they are the acts of a private person or because the person responsible has

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[56] *Cantoral Benavides v Peru*, Merits, IACtHR Series C No 67 (18 August 2000) para 104; *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 114 (7 September 2004) para 148.

[57] *Gomez-Paquiyauri Brothers v Peru*, Merits, Reparations and Costs, IACtHR Series C No 110 (8 July 2004) para 116.

[58] ICTY, *Prosecutor v Kvočka et al*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para 152.

[59] ICTY, *Prosecutor v Kunarac et al*, Trial Judgment, IT-96-23 and IT-23/1-T, 22 February 2001, para 654.

[60] *Prosecutor v Kunarac et al* (Trial Judgment) para 497.

[61] ICC Statute Art 7(2)(e).

[62] Elements of Crimes for the ICC Statute, Arts 8(2)(a)(ii)-1(2) and 8(2)(c)(i)-4(2).

[63] *Prosecutor v Delalić et al,* Trial Judgment, IT-96-21-T, 16 November 1998, para 495.

[64] Rodley and Pollard, *The Treatment of Prisoners under International Law* (3rd ed, OUP, 2011) 88–89.

[65] Charlesworth and Chinkin, 'The Gender of Jus Cogens' (1993) 15 *HRQ* 63, 72.

[66] *Elmi v Australia*, CAT/C/22/D/120/1998 (14 May 1999) para 6.5.

[67] *R v Reeves Taylor (Appellant)* [2019] UKSC 51, para 76.

[68] HRC, General Comment 28, CCPR/C/21/Rev.1/Add.10, para 11. See also, HRC, General Comment 20, HRI/GEN/1/Rev.1, 30, paras 13–14; HRC, General Comment 17, HRI/GEN/1/Rev.1, 23, para 6.

not been identified),[69] gender-based violence including domestic violence,[70] and the failure to protect prisoners from violence by other prisoners,[71] engage states' due diligence obligations. For the most part, this approach of recognizing state responsibility for the failure to exercise due diligence to prevent or respond to ill-treatment perpetrated by private actors has not led courts to recognize that private actors can or should be prosecuted for torture for the violence they perpetrate; human rights bodies have tended to refrain from labelling violence committed by non-state actors as 'torture'.[72] Also, the due diligence 'expansion' has not led to state officials being prosecuted for torture as such, when they fail to protect individuals from the violence caused by private actors.[73]

In contrast, under international criminal law, there is a relatively clear statement from the International Criminal Tribunal for Rwanda (ICTR) about an official's responsibility for torture when instigating a crowd (of private actors) to rape women, also characterizing the rapes by the private actors as torture; the accused 'was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture.'[74] Different to the framings under human rights law, international criminal law does not limit acts of torture to conduct perpetrated by or connected with public officials. When torture operates as an underlying act for genocide, war crimes, or crimes against humanity, there is no public official requirement. In *Delalić*, the ICTY held that torture could be perpetrated by officials of non-state parties to a conflict.[75] This jurisprudence has evolved, with later cases holding that torture does not require any involvement of a person acting in an official capacity.[76] The ICC Statute does not require official capacity for the crime against humanity or war crime of torture, although for a crime against humanity it specifies that the victim of torture must be in the custody or under the control of the perpetrator.[77]

This international criminal law framing has led to prosecutions of members of armed opposition groups for violence committed in the context of armed conflict. The ICTY set out its rationale in *Kunarac*: 'the characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it'.[78] However, this rationale has not been applied outside of armed conflicts where non-state actors take advantage of their positions of power and perpetrate violence on vulnerable persons in that power relationship, for instance, violence against children in care homes or religious establishments, migrant workers, or victims of trafficking, people smuggling, and other forms of organized crime. This is despite that under human rights law, abuse of power is central to the rationale for the public official requirement or, as the UN Special Rapporteur on torture has put it, 'the powerlessness of the victim' of which the perpetrator takes advantage.[79]

2.3.4 Pain or suffering arising from lawful sanctions

Article 1(1) UNCAT stipulates that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' However, a sanction that is lawful under national law will only engage the exception if it also complies with international law. Forms of corporal punishment,

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[69] *Velásquez-Rodríguez v Honduras*, Merits, IACtHR Series C No 4 (29 July 1988) paras 172–76.

[70] *Opuz v Turkey* (2010) 50 EHRR 28, paras 169, 176.

[71] *Yuriy Illarionovich Shchokin v Ukraine*, App no 4299/03, Judgment of 3 October 2013, paras 50–51.

[72] CAT, General Comment 2, CAT/C/GC/2, para 18; *Opuz v Turkey*, (2010) 50 EHRR 28, para 161. See, in contrast, *Caso López Soto y Otros v Venezuela*, Fondo, Reparaciones y Costas, IACtHR Series C No 3 (26 September 2018) para 192, where the Inter-American Court of Human Rights characterized the long-term abduction, rape, and mistreatment of a woman by a private individual in the face of state inaction as torture.

[73] *Hajrizi Dzemajl et al v Yugoslavia*, CAT/C/29/D/161/2000, para 9.2.

[74] *Prosecutor v Laurent Semanza*, Trial Judgment and Sentence, ICTR-97-20-T, 15 May 2003, para 485.

[75] *Prosecutor v Delalić et al,* para 473.

[76] *Prosecutor v Kunarac et al*, para 496.

[77] Art 7(2)(e).

[78] *Prosecutor v Kunarac et al*, para 495.

[79] Report of the Special Rapporteur on torture, E/CN.4/2006/6 (23 December 2005) para 39.

'including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure',[80] such as lashes, whipping, or flogging have been held to violate the prohibition.[81]

2.4 STATE OBLIGATIONS

The prohibition of torture and other ill-treatment entails both negative and positive obligations. There are several negative obligations. States and their officials must refrain from committing torture and ill-treatment, and from acquiescing to, supporting, or assisting others to commit such acts. States are also prohibited from returning or extraditing a person to a country where they face a real risk of torture or ill-treatment.[82] In *Chahal*, despite arguments that national security interests should either override the risk, or be taken into account in assessing the risk of ill-treatment in deportation cases, the European Court of Human Rights determined that the prohibition on *refoulement* is absolute.[83] Only in very limited circumstances will a state be in a position to override a risk of torture or ill-treatment in the receiving state by agreeing with it assurances that the person will be treated humanely.[84]

As a further negative obligation, statements extracted by torture cannot be used in proceedings except against a person accused of torture as evidence that the statement was made.[85] The UN Human Rights Committee's General Comment 32 clarifies that this prohibition applies to both torture and other prohibited ill-treatment.[86] The introduction of evidence obtained by torture into legal proceedings, including derivative evidence, taints those proceedings and violates the right to a fair trial.[87] The rule on the inadmissibility of evidence obtained by torture has also been applied where the torture was allegedly committed by officials of a third state on third parties.[88]

Positive obligations in UNCAT require states to take effective legislative, administrative, judicial, and other measures to prevent acts of torture in any territory under their jurisdiction.[89] Also, as canvassed earlier in this chapter, states are obliged to exercise due diligence to prevent acts of significant violence from occurring in the private sphere. Furthermore, states are required to carry out effective investigations[90] and, where sufficient evidence exists, to prosecute (or extradite) perpetrators of torture,[91] and protect victims from reprisals.[92] The obligation to investigate is not displaced when the acts took place outside the state's territorial jurisdiction in a difficult security environment.[93]

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[80] HRC, General Comment 20, HRI/GEN/1/Rev.1, 30, para 5.

[81] *Osbourne v Jamaica*, CCPR/C/68/D/759/1997 **(**13 March 2000) para 9.1; *Curtis Francis Doebbler v Sudan*, Comm no 236/2000 (ACommHPR, 15–19 May 2003) para 42; *Tyrer v UK* (1978) 2 EHRR 1, paras 30–35; *Caesar v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 123 (11 March 2005) paras 70–74, 88.

[82] *Soering v UK* (1989) 11 EHRR 439.

[83] *Chahal v UK*. See also *Saadi v Italy*.

[84] *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1; *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005 (10 November 2006) para 11.5.

[85] UNCAT, Art 15.

[86] CCPR/C/GC/32, para 41.

[87] *Jalloh v Germany* (2007) 44 EHRR 32, para 105; *Gäfgen v Germany*, paras 162–68. See also Chapter 13.

[88] *A v Secretary of State for the Home Department* [2005] UKHL 71. See also *Othman (Abu Qatada)*, paras 267, 276, and 282; *El Haski v Belgium*, App no 649/08, Judgment of 25 September 2012.

[89] Art 2.

[90] See Office of the UN High Commissioner for Human Rights, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', HR/P/PT/8/Rev.1.

[91] UNCAT, Arts 5(2), 7, and 12. See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, paras 118–19; *Case of Barrios Altos v Peru*, Merits, IACtHR Series C No 75 (14 March 2001) paras 41–44; HRC, General Comment 31, CCPR/C/21/Rev.1/Add.13, para 18.

[92] UNCAT, Art 13; Istanbul Protocol, para 111.

[93] *Al-Skeini and Ors v Secretary of State for Defence* [2004] EWHC 2911 (Admin) paras 318–36.

Additionally, states are obligated to afford a remedy for torture, including compensation and rehabilitation. Article 14 UNCAT recognizes that survivors are entitled to an 'enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.[94] The state is also required to take measures to prevent recurrence.

2.5 SPECIFIC PRACTICES

While the determination on whether conduct amounts to torture will depend on the particular circumstances, specific practices that have been held to amount to torture include *falanga* and sustained beatings,[95] water suffocation,[96] and rape.[97]

Findings related to other forms of prohibited ill-treatment have included instances where the severity has not attained the threshold for torture or where the ill-treatment was not inflicted for a specific purpose. For example, courts and treaty bodies have tended to characterize as ill-treatment (as opposed to torture), or have failed to specify whether the conduct amounts to torture or other prohibited ill-treatment, the suffering imposed on families of the disappeared[98] and the extra-judicial transfer of persons from one state to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman, or degrading treatment.[99] Prohibited ill-treatment has also been found in respect of various detention practices, particularly when they do not align with standards and principles related to the treatment of prisoners,[100] such as solitary confinement and prolonged *incommunicado* detention,[101] poor prison conditions and humiliation of prisoners,[102] including when the ill-treatment stems from detention in psychiatric hospitals and other care facilities[103] and refugee and migrant detention facilities.[104] Ill-treatment has also been found in respect of cruel, inhuman, or degrading punishments even when imposed in accordance with domestic law, such as corporal punishments,[105] and certain practices concerning the imposition of the death penalty, including its imposition following an unfair trial[106] and an overly lengthy period on death row.[107] It is important to remember, however, that there is no clear formula to classify conduct as torture or other ill-treatment, particularly given the importance for courts to take into account the particular circumstances of the case, including any special characteristics that can impact on how particular conduct is experienced by the affected individuals.

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[94] See CAT, General Comment 3, CAT/C/GC/3.

[95] *Abdel Hadi, Ali Radi and Others v Sudan*, para 71.

[96] *José Vicente and Amado Villafañe Chaparro v Colombia*, CCPR/C/60/D/612/1995 (14 June 1994).

[97] *Aydin v Turkey* (1998) 25 EHRR 251, paras 83–86; *Rosendo Cantú et al v Mexico*, Merits, Reparations, Costs, IACtHR Series C No 216 (31 August 2010) para 118; *Malawi African Association and Others v Mauritania* Comm nos 54/91, 61/91, 98/93, 164/97–196/97, 210/98 (ACommHPR, 11 May 2000) paras 117–18.

[98] *Bazorkina v Russia* (2008) 46 EHRR 261 para 139; *Kurt v Turkey* (1999) 27 EHRR 373 paras 133–34; *Blake v Guatemala*, Merits, IACtHR Series C No 36 (24 January 1998) paras 114–16.

[99] *El-Masri v FYR Macedonia* (2013) 57 EHRR 25; *Al Nashiri v Poland* (2015) 60 EHRR 16 and *Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16.

[100] Revised UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), A/RES/70/175 (8 January 2016).

[101] *El-Megreisi v Libya*, CCPR/C/46/D/440/1990 (23 March 1994) para 5.4; *Aber v Algeria*, CCPR/C/90/D/1439/2005 (16 August 2007) para 7.3; *Suárez-Rosero v Ecuador*, Merits, IACtHR Series C No 35 (12 November 1997) paras 90–91.

[102] *Womah Mukong v Cameroon*, CCPR/C/51/D/458/1991 (10 August 1994) para 9.4; *Hénaf v France* (2005) 40 EHRR 44, paras 55–60; *Loayza-Tamayo v Peru*, IACtHR Series C No 33 (17 September 1997) paras 46(d), 58.

[103] *Dhoest v Belgium* (1997) 12 EHRR 135.

[104] *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, paras 233, 263.

[105] *Tyrer v UK*.

[106] *Öcalan v Turkey* (2005) 41 EHRR 45, paras 167–75.

[107] *Soering v UK*; *Hilaire v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 123 (21 June 2002) paras 167–69.

UNCAT's demarcation between torture and cruel, inhuman, or degrading treatment or punishment has arguably undermined the progressive evolution of standards in this area. Several UNCAT obligations applicable to torture do not apply clearly to other forms of ill-treatment. This has helped create questionable areas of 'permissible' conduct. For instance, unlike in the case of treatment amounting to torture, UNCAT does not prohibit explicitly the refoulement of persons who face a real risk of cruel, inhuman, or degrading treatment or punishment nor does it require states to criminalize such treatment, afford reparation for such treatment, or disallow evidence procured by such treatment in any proceedings.[108] Nevertheless, for the most part, courts and the UN Committee Against Torture have interpreted progressively states' obligations and have recognized that both torture and other forms of prohibited ill-treatment form part of a continuum of ill-treatment that states are obligated to prevent, prohibit, and repair.[109]

3. THE RIGHT TO LIFE

The right to life applies to all persons without distinction or discrimination of any kind and concerns the right of individuals 'to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'[110]

Unlike the prohibition of torture which is absolute, the deprivation of life can be lawful in certain circumstances. Consequently, the right to life consists of the right not to be *arbitrarily* deprived of life – any deprivation of life must have a legal basis and be reasonable, necessary, and proportionate.

3.1 SOURCES

The right to life is set out in a range of international human rights conventions and declarative texts, including Article 3 UDHR and Article 6(1) ICCPR and specialist conventions related to women,[111] children,[112] persons with disabilities,[113] older people,[114] and migrant workers.[115] In addition, a number of specialist texts deal with particular aspects related to the right to life, such as the death penalty,[116] the use of force and firearms by law enforcement officials,[117] and extra-legal, arbitrary, and summary executions.[118] The right to life is also contained in regional conventions and declarations, including Article 4 ACHR, Article 4 ACHPR, Article 2 ECHR, Article 5 Arab Charter, Article 11 ASEAN Declaration, and Article 1 American Declaration.

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[108] UNCAT, Art 16.

[109] CAT, General Comment 3, CAT/C/GC/3, para 1.

[110] HRC, General Comment 36, para 3.

[111] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art 4; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Art 4; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

[112] CRC, Art 6; African Charter on the Rights and Welfare of the Child, Art 5.

[113] CRPD, Art 10.

[114] Inter-American Convention on Protecting the Human Rights of Older Persons, Art 6.

[115] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 9.

[116] ICCPR-OP2; Protocols 6 and 13 to the ECHR; Protocol to the ACHR to Abolish the Death Penalty; UN ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984).

[117] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

[118] UN ECOSOC, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

3.2 LEGAL STATUS

The prohibition on the arbitrary deprivation of life allows for no exceptions, not even in a state of war or a national emergency.[119] It also has peremptory status.[120] The African Commission on Human and Peoples' Rights, in its General Comment on the right to life, notes:

> The right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times. The right to life is contained in the constitutions and other legal provisions of the vast majority of African and other States. All national legal systems criminalise murder, and arbitrary killings committed or tolerated by the State are a matter of the utmost gravity.[121]

The right to life continues to apply during armed conflict in a complementary and not mutually exclusive way, and should be interpreted in light of applicable international humanitarian law.[122] International humanitarian law also prohibits the arbitrary deprivation of life, albeit not in those terms. It treats the wilful killing of protected persons as grave breaches;[123] prohibits disproportionate[124] and indiscriminate attacks;[125] and restricts the application of the death penalty.[126] Furthermore, killings that result from acts of aggression automatically constitute violations of the right to life.[127]

3.3 TERRITORIAL SCOPE

The obligation to respect and ensure the right to life operates within a state's territory but also extends to other locations outside a state's territory but subject to its jurisdiction.[128] The UN Human Rights Committee's General Comment 36 provides an expansive interpretation of states' extraterritorial obligations to protect, respect, and fulfil the right to life, holding that

> States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy.[129]

3.4 TEMPORAL SCOPE: BEGINNING AND END OF LIFE

Questions about when the right to life begins and ends remain controversial.

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[119] ICCPR, Art 4.

[120] HRC, General Comment 36, para 68.

[121] General Comment 3 (18 November 2015) para 5.

[122] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; HRC, General Comment 36, para 64. See Chapter 25.

[123] Geneva Convention 1, Art 50; Geneva Convention 2, Art 51; Geneva Convention 3, Art 130; Geneva Convention 4, Art 147.

[124] Protocol I, Arts 51(5)(b) and 57(2)(a)(iii).

[125] Protocol I, Art 51(4).

[126] Geneva Convention 4, Art 68; Protocol I, Arts 76(3) and 77(5); Protocol II, Art 6(4).

[127] HRC, General Comment 36, para 70.

[128] HRC, General Comment 31, para 10.

[129] Para 22.

Article 4 ACHR provides that the right to life must be protected 'in general, from the moment of conception.' The Inter-American Court of Human Rights has found that, in the case of in vitro fertilization, 'conception' occurs only with the implantation of the embryo in the uterus and not at the moment of fertilization; hence, an embryo alone cannot be granted the status of a 'person'. Furthermore, the Court held that the protection of life under Article 4 ACHR is not absolute, but incremental according to the degree of development of the foetus.[130] In contrast, Article 2 ECHR leaves undefined from what point the right to life is protected. In *Vo v France*, the European Court of Human Rights indicated that in the absence of a European consensus on the status of the embryo, it was not necessary for it to rule on whether the unborn child was a person for the purposes of Article 2.[131] Similarly, the Human Rights Committee has not articulated whether the right to life extends to human embryos, focusing instead on the rights of pregnant women; any regulation of the termination of pregnancies must not result in violation of the right to life or the right to be free from torture and other ill-treatment of such women.[132]

The right to life does not include a right to assisted suicide. In *Pretty v UK*, the European Court of Human Rights confirmed that 'no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.'[133] Conversely, there is no obligation on states stemming from the right to life to regulate assisted suicide. The Human Rights Committee, for instance, has simply required that where such regulation exists, states 'must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.'[134]

3.5 MATERIAL SCOPE: THE PROHIBITION OF ARBITRARY DEPRIVATION OF LIFE

The prohibition on the arbitrary deprivation of life entails both negative and positive obligations.

Negative obligations include the need to refrain from arbitrarily taking life, and to avoid extraditing, deporting, or otherwise transferring persons to countries where they face a real risk of being exposed to arbitrary deprivation of life. For instance, the Human Rights Committee determined that the right to life was violated where no weight was given to a *fatwa* that was allegedly ordered against an individual who faced expulsion.[135]

States' positive obligations to protect life include preventing arbitrary killings by their security forces and other groups under their control, as well as preventing and punishing murder and manslaughter. Authorities must take reasonable steps to protect a person's life if they know or ought to know that the person faces a real and immediate risk of life-threatening violence.[136] Furthermore, they must ensure that persons in their custody, such as in prisons[137] and hospitals,[138] are adequately protected from life-threatening risks that are foreseeable. This includes taking adequate measures to address the

[130] *Artavia Murillo et al v Costa Rica*, IACtHR Series C No 257 (28 November 2012) paras 163–264.

[131] *Vo v France* (2005) 10 EHRR 12, paras 84–5. See also *Evans v UK* (2008) 46 EHRR 34 paras 54–6.

[132] General Comment 36, para 8; *Mellet v Ireland*, CCPR/C/116/D/2324/2013 (31 March 2016).

[133] *Pretty v UK* (2002) 35 EHRR 1, para 40. See similarly *Haas v Switzerland* (2011) 53 EHRR 33.

[134] General Comment 36, para 9.

[135] *Masih Shakeel v Canada*, CCPR/C/108/D/1881/2009 (24 July 2013) paras 8.5 and 8.6.

[136] *Osman v UK* (1998) 29 EHRR 245, paras 115–16; Case 12.626, *Jessica Lenahan (Gonzales) et al v USA* IACommHR Report No 80/11 (21 July 2011) paras 128–36 and 164–70.

[137] *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19; *Dzieciak v Poland*, App no 77766/01, Judgment of 9 December 2008.

[138] *Mehmet Şentürk and Bekir Şentürk v Turkey* (2013) 60 EHRR 4.

spread of life-threatening, infectious diseases in places of confinement,[139] as well as preventing and responding to deaths in custody.[140] States cannot discriminate in their efforts to protect against arbitrary deaths. They must ensure that they protect vulnerable and marginalized groups from life-threatening acts of violence perpetrated by non-state actors.[141]

Equally, states must take appropriate steps to improve public health and increase life expectancy and address the causes and consequences of drought, diseases and epidemics, natural and nuclear disasters, malnutrition, and infant mortality.[142] In the words of the Human Rights Committee, they 'should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.'[143]

There must be proper investigations into all deaths caused by the state or where it appears that the state has failed to protect life. Such investigations must be impartial, effective, prompt, and open to public scrutiny. They must also allow for the next of kin to engage.[144] The duty to find out what happened is particularly strong in relation to deaths in custody.[145] As with all human rights, states must provide access to appropriate remedies for violations of the right to life, which must entail adequate and effective reparation, including guarantees of non-repetition.[146]

3.6 SPECIFIC PRACTICES

3.6.1 Lethal force by police and security forces

Police, security forces, and any other law enforcement authorities are only authorized to use force when conducting their operations in order to achieve a legitimate law enforcement objective. They can only use as much force as is necessary and proportionate in any particular situation. Force can only be resorted to when non-violent means such as persuasion, negotiation, and mediation remain ineffective or have no promise of achieving the intended legitimate law enforcement objective. When lethal force is used in such circumstances, it will not be arbitrary.

Law enforcement officials may only use firearms when less extreme means of force are insufficient

- to defend themselves or others against imminent threat of death or serious injury,
- to prevent a particularly serious crime involving grave threat to life,
- to enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves grave threat to life,
- or to prevent a person resisting arrest from escaping where he or she is about to commit a particularly serious crime that involves grave threat to life.[147]

Use of force that results in a deprivation of life must be 'absolutely necessary'[148] and 'strictly proportionate' to achieve the permitted purpose.[149] As the African Commission has made clear, '[t]he starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow

[139] *Pandemic and Human Rights in the Americas*, Res 1/2020 (IACommHR, 10 April 2020) paras 45–9; *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic*, CPT/Inf(2020)13 (20 March 2020).

[140] *Zhumbaeva v Kyrgyzstan*, CCPR/C/102/D/1756/2008 (19 July 2011) para 8.6.

[141] HRC, Concluding observations: El Salvador, CCPR/CO/78/SLV (22 August 2003) para 16.

[142] ACommHPR, General Comment 3, paras 3, 41, and 42; 155/96, *SERAC v Nigeria*, 16th Activity Report of the ACommHPR (2002–2003) para 67.

[143] General Comment 36, para 26.

[144] HRC, General Comment 36, para 28.

[145] *Salman v Turkey* (2000) 34 EHRR 425, paras 104–9; HRC, General Comment 36, para 29.

[146] HRC, General Comment 31, para 16; General Comment 36, paras 19 and 28.

[147] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

[148] ECHR, Art 2(2).

[149] *McCann and others v UK* (1996) 21 EHRR 97, para 194.

confines of exceptions to this rule requires strong motivation.'[150] For example, using lethal force to disperse protesters violates the right to life.[151] There is also a duty to plan law enforcement operations in a manner that minimizes the risk that officials may kill or injure a member of the public. Using lethal force without affording to the victims an opportunity to explain their presence and/or surrender to the police and outside of an action in self-defence violates the right to life.[152]

Human rights law requires there to be a system of accountability in which law enforcement agencies are held accountable for the fulfilment of their duties and their compliance with the legal and operational framework. Investigations must be adequate, effective, and capable of arriving at the truth and in leading to a prosecution, where appropriate.[153] Investigations must also address any underlying factors such as racial or other discrimination and other unlawful motives. As was held by the European Court, '[f]ailing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.'[154]

3.6.2 The death penalty

Whilst many countries continue to abolish the death penalty and human rights law has progressively limited the instances in which the death penalty can be carried out, the practise has not been outlawed altogether. Human rights texts and jurisprudence have approached the death penalty in several different ways.

First, human rights treaties have sought to encourage the trend to abolish the death penalty and to establish moratoria on its use. Both the ICCPR-OP2 and the Protocol to the ACHR to Abolish the Death Penalty provide for the total abolition of the death penalty but allow states parties to retain the death penalty in time of war if they make a reservation to that effect. Similarly, Protocol 6 to the ECHR provides for the abolition of the death penalty in peacetime, although states parties may retain the death penalty for crimes 'in time of war or of imminent threat of war'. The later Protocol 13 to the ECHR abolishes the death penalty in all circumstances. The European Court of Human Rights has found that the evolution towards the complete abolition of the death penalty, in law and in practise throughout Council of Europe member states, demonstrates that Article 2 ECHR has been amended so as to prohibit the death penalty in all circumstances.[155] For states that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. It would be inconsistent and contrary to this obligation to extradite or transfer a person to a country in which that person might face the death penalty, without taking adequate precautions to ensure the penalty is not carried out.[156] The failure to do so would give rise to violations of the right to life and potentially also the prohibition of torture and inhuman or degrading treatment or punishment. Consequently, states must require firm diplomatic assurances from retentionist countries that persons to be extradited or expelled will not be sentenced to death.[157]

Second, those states that retain the death penalty may only resort to it for the most serious crimes,[158] after full respect for a fair trial.[159] What counts as serious crimes is to be narrowly construed,

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[150] 295/04, *Noah Kazingachire et al v Zimbabwe* (2 May 2012) para 109.

[151] *Güleç v Turkey* (1999) 28 EHRR 121, paras 71–3.

[152] HRC, *Suarez de Guerrero v Colombia*, CCPR/C/15/D/45/1979 (31 March 1982) paras 13.2 and 13.3.

[153] OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016); HRC, General Comment 36, paras 27–8.

[154] *Nachova and others v Bulgaria* (2006) 42 EHRR 43, para 160.

[155] *Al-Saadoon and Mufdhi v UK* (2010) 51 EHRR 9, para 120.

[156] HRC, *Judge v Canada*, CCPR/C/78/D/829/1998 (5 August 2002) para 10.4.

[157] *Soering v UK*.

[158] ICCPR, Art 6(2); ACHR, Art 4(2); ACommHPR, General Comment 3, para 24.

[159] HRC, *McLawrence v Jamaica*, CCPR/C/60/D/702/1996 (18 July 1997) para 5.13; *Öcalan v Turkey*, para 166; 137/94, 154/96, and 161/97, *International Pen et al v Nigeria*, 12th Activity Report of the ACommHPR (1998–1999) para 103.

'their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.'[160] Because of its arbitrariness, a mandatory death penalty for all cases of murder violates the right to life.[161] Furthermore, states must address disparities in the rates of executions amongst ethnic minorities[162] and remove discriminatory laws (such as the imposition of the death penalty for same-sex relationships).[163]

Third, human rights treaties and bodies recognize that imposing the death penalty for crimes committed by children,[164] on pregnant women,[165] or on persons suffering from mental illness[166] violates the right to life.

Fourth, the application of the death penalty must cause the minimum possible suffering if it is not to violate the prohibition of ill-treatment. Thus, the Human Rights Committee held that execution by gas asphyxiation, stoning, injection of untested lethal drugs, burning, or burying alive, as well as public executions are incompatible with the prohibition on torture and other ill-treatment and thus also violate the right to life.[167] Additionally, spending an extended period on death row with the uncertainty about when the penalty would be executed may also violate the prohibition of torture and other ill-treatment.[168]

4. CONCLUSION

The right to be free from torture and ill-treatment and the right to life cover an ever-increasing array of factual scenarios and a variety of actors both within the state and outside. These wide contexts in which violations frequently occur require concerted and multi-pronged strategies to address both the causes and consequences, and increasingly necessitate a range of positive actions by states. The complexity of these rights and obligations attests to the growing awareness about the many interconnections between acts and omissions and the greater attention placed in all legal systems on locating realistic measures that can best meet obligations to respect, protect, and fulfil these most fundamental of human rights requirements.

Increasingly, jurisprudence and commentary are beginning to better address the relationship between access to the basic necessities of life and human dignity. In turn, there is a growing understanding that a failure to ensure access to such necessities can give rise to torture or ill-treatment and, in some cases, violations of the right to life. This is a more holistic vision of civil and political rights that has the potential to have a major practical benefit for many people.

Greater attention must be placed on identifying how racist and discriminatory attitudes foster torture and ill-treatment and violations of the right to life and on developing more robust responses that are capable of tackling root causes.

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[160] ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 1. See also ACommHPR, General Comment 3, para 24.

[161] HRC, *Thompson v St Vincent and the Grenadines*, CCPR/C/70/D/806/1998 (18 October 2000) para 8.2; *Hilaire and others v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 94 (21 June 2002) paras 106–8.

[162] HRC, General Comment 36, para 44.

[163] HRC, Concluding Observations: The Sudan, CCPR/C/SDN/CO/3 (29 August 2007) para 19.

[164] ICCPR, Art 6(5); ACHR, Art 4(5); CRC, Art 37; ACommHPR, General Comment 3, para 24.

[165] ICCPR, Art 6(5); ACHR, Art 4(5); ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 3.

[166] HRC, General Comment 36, para 49; ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 3.

[167] General Comment 36, para 40.

[168] *Soering v UK*, paras 106–11.

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USEFUL WEBSITES

Committee for the Prevention of Torture in Africa: <https://www.achpr.org/specialmechanisms/detail?id=7>

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: <http://www.cpt.coe.int/en>

UN Committee Against Torture: < https://www.ohchr.org/en/hrbodies/cat>

UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: <https://www.ohchr.org/EN/Issues/Executions>

UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: <https://www.ohchr.org/EN/Issues/Torture/SRTorture>

UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: <https://www.ohchr.org/EN/HRBodies/OPCAT>

Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa: <**https://www.achpr.org/specialmechanisms/detail?id=9**>

QUESTIONS FOR REFLECTION

1. What is the distinction between torture and other cruel, inhuman, or degrading treatment or punishment?
2. What, if any, is the impact of labelling conduct as torture as opposed to other cruel, inhuman, or degrading treatment or punishment?
3. How could the international law on torture better protect against violence occurring in the private sphere?
4. Does the right to life include the right to live in dignity? If so, what does this right entail?

5. Should human rights standards related to the right to life incorporate more fully cultural and religious values?