



State-sanctioned torture in Uzbekistan and beyond : a legal analysis

MALLINDER, Benjamin Thomas Harding

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**State-sanctioned Torture in Uzbekistan and Beyond:
A Legal Analysis**

Benjamin Thomas Harding Mallinder

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Abstract

This purpose of this study is to provide a greater understanding and awareness of the existence of state-sanctioned torture that is being committed in Uzbekistan.

In the early chapters, the definitions, meanings and understanding of what torture is and represents in a contemporary society are investigated, whilst the historical origins, uses and justifications for torture are also explored.

Following this, the main case study, Uzbekistan, is formally introduced. Torture in Uzbekistan is endemic, and wholly supported by its authoritarian government. This study investigates why that is the case; Chapter 3 in particular critically examines Uzbek domestic law to determine its current legal position, and compares this stance with the international provisions relating to torture.

This study also investigates the instances of torture in both Europe and Latin America, in order to draw similar comparisons with Uzbekistan, and to provide contextualisation. This involves examining key cases such as *Ireland v UK*, *Tomasi v France* and *Selmouni v France*. The conclusions drawn from the European legal landscape illustrate that torture is very much the exception rather than the norm, and that through clear precedent and rigorous protection of both Article 3 of the European Convention on Human Rights and Article 5 of the Universal Declaration of Human Rights, as well as relevant domestic law, European judges are well-placed to make torture a thankfully rare occurrence.

Latin America is exposed in Chapter 5 as having had a more problematic and legally concerning history of torture; in particular the dictatorships of Pinochet of Chile, Peron of Argentina, and Branco of Brazil during the 1960s, 1970s and 1980s. These regimes and the torture that was authorised under the command of these leaders are contrasted with that of former President Karimov of Uzbekistan, who ruled from 1992 to 2016. The leaders of these nations have trodden similar paths with regard to state-sanctioned torture, and again, provide relevant contextualisation and precedent for Uzbekistan to be compared to.

The difficulty Uzbekistan faces with its history of torture is then addressed in the closing chapters of this thesis, and questions are raised about its likely future occurrence and potential reforms, which may serve to limit or prevent this.

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Chapter 1

Context, Aims, and Methodology

Until recently, torture has arguably been a much neglected subject.¹ Society thinks it knows what it is, and it thinks it understands the rationale behind it – in simplest terms, it is a tool to extract information which may otherwise be unattainable through less drastic means. It may also be understood as simply a cruel and nasty punishment for the sake of punishment, or a way of one individual, group, organisation or state government displaying power and control over another group of individual group, or the citizens of a certain state, in order to make an example or to serve as a deterrent.

Many, most likely the majority, perceive it as a crime. For example, when referring to American citizens, Biswas and Zalloua reveal that ‘a mere 15 percent² support its use. Often perceived as an archaic, medieval practice that has no place in twenty-first century society, torture certainly has its critics. However, in certain parts of the world, it has considerable support.

Almost no state is exempt from its employment; at some point in history, no matter where you look, chances are torture has been utilised by the state or those asking under its authority. Writing in 1908, long before the United Nations was formed and an international prohibition of torture was enacted, Emil Reich observes that ‘In some countries the use of torture as a means of discovering truth in criminal matters was not forbidden before well in the nineteenth century’.³

However, before moving on to the main subject in question, it is appropriate to give a brief historical introduction to the origins of torture over time in order to give some greater context and lay the foundations for the analysis that is to come.

¹ Post 9/11, there has been a significant amount of academic debate and associated publications concerning torture and the legal and practical issues relating to its use.

² Shampa Biswas and Zahi Anbra Zalloua, *Torture: Power, Democracy, and the Human Body* (Whitman College 2011) 41.

³ Emil Reich, *General History of Western Nations from 5000 B.C. to 1900 A.D.* (Macmillan and Company Limited 1908) 252.

History of Torture

In terms of states, Spain is an appropriate choice for use as an opening example. During the middle-ages, torture was the infamous tool of the Spanish Inquisition used to strike fear into the hearts of the heretics and blasphemers; although, it was not used so nearly as often as commonly believed – its abundant use being a popular misconception:

The Inquisition, like other courts under the Ancien Regime, resorted to the torture of prisoners to make them confess, but it did so far less than other courts, not out of humanity or repugnance for such methods, but simply because it reckoned to the procedure to be fallible and inefficient. 90 per cent of the accused brought before the Inquisition were never subjected to torture.⁴

In England, it was used as both an early method of intelligence gathering⁵ and also a vengeful punishment on the behalf of the Crown toward Guy Fawkes as a result of the failed treasonous Gunpowder Plot of 1605. This has later been described as one of the first documented terrorist attacks on English soil, as Fawkes and his fellow conspirators attempted to oust Protestant rule in favour of Catholicism; ‘Like many terrorists throughout history, Fawkes and his colleagues justified their actions in terms of religion’.⁶

There also needs to be an outline as to why torture has been used for so long; the ever changing justifications for its use need clarifying.

Reasons for Torture

In the middle-ages, torture was used more as a punishment and deterrent, much like prison sentences are used now for a similar purpose. As Luban observes, ‘Until the last two centuries torture was used as a form of criminal punishment’.⁷ There was much less of an intelligence gathering objective than is the case today. Despite this being the case, Brecher argues that using torture

⁴ Joseph Perez, *The Spanish Inquisition – A History* (Profile Books 2004) 148.

⁵ Larissa Tracy, *Torture and Brutality in Medieval Literature: Negotiations of National Identity* (D.S. Brewer Cambridge) 10.

⁶ Sue Mahan and Pamala L. Griset, *Terrorism in Perspective* (SAGE Publications Inc. 2013) 43.

⁷ David Luban, *The Torture Debate in America: Liberalism, Torture, and The Ticking Bomb* (Cambridge University Press 2006) 40.

as a means of gleaning state secrets is essentially useless, especially in reference to the ticking bomb scenario:⁸

There is scant evidence that torture can work to produce timely and reliable ticking bomb intelligence... this does not provide a strong evidential base for arguing that torture is likely to produce the intelligence necessary to prevent a terrorist attack in time-limited circumstances.⁹

In the modern world, the ways of gathering evidence have evolved, which have had a direct effect of making it increasingly difficult in many instances to prove that torture has actually been used. As accountability becomes more important and information gathering powers become more refined, if a state is determined to employ torture, then it is likely to convert from using physiological torture methods to psychological. The subtlety of some forms of torture now makes it harder to garner evidence of its use; physical torture, for example, often leaves identifiable scars on the victim, but if an individual has been tortured via more psychological means, evidence is harder to collect. This issue was discussed when Gerrity and others investigated the rarely considered social and economic consequences for the victims of torture and explained the risks of physical and psychological torture effects:

Physical disability may arise from permanent bodily injury (Skylv, 1992) or head trauma leading to cognitive impairment. Psychological problems, including PTSD and depression, may cause significant social disability and undermine the chances of finding employment.

They further go on to explain the impact on families and relationships that torture can indelibly leave:

Irritability and rage reactions may impair interpersonal relationships. Marital and family problems may occur because of the inability to feel intimacy or to re-establish trust. Memory and concentration difficulties may reduce the capacity for learning and impair work performance. Symptoms of impulsivity may lead to problems with the law.¹⁰

⁸Bob Brecher, *Torture and the Ticking Bomb* (Blackwell Publishing Ltd 2007) 1.

⁹Philip Rumney, *Torturing Terrorists, Exploring the Limits of Law, Human Rights and Academic Freedom* (Routledge 2015) 78.

¹⁰Ellen Gerrity, Terence M. Keane and Farris Tuma, *The Mental Health Consequences of Torture* (Kluwer Academic/Plenum Publishers 2001) Chp 3.

Physical torture has often been proven to actually provoke defiance from the victim, rather than compliance,¹¹ whereas more delicate techniques are documented as being more successful. Gerrity and others, whilst referring to this, mention the KUBARK manual. This was an American codified interrogation technique manual detailing CIA research into 'no-touch' torture, or psychological torture methods developed in the 1960s.¹² Indeed, they submit that:

Use of force is a poor technique, yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.

...both CIA manuals detail the use of psychological techniques and physical coercion that can be used to obtain intelligence... Often even the threat of torture alone will evoke cooperation... The KUBARK manual states that threats could be 'worse than useless' although there is evidence that detainee threats or threats against family members can illicit information.¹³

In the United States, as recently as 2014, details have emerged concerning the Bush administration's post 9/11 use of torture and coercive interrogation, with evidence revealing that suspects held in Guantanamo Bay were repeatedly waterboarded¹⁴ and subjected to degrading and inhumane treatment, it being claimed that these practices produced vital intelligence which helped to protect the US and other countries against terrorist attacks.¹⁵ This admission of accountability was made by former President Barack Obama in August 2014, yet no apparent reference to torture as an international crime was made. This could perceivably be interpreted, albeit without sound evidence, that torture is still not being taken seriously as a crime, and that international laws on its prohibition are inadequate. Or rather, it is being taken seriously, but the problem could be that the state in mention may likely blame non-state actors for the

¹¹ Ian Leslie, 'The Long Read: The scientists persuading terrorists to spill their secrets' (The Guardian, 13/10/17) <https://www.theguardian.com/news/2017/oct/13/the-scientists-persuading-terrorists-to-spill-their-secrets?CMP=share_btn_link> accessed 20th October 2017.

¹² Alfred W. McCoy, *A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror* (Holt Paperback 2006) 10.

¹³ *ibid* 90.

¹⁴ This is a physical interrogation technique which typically involves the suspect to be tied down on to a table. The interrogator(s) then place a cloth over the suspect's mouth and then pour a large volume of water over the cloth at several time intervals. The suspect receives the sensation of drowning, but is generally not put in actual danger of death.

¹⁵ Alfred W. McCoy, *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation* (University of Wisconsin Press 2012) 159.

allegations but attempt to hide actual state-accountability for torture. As Amnesty International suggested;

The fact that President Obama not only ended the CIA secret detention program, but has also publicly acknowledged that torture was a part of it, is to be welcomed. Nevertheless, the President once again failed to say that torture is a crime under international law, that every instance must be subjected to investigation and that anyone responsible for it must be brought to justice.

Amnesty goes on to explain the problems that the US still faces regarding the hard truth of the matter that it has tortured;

President Obama's silence on accountability and redress reflects the USA's continuing and active failure to meet its international human rights obligations on these issues.¹⁶

President Trump, in the infancy of his administration in January 2017, personally spoke on the issue of US-led torture, and contrary to what Obama suggested in 2014, explained that America needed to continue using techniques such as waterboarding against Islamist terrorists in order for there to be 'an even field'.¹⁷ These comments suggest a dangerous slip back into the torture-tainted past that the US was only just beginning to come to terms with and attempt to move on from. This space will need to be observed very closely as Trump's presidency evolves over the next four years.

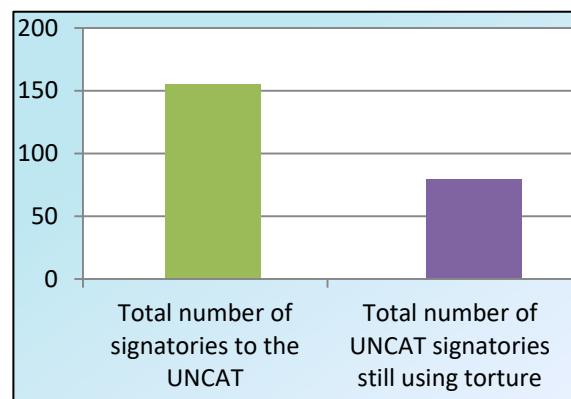
Regardless of how effective international law is on controlling the use of torture by states worldwide, and that these given examples are just the tip of the iceberg when it comes to examining the dark histories of state involvement in committing torture, one thing does seem clear; In the Western world (North America, Western and Central Europe), the authorities are by no means innocent in terms of their activities but at least there is some effort made on their part to explain past actions.

¹⁶ Amnesty International, 'USA: 'We Tortured Some Folks': The Wait For Truth, Remedy and Accountability Continues As Redaction Issue Delays Release of Senate Report on CIA Detentions' (Amnesty International, 2nd September 2014, Index Number AMR 51/046/2014 <https://www.amnesty.org/en/documents/AMR51/046/2014/en/>.

¹⁷ Matthew Weaver and Spencer Ackerman, 'Trump claims torture works but experts warn of its 'potentially existential' costs (The Guardian, 26/01/17) < <https://www.theguardian.com/us-news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview>> accessed 24th October 2017.

However, one individual state stands out from this crowd in several ways. Despite being a signatory to the 1984 United Nations Convention against Torture¹⁸ it has become renowned amongst several leading human rights organisations and the governments of many first world countries for its relentless and systematic use of torture in various aspects of its criminal justice system. This state does not employ torture secretly. It has a national agenda built around it, as though intertwined in its constitutional values and identity. The state being referred to here is Uzbekistan.

¹⁹Chart 1.1: This bar chart shows the number of signatories to the United Nations Convention against Torture still committing acts of torture inside their borders. Out of the 155 UNCAT signatories, 79 are still torturing according to Amnesty International, over the 32 years since its inception.



The Situation of Uzbekistan

‘Torture is endemic in Uzbekistan’s criminal justice system...’²⁰

Amnesty International 2015

Located in Central Asia, neighboured by five states including Kazakhstan and Afghanistan, Uzbekistan is a mid-sized nation relative to its surrounding area. From 1924 to 1991, it was merged into the Soviet Bloc and was incorporated into the USSR. It has a population of just over 31 million, making it the 42nd most populous nation in the world. Geographically, it is situated at a crossroads, with Eastern Europe to the west, Russia to the north, and China to the east.

It is also a nation that is notorious for its regular use of torture on prisoners and suspects in detention; this having been repeatedly highlighted by several leading human rights organisations in recent times, some of the most noteworthy of these being Human Rights Watch (HRW) and Amnesty

¹⁸ As of September 1995.

¹⁹ Chart 1.1: Bar chart comparing signatories to the UNCAT with signatories committing torture.

²⁰ Amnesty International, *Secrets and Lies: Forces Confessions Under Torture in Uzbekistan* (Stop Torture Campaign Report, Index EUR 62/1086/2015) 8.

International. For example, in May 2015, HRW used these words to open its damning report entitled 'Uzbekistan – A Call for Human Rights Council Action':

Despite appearing only rarely in global headlines, Uzbekistan's atrocious human rights record requires an urgent and coordinated international response. Its authoritarian government severely limits freedom of expression, assembly, association, and religion; has imprisoned thousands on politically motivated charges; and continues to wage an unrelenting crackdown on human rights work, independent journalism, peaceful opposition, and civic activity. Torture in Uzbekistan is widespread and systematic.²¹

The ongoing concern that is Uzbekistan's treatment of its nationals is bad enough, but what further intensifies the situation is the fact that it appears to act, to the outside world at least, in good faith, and seemingly complies with prohibitions on torture, paying hypocritical lip-service to the international community. It has, of late, been keen to emphasise its efforts at reform, namely its 'engagement with the United Nations anti-torture machinery, which resulted in several legal reforms'.²² This is coupled with the Uzbek 'government's strenuous efforts to convince the international community that it is committed to torture reform, while acknowledging neither the scale nor the impunity for it'.²³

A detailed analysis of the torture methods Uzbekistan uses on its prisoners will be explored in later chapters of this thesis, which will be accompanied by a closer look at its continuing hypocrisy which critically contrasts this behaviour with its positive UN engagement and signing of several international anti-torture charters, as well as attempts to modify its own national criminal code at the behest of UN recommendations. This brings about another wider issue which boils down to the effectiveness of the enforcement capabilities of international law in general, of which they are arguably ineffective. The central focus will be the assessment of whether international law is effectively controlling Uzbekistan's breach of basic human rights laws; if not, then perhaps an overhaul of its national laws would be more beneficial, possibly in the form of a

²¹ Human Rights Watch, *Uzbekistan – A Call for Human Rights Council Action* (May 2015) 3.

²² Human Rights Watch, *Nowhere to Turn – Torture and ill-treatment in Uzbekistan* (November 2007, Volume 19, No. 6(D)) 7.

²³ *ibid* 7.

new torture statute or the creation of new national human rights institutions (NHRIs).

Aims

The principal aim of this thesis is to put forward an argument for a national, codified and entrenched torture statute for the sovereign state of Uzbekistan, and to justify the incorporation of this statute into Uzbekistan's domestic law, with its provisions being applied to the country's criminal justice system.

During the subsequent chapters of this thesis, the current condition of Uzbekistan's legal system will be critically analysed, with particular focus on its attitude toward basic and intrinsic human rights which are, from an international perspective at least, understood to be one of the core legal guarantees for all human beings.

There will also be a comparison between Uzbekistan's attitude towards human rights and its compatibility with the relevant statutes regarding such rights, which in turn will be compared with a variety of other states, some of which are prosperous and westernised and which seek to safeguard such rights, including Western European nations, and some of which are more closely related to Uzbekistan in terms of their economic, social, geographical and cultural parallels. These include nations within Uzbekistan's surrounding area, such as Kazakhstan, and also past regimes with a history of torture in more remote nations, such as Chile under the infamous Pinochet regime of the 1970s and 1980s. There will also be a study of nations which have reformed their use of torture somewhat for a variety of reasons, such as international pressure or state compromise.

In addition, there will be careful consideration of what monitoring systems are currently in place and embedded within the constitutions and legal frameworks of such states in order to gain a better understanding of what legal incentives are present to ensure the highest possible level of state compliance with black letter law, and to safeguard against potential infringements of such law.

As part of this study, there will be a critical discussion of the term 'torture' and its definition under domestic and international law, and engagement with a

number of the key debates present in this field. There is a significant element of ambiguity worldwide as to the appropriate definition of torture (notwithstanding the existence of the various international law measures), and so there will be an assessment of many examples contained in case law, particularly European, whereby the goalposts of what actually constitutes committing the crime of torture have been shifted and arguably blurred due to different decisions interpreting breaches of the law in different ways. For instance, the difference between ‘torture’ and ‘inhuman and degrading treatment’ is seen as significant by certain judges, despite the fact that the Charter of Fundamental Rights of the European Union, explicitly Article 4, makes no such distinction. Any action which could be described as inhuman treatment towards a fellow human being is enough to constitute a breach of European law.

Moving on to ECHR law, a prime example of this is *Ireland v UK*²⁴ which took place during ‘The Troubles’. Several IRA members conducted acts of terrorism in the UK, and were subsequently arrested by British police. During their internment, the IRA suspects were repeatedly subjected to several punishments which could be considered inhuman and degrading, including being hooded, placed in stress positions against a wall for hours at a time, and food deprivation. The Irish government claimed that these punishment techniques breached Article 3 of the European Convention on Human Rights; the prohibition of torture.

It was held that such techniques used were premeditated, and that although not deemed severe enough to constitute torture, the mental and physical effects suffered as a result were enough to breach Article 3. The Court also made a point of distinguishing torture from inhuman treatment, by ruling that torture was ‘deliberate inhuman treatment causing very serious and cruel suffering’. Applying this test, it held that neither the use in interrogation of the ‘five techniques’ nor the physical assaults that had occurred in that case were torture.²⁵

²⁴ *Ireland v United Kingdom* ECHR (1978) App no. 5310/71.

²⁵ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (Oxford University Press 1994) 238.

This distinction is important. Looking at it from the perspective of this ruling, rather than seeing inhuman treatment as a grade down from torture, it instead portrays torture as a grade above inhuman treatment – or rather, inhuman treatment and something extra – the very serious and cruel suffering. This case demonstrates how brittle Article 3 of the ECHR can be – you do not need to torture someone to breach its provisions; rather it is more like a spectrum of mental and physical pain or suffering, and landing anywhere in the spectrum is likely to constitute a violation of the law.²⁶

In later chapters of this study, there will be further discussion of the separation, or rather categorisation, of the assumed various gradations of torture law breach. This explanation will be used as a basis to argue and reason that there is a distinct difference in the ways in which international, or supra-national, organisations such as the United Nations and the European Union interpret laws on torture as compared to domestic laws of individual states, such as the United Kingdom's Human Rights Act 1998, and the American Convention on Human Rights 1969.

Methodology

The various sources used and referred to in this thesis will be a combination of case law, national statute law, international charters and conventions, legal journal articles, textbooks and monographs, reports, websites and also various magazine and newspaper articles, where relevant. These sources may either complement or negate each other during the process. This type of situation is valued, as it promotes debate between conflicting ideas and opinions on how torture is viewed by different scholars, academics and jurors, and from there, a more reasoned answer to the growing problem of Uzbekistan's use of torture may be drawn. There must also be an understanding as to the levels of bias which are possible.

²⁶ Incidentally, this case was the first time in English law that treatment of a detainee equated to torture.

Chapter 2

What is Torture?

Admittedly the word "torture" included in Article 3 of the Convention is not capable of an exact and comprehensive definition.²⁷

Opinion of Judge M. Zekia in *Ireland v United Kingdom* (1978)

Before examining the intricacies of the flaws present within the system of human rights protection in place in Uzbekistan, its legal framework, treatment of suspects, comparisons with neighbouring and contrasting systems worldwide, and also the possible remedies to any identified deficiencies, it is important to establish a definition of the focal subject matter. Torture, for legal purposes, should be defined. Moreover, is comprehensively defining such a term an achievable aim?

From many perspectives, notably a lawyer's amongst others, torture is a deceptively ambiguous term, the interpretation of which depends on who is asked. Torture can take many forms; it is useful to establish which of those forms are culturally most recognisable. Perhaps, a hooded victim in a cellar with a hot poker being applied to his chest by a masked assailant? A peasant having his limbs slowly ripped apart by the wooden rack in a medieval dungeon? Or even a more recent approach, such as one seen in modern fictional film and television adaptations created purely for entertainment purposes; perhaps the sight of 24's Jack Bauer injecting a would-be Iranian bomber with pain-inducing chemicals on the behalf of the fictitious Counter Terrorist Unit to discover some critical information so that he can save the day before it is too late.

In relation to this, Green compares the way in which torture is presented to us on screen with reality, before giving a frank assessment of how he identifies with torture:

It is often noted that torture goes against the tenets of human community in two fundamental ways. Because torturers deny the basic humanity of their victims, it's a violation of the norms governing everyday society. At

²⁷*Ireland v United Kingdom* ECHR (1978) App no. 5310/71.

the same time, torture constitutes society's ultimate perversion, shaking or breaking its victims' faith in humanity by turning their bodies and their deepest commitments – political or spiritual belief, love of family – against them to produce pain and fear.²⁸

Many people will have their own notion of torture which is akin to that of others, but rarely identical. Herein lies a significant legal conundrum – if there is no universally and internationally accepted legal standard for what represents torture, then it needs to be established how individual state's legal systems apply the law in a uniform manner in order to prevent its use. Arguably, this in itself opens the possibility of a breeding ground for national states to stretch and uniquely interpret such laws in order to fit their own needs, as can be demonstrated with Uzbekistan.

This fundamental issue of the lack of universal understanding of what actually constitutes torture is something which international law has tried to correct since the second half of the twentieth century, but has thus far been arguably unsuccessful. Before analysing the failings of the ways in which supra-national bodies and the various conventions ascribed to them handle the definition of torture, there must firstly be a succinct examination of the main definitions which are the most well-known worldwide.

General definitions of torture

Initially, a standard dictionary definition is probably the one source that the average man would turn to if they were asked to provide an accurate meaning of the word. The Oxford English dictionary provides three definitions;

1. The infliction of severe bodily pain, as punishment or a means of persuasion; spec. judicial torture, inflicted by a judicial or quasi-judicial authority, for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information
2. Severe or excruciating pain or suffering (of body and mind); anguish, agony, torment; the infliction of such
3. Severe pressure; violent perversion or 'wresting'; violent action or operation; severe testing or examination.²⁹

²⁸ Adam Green, 'Normalising Torture on 24' (22nd May 2005) *The New York Times*
<http://www.nytimes.com/2005/05/22/arts/television/normalizing-torture-on-245.html?_r=0>
'accessed on 25th November 2015'.

²⁹ <[www.oed.com.icproxy.shu.ac.uk](http://www.oed.com.icproxy.shu.ac.uk/view/Entry/203700?rskey=od8WHB&result=1#eid)>/view/Entry/203700?rskey=od8WHB&result=1#eid - torture, n.
:Oxford English Dictionary.

The first definition conveys some understanding as to why certain states employ torture in order to obtain information from suspected criminals; in essence, it is often a way of extracting either often vital evidence, a full confession, or both. However, as is the case in many circumstances involving this course of action, the evidence and confession given by the victim is often false, or at least not entirely accurate, as the desperation to end the suffering can lead to the provision of false information.

A recent extract given by O'Mara in *Why Torture Doesn't Work – The Neuroscience of Interrogation*³⁰ expands on this as analysed by Elliott in *New Scientist* magazine, under the heading; 'Torture doesn't work, says science: Why are we still doing it?' Commenting on O'Mara's text, Elliott states;

If you torture the data long enough, the saying goes, it will confess to anything. Although this is a problem for scientists, the stakes are higher for torturers. If tortured people really will tell you anything, how do you know when they are telling the truth?³¹

He then goes on to explain the view that torture is far more ineffective than is often claimed, paraphrasing O'Mara's publication, he notes:

Interrogators often escalate torture when they think a suspect is withholding information or lying, but there is no good evidence that interrogators are better than the rest of us at detecting lies. In fact, there is evidence that when people are trained as interrogators, they become more likely to think others are lying to them. This belief can lead to alarming errors, whereby people are tortured because their torturer wrongly believes they are lying. New technologies to detect lies do not work either, says O'Mara.³²

This shines torture in an ever worsening light. When at one stage, those who justified torture pointed to the value of, and speed in which results can be gathered, O'Mara successfully counters the arguments justifying torture with measurable, accurate quantitative evidence denoting the exact opposite.

³⁰ Shane O'Mara, *Why Torture Doesn't Work – The Neuroscience of Interrogation* (Harvard University Press November 2015).

³¹ Carl Elliott, 'Torture doesn't work, says science: Why are we still doing it?' (*New Scientist*, 11 November 2015) www.newscientist.com/article/mg22830471-200-torture-doesnt-work-says-science-why-are-we-still-doing-it/-.

³² *ibid.*

Justifying Torture: The Ticking-Bomb Hypothetical

These revelations bring into debate the often referred to argument that torture is a necessity in certain extreme situations, such as the ‘ticking time bomb’ scenario where a suspect is believed to have critical knowledge of an imminent mass scale terror attack capable of inflicting large scale casualties on civilians, and there is a limited window of opportunity to collect such knowledge. Defenders of torture often use this as justification for using enhanced and illegal interrogation techniques on terror suspects because there is no time to go down a more ethical and morally acceptable route.³³ Philip Heymann, the former US Deputy Attorney-General, is quoted in *Why Terrorism Works* by Dershowitz as stating; ‘Authorizing torture is a bad and dangerous idea that can easily be made to sound plausible. There is a subtle fallacy embedded in the traditional ‘ticking bomb’ argument for torture to save lives’.³⁴ Heymann appears to see it as a way of falsely justifying torture by hiding its use behind a mask of assumed necessity; essentially an excuse which is ultimately scattered with flaws and untested suppositions.

Mendez and Schulz are also critical of the scenario’s justification, stating that:

Proponents of ticking bomb torture try to convince us that the calculation is straightforward: torture one terrorist, save 100 people. But that assumes that there are no further detrimental consequences once the victims of the bombing are saved – no retaliatory strikes, for example, by the torture victim’s comrades to pay back the inhumanity done their brother. If that happens, the math may quickly change: 100 people saved today; 1,000 killed tomorrow.³⁵

The point they are making is often either overlooked or neglected by ticking-bomb proponents, but it is a crucial flaw which should be used as a clear warning and deterrent against those who defend torture in such circumstances.

A more detailed examination of what the main definitions of torture are worldwide, and the extent of state subscriptions to these definitions can now be undertaken.

³³ Bob Brecher, *Torture and the Ticking Bomb* (Blackwell Publishing 2007) 9.

³⁴ Alan M. Dershowitz, *Why Terrorism Works* (Yale University Press 2002) 131.

³⁵ Juan E. Mendez and William F. Schulz, *The Phenomenon of Torture – Readings and Commentary* (University of Pennsylvania Press 2007) 261.

Legal and Academic Definitions

An official dictionary definition is an appropriate starting point for a popular understanding as to what torture means, but for the purposes of this study there needs to be clarity as to how individual states interpret the meaning of the word, and how this informs practice within their legal systems.

Similarly in part with the dictionary definition, the UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, which is legally binding upon its signatories, 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.³⁶

This definition notes that torture can be defined as such for either means of punishment or obtaining information.

Basoglu, and quoting Mangakis, gives the view that torture is complex and not easy to summarise in a sentence or two; rather it is an amalgamation of several proportions, and he also draws on the significance of state involvement:

Torture is a complex, multi-dimensional act, and these dimensions are mirrored in the torture definition's requirements of intention, purpose (or discrimination), "severe pain or suffering" of whatever kind, and official involvement. When they all come together, the atrocity that is torture is committed.³⁷

He also explains that:

...it is never easy nor cheap to torture – and the definition expands on this: torture has a perpetrator and a victim, as well as a third "entity" – the state in all its might – on hand to facilitate, order, commit, or tolerate.³⁸

³⁶ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, art 1.1.

³⁷ Metin Basoglu, *Torture and its Definition in International Law, An Interdisciplinary Approach* (Oxford University Press 2017) 307.

³⁸ *ibid.*

This gives the impression that state-sponsored torture has several guises, yet in essence, there is no great difference between the state either allowing, or actively involving itself in carrying out torture. The distinction is there, but ultimately it all comes under the same definition.

There is also the question as to whether the current legal definitions of torture are adequate, or perhaps they need refreshing over time; in essence, the evolving nature of the beast. Laws need to steadily evolve to reflect society's changing priorities. Basoglu also addresses this matter, and has the opinion that the differing reactions to torture worldwide necessitate the means for it to have different definitions, which is in direct contrast to the accepted international definitions and prohibitions. 'A commonly recognised definition of torture does not exist because torture has many unique forms and cultural meanings in different geopolitical regions'.³⁹

Basoglu appears to be going against the grain here, because clear legal prohibitions of torture indeed exist and are meant to be treated as universal, rejecting the diverse nature of torture that he describes. He is giving credence to the argument that there is a division between universalism, which encompasses the international laws on torture, and cultural relativism, which in this case covers domestic laws which are not entirely compatible with the international versions.

One such example of this could be the Cairo Declaration of Human Rights in Islam⁴⁰, (of which Uzbekistan is a signatory)⁴¹ which while having very strong similarities with the Universal Declaration of Human Rights, differs in some areas due to the cultural uniqueness of Islam and Shari'ah law influencing the wording and interpretation of certain provisions. These cultural differences can be contrasted with the arguably western, more secular nature of the UN's equivalent laws.

Indeed, in 1981, the Iranian representative to the UN, Said Rajaie-Khorassani expressed that in contrast to the CDHRI, the 'UNDHR was "a secular

³⁹ Metin Basoglu, *Torture and its Consequences: Current Treatment and Approaches* (Cambridge University Press 1992) 270.

⁴⁰ CHDRI 1990

⁴¹ Eva Brems, *Human Rights: Universality and Diversity* (Kluwer Law International 2001) 259.

understanding of the Judeo-Christian tradition", which could not be implemented by Muslims without trespassing the Islamic law.'⁴² In respect to Basoglu, he has correctly addressed the fact that in some aspects, human rights are interpreted by some as having differing cultural flavours rather than universal meaning. Nevertheless, Uzbekistan is incorporated by both the UNDHR and CDHRI, and so there should be enough compatibility between the two for a state which is a signatory to both to be able to follow the relevant provisions without significant conflict. However, there does appear to be an element of hypocrisy, or at least confusion, if Uzbekistan can adhere to and align itself with Shari'ah law on the one hand, and also appear to follow western legal interpretations on the other. Uzbekistan itself adds fuel to the fire of the 'universalism versus cultural relativism' debate, given its hybrid approach to international treaties and conventions, yet ultimately, ignores the laws of both in its continuation of sanctioning state-sponsored torture.

It is now necessary to give some background on what these key international torture prohibitions are, and also start framing the argument as to whether the prohibition of torture under international law represents an effective mechanism for preventing, or at least limiting its use.

The Current Legal Prohibition of Torture: Internationally and Domestically

Prevention of torture requires an *effective national legal framework that incorporates international human rights standards* and includes specific provisions to prohibit and prevent torture.⁴³

Torture is currently outlawed at several levels, in both international law and at a regional level in the national legal systems of many different states. This could be regarded as significant, as it raises the point as to why two levels of legal proscription are considered necessary. Converting international law and convention provisions into national laws and measures is nothing revolutionary,

⁴² Europe News, 'Cairo Declaration on Human Rights in Islam – Diverges from the Universal Declaration of Human Rights in key aspects' <<https://en.europenews.dk/Cairo-Declaration-on-Human-Rights-in-Islam-Diverges-from-the-Universal-Declaration-of-Human-Rights-in-key-respects-78272.html>> accessed 26th October 2017.

⁴³ Association for the Prevention of Torture < <http://www.ap.t.ch/en/national-level/>> (italicised for emphasis).

but there is strong evidence on both sides of the argument as to whether it is necessary.

Halliday and Schmidt⁴⁴ express that nationalised human rights systems are perhaps overestimated in their effectiveness, and that more often than not, they simply regurgitate the same measures which are set out in European and international charters for individual rights and freedoms protection, adding little in the form of specialisation or unique customisation of the law for the state concerned. This complies with the broad understanding that rights, specifically human rights, belong to everyone, no matter what creed, colour, gender or culture they identify with, and that they should not be tailored to certain countries and adopted in a way which is different to any other, given that in essence, human beings are all alike and should all be guaranteed the same freedoms and privileges wherever they are in the world. This is in contrast with Basoglu's 'cultural differences' view as mentioned earlier.

Halliday and Schmidt's notion is exemplified by Donnelly, firstly in his definition of the term human rights; 'Human rights - *droits de l'homme, derechos humanos, Menschenrechte*, "the rights of man" – are literally the rights that one has because one is human.⁴⁵ This is a simple yet profound statement. We are all entitled to the same human rights, because we are all human. Further categorisations come after this (gender, race, and age for example) but humans are all alike at the first instance.

He follows up this statement by emphasising how human rights can never be stripped from an individual:

Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). Human rights also are *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo sapiens* "human beings" and thus holders of human rights.⁴⁶

⁴⁴ Simon Halliday and Patrick Schmidt, *Human Rights Brought Home – Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 9.

⁴⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 7.

⁴⁶ *ibid* 10.

Donnelly captures the bare essentials of what human rights truly mean in just these few sentences. In this vein, it is easy to understand why there is such confusion over human rights being both domestically and internationally enforceable and asks the question as to why there is need for two similar formats. Torture, like most human rights areas, is presented in both of these formats.

Gibney and Skogly give insight into how the reach of international human rights is spreading;

International law, which traditionally has regulated the conduct between and among countries, has had at its core the respect for state sovereignty. However, the latter part of the twentieth century witnessed fundamental changes to the way in which the international community operates that are based upon a deep interdependence among states and on the way in which international law regulates the interaction among states. This is often labelled the process of globalization.⁴⁷

There is also the argument that international law now gives rights to individuals and not just nation states, backed up with efficient enforcement measures such as the rights of individual petition before international courts. Rights are now given by states to their own nationals, not just to foreigners.

After setting the scene on how the landscape for legal rights is shifting, both writers go on to suggest that human rights are distinct in that they are overly-domesticised. They write:

The reason why international human rights is so 'revolutionary' is that it focuses almost exclusively on the 'vertical' relationship between the state and the subjects of that state, rather than the 'horizontal' relationship between and among nation-states. However, what human rights has almost totally ignored is that in an increasingly interdependent world... it is not simply sufficient to assess what domestic governments are doing in terms of human rights; it is equally important to assess the effect of other actors; intergovernmental organisations, international private entities, and foreign states as well.⁴⁸

The view of these authors appears to be that a balance of national and international regulation of human rights is the best solution. Halliday and

⁴⁷ Mark Gibney and Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Philadelphia Press 2010) 1.

⁴⁸ *ibid* 2.

Schmidt echo this belief, as they explain why domestic rights are emphasised too often;

There is another sense in which human rights may have been 'domesticated' by being received into national law... the impact of bringing rights home has been more like a certain aspect of human rights has been more like a 'damp squib' than the fireworks anticipated. Human rights... have been 'domesticated' in the sense of being tamed – by its entry into national legal systems.

By becoming 'merely law' human rights becomes subject to the same limitations, qualifications, mundanities, and technical operations as other aspects of domestic law.⁴⁹

These are all valid points. If torture is to be taken seriously as an illegal act by all nations, does it lose its impetus and become diluted when channelled into the legal systems of individual state charters and constitutions? Or, on the contrary, does it become more directly embedded into the legal system of the individual state?

One such opposing view is illustrated by Reif in reviewing a publication by Cardenas, who explains that 'Cardenas takes the position that an NHRI⁵⁰ can enhance accountability in a state through its efforts to make human rights part of the public space and dialogue.'⁵¹ This is also a key issue – if a human rights regime, or more specifically, a statute on the prohibition on torture, were incorporated into the criminal code of a state with notorious torture history, such as Uzbekistan or North Korea, it would arguably be more apparent to people if and when that statute was broken by the authorities. Breach of its provisions would be far more obvious because it would be a national statute woven into the country's own legal system. If a state breaches an international convention, the inhabitants of that state may not be aware of this because they may not have any knowledge of the rules of international law, but breaching a law closer to home could have more immediate implications and so it may be more likely to provoke a response from, and outrage amongst, the citizens of the state.

⁴⁹ Simon Halliday and Patrick Schmidt, *Human Rights Brought Home – Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 9.

⁵⁰ National Human Rights Institution

⁵¹ Linda C. Reif, 'Book Reviews: Chains of Justice: The Global Rise of State Institutions for Human Rights' [1 March 2015] *Human Rights Law Review* (2015) 15(1): 185-190.

Uzbekistan is strictly speaking a monist state, so international treaties which it has signed and ratified do not usually require any special treatment before incorporated into Uzbek law.⁵² However, as is already the case with regard to enforceability and compliance with international treaties, the Uzbek approach to its supposed monism is generally symbolic and there is no genuine adoption. The OHCHR⁵³ provides insight on this:

The Preamble of the Uzbek Constitution suggests that the Uzbek law gives precedence to international law over national law by stating that:

The people of Uzbekistan ...recognizing the priority of generally recognized norms of international law ...adopt ...the present Constitution of the Republic of Uzbekistan...”

The Criminal Code and CPC also contain provisions which suggest that international standards override national ones. However, in practice these provisions appear to have little or no effect: they are seen as mainly of an inspirational nature, as an expression of a desire on the part of the legislator to conform to international standards.⁵⁴

This provides another stumbling block in terms of the incorporation of international anti-torture laws into Uzbekistan, and acts as evidence that the Uzbek government has no interest in enforcing such laws domestically.

The International Stance on Torture: A Brief History

Torture was only recognised as a global crime relatively recently. Substantial legal weight given to historically significant legal charters, such as Magna Carta, is seen by some academics as exaggerated, which could be justified in one sense given that the charter itself was repealed just a few months after its enactment, and that; ‘for some, Magna Carta today represents no more than a distant constitutional echo’.⁵⁵

⁵² Juris Legal Information, ‘Law and Legal System of Uzbekistan’

<<http://www.jurispub.com/Bookstore/All-Books-by-Title/LAW-LEGAL-SYSTEM-OF-UZBEKISTAN.html>> accessed 26th October 2017.

⁵³ Office of the High Commissioner for Human Rights.

⁵⁴ Legal and institutional framework for human rights in Uzbekistan,

<http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/UZ/VERITAS_UZB_UPR_S3_2008_LegalandInstitutionalFramework_Appendix1.pdf> 2 accessed 26th October 2017.

⁵⁵ Lord Irving of Lairg, ‘Law Quarterly Review, The spirit of Magna Carta continues to resonate in modern law’ [April 2003] LQR 119, 227-245.

Indeed, for all the rights laid out by Magna Carta, it makes no such reference to torture. It wasn't until 1769 that William Blackstone, an English jurist of the eighteenth century, mentioned it in his writings. As Peters explains:

When William Blackstone briefly considered torture in his 'Commentaries on the Laws of England' around 1769, he dismissed the subject as not being part of the province of English law; the rack was, said Blackstone, 'an engine of the state, not of law'. What Blackstone meant – and here he echoed legal literature if not actual practice in England from Fortescue on – was that torture had no place in Common Law, and its few and scattered use had been solely by political authorities for political purposes.⁵⁶

250 years ago, torture was still seen as at least some part of a nation's identity and an ancient but still occasionally worthwhile tool of justice. The questions that need answering are when and why was torture condemned, and also whether it was used as punishment, as a means of gathering intelligence, or both. Before that, however, there needs to be a close inspection of Uzbekistan's laws on torture, and why they are seemingly ineffective in controlling its use.

⁵⁶ Edward Peters, *Torture Expanded Edition* (University of Pennsylvania Press and Basil Blackwell Ltd 1985) 105.

Chapter 3

Uzbekistan's Laws on Torture

Despite some formal steps toward strengthening safeguards against torture and other cruel, inhuman or degrading treatment or punishment, serious concerns remain about *Uzbekistan's failure to implement existing laws and safeguards, to adopt new effective measures toward the prevention of torture, and to hold accountable those responsible for torture.*

Egamberdiyev v Russia (2014)⁵⁷

Following on from the discussion of the nature of torture and the legal prohibitions on its use in the previous chapter, it is important next to justify why the state of Uzbekistan has been chosen as the main focus in this thesis, clearly delineate what measures it already has in place to prevent torture, and why, and in what ways, they may be regarded as deficient. It needs to be understood what exactly makes Uzbekistan stand out, and why its need for radical human rights reform and restructuring is arguably greater than that of its neighbours such as Afghanistan, Turkmenistan and Kazakhstan.

Geographically speaking, and in the context of both international and domestic legal systems, Uzbekistan is located within a metaphorical no-man's land; a little too eastern to feel the inclusive effects of the pack-leading European human rights control mechanisms, for example the ECHR and the strict prerequisites to joining the EU. It is, however, a signatory to the Cairo Declaration on Human Rights in Islam as of 1990, a charter it automatically became tied to due to its membership of the Organisation of the Islamic Conference. However, this membership is merely symbolic, as it has had no meaningful impact in helping to improve Uzbekistan's appalling record of human rights abuses. The Cairo Declaration has been said to conflict with other international human rights, partly, as Kayaoglu explains,⁵⁸ because of its heavy influence by Shari'ah law

⁵⁷ *Egamberdiyev v Russia* (2014) App No. 34742/13 para. 34 (italicised for emphasis).

⁵⁸ Turan Kayaoglu, 'It's Time to Revise the Cairo Declaration of Human Rights in Islam' (2012) <https://www.brookings.edu/opinions/its-time-to-revise-the-cairo-declaration-of-human-rights-in-islam/> accessed 18th December 2015

which contradicts certain areas of other human rights declarations based on secular grounds.⁵⁹

Uzbekistan has been blacklisted by human rights bodies for many years,⁶⁰ (the disengagement factor of which could be a crucial reason why Uzbekistan is drifting ever further away from international norms) but in order to fully understand why torture is such a problem in the country, it is necessary to identify what relevant domestic legislation is currently in place, and then analyse its efficacy. Whether Uzbekistan is more influenced by international or national laws which prohibit torture, in practice these laws are lacking in terms of their effectiveness in preventing torture. As a starting point, critical focus must be placed on Uzbekistan's own Criminal Code to determine whether certain aspects need particular attention when comparing its provisions with corresponding anti-torture charters and legislation in other states, especially those which appear to have a relatively clean record concerning the use of torture or coercive interrogation amounting to inhuman and degrading treatment. A variety of questions also need to be asked; is torture explicitly outlawed? Is torture mentioned in the Uzbek Constitution? It must be established whether the Uzbek Criminal Code mirrors other human rights codes in other countries, and whether it resembles how established international conventions deal with the issue of torture, such as the UNCAT or ECHR.

The Constitution of Uzbekistan

The most logical starting point for this discussion is to identify whether Uzbekistan's own Constitution outlaws torture. A legal constitution is a set of written rules for a state⁶¹ and can be analogised as a contract between a government and its citizens. The constitution outlines rules and responsibilities which both the government and the citizens must obey. Some constitutions merely outline the limited powers of a state, such as the US Constitution, and have a separate charter concerning the rights of the citizens (or in the case of

⁵⁹ See previous chapter for more on this debate.

⁶⁰ Human Rights Watch, 'Uzbekistan: Detainees Tortured, Lawyers Silenced – New Evidence Rebutts Claim of Safeguards (HRW 13th December 2011) <<https://www.hrw.org/news/2011/12/13/uzbekistan-detainees-tortured-lawyers-silenced>> accessed 4th May 2016.

⁶¹ Graham Gee and Gregoire C. N. Webber, Vol 30 Issue 2 'What is a Political Constitution?' (2010) Oxford Journal of Legal Studies

the US, the Bill of Rights which is part of and an amendment to the original drafting of the US Constitution).⁶² Other states, Uzbekistan included, have citizens' rights embedded in the constitution itself.

Uzbekistan's current Constitution was enacted in 1992, replacing the now repealed Constitution of the Republic of Uzbekistan 1978. It has seven chapters; State Sovereignty, Democracy, Supremacy of the Constitution and the Law, Foreign Policy, General Provisions, Citizenship and Personal Rights and Freedoms.

Under chapter 7, Personal Rights and Freedoms, Article 26 states;

Everyone, accused of committing a crime, shall be considered not guilty, so long as his guilt is not established by legal order, public legal proceeding when all possibilities, to protect him, are secured.

No one may be subject to torture, violence, other cruel or humiliating human dignity treatment.

No one may be subject to medical or scientific experiments without his consent.⁶³

The wording of the prohibition of torture is almost identical to Article 3 of the ECHR, which provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.⁶⁴ Similarly, Article 5 of the Universal Declaration of Human Rights⁶⁵ states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

The corresponding articles of the ECHR and UDHR are more similar to each other than the COU (the ECHR merely has the additional word 'cruel'), but the Uzbekistan version is not much different, and could even be perceived to actually have more scope for the protection of torture victims, as it includes the words 'violence' and 'dignity', which are entirely absent from the former. Logically, and chronologically, this makes sense. The UDHR was the first fully international attempt at criminalising torture, but it could also be seen as an imperfect first draft, given that it was passed 69 years ago. The ECHR

⁶²William David Thomas, *What Is a Constitution?* (Gareth Stevens Publishing 2008) 20.

⁶³Constitution of Uzbekistan 1992, Article 26 <https://www.gov.uz/en/constitution/english#26> – emphasis added.

⁶⁴European Convention on Human Rights 1950, Article 3.

⁶⁵To be abbreviated as UDHR.

equivalent is 67 years old and barely differs from the UDHR, yet advances in the perception of what constitutes torture over many decades may have evolved enough to warrant the COU's interpretation to be noteworthy in its slight alteration; at just 24 years old, the COU is modern by comparison.

Yet, despite the clarity of Uzbekistan's constitutional prohibition of torture, the continuing condemnation by western states and human rights organisations of the endemic torture being committed inside its borders gives an indication that no law, neither national nor international, is having meaningful impact. Rather than the wording of the law being the concern, it appears that its enforcement is the problem. As an illustrative example, terror suspects held by Uzbek authorities are reportedly subjected to torture. As reported in the European Human Rights Law Review:

On July 20, the UN Human Rights Committee⁶⁶ issued its concluding observations on the compliance by Uzbekistan with its obligations under the ICCPR. The Committee expressed concern at the...“legal safeguards for persons suspected of, or charged with, a terrorist or related crime and allegations of incommunicado detention, torture and long prison sentences in inhuman and degrading conditions”.⁶⁷

Furthermore, in the report itself, the UNHRC commented on the definition of torture utilised by Uzbekistan, and the ongoing prevalence of unlawful treatment, in the following terms:

The Committee remains concerned that the *definition of torture* contained in the criminal legislation, including article 235 of the Criminal Code, *does not meet the requirements of article 7 of the Covenant...*

The Committee reiterates its previous recommendation and urges the State party, as a matter of urgency, to amend its criminal legislation, including article 235 of its Criminal Code, with a view to ensuring that the definition of torture is in full compliance with article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and with article 7 of the Covenant...

The Committee remains concerned about reports that *torture continues to be routinely used throughout the criminal justice system*; that, despite the existing legal prohibition, forced confessions are in practice used as evidence in court... judges fail to order investigations into allegations of forced confessions even when signs of torture are visible... persons

⁶⁶To be abbreviated as the UNHRC.

⁶⁷ European Human Rights Law Review, 'Bulletin: counter-terrorism and human rights' (2015) para 25.

complaining of torture are subjected to reprisals and family members are often intimidated and threatened to ensure that complaints are retracted... the rate of prosecution is very low and impunity is prevalent (arts. 2, 7 and 14).⁶⁸

As revealed by this report, state practice is in contravention of Uzbek constitutional law.

In *Ismoilov v Russia*, a dispute over the extradition of terror suspects from Russia to Uzbekistan to face a national hearing ended with a resounding breach of both Articles 5(4) and 6(2) of the ECHR, the right to liberty and the right to a fair trial. In May 2005, several armed attackers stormed military barracks in Uzbekistan and also broke into a prison, releasing inmates. Hundreds of suspects were detained, but the applicants themselves fled to Russia. Uzbekistan charged them with terror-related activities and negotiations over the suspects' extradition were exchanged with their Russian counterparts ('The courts held that it was not possible to apply a less restrictive measure and that only detention could secure their extradition and "the execution of any sentence that might be imposed"⁶⁹). Russian national courts ordered detention pending extradition, and such extradition was allowed in 2006. The applicants claimed a breach of Articles 5(4)⁷⁰ and 6(2)⁷¹ of the ECHR. They also claimed under Article 41⁷² in pursuance of just satisfaction.

It was held by the ECtHR that to identify a breach of the Article 5 right to liberty, 'particular regard had to be had to the safeguards provided by the national system'.⁷³ Referring to national law, the Court ruled that any deprivation of liberty should also be in line with the interpretation of Article 5 of the Convention; over-reliance on national law which in anyway detracted or

⁶⁸United Nations International Covenant on Civil and Political Rights, *Concluding observations on the fourth periodic report of Uzbekistan* (CCPR/C/SR/.3178 and 3179, 17 August 2015) para 13 – emphasis added.

⁶⁹*Ismoilov and Others v Russia* App no. 2947/06 (ECHR, 24 April 2008) para 35.

⁷⁰Article 5(4) ECHR provides that 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

⁷¹'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

⁷²'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

⁷³*Ismoilov v Russia* (2008) (Application No 2947/06) (2008) 49 EHRR 1128, (2008) ECHR 2947/06.

deviated from the standards embodied in the Convention would be inadequate. It was ultimately determined that ‘The national system failed to protect the applicants from arbitrary detention and their detention could not be considered ‘lawful’ for the purposes of the detention.’⁷⁴ There had, therefore been a violation of Art 5(1).⁷⁵

This case highlighted the shortcomings of national human rights laws in both Uzbekistan and Russia, the former’s lack of compliance with the standards prescribed by the higher law of the ECHR consequently being responsible for the negative ruling. It also shows how the domestic laws on torture are not the only failings of the Uzbek criminal justice system, as human rights breaches in a range of areas have been well documented.

However, for Uzbekistan, the ideal solution may be a compromise. A separate, codified and entrenched torture statute, which could be adopted as an additional protocol to either the COU or Uzbekistan Criminal Code, which mirrors many of the key aspects of the ECHR and UDHR, but with slight tweaks to some of the wording in order to give it more of a distinctive Uzbek flavour, and to give it a cultural sense of national identity and uniqueness. It must be stressed that Uzbekistan should feel like such a statute is its own, even if it does reiterate most of what other international conventions state. This could assist greatly in terms of its enforceability, as being made to follow international law could be seen as too distant and invasive of an individual sovereign state’s own interpretation of the law. Conversely, as domestic provisions have been demonstrated as insufficient in *Ismoilov*, there would need to be a higher standard of enforceability than of current. Additionally, the argument that international legal prohibitions are fundamental to all and negate the effects of individual state differences and non-compliance also detracts from this suggestion.

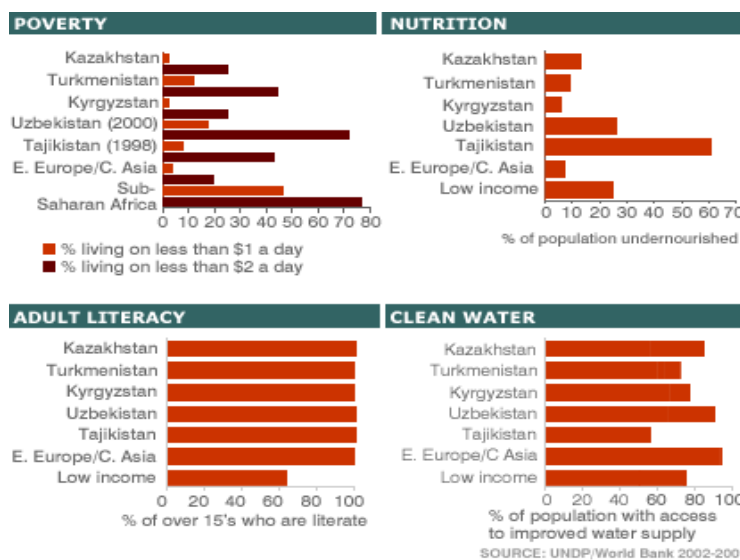
However, more evidence to support it comes from Halliday and Schmidt, who, in discussing NHRIs, state that:

⁷⁴ibid.

⁷⁵“No one shall be deprived of his liberty”.

Such institutions mark a recognition that the growing range of international human rights standards are not self-executing and that if rights are to become a reality for many people then there must be a public institution whose task it is to promote and protect them, especially where government courts and the media are unwilling or unable to do so. In many parts of the world, NHRIs are promoted in a way of making rights accessible, especially to poor and marginalised people who may lack the resources or knowledge to access lawyers and the courts.⁷⁶

Chart 3.1: Bar charts comparing the levels of poverty, nutrition, adult literacy and clean water in Middle-Eastern, Eastern European, Central Asian and Sub-Saharan African states.



It is acceptable to suggest that the citizens of Uzbekistan fall under the catchment of 'poor and marginalised people',⁷⁷ and that a carefully phrased NHRI in the form of a torture charter/statute could be successfully implemented

and stand a chance of successfully fulfilling its function. The four bar charts illustrated in figure 3.1 demonstrate the relative hardships that Uzbek people endure, at least in terms of poverty and nutrition. This notion is speculative, and so it cannot currently be determined what the true effects of an NHRI based on torture could actually have. It may, however, be worth a try at least.

It is clear that the COU provides a perfectly suitable provision on the prohibition on torture, one which would easily be incorporated into any legal system in the world, as it meets the standards of many well-respected human rights bodies and conventions. However, a severe lack of enforcement of the current law makes its very existence almost meaningless.

⁷⁶Simon Halliday and Patrick Schmidt, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 137-138.

⁷⁷Simon Halliday and Patrick Schmidt, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 138.

The following pattern is thus discernible: Uzbekistan appears to have the necessary constitutional prohibition of torture, but this is frequently ignored in practice. Nevertheless, it is still necessary to consider what other avenues Uzbekistan has to protect its citizens from such treatment. As well as being enshrined in the constitution, Uzbekistan also refers to torture in its own criminal code.

The Criminal Code of the Republic of Uzbekistan 1994⁷⁸

The Criminal Code of the Republic of Uzbekistan was enacted on the 22nd September 1994. It encompasses 586 articles covering a variety of areas, including the powers of a court and judges,⁷⁹ rights and obligations of suspects, the types of evidence and proof, laws concerning police questioning and detention of suspects, laws on phone-tapping (similar to the UK's IPA 2016⁸⁰), detention facilities and the rights and obligations of detained persons, just to name a number of key examples.

The most relevant areas in relation to torture are located in Article 17, entitled 'Respect for Honour and Dignity of Individual':

A judge, prosecutor, investigator, and inquiry officer shall respect the honour and dignity of individuals participating in case.

Nobody may be subject to violence, torture, or other cruel or degrading treatment.

Acts or decisions, which degrade dignity, violate privacy, endanger health, and cause unjustified physical or moral suffering, shall be strictly prohibited.⁸¹

Again, like in the COU, several typical words and phrases are repeated, such as 'honour', 'dignity', and 'degrading'. Also in similar fashion to the COU, the

⁷⁸To be abbreviated as the CCRU.

⁷⁹Criminal Code for the Republic of Uzbekistan 1994, s 2 arts 29 and 31

Art 29: 'A court shall be empowered: to prepare a case for trial hearing; to examine the case and render sentence or another finding; to consider the case at the court of appeal, or cassation, or supervision; to request enforcement of the sentence (*As amended by the Law of 14.12.2000*). In addition to the aforementioned, higher courts, within their competence, shall supervise lower courts'.

Art 31: 'A judge acting in one-judge proceeding or in multiple-member court shall have power envisaged by Article 29 of this Code. Besides, the judge shall participate in preparation of the case for the trial, preside at the court session, and have other rights and duties envisaged by this Code'.

⁸⁰Investigatory Powers Act 2016 (to be abbreviated as IPA).

⁸¹Criminal Procedure Code of the Republic of Uzbekistan 1994, Chp 2, Art 17 (emphasis added).

CCRU goes into a lot more detail than in the prohibitions laid out the ECHR and UDHR, suggesting a greater degree of stringency.

A pattern is emerging which appears to suggest that, contrary to what one would expect, the more detailed an explanation of how torture is prohibited is displayed in a charter or statute of a given state, the less likely it is to follow such law, at least in terms of Uzbekistan.

Additionally, the legal systems of western nations have much less disparity between the prohibitions contained in their own statutes and those found in law. Rather, they are much more interconnected in terms of legislation. In the UK, section 2 of the HRA 1998, entitled 'interpretation of Convention Rights', ensures all domestic cases concerning rights enshrined in the ECHR must take relevant ECtHR⁸² judgments and Commission decisions into account. They are therefore obliged to take into account such judgments and decisions.

In Germany, this approach is very similar; as explained by Oltermann:

The federal constitutional court in Germany has effectively given constitutional status to the judicial duty to take into account the European convention on human rights and the decisions of the Strasbourg court. In the UK this duty is enshrined in section 2 of the Human Rights Act 1998.⁸³

Successful domestic human rights law often tends to reproduce much of what is mentioned in higher law, whilst also embodying some distinctions relevant to the specific national context. For example, the ECtHR is beneficial for processing appeals by nationals who reject the ruling of their domestic courts. It indirectly enforces the laws of the ECHR where necessary, which as established by Mottershaw and Murray, is not a like for like replacement for domestic law:

The ECHR, though an international treaty, is one that "creates not only obligations for member states but also rights which are enforceable by individuals". The Court... operates to ensure States Parties observe their commitments under the Convention and to ensure that individuals can... access this international judicial means of securing their rights.

⁸² European Court of Human Rights, to be abbreviated as the ECtHR

⁸³ Philip Oltermann, 'Tory bid to liken human rights plan to German legal system backfires' – The Guardian (3rd October 2014) <http://www.theguardian.com/law/2014/oct/03/tory-human-rights-convention-plan-german-legal-system-comparison-backfires>.

The Court, however... has no powers of its own to implement measures in response to findings of violations of Convention rights. The role of the Court is not as a substitute for national mechanisms... domestic mechanisms are of fundamental importance for implementation.⁸⁴

These explanations emphasise the importance of national law, when properly applied. Uzbekistan's failing is its complete disregard of its own constitutional and criminal laws, most crucially on torture. In order to determine how reversible its situation is, it is instructive to make a comparison between Uzbekistan and other states which have either used torture in the past and managed to reduce or eradicate such actions through the combination of international pressure and the enactment of new statutory instruments, such as that of Jordan, or states which still employ torture regularly and what plans are being put into place to stop it, one of which is Israel.

Case Study I: Israel

The way the Israeli government has chosen to deal with non-violent protest against its own anti-democratic practice of administrative detention is by instituting yet another serious violation of international law: *torture* - one of the most severe forms of dehumanisation.⁸⁵

Israel has as much a dark history of torture usage as Uzbekistan, arguably more so as of 2015, when a new national bill was passed which legalised the use of force-feeding on hunger-striking suspects.⁸⁶ This technique is currently being used on over 5000 Palestinian political prisoners, some of which have been held in indefinite detention for many years and not yet had a proper trial.⁸⁷

17 years ago, *Public Committee Against Torture v Israel*⁸⁸ considered the extent to which physical interrogation practices were deemed lawful when the defence of necessity was invoked. The applicants were a combination of human rights

⁸⁴Elizabeth Mottershaw and Rachel Murray, 'National responses to human rights judgments: the need for government co-ordination and implementation' (2012) (European Human Rights Law Review) (2, ss 4-6).

⁸⁵Neve Gordon, 'Israel's torture method: Force feeding' (*Al-Jazeera English*, 15th August 2015). <<http://www.aljazeera.com/indepth/opinion/2015/08/israel-torture-method-force-feeding-palestine-150814135835420.html>> accessed 9th January 2016.

⁸⁶Judah Ari Gross, 'Knesset passes controversial force-feeding bill for prisoners' (*The Times of Israel.com*, 30th July 2015) <<https://www.timesofisrael.com/knesset-passes-controversial-force-feeding-bill-for-prisoners/>> accessed 18th September 2017.

⁸⁷BBC News, 'Israel passes law allowing force-feeding of prisoners' (*BBC News website*, 30th July 2015) <<http://www.bbc.co.uk/news/world-middle-east-33717075>> accessed 17th May 2016.

⁸⁸*Public Committee Against Torture in Israel and others* (1999) 7 BHRC 31.

organisations and also individuals who had experienced the interrogation techniques employed by the Israeli authorities first-hand. These individuals had been interrogated for suspicion of committing crimes against Israeli security. The Court heard that these extensive interrogation practices included:

forceful shaking; use of the 'Shabach' position whereby the suspect was seated on a low chair tilting forward with his hands tied behind his back and his head covered by an opaque sack and subjected to powerfully loud music; use of the 'frog crouch' position whereby the suspect was compelled to crouch on the tips of his toes for repeated intervals; excessive tightening of hand or leg cuffs, and; excessive sleep deprivation.⁸⁹

The justification for the methods was that they were 'immediately necessary for saving human lives'.⁹⁰ Applying to the Supreme Court of Israel, the applicants argued that the defence of necessity was invalid and that the GSS (General Security Service, which carried out the interrogations) did not have the power to use psychological and physiological techniques during their questioning periods.

It was held that such interrogations could only be considered lawful when there was explicit statutory authorisation. It was ruled that the techniques used in this case were not enshrined by statute, but by referring to art 2(1) of the Israeli Criminal Procedure Statute, 'which conferred a general power of interrogation on the police, the Minister of Justice particularly authorised the GSS to interrogate terrorist suspects'.⁹¹ The methods used by the GSS were considered unreasonable and unfair and were not an integral part of the interrogation process.

Accordingly, necessity was not an adequate defence in this instance, since it did not empower the GSS authority to establish directives concerning the use of physically coercive techniques.

This case provides insightful evidence to support both sides of the claim that the domestic law either negates, or fails to prevent, the use of torture. On the one hand, the Israeli domestic criminal procedure statute authorised the conducting

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

of interrogation of suspects, yet it also did not permit the argument for necessity as justification for the level of force used. On this basis, Israeli national law protected the rights of the victims concerned by recognising a breach of its own laws on interrogation. This can be used to argue that domestic laws on torture can work even in states with a poor recent history of torture, giving some hope for Uzbekistan.

Case Study II: North Korea

In recent times, North Korea has attracted much negativity with regards to its treatment of citizens. Human Rights Watch has been especially critical, describing the secretive state as ‘among the world’s most repressive countries’, and a 2014 UN Commission of Inquiry revealed that ‘abuses in North Korea were without parallel in the contemporary world’.⁹²

If one was to imagine a theoretical hierarchy of states with notoriety for the use of torture and human rights abuses, North Korea would almost certainly be at the very top of such a hierarchy, even beyond that of Uzbekistan. If a possible solution to Uzbekistan’s actions lies within the implementation of a new torture statute, Rumney hypothesises on the practicalities of such a resolution using North Korea as an example.

Would the introduction of a torture statute in North Korea have the same societal impact as the same statute introduced in the United Kingdom? North Korea, is a country with a record of ‘widespread and systematic human rights violations’. The state has no respect for fundamental human rights. It conducts extra-judicial killing, torture and has no organised political opposition and elections... It is simply inconceivable that a torture law would be implemented and interpreted similarly in these two nations.⁹³

Rumney’s incisive comments here indicate that the implementation of a domestic torture statute in Uzbekistan could be similarly problematic. However, Uzbekistan is not as autocratic as North Korea. It does have elections, albeit

⁹²Human Rights Watch, ‘North Korea’ <<https://www.hrw.org/asia/north-korea>> accessed 19 August 2016.

⁹³Philip N.S. Rumney, *Torturing Terrorists – Exploring the Limits of Law, Human Rights and Academic Freedom* (Routledge 2015) 138.

infrequently, and they are usually fixed,⁹⁴ but the situation does appear somewhat recoverable, at least compared to North Korea. The possibilities of such a torture statute being successfully implemented in Uzbekistan will be discussed in further detail in Chapters 6 and 7.

⁹⁴Kallie Szczepanski, 'Uzbekistan Facts and History (about education, 20 January 2016 <<http://asianhistory.about.com/od/uzbekistan/p/UzbekistanProf.htm>> accessed 19 August 2016.

Chapter 4

The Use of Torture in Europe

Part I

The various legal prohibitions for the use of torture in Uzbekistan have now been clarified. It is now important to take a step back from purely Uzbekistani law in order to compare its actions with those of its neighbouring states, and also countries which, at first glance, would appear to be places where it would not be expected that torture would be in frequent use. These especially include fully Westernised European nations, most notably Germany and the UK in Part I, as well as Turkey, a state with a more complex history of torture. Additionally, a discussion of relevant ECtHR jurisprudence⁹⁵ is examined, and the diplomatic relations between the UK and Jordan are investigated, with torture being the focus of what transpired. Part II focuses more on French ECtHR case law, as well as an in-depth investigation of the then different laws (to the UK and most of Europe) on inhumane punishment in the Isle of Man which came to light in *Tyrrer v UK*⁹⁶ in the 1970s.

Whilst reviewing the various examples and case law from these jurisdictions, it is also worthwhile to judge the severity of each nation's breach of the laws regarding torture. There are various components to identify and comment on, such as whether the crime committed was described as 'torture' in the jurisprudence, or whether particular cases instead were deemed to involve inhuman or degrading treatment. This is addressed by Grans who explains:

Not only is the definition of torture a complex issue, the definitional threshold between torture and cruel, inhuman or degrading treatment or punishment is not clear. This potentially poses a problem in relation to those State obligations which apply only to torture and not to other forms of ill-treatment.⁹⁷

In certain cases, were national statutes breached, but not relevant provisions of international charters and conventions, or vice-versa? Another area to investigate is whether, geographically speaking, the nature of torture changes

⁹⁵ *Othman (Abu Qatada) v United Kingdom* (2012) EHRR 1, 189 App no. 8139/09.

⁹⁶ *Tyrrer v United Kingdom* (1978) 2 EHRR 1.

⁹⁷ Lisa Grans, 'The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence' (2015) 15(4) Human Rights Law Review 695.

culturally, and whether the response and sentencing of breaches of relevant legal prohibitions fluctuates according to individual national values. As an example, a country with an Islamic heritage like Turkey⁹⁸ could have different parameters and different considerations may be at play when determining whether a certain act is classified as torture compared to Italy for example, which has a Catholic history; cultural differences may tip the balance in respect of particular rulings, whereby treatment which could be perceived as constituting either the extreme end of inhuman treatment in one state and the least severe end of torture in another.

It will also be discovered that the mere threat of torture may amount to a breach of the law and result in a conviction in certain instances. The act of physically carrying out such treatment is not always needed to constitute a breach of national and/or international law. Indeed, it may appear that there is therefore a sliding scale of torture, whereby threatening or committing the exact same crime in different countries may result in differing legal verdicts and consequences.

The Strasbourg Cases

As a starting point, it appears appropriate to begin by reviewing the key cases to come out of Europe, in particular, cases which have been used as key precedents which exert a strong influence upon later rulings.

Chronologically, and since the ECHR was enacted in 1950, *Ireland v UK*⁹⁹ represents one of the first European cases to involve a legal challenge relating to allegations of torture.¹⁰⁰ Whilst the treatment involved was held not to amount to torture, it was, however, deemed severe enough to count as deliberate inhuman and degrading treatment¹⁰¹ and therefore a breach of Article 3. Importantly, this case emphasised the distinction between torture and degrading treatment, the ECtHR explaining that:

...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

⁹⁸Turkey has been officially classified as a secular state since 1928 through President Ataturk's reforms and an amendment to the 1924 Turkish Constitution.

⁹⁹*Ireland v United Kingdom* ECHR (1978) App no. 5310/71.

¹⁰⁰For discussion of the details of the case, see chapter one on this thesis.

¹⁰¹*ibid* paras 246, 4.

of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.¹⁰²

It is thus clear that defining torture is not an exact science. Because Article 3 ECHR is so brief, its scope has come to be considered debatable, and cases are therefore necessarily assessed individually in great detail in order to determine whether a breach has been committed. Indeed, the very nature of torture, for legal purposes at least, is changeable depending on its context, a view which is again supported by Grans, who states:

The fact that torture is a concept applied not only in human rights law but also in international humanitarian law and international criminal law makes the situation even more complex. Gaeta has termed the legal definition of torture a chameleon, as its elements change depending on the particular normative framework.¹⁰³

However, the first finding of actual torture came in *Aksoy v Turkey*¹⁰⁴ in the mid-nineties. In this case, the applicant (A) was arrested and detained by the Turkish authorities for fourteen days after being accused of being a member of the PKK (Kurdish Workers' Party), which is still considered a terrorist organisation in Turkey. During his detention, A was placed in a small cell of 4.5 metres with two other prisoners. A was then subjected to brutal torture methods, including a technique called 'Palestinian hanging'. Even prior to the commencement of the physical torture, A was threatened with torture when questioned about whether he knew the identity of the man who tipped off the police as to his whereabouts and which led to his arrest, as revealed by this extract from the case facts:

He was interrogated about whether he knew Metin (the man who had identified him). He claimed to have been told: "If you don't know him now, you will know him under torture."

According to the applicant, on the second day of his detention he was stripped naked, his hands were tied behind his back and he was strung up by his arms in the form of torture known as "Palestinian hanging". While he was hanging, the police connected electrodes to his genitals

¹⁰² *ibid.*

¹⁰³ Lisa Grans, 'The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence' [2015] 15(4) Human Rights Law Review: 695.

¹⁰⁴ ECHR 68 (1996) App no. 21987/83 paras 14,15.

and threw water over him while they electrocuted him. He was kept blindfolded during this torture, which continued for approximately thirty-five minutes.

During the next two days, he was allegedly beaten repeatedly at intervals of two hours or half an hour, without being suspended. The torture continued for four days, the first two being very intensive.

He claimed that, as a result of the torture, he lost the movement of his arms and hands. His interrogators ordered him to make movements to restore the control of his hands. He asked to see a doctor, but was refused permission.¹⁰⁵

Similar to Uzbekistan, both the Turkish Criminal Code¹⁰⁶ and the Turkish Constitution prohibit a governmental official from carrying out acts of torture or ill-treatment against a citizen. The most recent version of the TCC, which was passed in October 2004, classifies torture as an international offence against humanity:

(1) Execution of any one of the following acts systematically under a plan against a sector of a community for political, philosophical, racial or religious reasons, creates the legal consequence of an offenses against humanity.

a) Voluntary manslaughter,

b) To act with the intension of giving injury to another person,

c) Torturing, infliction of severe suffering, or forcing a person to live as a slave,

d) To restrict freedom,

e) To make a person to be subject to scientific researches/tests

f) Sexual harassment, child molestation,

g) Forced pregnancy

h) Forced prostitution¹⁰⁷

Similarly, the Turkish Constitution has a comparable clause, one which is very much like the ECHR's Article 3, in the form of Article 17(3), which states: 'No-

¹⁰⁵ibid paras 14-15.

¹⁰⁶Hereafter TCC.

¹⁰⁷Turkish Criminal Procedure Code 2004, Second Volume, Art 77 (emphasis added).

one shall be subjected to torture or ill-treatment; no-one shall be subjected to penalties or treatment incompatible with human dignity'.¹⁰⁸

Ultimately, in *Aksoy v Turkey* the ECtHR, by a majority of eight to one it was held that there had been a violation of Article 3.¹⁰⁹ It was explained that the treatment inflicted by the Turkish authorities was deemed so severe and cruel that it constituted torture, and that the State in question was obliged to explain why A had injuries after his detention when no such injuries were present before being taken into custody.¹¹⁰ No violation of Article 5¹¹¹ was found.¹¹²

From this case, it is clear that Turkish laws on torture are very similar to those of Uzbekistan. Turkey has the added protection of the ECHR since it has been a signatory since 1950 and ratified the Convention in 1954.¹¹³ It therefore raises the question, has the ECHR's prohibition of torture made any practical difference in Turkey, and if Uzbekistan had been allowed to sign the Convention in 1950 or subsequently to join the existing 47 state signatories, would this have prevented its history of violence?

Until recently (July 2016) Turkey did not appear to have a major problem with torture. However, acting President, Tayyip Erdogan, has been a cause of concern amongst human rights organisations and governments in the West for his apparent desire to make the modern-day Turkey more Islamic and lessen the secular values that have defined Turkey for the past century.¹¹⁴ Even more worryingly, the attempted Turkish military coup of 2016 resulted in Erdogan expressing a desire to reinstate the death penalty to punish all who took part in the rebellion, and unofficial reports state that military rebels were being tortured by the Turkish government.¹¹⁵ Inflammatory rhetoric is being used by Erdogan,

¹⁰⁸ Constitution of the Republic of Turkey 1982, Chp 2, Art 17 (3).

¹⁰⁹ ECHR 68 (1996) App no. 21987/83 [117].

¹¹⁰ *ibid* (58-64).

¹¹¹ The right to liberty and security of person.

¹¹² ECHR 68 (1996) App no. 21987/83 (65-67).

¹¹³ http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=YkWGJP4u.

¹¹⁴ 'Recep Tayyip Erdogan: Turkey's dominant president' (*BBC News*, 21st July 2016)

<http://www.bbc.co.uk/news/world-europe-13746679> accessed 11 January 2017.

¹¹⁵ John Sparks, 'Relatives Worry Amid Turkey Torture Claims' (*Sky News*, 25th July 2016).

<<http://news.sky.com/story/relatives-worry-amid-turkey-torture-claims-10509751>> accessed 9 August 2016.

as he recently vowed to “clean all state institutions of the virus’ of Fethullah Gulen supporters”.¹¹⁶ Yet, whilst it is possible to handpick individual cases, there is not, unlike in relation to Uzbekistan, any evidence of a state-sponsored regime of torture. However, the direction of Erdogan’s presidency over the next few years may be of increasing interest, and Turkey is more of a relatable example to Uzbekistan, particularly given the recent moves of President Erdogan, and can usefully be applied by analogy to the position of Uzbekistan.

It is also important to assess whether the ECHR has proven effective in preventing the use of torture in nations, and to consider what domestic frameworks they have in place as further protection. *Gafgen v Germany*¹¹⁷ is a much more recent example of how the mere threat of torture is enough to breach the prohibition contained in Article 3 ECHR.

In *Gafgen*, the applicant (A) brought a child to his abode, murdered him, hid the body, and demanded a ransom from the child’s parents, who were unaware of the murder. After the parents paid the ransom, the German authorities arrested A and took him into custody. During A’s interrogation, the police still believed the child to be alive and so, acting under this assumption, told A that if he did not disclose the child’s location, he would endure considerable suffering. The case report reveals the specifics of this:

Early in the morning of 1 October 2002, before M. came to work, Mr Daschner (“D.”), deputy chief of the Frankfurt police, ordered another officer, Mr Ennigkeit (“E.”), to *threaten the applicant with considerable physical pain*, and, if necessary, to subject him to such pain in order to make him reveal the boy’s whereabouts. D.’s subordinate heads of department had previously and repeatedly opposed such a measure.

Detective officer E. thereupon *threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes* if he did not disclose the child’s whereabouts. According to the applicant, the officer further threatened to lock him in a cell with two huge black men who would sexually abuse him. *The officer also hit him*

¹¹⁶Sally Guyoncourt, ‘Turkey coup: Death penalty fears as President Erdogan begins ‘cleansing’ operation of dissidents’ (*The Independent*, 17 July 2016) <<http://www.independent.co.uk/news/world/europe/turkey-coup-erdogan-purges-army-protesters-arrested-france-warning-blank-cheque-a7141361.html>> accessed 9 August 2016.

¹¹⁷*Gafgen v Germany* (2010) ECHR App no. 22978/05.

*several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall.*¹¹⁸

As a result of this threat, A confessed to his crime and disclosed the location of the child's corpse. In the ECtHR, it was held that the threat of torture constituted inhuman treatment, but not torture, and that Article 3 had been breached, the Court asserting:

Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him *attained the minimum level of severity to bring the impugned conduct within the scope of Article 3.*

Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that *it did not reach the level of cruelty required to attain the threshold of torture.*¹¹⁹

In the judgment, it was appreciated that the German authorities acted in the best interests of the child, and, believing he was alive at the time, were in a 'ticking bomb' scenario where time was critical and the threat of torture could and most likely would have prevented a possible catastrophe were the child not already dead. Even in such a situation, however, no extenuating circumstances may be used as a reasonable defence,¹²⁰ it being held that:

Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. *Article 3, which has been framed in unambiguous terms,* recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult...¹²¹

It should especially be noted that the judgment emphasised that Article 3 is unambiguous, essentially stating that there was no room for doubt that all forms of torture are prohibited, no matter the circumstances. The literal meaning of

¹¹⁸ *ibid* (emphasis added).

¹¹⁹ *Gafgen v Germany* (2010) ECHR App no. 22978/05 [108] (emphasis added).

¹²⁰ Also seen in *Selmouni v France* (1999) ECHR App no. 25803/94, to be discussed later.

¹²¹ *Gafgen v Germany* (2010) ECHR App no. 22978/05 (107).

Article 3 was fully protected in this case. The ECtHR continued in this vein by ruling that:

The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.¹²²

One of the most concerning aspects of this case is the lengths the police went to in order to contravene standard procedure and willingly use torture against A despite being aware that this constituted a breach of the law. Indeed, 'The authorisation was fully documented in the police file, and was taken in defiance of explicit orders to the contrary by superiors'.¹²³ This one example is clearly insufficiently weighty evidence to suggest that a system of official state-sponsored torture by the German state exists, but it at least indicates how Uzbekistan's problem with torture is not unique.¹²⁴ It is expected that a well-respected country like Germany would fully train their officials to observe international law.

Torture and Inhuman and Degrading Treatment: A Sliding Scale?

Gafgen has evidenced that state authorised inhuman treatment is a very real possibility in Europe. However, if the assessment of legality can be identified as being on a sliding scale, several differing levels of severity are observable. The outcome of *Aksoy* can be related to Uzbekistan much more, mainly because of a finding of actual torture rather than inhuman treatment and the brutality of the mistreatment; but it is still an isolated case.

It is arguable that it does not matter whether a ruling finds merely inhuman treatment or actual torture, since either is enough to breach Article 3, however in realistic terms, severe torture should be recognised as a major matter of concern, particularly in light of the manner and volume of which it is being

¹²² *ibid*, emphasis added.

¹²³ Natasha Simonsen, 'Is Torture ever justified? The European Court of Human Rights decision in *Gafgen v Germany*' (2010) < <http://www.ejiltalk.org/%E2%80%98is-torture-ever-justified%E2%80%99-the-european-court-of-human-rights-decision-in-gafgen-v-germany/>>.

¹²⁴ *Jalloh v Germany* (2006) ECHR App no. 54810/00, is another example of a breach of Article 3. Not as relevant as *Gafgen*, it nevertheless involved a suspect forcibly made to regurgitate drugs from the stomach by police officers who believed the accused was dealing illegal substances on the streets of Germany. At the ECtHR, it was held that the applicant had been subjected to inhuman and degrading treatment, but not torture. Article 3 was still deemed to have been breached.

administered in Uzbekistan. It may be submitted that the distinction is significant; Janis, Kay and Bradley agree that torture has distinct levels of gradation, observing that:

The nature of torture admits gradation in its intensity, in its severity and in the methods adopted. It is, therefore, primarily the duty and responsibility of the authority conducting the enquiries from close quarters, after taking into account all the surrounding circumstances, evidence and material available, to say whether in a particular case inhuman ill-treatment reached the degree of torture.¹²⁵

Evidence obtained by torture

One of the major issues with the use of torture in Uzbekistan is that a large volume of evidence obtained by Uzbek authorities through the use of torture against suspects is accepted as fully binding in the courts.¹²⁶

Amnesty International has repeatedly reported on this situation. In their 2015 *Secrets and Lies* report, for example, they claim that:

Torture and ill-treatment continue to be used to extract confessions and other incriminating information and to intimidate and punish detainees in pre-charge and pre-trial detention. Courts continue to rely heavily on these torture-tainted “confessions” to convict. In most – if not all – of the cases in this report, judges ignored or dismissed as unfounded allegations of torture or other ill-treatment, even when presented with credible evidence in court.¹²⁷

As Amnesty notes:

This practice continues despite the Plenum of the Supreme Court having issued four directives since 1996 explicitly prohibiting the use of torture to extract confessions and the admissibility of such tainted confessions in court proceedings.¹²⁸

Such statements are concerning. This is the clearest evidence yet that the problems Uzbekistan faces over its accusations of the use of torture stems from

¹²⁵Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials* (OUP 2008) 174.

¹²⁶International Partnership for Human Rights (IPHHR), ‘Endemic Torture in Uzbekistan’ (2015) <http://iphronline.org/endemic-torture-in-uzbekistan20150923.html> (accessed May 2016).

¹²⁷Amnesty International, *Secrets and Lies: Forces Confessions Under Torture in Uzbekistan* (Stop Torture Campaign Report, Index EUR 62/1086/2015) 11.

¹²⁸*ibid* 11.

the domestic framework of its judicial system. It appears to be fighting against itself, and is confused as to its official line – on the one hand, its highest court has tried to address and remedy the situation,¹²⁹ yet on the other, judges appear largely indifferent to allegations that torture has been used when faced with such claims in legal challenges.

The International Partnership for Human Rights¹³⁰ also reports similar findings and echo Amnesty in stating that:

Four directives by the Plenum of the Supreme Court issued since 1996 explicitly prohibiting the use of torture and other ill-treatment to extract confessions and the admissibility of evidence obtained through torture have not been implemented in practice. The provisions in the Supreme Court directives have not been incorporated into the Criminal Procedure Code.¹³¹

The IPHR then go on to explain that:

Courts in Uzbekistan continue to rely heavily on ‘confessions’ extracted under torture, duress or deception. Judges ignore or dismiss allegations of torture or other ill-treatment, even when directly presented with credible evidence in court. There are reports of some cases where false confessions have been filmed on camera, and Amnesty International, AHRCA and IPHR are aware of at least two recent cases where people were tortured to “confess” on camera to charges which they later denied in court.¹³²

Based on these findings, it would be easy to suggest that if Uzbekistan truly wished to change its ways, it would have done so by now. Corruption seems to be the main driving force behind the direction in which the judiciary goes; ‘Formally, the judicial system in Uzbekistan is independent but government interference and corruption are common’.¹³³ The attitude of national judges appears to be a major stalling point for any genuine progress.

¹²⁹ See Chapter 3 of this thesis (Uzbekistan signing the UNDHR and outlawing torture in national law for example)

¹³⁰ Hereafter IPHR.

¹³¹ International Partnership for Human Rights (IPHR), ‘Endemic Torture in Uzbekistan’ (2015) <http://iphronline.org/endemic-torture-in-uzbekistan20150923.html> (accessed May 2016).

¹³² *ibid.*

¹³³ U.S. Department of State, Diplomacy in Action, ‘2015 Investment Climate Statement – Uzbekistan’ <<http://www.state.gov/e/eb/rls/othr/ics/2015/241790.htm>> (accessed May 2016).

In addition, the CCRU is not unalterable as a statute; it is flexible and open to amendments and additions. For example, Uzbekistan has already successfully amended the CCRU by adding a new section entitled ‘International cooperation in criminal matters’, and also a new article on the admissibility of evidence.¹³⁴ Therefore implementing a new section on torture would be feasible.

Evidence obtained by torture has already been determined as not being admissible in English law since the judgment of *A and others v Secretary of State for the Home Department*¹³⁵ in 2005. The facts were that the applicants were detained in the UK under the Anti-terrorism, Crime and Security Act 2001 after being issued certificates demonstrating that they were a terror threat. The applicants argued that the evidence behind the decision to grant the certificates was obtained by torture from foreign powers and should therefore be deemed inadmissible. It was held in the House of Lords that evidence obtained by torture should not be admitted. Lord Carswell ruled that the reasoning behind the prohibition on accepting evidence obtained by torture was due to unreliability of such evidence, and was also based on the ‘morality of giving any countenance to the practice’.¹³⁶

The ruling in this case shows how the judiciaries of certain states can differ greatly. The fact that the UK was in favour of protecting Article 3¹³⁷ ECHR shows how far some states are willing to go to distance themselves from any connection to torture, no matter how vague, as it is considered a taboo subject by many. Posner and Vermeule debated this notion, stating:

People often say, in sweeping terms, that torture (and by subsumption coercive interrogation) is in some general sense “evil” or “wrong.” People want to be well thought of by others, want to be seen to stand on the right side of charged moral questions, and tend to follow the moral judgments of others if they are themselves unsure what morality requires. Perhaps these phenomena are linked.¹³⁸

¹³⁴United Nations Office on Drugs and Crime (UNODC), ‘Uzbekistan adopts amendments to the Criminal Procedure Code’ <<http://www.unodc.org/centralasia/en/news/uzbekistan-adopts-amendments-to-the-criminal-procedure-code.html>> (accessed May 2016).

¹³⁵*A and others v Secretary of State for the Home Department* [2005] No.2 HL 8.

¹³⁶*Idib* [147].

¹³⁷Right to freedom from torture.

¹³⁸Eric A. Posner and Adrian Vermeule, ‘Should Coercive Interrogation be Legal?’ [2005] Public Law and Legal Theory Working Paper No.84 33.

Can moral guilt be a way of pressurising Uzbekistan into ceasing its current stance on torture? Perhaps the media spotlight needs to be shone more brightly, in the hope that in turn, greater public awareness can pressure change as the volume of international condemnation increases.

A good model to base this on is that of Jordan. Until 2012, Jordan used torture ubiquitously in similar vein to Uzbekistan, the most high profile cases being those of suspected Islamists who were alleged of plotting against Jordanian national security. As recently as 2008, HRW documented such treatment in a random prison visit, identifying:

credible allegations of ill-treatment, often amounting to torture, from 66 out of 110 prisoners interviewed at random in 2007 and 2008, and in each of the seven of Jordan's 10 prisons visited. Human Rights Watch's evidence suggests that five prison directors personally participated in torturing detainees.¹³⁹

This changed when Abu Qatada Al-Filistini, a radical Jordanian cleric with suspected terrorist links, was detained in the UK several times throughout the 2000s. His extradition to Jordan to face trial in his own national courts was blocked on multiple occasions by the ECtHR because of the strong probability he would be tortured in his native state, and due to the prospect that evidence obtained by torture would be used in his re-trial for terrorism offences in Jordan, this would constitute a breach of the UK's obligations under Article 6 EHCR.¹⁴⁰

Partially due to the pressure from the UK, and to secure the bargain of getting Qatada on their own soil to face trial, Jordan agreed to amend their constitution and prohibit torture absolutely:

torture has been illegal in Jordan since 2006, and last year (2011) the Jordanian constitution was amended to make it clear that not only is torture forbidden, but

“any statement extracted from a person under duress...or the threat thereof shall neither be taken into consideration or relied on.”

¹³⁹HRW, 'Jordan: Torture in Prisons Routine and Widespread, Reforms Fail to Tackle Abuse, Impunity Persists' (*Human Rights Watch*, 8 October 2008) <<https://www.hrw.org/news/2008/10/08/jordan-torture-prisons-routine-and-widespread>> accessed 20 August 2016.

¹⁴⁰*Othman (Abu Qatada) v UK* (2012) EHRR 1, 189 App no. 8139/09.

That is a direct quotation from article 8.2 of the Jordanian constitution.¹⁴¹

The UK successfully influenced Jordan's decision to change its own laws on torture in order to fulfil an end result, the successful deportation of Qatada with assurances that he would not be subjected to such treatment on foreign territory and that torture would not be used in his re-trial.

Qatada was eventually deported in 2013. The example of Jordan, and the fact that it changed its laws partly due to a mutual agreement between itself and the UK and international pressure will be discussed in further detail later on, but it is worth mentioning now because a similar course of action could shift the attitudes of the Uzbek government and pressurise change in a similar way.

The model of the pressures that the UK applied to Jordan could be used, in conjunction with a number of different solutions to slowly reduce the levels of torture in Uzbekistan.

Part II of this chapter will discuss more relevant case law which can be used as precedent to argue why what Uzbekistan is doing is wrong, morally, legally, and socially. Historical regimes which employed torture will also be looked at in detail, and the similarities between such regimes and the Uzbek stance will be discussed. In addition, it will also be useful to consider current academic opinion on what solutions are currently available to remedy illegal uses of torture. Dershowitz believes that torture warrants are realistic ways of controlling its use,¹⁴² but this idea is criticised by others. Perhaps an amalgamation of several different tactics will be the way forward.

¹⁴¹House of Commons, Hansard 'Abu Qatada' (Hansard Online, 12 November 2012) <<https://hansard.parliament.uk/Commons/2012-11-12/debates/12111213000003/AbuQatada>> accessed 20 August 2016.

¹⁴²Alan M. Dershowitz, *Why Terrorism Works* (Yale University Press 2002) 159.

Part II

Torture is a staple in tyrannical regimes. Enemies are tortured mercilessly for information and then killed. Political opponents are tortured to death to send a powerful deterrent message. For understandable reasons, torture has become a symbol of tyranny. The fact is that torture has not gone away.¹⁴³

Now that an understanding of the international scope of the problem of torture perpetrated by, or on behalf of, states has been established, it is logical to identify further examples of state-controlled mistreatment in order to put Uzbekistan's situation into greater context. Additionally, more lessons may be learned from failed autocratic regimes of the past and such regimes may be used as contextual examples.

It is already evident that examples of actual torture in Europe are not commonplace, which makes the task of relating a substantial number of European cases to Uzbekistan challenging, but nevertheless there are some particularly relevant examples to follow.

In the UK, one of the few findings of inhuman and degrading treatment came in *Ireland v UK*.¹⁴⁴ A similar ruling to *Ireland* was reached in *Tyrer v UK*¹⁴⁵ the same year. Here, a 15 year old child from the Isle of Man had been subjected to a physical punishment by a policeman known as 'birching'. This is an act similar to that of caning, whereby the victim is thrashed with the bark and leaves of a birch tree bound together to make a firm rod.¹⁴⁶

The child was struck three times across the buttocks in private, and as part of the ordeal, was required to take down his trousers and underwear. The case was taken to the ECtHR, where it was held that birching was severe enough to constitute inhuman and degrading treatment and therefore breached Article 3 of the ECHR, but did not constitute torture, the Court stating:

¹⁴³David Hope, 'Torture' [2004] International & Comparative Law Quarterly 807.

¹⁴⁴*Ireland v United Kingdom* ECHR (1978) App no. 5310/71.

¹⁴⁵*Tyrer v United Kingdom* ECHR (1978) 2 EHRR 1.

¹⁴⁶During the 1970s, the law in the Isle of Man differed from that of the UK to a certain extent, and at that time corporal punishment was still legal. The Isle of Man was in fact the last place in Europe to allow birching as a punishment up until 1978.

In its report, the Commission expressed the opinion that judicial corporal punishment, being degrading, constituted a breach of Article 3... and that, consequently, its infliction on the applicant was in violation of that provision.

The Court shares the Commission's view that Mr. Tyrer's punishment did not amount to "torture" within the meaning of Article 3... The Court does not consider that the facts of this particular case reveal that the applicant underwent suffering of the level inherent in this notion as it was interpreted and applied by the Court in its judgment of 18 January 1978 (*Ireland v. the United Kingdom*).¹⁴⁷

The ECtHR used *Ireland* as precedent when explaining its judgment in *Tyrer*, and identified a divergence between the two cases with regard to the severity of the mistreatment applied. Neither case resulted in a finding of torture, but a sliding scale of inhuman and degrading treatment was still identified: Whilst the treatment in *Ireland* was considered more severe than in *Tyrer*, both cases still involved a breach of Article 3 due to its absolute nature. Upon making a distinction between *Tyrer* and *Ireland*, as well as justifying its decision to indicate that the treatment applied in *Tyrer* was not considered severe enough to be classified as 'inhuman', the Court explained that:

...it remains true that the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman" within the meaning of Article 3. Here again, the Court *does not consider on the facts if the case that that level was attained* and it therefore concurs with the Commission that the penalty imposed on Mr. Tyrer was not "inhuman punishment" within the meaning of Article 3.¹⁴⁸

The Court also considered several elements of the case in order to come to its overall conclusion that Article 3 was breached but inhuman treatment was not identified. One of these key elements was the argument, posed by the Attorney-General for the Isle of Man, that because the punishment administered to the child was done in private rather than public view, this nullified the possibility of the act being classed as 'humiliating'. Humiliation can be considered one of the criteria for inhuman treatment, and although the argument of privacy was acknowledged, the Court also explained that the lack of public viewing did not

¹⁴⁷ibid (28-29).

¹⁴⁸*Tyrer v United Kingdom* ECHR (1978) 2 EHRR 1 para 29.

completely negate the perception of humiliation on behalf of the child, stating that the 'absence of publicity will (not) necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others'.¹⁴⁹

This particular strand of the case was given extra legal weight when the Court summarised its ruling, and its influence was such that a finding of 'degrading' treatment was ultimately reached.

Being one of the two criteria explicitly outlined in Article 3, a finding of degrading treatment is enough to constitute a breach, yet inhuman treatment was still found to be absent. The main reasoning for this was determined by the lack of clear evidence of lasting psychological effects that the birching punishment may have had on the applicant. Using this as the test for inhuman treatment in this particular case, it was explained that:

If psychological effects could be established, and if these were appreciable and more than merely temporary, there might be a case for calling the punishment "inhuman", but none of this would have the slightest bearing on the question of degradation or debasement.¹⁵⁰

Since the judgment of *Tyrer*, as McCrudden explains, it has been used as a yardstick in relation to the challenge of several legal rights, including the Article 6 ECHR right to a fair hearing and Article 3 ECHR right to private life:

The first reference by the Court (ECtHR) to human dignity was in *Tyrer v. UK* in which corporal punishment, administered as part of a judicial sentence, was held to be contrary to Article 3 on the ground that it was an assault 'on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'. Since then, it has been drawn on in the context of the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture, and the right to private life. The Court now regards human dignity as underpinning all of the rights protected by the Convention.¹⁵¹

¹⁴⁹ibid para 32.

¹⁵⁰ibid para 33.

¹⁵¹Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *European Journal of International Law* 19 (4): 655.

These two examples signify the complexities when reading between the lines on the prohibition of torture. Article 3 of the ECHR is absolute, yet there are still degrees of severity in assessing whether the treatment constitutes torture or inhuman and degrading treatments which are debated upon by judges in individual cases.

This apparent lack of clarity when classifying whether a certain act is 'torture', 'inhuman treatment', or 'degrading treatment' is criticised by Greer, who expresses his opinion that taking a non-committal stance on a topic of such importance is unfeasible:

...[S]ince absoluteness is not an express, inherent, self-evident, or necessary feature of the provisions in question, this status is a matter of attribution rather than, as the orthodoxy holds, inherent legal necessity. Other non-absolute interpretations are not only possible, but expressly underpin similar prohibitions in some celebrated national human rights instruments. It does not follow either, because *the term 'cruel, inhuman or degrading treatment' is typically included in the same clauses which prohibit torture*, that each of these very different types of harmful conduct must necessarily share the same status. *The much-repeated claim that the prohibition is absolute in principle but relative in application is also unconvincing.*¹⁵²

Grans, on the contrary, makes slightly more allowance for the slippery nature of the prohibition of torture, explaining that because torture is unique in that its reach spreads across several separate branches of law, its complex nature is its own downfall in given circumstances.¹⁵³ Additionally, the ECHR is a living instrument, designed to accommodate changes in values, society and technology.

These opinions help paint a picture of how polarising the topic of torture in law can be, and the fact that it is difficult to pin down both an accepted definition and a laterally agreed mainstream method to interpret the laws concerning torture in court make the challenge of tackling Uzbekistan's use of it even larger in scale.

¹⁵²Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15(1) Human Rights Law Review 101, emphasis added.

¹⁵³See page 45 for relevant quote.

Greer also claims that the 'absolute nature' of torture is actually an interpretation (not black letter law) by judges themselves, and that 'the term, 'formally unqualified rights',¹⁵⁴ is arguably more accurate and begs fewer questions'.¹⁵⁵

Nonetheless, the slightly fogged interpretation of these laws by judges has remained a relative constant throughout ECtHR case law, and can be exemplified further with the next set of cases.

The French ECtHR cases

*Selmouni v France*¹⁵⁶ is another example of inhuman and degrading treatment as authorised by the state, the judgment in which involved a consideration of whether there was a clear, discernible difference between inhuman treatment and torture. The applicant, a joint Dutch/Moroccan national, had been arrested in France for drug trafficking offences, and was sentenced to 13 years imprisonment. During his 3 day custody, the applicant claimed he was subjected to several physical punishments. An extract from his account of the mistreatment is as follows:

After I had been subjected to a body search, during which everything in my possession was taken, my interrogation by five police officers began.

One of them, who appeared to be in charge, made me kneel on the floor and began pulling my hair while another one hit me in the ribs with a stick resembling a baseball bat.¹⁵⁷

The applicant then goes on to describe how he was repeatedly tapped on the head with the baseball bat, before being punched, stamped on and subjected to further questioning whilst having his hair violently pulled.¹⁵⁸

In the evening of the same day, when there were fewer staff on the first floor, I was questioned again by six police officers, who were particularly brutal to me. I was punched, and beaten with a truncheon and a baseball bat. They all carried on assaulting

¹⁵⁴ Rights which have no internal limitations.

¹⁵⁵ Steven Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gafgen* case' [2011] Human Rights Law Review 11 (1) 68.

¹⁵⁶ *Selmouni v France* ECHR (1999) App no. 25803/94.

¹⁵⁷ *ibid* para 24.

¹⁵⁸ *ibid*.

me until 1 a.m. I think that this session of ill-treatment had begun at about 7 p.m.¹⁵⁹

He then documents that the head police officer dragged him down a long corridor by the hair and was made to run, whilst the other officers stood either side of him tripping him as he went.¹⁶⁰

It was held that there had been a violation of Article 3 ECHR, but the Court also described the ECHR as a 'living instrument' which is flexible and changes over time, as attitudes to the interpretation of the law can alter or adapt to contemporary perspectives. As such, it was ruled that although Article 3 had been breached, similar cases in the past, including *Tyrer v UK*,¹⁶¹ showed that the treatment involved constituted inhuman and degrading treatment rather than torture. Arguably, this should still constitute a violation given the absoluteness of Article 3. Nevertheless, it was observed that:

The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture (see the *Aksoy* judgment ... and the *Aydin* judgment ...).

However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, the following judgments: *Tyrer v. the United Kingdom*, ... *Soering* ... and *Loizidou v. Turkey*, ... the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future.¹⁶²

The Court noted that there had been a transition over time in that the threshold level for torture has been lowered somewhat when concerning the defence of human rights and, in this case, Article 3. The judge stated that:

It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.¹⁶³

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Tyrer v United Kingdom* ECHR (1978) 2 EHRR 1.

¹⁶² *Selmouni v France* ECHR (1999) App no. 25803/94 (101).

¹⁶³ *Ibid.*

The ruling in *Selmouni* shows how the laws on torture are never left to stagnate. Over time, standards are raised; the incidence of cases resulting in convictions of torture rather than degrading and inhuman treatment may not be substantially increasing, but it has been made clear that, in general, torture thresholds are lowering and 'society is raising its expectations' on the topic of torture, resulting in higher standards and greater expectations on rulings.¹⁶⁴ Perception of what constitutes torture evolves, rather than stays constant or regresses. This can only be a positive, especially when attempting to hold Uzbekistan to account for its crimes. Uzbekistan should look to take heed of this fact, and realise that it is not too late for it to adapt to the changing nature of torture thresholds and change its provisions accordingly, using European precedent such as *Selmouni*.

Another interesting development in *Selmouni* was the fact that the distinction was made between the state and state actors, in this case the police officers acting on behalf of the state and carrying out the mistreatment of the applicant. Here, Yeo refers to the judgments in the ECtHR:

In *Selmouni v France*, the ECtHR found that the French government was liable to the appellant even though disciplinary action had been taken against the police officers who had allegedly ill-treated him. The case once again concerned the question of compensation for past wrongs, but this judgment and others clearly indicate that in the case law of the European Convention on Human Rights, a state is responsible for the actions of its employees.¹⁶⁵

Yeo also explains that both *Ireland* and *Selmouni* concerned state officials improperly carrying out their duties, and that both cases demonstrate the positives and negatives of applying the 'course of employment' analysis.

The law in other jurisdictions might not, however, particularly if the employer had prohibited such modes of carrying out duties and taken remedial action when alerted to the problem. In *Ireland v UK*, the Court upheld the finding of the Commission, which was not disputed by the UK government, that the

¹⁶⁴European Court of Human Rights: Suicide in Prison: State's Duties Towards Mentally Ill Prisoners, Disciplinary Punishments as Inhuman Punishment, and the Inadequacy of Remedies' [2001] Journal of Criminal Law Vol 65(2), para 11.

¹⁶⁵ Colin Yeo, 'Agents of the State: When is an Official of the State an Agent of the State?' (2002) International Journal of Refugee Law 14 (4): 531.

interrogation techniques involve constituted a 'practice'. In *Selmouni v France*, the state had only very belatedly taken any remedial action.¹⁶⁶

Towards the end of this study, when a more detailed focus on how large a role the state of Uzbekistan has to play in its use of torture is given, it will be important to report on whether Uzbek officials call upon state actors to carry out their work, or whether the blame lies solely at the door of state officials.

Another French ECtHR case which involved a breach of Article 3 by the state came in *Tomasi v France*.¹⁶⁷ A,¹⁶⁸ a French national, was a member of a Corsican political group called the Corsican National Liberation Group, which sought independence from France. In 1982, the group attacked a Foreign Legion rest centre, and as a result of which a French soldier was killed. The French authorities suspected A of having contributed to the attack, and he was arrested. A claimed he had been subjected to various violent assaults during his interrogation and incarceration period, and his statement is as follows:

I was beaten for forty hours non-stop. I didn't have a moment's rest. I was left without food and drink.

A police-officer, whom I would be able to recognise, held a loaded pistol to my temple and to my mouth, to make me talk. I was spat upon in the face several times. I was left undressed for a part of the night, in an office, with the doors and windows open. It was in March.

I spent almost all the time in police custody standing, hands handcuffed behind the back. They knocked my head against the wall, hit me in the stomach using forearm blows and I was slapped and kicked continuously. When I fell to the ground I was kicked or slapped to make me get up.

They also threatened to kill me, Superintendent [D.] and officer [A.] told me that if I managed to get off they would kill me. They also said that they would kill my parents. They said that there had been an attack at Lumio where there had been a person injured and that the same thing would happen to my parents, that they would use explosives to kill them.¹⁶⁹

Both physical and psychological types of torture are mentioned here, the latter referring to the threats of execution and the threat of harm to A's family. Using

¹⁶⁶ *ibid.*

¹⁶⁷ *Tomasi v France* (1992) 15 EHRR 1, App no. 12850/87.

¹⁶⁸ The applicant.

¹⁶⁹ *ibid* 49.

Ireland v UK as precedent, A argued that the blows he suffered 'not only caused him intense physical and mental suffering; they had also aroused in him feelings of fear, anguish and inferiority capable of humiliating him and breaking his physical or moral resistance'.¹⁷⁰ In their defence, the French government argued that the Commission had misunderstood the scope of Article 3. It was ultimately held that the severity of the blows applied to A reached the threshold of inhuman and degrading treatment, and despite the Court conceding that the French state had its hands tied somewhat when interrogating potential terror suspects, such a fact cannot be used as an excuse to allow the lessening of safeguards in place to protect such suspects from physical coercion. The judge stated that:

The Court... does not consider that it has to examine the system of police custody in France and the rules pertaining thereto, or, in this case, the length and the timing of the applicant's interrogations. It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the *undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals*.¹⁷¹

Again, in similar circumstances to *Selmouni*, the exact burden of guilt placed directly on the state was in dispute before the final verdict. The French government did not dispute the visible injuries to A, but they argued that the level of severity of such injuries was not consistent with the level of force used by the police. Smith notes the dismissal of this claim by the ECtHR; 'Strasbourg rejected this argument. It held that the applicant's precise and detailed description of events, with an absence of evidence or explanation to the contrary, made it appropriate to infer that the authorities were responsible for an art.3 violation'.¹⁷²

¹⁷⁰ibid 112.

¹⁷¹ibid 115.

¹⁷²Matthew Smith, 'The adjudicatory fact-finding tools of the European Court of Human Rights' (2009) E.H.R.L.R. 218 82.

The outcomes of these cases make it appear that Uzbek accountability may be easier to prove when looking in depth at cases coming out of Uzbekistan. In theory, if the Uzbek government is ever brought to an international court such as the ICC¹⁷³ to face a hearing and it decides to lay the blame on the police, it is looking more likely that prosecution of the government itself is feasible. Indeed, Uzbekistan already uses a lot of its torture techniques on terror suspects, echoing the facts of *Tomasi*. The extent of which is that it often uses an ‘overly-broad definition of terrorism and terrorist activities’ to ‘charge and prosecute members or suspected members of banned Islamic movements’.¹⁷⁴

In relation to Uzbekistan, successful accountability and state liability may be sought using the precedent of such European cases, and may negate the effect which Uzbekistan has of blaming use of torture on non-state actors. It is however acknowledgeable that this would be case dependent.

One glaring problem with this is that in Uzbekistan’s own criminal code, despite outlawing torture, it specifically excludes non-state actors or third parties, a point which has been importantly raised by Marchesi:

Similarly, in another former Soviet Republic, Uzbekistan, Article 235 of the Criminal Code, which was also amended in 2003 in order to include a definition of torture which is largely based on Article 1, ‘does not cover acts by “other persons acting in an official capacity” including those acts that result from instigation, consent or acquiescence of a public official.’¹⁷⁵

This means that any domestic legislation will most likely prove ineffective if it did not address this issue or amend this provision, and consequently, external regulations will be needed. However, this still gives some hope when moving forward. Further discussion of this topic will be given in Chapter 6.

Certainly, in Europe at least, there are multiple examples of legal provisions aimed at eliminating torture from a variety of sources. In May 2016, the

¹⁷³ The International Criminal Court, based in The Hague, The Netherlands. It hears cases concerning the most serious of crimes including genocide, crimes against humanity and war crimes.

¹⁷⁴ ‘Bulletin: counter-terrorism and human rights’ [2015] ICJ E-Bulletin, E.H.R.L.R. 575, 576 (25).

¹⁷⁵ Antonio Marchesi, ‘Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)’ [2008] Journal of International Criminal Justice 6 (2) 195-214, para 19.

President of the Parliamentary Assembly for the Council of Europe, Pedro Agramunt, stated that he was:

proud of the role that the Council of Europe has played in helping to expose how some European nations colluded in torture” and expressed the “sincere hope... that torture will never again take place on European soil with the complicity of State authorities.¹⁷⁶

A somewhat optimistic, and arguably naïve, aspiration, Agramunt’s statement here nevertheless indicates the notion that state-implicit torture, at least in Europe, could eventually be eradicated through repeated convictions and the systematic upholding of the various relevant statutory safeguards, along with a steadily declining threshold and tolerance when ruling on what constitutes torture. Additionally, there needs to be an acceptance of the evidence which shows that rapport and a build-up of trust between interviewer and interviewee is a far more effective tool of intelligence gathering as opposed to torture in today’s society.¹⁷⁷

Now that the extent to which the use of torture in Europe has been discussed more deeply, it is logical to expand the search for other states which have had similar regimes and difficulties in eradicating the use of torture from their own internal police systems. Latin America has often been cited when scholars and human rights activists alike have been aiming to provide a yardstick by which to compare current problem states with past failures with regard to torture. An analysis of the region’s historical ties with torture will now help to further clear the path towards the ultimate goal of providing sensible solutions towards the question of how to stop Uzbekistan from torturing its citizens.

¹⁷⁶As ten-year torture inquiry ends, Council of Europe states give final response on CIA ‘secret prisons’ (Council of Europe, Parliamentary Assembly) < <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6040&lang=2&cat=15>> accessed 25 October 2016.

¹⁷⁷ The Long Read, ‘The scientists persuading terrorists to spill their secrets’ (The Guardian) <https://www.theguardian.com/news/2017/oct/13/the-scientists-persuading-terrorists-to-spill-their-secrets?CMP=share_btn_link> accessed 27th October 2017.

Chapter 5

The Use of Torture in Latin America

In order to put Uzbekistan's state-controlled torture regime into greater context, it is important to identify various relevant past and present examples of torture being committed on a similar scale in other countries. Some states have been mentioned already, including Israel and Turkey,¹⁷⁸ but although such countries have committed torture in the past, they are arguably less significant in comparison with more infamous examples.

Since torture has evolved over time, both in terms of the justification for its use and the methods of its application, a clear contrast is visible between the use of enhanced interrogation techniques in western countries today and less developed countries which used torture during the late 20th century.

Advances in technology have made it easier than ever to conduct tests on humans and discover where their main mental weaknesses lie. The use of sophisticated equipment, EEGs for example, can monitor victims' stress levels and modify torture techniques accordingly, based on the suspects vital signs.¹⁷⁹ However, it requires more stringent testing and specialised equipment, whereas when someone has been severely beaten, it is rather more obvious to the naked eye what has happened to them. However, in Latin America during the latter half of the 20th century, physical torture was still very much the norm; culturally, the different types of torture depend on geographical location, as different states use different methods. As Basoglu explains:

The physical manifestations of torture are as diverse as the oppressive societies and types of torture inflicted by them... For example, under the Khmer Rouge, Cambodian civilians were commonly subjected to starvation, brain washing and hard labour. In contrast, Latin American regimes have frequently subjected their political prisoners to electric shock... dunking of

¹⁷⁸See Chapter 3 of this thesis for Israel, Chapter 4 for Turkey.

¹⁷⁹J. Jeremy Wisnewski, *Understanding Torture* (Edinburgh University Press Ltd 2010) 9.

the head in water which is often fouled by human waste and...
beatings of the soles of the feet.¹⁸⁰

Identifying this trend provides a useful introduction to the facts on the prevalence of torture, and the reasons for its use in Latin America during the latter 20th century. Mendez elaborates on this, explaining that:

In the current democratic era, torture continues to be used, albeit in a less systematic fashion and perhaps with less intensity and cruelty than during the “dirty wars” against a perceived political enemy. There is now less need to destroy cells and organisational structures, and less fear that the victim of torture is an intelligent, dedicated revolutionary that knows how to “beat the system” if the torment remains at a bearable level. But torture continues to be the shortcut to the clarification of crimes, and police interrogators are more interested in immediate media-focused results than in successful prosecutions with scientifically gathered evidence.¹⁸¹

Under the rule of Pinochet, tens of thousands of Chilean nationals were tortured for the former rather than the latter of reasons mentioned above, mainly to instil fear and ensure obedience. Luban also echoes this, claiming that:

First, there is torture for the purpose of terrorising people into submission. Dictators from Hitler to Pinochet to Saddam Hussein torture their political prisoners so that their enemies would be afraid to oppose them, knowing that they might face a fate far worse than death.¹⁸²

How relatable is this type of torture to that present in Uzbekistan? A direct comparison serves as a useful means by which to identify various idiosyncrasies that are common to both ‘regimes’, and also help discover whether the reason for Pinochet’s eventual downfall could be applied to the case of Uzbekistan.

Unfortunately, torture in South America is not an isolated problem. In a recent report by Amnesty International, Mexico was specifically highlighted in respect

¹⁸⁰Metin Basoglu, *Torture and its consequences – Current Treatment Approaches* (Cambridge University Press 1992) 255.

¹⁸¹Juan E. Mendez, *Torture: Does it make us safer? Is it ever OK?* (Human Rights Watch and The New Press 2005) 56.

¹⁸²David Luban, *The Torture Debate in America: Liberalism, Torture, and The Ticking Bomb* (Cambridge University Press 2006) 40.

of its serious and ongoing torture-related human rights breaches.¹⁸³ Further, in similar vein to Uzbekistan, the attitude towards torture at first glance appears to be that of apathy, Amnesty documenting that:

Reports of torture and other ill-treatment continued to be widespread, as was the failure on the part of federal and state prosecutors to adequately investigate complaints.¹⁸⁴

However, more positively and in a move which Uzbekistan could seek to replicate, the Mexican Supreme Court improved the situation by making the inclusion of torture based evidence more difficult:

The Supreme Court strengthened legal obligations to exclude evidence obtained under torture.¹⁸⁵

This notable improvement aside (and Mexico's attempts at reform acknowledged), the common factor appears to be the state, and more specifically, the judiciary of problem states either behaving apathetically towards the continuing use of torture, or condoning it through permissive judgments.¹⁸⁶ A number of individual states are, rather than creating fresh anti-torture legislation and reinforcing anti-torture safeguards, allowing evidence gathered by means of torture to slip through the cracks of what should constitute a fair trial. Deficiencies in the legal system itself exasperate the problem. Consider the case of this Mexican national, who was imprisoned despite claiming that evidence against her had been extracted through the use of torture:

The Supreme Court's ruling came in the case of a woman sentenced to 25 years in prison for murdering her husband. Even though the woman did not ratify her initial confession and argued that it was obtained by torture, the first instance judge did not start an investigation into this allegation and insisted

¹⁸³ Amnesty International, 'Torture in Mexico is Out of Control' (2015) <<https://www.amnesty.org/en/latest/campaigns/2015/10/stop-torture-mexico/>> accessed 20th September 2017.

¹⁸⁴ Amnesty International, 'Report 2014/15 – The State of the World's Human Rights' (2015) para 247 https://www.amnesty.org.uk/sites/default/files/annual_report_-_english_-_air1415.pdf accessed 1 September 2016.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid* 399.

that the initial medical report did not describe any evidence of torture, concluding that the torture allegations were false.¹⁸⁷

It also appears to be the case that in Mexico, attempting to seek justice for being the victim of torture and ill-treatment is almost an impossibly difficult task. Regardless of large volumes of complaints, very few cases result in a trial and conviction of state agents for state-controlled torture. So few, even, that when such cases are successful, they become prominent due to their rarity, Amnesty reporting that:

Despite scores of complaints at the federal and state levels, there were few prosecutions and almost no convictions of public officials responsible....

In two exceptional cases the Federal Attorney General's Office dropped charges against the victims of torture after finally accepting evidence that they had been tortured in order to falsely implicate themselves. The victims had spent between three and five years in pre-trial detention.¹⁸⁸

Although such cases were ultimately successful, they were still drawn-out, lengthy investigations. A requirement of waiting three to five years whilst in detention seems punishment enough (although admittedly, this is entirely dependent upon the nature of each offence), regardless of the verdict.

Another stumbling block which makes the prosecution of torture in Mexico so difficult is that 'torture is a distinct offence under federal law but not under the law of all the individual states.'¹⁸⁹ Seemingly, such is the seriousness of torture that it is not considered something that district courts can handle alone. Torture is regarded as a grave offence which is potentially encouraging, but conversely it probably means a lot of actual torture goes under the radar due to the inherent nature of the court systems. Amnesty exemplifies this, stating that

¹⁸⁷Masha Lisitsyna and Adriana Garcia, 'Mexican Courts Can Help End the Use of Torture. So Why Don't They?' (Open Society Foundations, Voices) <https://www.opensocietyfoundations.org/voices/mexican-courts-can-help-end-use-torture-so-why-don-t-they> accessed 27 October 2016.

¹⁸⁸Amnesty International, 'Report 2014/15 – The State of the World's Human Rights' (2015) https://www.amnesty.org.uk/sites/default/files/annual_report_-_english_-_air1415.pdf accessed 1 September 2016, 249.

¹⁸⁹Antonio Marchesi, *Journal of International Criminal Justice* 6 (2) 'Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)' (2008) 195-214 para 11.

'Laws against torture exist in Mexico, it's just that few pay any attention to them, and torturers get away with it'.¹⁹⁰

On the other hand, the Mexican government has shown some initiative in recent years in terms of giving protection to both human rights defenders (HDRs) and journalists in the region documenting human rights abuses. In 2012, it approved the Law for the Protection of Human Rights Defenders and Journalists through the Mexican Congress. Such a law reduces the capacity for authorities making excuses for failing to implement proper human rights protection for such parties, who are likely to be crucial in revealing incidences of torture.¹⁹¹

However, Joloy warns that since 2006, torture, as well as other human rights violations, have been on the increase:

The so-called 'war against organized crime', launched by President Calderón in December 2006, aggravated the levels of violence and insecurity around the country. With it, Mexico has also experienced an alarming increase in human rights violations in direct relation with the public security strategy based on the use of force and militarization. Cases of extrajudicial executions, enforced disappearances and torture have registered a sustained increase during recent years.¹⁹²

The situation is not so bleak in Brazil and Argentina, given their past. Juan E. Mendez, who is now the UN Secretary General's Special Adviser on the Prevention of Genocide and President of the International Centre for Transitional Justice, was tortured in 1975 by SIPBA¹⁹³ during the Argentinian military dictatorship. As he documents:

...over the (course of) two days I was transported by car to several different places in the suburbs, where I was interrogated under beatings and application of the electric prod (*picana*)...

¹⁹⁰Amnesty International, 'Torture in Mexico Is Out of Control' <https://www.amnesty.org/en/latest/campaigns/2015/10/stop-torture-mexico/> accessed 6 February 2017.

¹⁹¹Daniel Joloy, Journal of Human Rights Practices 5 (3): 'Mexico's National Protection Mechanism for Human Rights Defenders: Challenges and Good Practices' (2013) 489-499 (abstract and introduction).

¹⁹²ibid, para 5.

¹⁹³The Intelligence Service of the Police of the Province of Buenos Aires.

The pain I suffered with each discharge was so intense that my whole body tensed up; many muscles ached for several days after my treatment.¹⁹⁴

Mendez's treatment was typical of political prisoners under the Peron regime in Argentina in the 1970s. He goes on to describe the apparent reason for such torture:

When security forces are allowed free reign, as in Argentina in the 1970s, they torture not to prevent harm or to gather evidence but to develop leads that might guide them in destroying the structures of the guerrilla organisations they are fighting. This means they will routinely torture every person they capture, without regard to guilt or innocence or to their significance as potential intelligence yields.¹⁹⁵

This 'blunderbuss' approach to torture meant that under Argentinian rule, no prisoner could escape this fate, no matter his personal situation. Such an indiscriminate approach to torture is perhaps more worrying than more traditional methods, i.e. singling out particular persons who are deemed to possess knowledge which is of interest to the authorities.

However, Argentina also appears to now be making up for lost time, specifically in terms of its overhauling of human rights protection. Since the Peron regime ended, one of the biggest statements to the world community that Argentina was serious about changing its ways was its early adoption of the ICC Statute in November 2000. Alvarez comments that:

Argentina's strong support for the ICC is undoubtedly a consequence of its recent history. Barely three decades ago, the country was ruled by a military dictatorship which systematically repressed its political opponents through selective assassinations, forced disappearances and widespread torture in clandestine detention centres spread across the country. It is not surprising that Argentina has sought all possible ways to prevent these events from happening ever again. Hence, it signed the ICC Statute on 8 January 1999 and adopted the ratification law on 30 November 2000.¹⁹⁶

¹⁹⁴ Juan E. Mendez (edited by Kenneth Roth, Minky Worden and Amy D. Bernstein), *Torture: Does it Make us Safer? Is it Ever OK?* (The New Press and Human Rights Watch 2005) 57-58.

¹⁹⁵ *ibid* para 61.

¹⁹⁶ Alejandro E. Alvarez, *Journal of International Criminal Justice* 5 (2) 'The Implementation of the ICC Statute in Argentina' (2007) 480.

This is another encouraging sign; it also serves to show that previously rogue states can reform and even lead the way in setting an example to other problematic states on how to move forward.

Brazil had a similar history of torture to Argentina during the 1960s, '70s and '80s. From 1964 to 1985, under military regime and in similar circumstances to Argentina and Chile, accounts of gross mistreatment became public. The regime was led by five different presidents during its 21 year duration, starting with Humberto de Alencar Castelo Branco and ending with Joao Figueiredo.

Although the situation improved after the regime ended, torture was still commonplace in Brazil until in 1996, when the lower house of Congress finally accepted the international outlawing of torture, seven years after it had ratified the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in 1989.¹⁹⁷

Brazil has made several significant steps in recent years to close the door on its unsavoury past, including the unveiling of a Truth Commission in 2014 by former President Dilma Rousseff, who herself was a victim of the mid-to-late 20th century torture regime. As Phillips documents:¹⁹⁸

The Truth Commission has spent two years and seven months compiling its report, which contains harrowing details of tortures carried out by the military dictatorship. It detailed beatings, electric shocks, sexual violations, and psychological torture on people the state saw as a threat.

The report increased the number of those it said were killed or disappeared during the dictatorship to 434, from the previous official number of 362. It also named 377 people it said were involved in human rights abuses, of whom 196 are still alive. The names included deceased former presidents and military leaders.¹⁹⁹

A 'National System to Fight and Prevent Torture' has also been recently introduced, and:

¹⁹⁷James Cavallero and Anne Manuel, *Police Brutality in Urban Brazil* (Human Rights Watch 1997)28, 29.

¹⁹⁸Dom Philips, 'Brazil Confronts Horrors of the Past With Torture Report's Release' (TIME, Brazil) <http://time.com/3629031/brazil-torture-report-truth-commission/> accessed 1 November 2016.

¹⁹⁹ibid.

Although the System did not fully meet international standards in terms of its independence, it represented an important step forward in fulfilling the country's obligations under the Optional Protocol to the UN Convention against Torture, which Brazil had ratified in 2007.²⁰⁰

Ploton offers an optimistic view of the future of Argentina's use of torture, explaining that in August 2014, calls were made on the behalf of its government, amongst other states, to apply for eligibility for a relatively new (2011) fund to support the implementation of the OPCAT:²⁰¹

Like its sister fund, the UN Fund for Victims of Torture, the OPCAT Special Fund could contribute to bringing human rights closer to the ground and provide direct support to a burgeoning and vibrant movement of torture prevention actors around the world.

This new treaty, which entered into force in 2006, represents a breakthrough in international human rights law, as it requires states parties to create, designate or maintain one or more national institutions to monitor places of deprivation of liberty. That approach differs radically from 'traditional' international human rights treaties, whose modus operandi is based on a more classical cycle of reporting to UN treaty bodies and implementation of recommendations formulated by the treaty bodies.²⁰²

This breakthrough could radically improve the landscape of torture prevention in years to come. Rather than merely recommending states to sign up to a treaty or convention, like the ECHR and UDHR,²⁰³ the OPCAT is a more active system, and points states in the right direction by positively reinforcing their need to create or greatly improve existing domestic institutions, which can be set up to be uniquely tailored to the state it is responsible for safeguarding. If the OPCAT becomes a success in the states it has already been implemented into, it could be an approach that could work in respect of Uzbekistan.

²⁰⁰ Amnesty International, 'Report 2014/15 – The State of the World's Human Rights' (2015) [247] https://www.amnesty.org.uk/sites/default/files/annual_report_-_english_-_air1415.pdf accessed 1 September 2016 84.

²⁰¹ Optional Protocol to the Convention Against Torture [2002].

²⁰² Vincent Ploton, Journal of Human Rights Practices 7 (1): 'The OPCAT Special Fund: A New Resource for Torture Prevention?' (2015) 153-165, 1.1

²⁰³ United Nations Convention on Human Rights.

It is important to note at this stage that Uzbekistan is not yet a signatory of the OPCAT 2002,²⁰⁴ nor has it ratified it, despite having ratified the UNCAT 1984²⁰⁵ in September 1995. If the OPCAT special fund is ever introduced to Uzbekistan, any positive impact would be welcomed, not least by the victims of torture within its borders.

Argentina also followed similar steps to Brazil in that by April 2015, its 'government regulated the National System for the Prevention of Torture'.²⁰⁶ However, in a move that mirrors that of Uzbekistan, it has so far failed to create a National Committee. 'The Committee's functions would include visiting detention centres and establishing criteria for the use of force, control of overpopulation and transfer regulations'.²⁰⁷ Such criteria would have given Argentinian authorities greater understanding of the legal boundaries they would be restricted to, and any possible infringement would have been much easier to define and prove.

Lessa also expresses her opinion that despite general improvements regarding human rights in Argentina since the end of military rule, torture and murder are still commonplace:

Although there have been significant improvements since democratization in the mid-1980s, conditions favouring human rights abuses still persist. In particular, specific human rights abuses (torture, disappearances, and murder) that resemble practices common during the repression under state terrorism (1976 to 1983) continue to take place.²⁰⁸

Argentina's progress could provide an instructive example which may provide useful lessons in respect of Uzbekistan.

However, Argentina's approach to the permitting of detention centre visits and regular monitoring marks a significant contrast with Uzbekistan's. Prison visits in

²⁰⁴ *ibid.*

²⁰⁵ United Nations Convention Against Torture 1984.

²⁰⁶ Amnesty International, 'Report 2014/15 – The State of the World's Human Rights' (2015) para 62. https://www.amnesty.org.uk/sites/default/files/annual_report_-_english_-_air1415.pdf accessed 1 September 2016.

²⁰⁷ *ibid* [62].

²⁰⁸ Francesca Lessa, *Journal of Human Rights Practice* 3 (1): 'Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010' (2011) 25-48 (Abstract).

Uzbekistan are very rarely allowed,²⁰⁹ and even when they are, 'while granted access to some detention facilities, (foreign diplomats) are usually accompanied by prison or law enforcement officials during their visits'.²¹⁰ When independent human rights organisations such as Human Rights Watch attempt to inspect Uzbek prisons, they are almost always denied any access whatsoever.²¹¹

Chile also has a long history of torture, one which is arguably more directly comparable to Uzbekistan.

Chile under the rule of Pinochet

Since the Pinochet regime grudgingly relinquished power in 1990, Chile, like the rest of the world, has changed profoundly. The passage of time has allowed older Chileans to look back on the Pinochet regime with greater critical detachment.²¹²

In June 1974, Augusto Pinochet Ugarte was sworn in as the self-proclaimed 'Supreme Chief of the Nation' of Chile²¹³ following a military coup that previous year. This marked the beginning of a 17 year tyrannical dictatorship, now renowned for an epidemic of torture, murder and the unexplained disappearances of thousands of Chilean nationals.²¹⁴

It has already been explained why torture was used so ubiquitously under Pinochet's regime, whilst, as Claude and Weston comment, 'Pinochet... never personally tortured anyone... his control over those who did rendered him liable for torture under international law'.²¹⁵ The purpose of the Pinochet regime's extensive use of torture was to make the Chilean people submit to his will through terror and fear, not necessarily to extract vital intelligence or even to reveal the plans behind possible separatist revolutionary movements. Torture was an extension of his grip on power, and it was effective. During his reign, old

²⁰⁹Refer to Chapter 1.

²¹⁰Amnesty International, 'Secrets and Lies, Forced Confessions Under Torture in Uzbekistan' (2015) 61.

²¹¹ibid.

²¹²Mary Helen Spooner, *Soldiers in a Narrow Land: The Pinochet Regime in Chile* (University of California Press 1999) 15.

²¹³He changed this title to 'President' on 17th December 1974.

²¹⁴BBC News, 'Clashes as Chile mourns disappeared under Pinochet rule' (*BBC News, Latin America & Caribbean*, 8th September 2014) <http://www.bbc.co.uk/news/world-latin-america-29106846> accessed 5th September 2016.

²¹⁵Richard Pierre Claude and Burns H. Weston, *Human Rights in the World Community: Issues and Action* (Third Edition, University of Philadelphia Press 2006) 84, emphasis added.

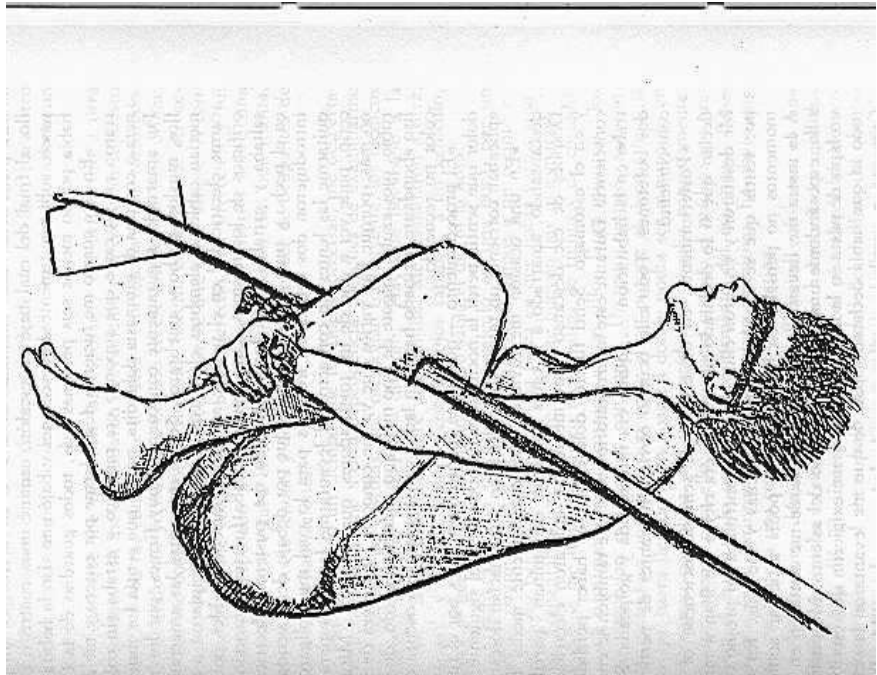
airports, barracks, stadia and disused ships were converted into specialised torture detention centres, built for the sole purpose of breaking the will of his victims.²¹⁶

Various examples of the violent methods used by Pinochet's operatives include:

simple and *violent and continuous blows* causing fractures and bloodshed, as well as keeping the detainees prostrate on the ground or standing, *naked under constant light* or with the head covered by a hood, sprayed upon, partitioned off, or in niches, in other words in narrow cubicles in which it was impossible to move; *denial of food, water, clothing* in similar needs; suspension by the arms in the air, *semi-asphyxiation* by water, foul-smelling substances and excrement, the *application of electricity to the testicles, tongue and vagina, systematic rape*, simulations of shootings and other sophisticated methods of torture such as that known as the "pan de arara" which consisted of the *hanging of the body* for a prolonged period.²¹⁷

The following diagrams show the detailed mechanics of torture techniques Pinochet ordered to be used:

Diagram 5.1:
Suspended from
pole²¹⁸



²¹⁶ See Reed Brody and Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000) 208.

²¹⁷ *ibid* 208.

²¹⁸ Diagram 5.1: Michael Neumann, 'The Crimes of Augusto Pinochet'
<http://mneumann.tripod.com/pinochet.html> accessed 5th September 2016.

Diagram 5.2: Electrocution to genitals²¹⁹

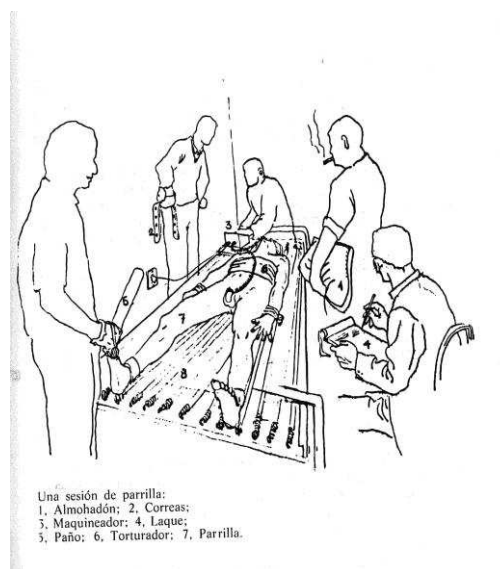


Diagram 5.3: Beatings and asphyxiation²²⁰

These examples of torture techniques, as barbaric as they are, appear rudimentary and almost archaic. Tried and tested methods have changed very little since the middle ages, so little that simply beating someone into submission is often rather effective, at least in terms of making the victim bow to your will. As a form of intelligence gathering, however, it is highly flawed, as will be discussed in more detail later on in this study.

In order to contextualise and better envisage the kind of torture used inside Uzbekistan's borders, it is useful to compare the techniques used under Pinochet's rule with those used today by the former:

Beatings: Survivors report being beaten with hands and fists, batons, rubber truncheons, iron rods and water-filled plastic bottles, while suspended from ceiling hooks by their hands.

²¹⁹ Diagram 5.2: *ibid.*

²²⁰ Diagram 5.3: *ibid.*

Asphyxiation: This is carried out with plastic bags or gas masks placed over detainee's head. When the gas mask is securely fastened, the air supply is turned off until the victim loses, or is on the point of losing, consciousness.

Electric shocks: Survivors report having electric shocks applied to sensitive areas of the body, such as genitals, buttocks and breasts, while suspended from a ceiling hook.

Rape and sexual assault of women and men: Survivors report rape and sexual assault with objects, such as bottles and batons, and a group rape of women and men by police officers.

Deprivation of food and water: Many former detainees have reported that they were not given adequate food or water for up to six days in pre-charge custody and/or in pre-trial detention.

Sleep deprivation: In general, the light in punishment cells and all pre-charge and pre-trial detention cells, most commonly a single lightbulb, is never switched off, making it difficult for detainees to sleep.²²¹

These examples of Uzbek torture are just a glimpse of what goes on behind its closed doors, but the list is almost identical to the Chilean techniques of the 1970s. Rape, beatings, asphyxiation, starvation and electric shocks are particularly common denominators.²²²

Despite this, Chile and Uzbekistan, Pinochet and Karimov, have had no intervention by the US. Because Karimov of Uzbekistan provides a certain level of stability in the Middle East via his brutal crackdowns on Muslim extremism, since 9/11, the US has used Uzbekistan as a marker as to the stability of the landscape in that area. As Gupta comments:

Suharto, Mobutu and Pinochet are the true faces of America's 'promoting democracy' abroad. One of the newest recruits to this list is the Uzbek president, Islam Karimov. Washington is 'involved in a conspiracy of silence' over Uzbekistan's human rights record since that country was declared an ally in the 'war on terror' in 2001.²²³

None of this silence from America does anything to help the suppression of torture – it is an inconvenient truth that Uzbekistan tortures, yet the US tends to

²²¹Amnesty International, 'Forced Confessions Under Torture in Uzbekistan' - Stop Torture Campaign (2015) 26-27.

²²²Amnesty International, 'Secrets and Lies, Forced Confessions Under Torture in Uzbekistan' (2015) 26,27.

²²³Ed.K.R. Gupta, *Studies in World Affairs* (Atlantic Publishing 2006) 22.

look the other way because of the advantages it has in allying itself with Karimov.

The reality is, at best, the US is not contributing towards reducing the prevalence of torture in the Middle East, especially Uzbekistan, and at worst, is tacitly supporting it. When combined with factors such as Guantanamo Bay, it puts the US in a particularly bad light when it should be at the forefront of providing a global example to opposing torturing.

As is now evident, both the motives for torture and the techniques used in Uzbekistan closely mirror that of Chile. It is also of use to investigate what happened after Pinochet's rule in Chile ended, what relevant, if any, safeguards Chile's legal system and or constitution puts in place to prevent such measures from ever happening again, and whether the lessons learned in Chile can be applied in the same way to Uzbekistan. Chile's troubled past is not a perfect fit for what is happening to the Uzbek regime, but it is too useful an example to ignore.

Post-Pinochet Chile – Does it Still Torture?

There is strong evidence to suggest that Chile has been very slow to respond in surfacing from its torture-ridden past and wiping the slate clean in terms of denouncing and banning its use since Pinochet eventually lost power in 1990.

In 1995, a UN Special Rapporteur on Torture 'conducted a mission to Chile where he found that recognition of what constituted torture was shaped by the practice of the previous regime'.²²⁴

It also appears to be the case that Chile underestimated the scale of what needed to be done post-1990 in order to refocus its laws and move on from what Pinochet's practices had once been. A mixture of naivety and grossly misjudged assumptions prompted what was to become a very lacklustre attempt at torture reform, upon which McGregor comments that:

The TJ (transitional justice) processes in Chile have not resulted in engagement with how the state security apparatus functioned under the Pinochet regime or with reform of the

²²⁴Lorna McGregor, IJTJ 7(1): 'Transitional Justice and the Prevention of Torture' (2013) 29, 50.

security sector. Rather, it may simply have been assumed that the combination of the police's resumption of its role as the primary organ responsible for law and order and the disbanding of the military unit principally responsible for the use of torture against political detainees were sufficient to ensure its cessation and nonrecurrence. However, UN reports issued after the transition point to the *continuing influence of the Pinochet era on the practice and treatment of alleged cases of torture*.²²⁵

These revelations are not encouraging. A shift in power and the collapse of a tyrannical regime are clearly not guaranteed to make a big enough difference when it concerns efforts made towards human rights reforms. The fact that the almost three decades since the fall of Pinochet have not been long enough to effectively eradicate state-sanctioned torture makes the challenge posed by Uzbekistan appear even more daunting.

Indeed, the 2009 session of the Human Rights Council set out a list of recommendations which included those specifically for Uzbekistan, but the subject matter of the session itself had been influenced by 'allegations that torture and other ill-treatment continue to be committed by the police'²²⁶ in Chile. Recommendation numbers 33 and 43 were both aimed at Uzbekistan, and were as follows:

33. Take appropriate measures to prevent torture and to ensure that all allegations of torture are properly and independently investigated, and ensure that the law adopted to define torture is in accordance with article 1 of the Convention against Torture (Uzbekistan);

43. Thoroughly investigate all forms of human rights violations particularly of those who were arrested in the course of police operations (Uzbekistan).

Claims and complaints of torture in both Chile and Uzbekistan appear to go hand in hand currently. If a theoretical solution to, or at least an alleviation of Uzbekistan's use of torture is to be sought, Chile is not the best model.

²²⁵ibid 49 emphasis added.

²²⁶ibid (53).

These are dangerous times for countries like Uzbekistan. When regimes are toppled and power vacuums are created as a result, people come to expect the change they have longed for, yet they are often disappointed.

Pinochet is just one example, and the resulting shift in laws and attitudes after regime change are highly unpredictable. The best way to determine the value of this change is to directly examine Chilean laws before, during and after the Pinochet regime, specifically those concerning human rights.

In the short time before Pinochet violently took power in Chile, a democratically elected Marxist, Salvador Allende, became President in the 1970 election. His main aims were typically Marxist, most notably to provide support to the poorer classes, and introduce widespread nationalisation with regards to the economy.²²⁷ O'Shaughnessy described him as a 'country doctor and upstanding freemason who was set on introducing elements of social democracy in a country long organised for the benefit of the landowners, industrialists and money men'.²²⁸

Allende stayed faithful to the-then 1925 Chilean Constitution, which included the 'promise to care for the social welfare of all citizens'.²²⁹ This was replaced by the 1980 Constitution, and work towards it began soon after Pinochet came to power in 1973. The 1980 version is still in force today, but has undergone several alterations and the elimination of various articles. A new constitution is set to be created in 2017, after an announcement by current President Michelle Bachelet in October 2015.²³⁰ The attention brought to the use of state-torture and the level of its illegality remains to be seen.

The current 1980 constitution in place during Pinochet's rule does not contain any articles which explicitly outlaw the use of torture, or inhuman or degrading

²²⁷Paul E. Sigmund, *The Overthrow of Allende and the Politics of Chile 1964-1976*, (University of Pittsburgh Press 1977) 24.

²²⁸Hugh O'Shaughnessy, 'Chilean coup: 40 years ago I watched Pinochet crush a democratic dream' (*The Observer*, 7 September 2013) <<https://www.theguardian.com/world/2013/sep/07/chile-coup-pinochet-allende>> accessed 2 November 2016.

²²⁹'Constitutional history of Chile', (ConstitutionNet) <<http://www.constitutionnet.org/country/constitutional-history-chile>> accessed 2 November 2016.

²³⁰Amnesty International, 'Chile 2015/16 Annual Report' <<https://www.amnesty.org/en/countries/americas/chile/report-chile/>> accessed 2 November 2016.

treatment. The closest possible matches to this are listed under Chapter III, Article 19: Constitutional Rights and Obligations, sections 1 and 7(c):

S.1 The Constitution guarantees to all persons: 1.- The right to life and to the physical and psychological integrity of the individual.

S.7(c) No one may be arrested or detained unless on an order of a public official, expressly empowered by law to that effect and provided such an order has been served in the manner prescribed for by law. However, an individual caught in the act of committing a crime may be detained provided that he be brought before the competent judge within the following twenty-four hours. Should the authority order the arrest or detention of an individual, the competent judge must be served, within forty-eight hours following the arrest or detention, and the individual is to be brought before him. By virtue of a well-founded decision, the judge may extend this period to five days and, in instances where the facts under investigation are described by the law as terrorist acts, such period may be extended to ten days.²³¹

The basic rules concerning arrest and detainment of suspects are outlined, but no specific rules as to the treatment of each suspect are mentioned. As such, on a domestic level, Chile does not appear to have a prohibition of torture. Instead, Chile ratified the Inter-American Convention to Prevent and Punish Torture in 1988,²³² and also the UNCAT that same year. The Chilean Penal Code of 1874 also contains a definition of torture, but it is one which does not currently comply with international standards.²³³

To summarise Chile's development over time concerning its history of torture, the laws in place during Pinochet's rule were insufficient to protect citizens from its use, and even now, there is a clear deficiency with its current Constitution, which may be one of the reasons why the clamour for a new one has been answered.²³⁴ But when so few safeguards and legal prohibitions of torture were around during the time of Pinochet, it is no surprise that the atrocities committed under his rule were indeed carried out. Whether they would have made any

²³¹Constitution of the Republic of Chile 1980, Art 19 (1), (7c).

²³²Karina Fernandez, 'Chile' (*NHRI torture prevention and response*) <

<http://nhritortureprevention.org/local-and-regional-resources/domestic-torture-laws/chile/>> accessed 3 November 2016.

²³³ibid.

²³⁴Amnesty International, 'Chile 2015/16 Annual Report' <

<https://www.amnesty.org/en/countries/americas/chile/report-chile/>> accessed 2 November 2016.

difference is debatable, but having them there in the first place is certainly preferable. Uzbekistan does have such safeguards in place, both domestically and internationally, to no effect.²³⁵ Such is its denial that torture is a major issue, in July 2015 it ‘rejected allegations of the pervasive use of torture and other ill-treatment by security forces and prison staff’, and ‘insisted that the constitutional prohibition of torture and single mention of it in the Criminal Procedure Code conformed to the state’s obligations under the ICCPR’.²³⁶

Using Pinochet’s regime as a model that gives Uzbekistan some sort of relatable context, it is clear that even with a far greater volume of statutory safeguards, both national and international, its plight is no better than that of Chile’s, even given that the former happened several decades ago, and that generally, human rights have steadily improved over such a period of time (although one of the main reasons for this progress is due to the increased implementation of human rights statutes/conventions,²³⁷ the very conventions which Uzbekistan continues to ignore).

A strong similarity is also notable between both Chile and Uzbekistan in terms of attempted prosecution of state officials for torture crimes in two separate cases of extraterritorial jurisdiction. Neither case produced a conviction, but the established link is worth discussion.

The Pinochet case of 1997 concerned Pinochet (who was then no longer the dictator of Chile) visiting the UK and receiving surgery in a London hospital. After a request by Spanish courts, he was then arrested by British police under two arrest warrants relating to the acts of torture and murder he authorised whilst Chilean head of state. After a number of appeals and retrials, Pinochet was eventually extradited to await further trial in Spain.²³⁸ A number of legal blocks had to be circumnavigated to achieve this, including the debate over

²³⁵See Chapter 3 for a detailed analysis on Uzbekistan’s subscriptions to various types of anti-torture legislation.

²³⁶Amnesty International, ‘Uzbekistan 2015/16 Annual Report’ <https://www.amnesty.org/en/countries/europe-and-central-asia/uzbekistan/report-uzbekistan/> accessed 3 November 2016.

²³⁷Council on Foreign Relations, ‘The Global Human Rights Regime’ (*International Institutions and Global Governance Programme*) <http://www.cfr.org/human-rights/global-human-rights-regime/p27450> accessed 4 November 2016.

²³⁸Andrea Bianchi, EJIL Vol. 10 No.2. ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 237-277.

whether he had state immunity as he was the head of state for Chile during the time of the crimes.

Additionally, at the time of the case, Bianchi reveals that:

...no one stressed that the UK has the obligation under the Torture Convention either to extradite General Pinochet to Spain or to any other country that has submitted an extradition request or to refer the case to its judicial, authorities for prosecution in the UK.²³⁹

Unfortunately, Pinochet did not stand trial as he died just a month after being put under house arrest and having his state immunity removed, and thus he was never convicted for his crimes. However, the mere fact that he was about to stand trial is testament to the law; ultimately, he was about to be made to answer for offences, albeit after a number of decades. This should cause some degree of concern for the leaders of other rogue states, Uzbekistan included.

Echoing this, in 2005, a former Minister of Internal Affairs of Uzbekistan, Zokirjon Almatov, visited Germany to receive medical treatment. Uzbek victims of torture authorised by his hand filed complaints against him with the German police.²⁴⁰ In December 2005, a complaint made via eight Uzbek officials was presented against him on the grounds of him committing acts of torture via the use of Uzbek police and security forces during the mid-1990s.²⁴¹

The case against Almatov was dropped the following March due to several reasons, namely that several of the alleged acts committed by him happened before the German International Crimes Code entered into force and also it could not be expected that Almatov would return to Germany, and further cooperation by Uzbekistan was not guaranteed.²⁴² However, this is an encouraging example of how the past can catch up with those who employ torture.

²³⁹ Ibid 247, 248.

²⁴⁰ Salvatore Zappala, *Journal of International Criminal Justice* 4 (3): 'The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister – Missed Opportunity or Prosecutorial Wisdom?' (2006) 602-622.

²⁴¹ Ibid 602.

²⁴² 'Zakirjon Almatovich Almatov' (*Trial International*) <https://trialinternational.org/latest-post/zakirjon-almatovich-almatov/> accessed 6 February 2017.

Zappala argues that had the case gone ahead, it would have been a major stepping stone in addressing the impunity of state officials:

The Federal Prosecutor should have opened the case and started investigations. Subsequently, he should have requested the cooperation of Uzbek authorities both for the purpose of securing evidence and, if necessary, for the extradition of the accused. At that stage he could have informed Uzbek authorities that under German law he was entitled to drop the case should they decide to prosecute the suspect in Uzbekistan. In doing so, he would have fulfilled the task assigned to him by the CCAIL. This would have been a major contribution to the fight against impunity.²⁴³

It is debatable how much cooperation the Uzbek authorities would have provided their German counterparts given that the aim was to convict one of its former ministers. Yet, even though it was arguably a missed opportunity, it does give hope for a future where the use of torture is convictable anywhere, through the use of universal jurisdiction. It also identifies a link between Pinochet's Chile, and today's Uzbekistan, and could be used as precedent to further pressurise for more active prosecution of Uzbek officials.

It is clear that the aftermath of a deposed tyrannical leadership, or an upheaval of old regimes which relied on torture is not a guarantee of a better future for the state concerned. Change can be both positive and negative, and in the case of torture, the outcomes are not always clear.

A much closer inspection of the fundamental problems that lie at the heart of Uzbekistan is now necessary in order to propose achievable ways in which the problems identified can potentially be addressed.

²⁴³ *ibid* 622.

Chapter 6

Uzbekistan's Ultimatum

It is clear from the discussion contained in previous chapters that, from its use in the Middle-Ages through the 20th century, and now in the 21st century, torture has taken many forms, has been employed for a variety of purposes, and that its practitioners have sought to justify its use on a number of different grounds.

Several examples of historic regimes, or individual state-sponsored uses of torture that have been committed by the state and its agents, have been documented and analysed. The fundamental question now is of how the lessons derived from these examples can be applied in respect of Uzbekistan's use of torture, and how they can be utilised as a basis for suggesting what changes and reforms are necessary in relation to Uzbekistan's legal provisions on torture and their interpretation by the country's judiciary.

Several key recommendations need to be given to the Uzbek authorities, using the knowledge of what has been learned and formulated from other countries' experiences and past mistakes in a way which has apparent benefits for both parties; the international community and Uzbekistan.

Uzbekistan acknowledges that torture is wrong, otherwise it would not have criminalised it²⁴⁴ nor referred to it in the CCRU or COU,²⁴⁵ yet it continues to employ it. International criticism clearly has not worked, and so providing genuine alternatives which both improve the plight of Uzbek civilians when taken into custody by the authorities, yet do not diminish the ability to gather intelligence on suspected criminals and serve as a deterrent to other prospective outlaws, need to be sought. A 'bargaining' type situation may be the only way of solving this dilemma. The UK took similar steps with Jordan over the Abu Qatada situation. Economic pressures from the UK proved to be bringing about significant change in respect of Jordan's domestic laws on

²⁴⁴ 'US and Europe 'turn a blind eye' to Uzbekistan torture' (*BBC News*, 15 April 2015)

<http://www.bbc.co.uk/news/world-asia-32316899> accessed 10 April 2017.

²⁴⁵ See Chapter 3 of this thesis.

torture and the use of torture evidence in legal proceedings.²⁴⁶ Using a model that has had some limited success, like that of Jordan, must surely be one of the more viable courses of action. An incentive of some sort may be the elusive element at work here. Nevertheless, it must also be appreciated that Jordan is not a perfect model, as allegations of torture in Jordan still persist.²⁴⁷ The challenge may ultimately result in an acceptance that there is no perfect model for Uzbekistan to follow, and no perfect solution, but using several examples of progress in the reduction of torture in other states as inspiration appears to be the best way forward.

Despite its use as a tool of terror and information gathering, torture has been proven to be a grossly ineffective means of achieving its intended aims. Regardless, US President Donald Trump voiced his enthusiasm for using torture and enhanced interrogation techniques on terror suspects in January 2017,²⁴⁸ something which former President Obama denounced and regretfully admitted that it was something that the post 9/11 Bush administration secretly used in Guantanamo Bay on Al-Qaeda suspects.²⁴⁹

These are worrying times indeed when the President of the US, a major global power and one that so many states look to as an example to follow, is suddenly openly announcing its interest in using torture. This example is something that may only add to Uzbekistan's fervour for using torture on its own suspects. Nevertheless, O'Mara explicitly outlines the shortcomings of torture asserting that:

[T]orture fails utterly as a means of getting at the truth, even more so compared with non-coercive investigative methods. The purpose of a modern interrogation is to get reliable, replicable and verifiable information. Professional interrogators

²⁴⁶ See Chapter 4 of this thesis.

²⁴⁷ 'Amnesty International Report 2016/17 – The State of the World's Human Rights, Jordan 211-212' (Amnesty International 2017) <https://amnesty.org.uk/files/2017-02/POL1048002017ENGLISH.PDF?xMHdSpNaJBUNbiuvtMCJvJrnGuLiZnFU> accessed 10 April 2017.

²⁴⁸ Matthew Weaver and Spencer Ackerman, 'Trump claims torture works but experts warn of its 'potentially existential' costs' (*The Guardian*, 26 January 2017) <https://www.theguardian.com/us-news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview> accessed 10 April 2017.

²⁴⁹ Paul Lewis, 'Obama admits CIS 'tortured some folks' but stands by Brennan over spying' (*The Guardian*, 1 August 2014) <https://www.theguardian.com/world/2014/aug/01/obama-cia-torture-some-folks-brennan-spying> accessed 7 February 2017.

say torture is the worst possible method for this. Neuroscience agrees. Imposing extremes of pain, anxiety, hunger, sleep deprivation and the threat of drowning does not enhance interrogation. It degrades it...

A torturer hopes that enough residual function is unaffected so that intelligence can be gathered. Instead, people say whatever is needed to make the torture stop.²⁵⁰

Despite this, and in spite of the sheer volume of international and national statutes which explicitly ban its use, it appears to be something that, either covertly or completely brazenly, states continue to use.

O'Mara suggests a preferable, and generally rights-compliant, alternative:

What's the alternative? It is to talk. Humans like to talk. Perhaps 40 per cent of what we say to other people consists of self-disclosure... during [it], the brain's reward system is activated.²⁵¹

Carefully structured psychological methods of talking may eventually prove to be one of the best ways in which torture could be consigned to history as a method of extracting intelligence from an individual. Advising countries such as Uzbekistan that these newer, more ethical, and perhaps even more effective approaches to intel-gathering can surely be worth attempting. O'Mara goes on to show that this is not a new practice; conversely, it has been tried, tested and shown to yield excellent results when conducted by a trained interrogator with the right approach:

The legendary German interrogator Hanns-Joachim Scharff knew this, debriefing more than 500 allied airmen during the second world war. He never used coercion, but was incredibly well prepared, cross-checking information carefully. He never asked a direct question, and never indicated any interest in any answer he got. He was adept at taking the pilots' perspective and actively listening. These skills can be learned, and are not so different from the skills of a highly trained doctor.²⁵²

Perhaps it is already emerging that a combination of political pressures, proposed amendments to current Uzbek legislation, and rights-compliant

²⁵⁰Shane O'Mara 'Pain brings no gain' *New Scientist* (4 February 2017) 24 (O'Mara is discussing the neuroscience aspect of torture's use).

²⁵¹ibid 24.

²⁵²ibid 25.

alternatives to torture as a recommendation are all viable options for stopping or at least reducing Uzbekistan's use of torture. A combination of these approaches may be the best way of achieving a breakthrough.

Before recommendations are made to Uzbekistan, it must firstly be established what its own aspirations as a nation are. It needs to be clarified how Uzbekistan wants the world to perceive it. Conceivably, it may aim to please the western world and show its reliability in providing a buffer protecting the west from Islamic terror organisations.²⁵³ Alternatively, as a former Soviet state, previous Communist frameworks may still be in place that suggest the country still identifies and sympathises with its old ties. Indeed, evidence to suggest this possibility lies with the fact that its late former President, Islam Karimov, was a First Secretary of the Communist Party of Uzbekistan, and went on to rule for 25 years.²⁵⁴ It needs to be established whether Karimov's former Communist influence dictated the way in which he ruled Uzbekistan, and the direction in which he steered it. Establishing Uzbekistan's political compass and identity may give further clues as to what leverage can then be applied to it when attempting torture reforms.

The Aspirations of Uzbekistan

Historically, Uzbekistan has always been a state having to come to terms with several conflicting cultural identities and statuses. For centuries, the country was the centre of a 'cultural cross-roads'.²⁵⁵ Merchants from across both Asia and Europe passed through in ancient times, carrying silks and spices from India and China through its borders. Naturally, the area was influenced by these differing cultures as they made their passage, as Khan explains:

Over the centuries, Uzbekistan has been a part of many empires – Iranian, Greek, Chinese, Arab, Mongol, Turk – and its historical influences have contributed to its unique modern identity.²⁵⁶

²⁵³ Gary K. Bertsch, Caddady Craft, Scott A. Jones and Michael Beck, *Crossroads and Conflict: Security and Foreign Policy in the Caucasus and Central Asia* (Routledge 2000) 85.

²⁵⁴ Mary Lee Knowlton, *Cultures of the World: Uzbekistan* (Marshall Cavendish International Private Ltd 2006) 38.

²⁵⁵ Aisha Khan, *A Historical Atlas of Uzbekistan* (The Rosen Publishing Group Inc. 2003) 7.

²⁵⁶ *ibid* 7.

This distinctive history helped to forge a country with a colourful past, yet by the late 1800s, Russian forces subjugated areas of the state. Leading up to the Bolshevik Revolution in 1917, Uzbek nationals became dissatisfied with their Russian occupiers and staged revolts. After the Revolution, Bolshevik leaders took control, and leading up to World War II, Russification took hold in terms of cultural and language policies. By 1940, the Cyrillic alphabet replaced Latin and Stalin's purges of the 1930s involved the removal of almost all Uzbek national leaders, mostly through execution. World War II generated greater industrialisation for the war effort on behalf of the USSR, and also an influx of western Russian refugees.²⁵⁷

After the war, Islam Karimov, who at the time was First Secretary for the Communist Party of Uzbekistan, introduced extreme policy change to the country, including reforms to bring back a sense of Uzbek nationalism and a rejection of the former Sovietisation. Examples include conciliatory attitudes towards Islam and a shift back towards traditional Uzbek language. The country gradually retained more of its powers and regional control through the latter half of the 20th century.²⁵⁸

By 1990, Karimov had taken a lead in the national government, and was subsequently elected President of Uzbekistan in March of the same year. Uzbek was reinstated as the official language and Uzbek culture revival was encouraged. On 31 August 1989, the state was declared independent from the USSR and officially renamed the Republic of Uzbekistan. Back then, the cultural direction of Uzbekistan was clear – its citizens wanted to retake control of their own identity, demonstrated in an independence vote which stood at 98.2% in favour.²⁵⁹ By 1992, Uzbekistan had joined the UN, demonstrating its intention to be recognised as a sovereign state with intentions to create meaningful international relations.²⁶⁰

²⁵⁷ 'About Uzbekistan' (*Embassy of Uzbekistan to the United States*)
<http://www.uzbekistan.org/uzbekistan/history/> accessed 10 February 2017.

²⁵⁸ *ibid.*

²⁵⁹ Commission on Security and Cooperation in Europe: *The Referendum on Independence and Presidential Election in Uzbekistan, December 29 1991* (Prepared by the Staff of the Cooperation in Europe Washington, D.C. January 31 1992) 1.

²⁶⁰ *ibid.*

On the face of it, since the start of Karimov's rule, Uzbekistan has been trying to reject its past oppression under the control of the red flag. In relation to state-related torture, this is somewhat encouraging, given the fact that the USSR does not have a good history with torture itself. As Boulesbaa explains, when the UNCAT was first drafted, the USSR disagreed with the distinction between torture and inhuman/degrading treatment:

Others were in favour of the wording of the paragraph with its inclusion of the concept of 'cruel, inhuman or degrading treatment or punishment'. The former USSR held the former position; the US and Swiss government held the latter. The former USSR argued that the concept of 'torture' and that of 'cruel, inhuman or degrading treatment or punishment', should be treated as legally distinct.

The USSR held the view that having punishment as an institution was justifiable and a multilateral agreement between many states, and that applying such punishment to lawbreakers was commonplace, not just unique to them. As Boulesbaa explains:

In the former USSR's opinion, the Convention required a clear distinction between punishments that can be justly applied to offenders and forms of treatment or punishment which, because of their cruel, inhuman or particularly degrading nature, cannot be applied. The former USSR objected to the paragraph on the premise that there are no criteria by which the concept can be defined.²⁶¹

Using torture as a form of punishment was clearly something the former USSR was keen to hold on to, and hints at the likelihood of mass uses of torture within its borders. If Karimov was keen to reject USSR culture, then torture was apparently one such part of the old regime which was to stay. Furthermore, global examples which Uzbekistan may look to today for direction on where to go next with regard to human rights in general are arguably not helping the situation. Already, President Trump and his eagerness to restart a state-sponsored torture programme has been mentioned, and in November 2016, President Putin of Russia removed his signature from the jurisdiction of the

²⁶¹ Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Kluwer Law International 1999) 6.

International Criminal Court after calls were made for the Russian military to be held accountable for air strikes made in Syria in support of President Assad.²⁶²

This is an appalling example for Uzbekistan to follow, as it simply sends out the message that, if you are caught committing war crimes or crimes against humanity (torture is classified as such), then you can remove yourself from any legislation or tribunal under or by means of which sanctions may be imposed. In essence, states need only take heed of law which they want to obey.

It seems relatively clear that Uzbekistan does not want to shift back to its USSR past, yet the negative influence of Putin may still be used as an excuse for future uses of torture and maltreatment of Uzbek nationals. The autocratic nature of Karimov may, however, suggest otherwise. The media, for example, is heavily restricted. Anti-torture publicity along with other human rights related issues are therefore subject to intense governmental vetting, and most likely never reach their intended audience (unless in a censored form). As Richter explains:

Despite [the] collapse of the communist party and the socialist empire, state media continue to dominate in most of the post-Soviet countries...

In Uzbekistan, for example, the state and its ministries and agencies are the founders and financiers of over 70 per cent of the print media. (T)hese media supply pre-packaged and one-sided coverage and exclude anything that might paint the state and senior officials in an unflattering light.

(The) performance of the government 'is covered selectively and in a mostly positive tone.'²⁶³

Again, none of this is helpful to the cause of eliminating torture inside the country. Since taking power in 1990, Karimov has taken on his role in ruthless authoritarian fashion, and a state system which rejects democracy and freedom of speech is notoriously hard to break down to bring positive reform.²⁶⁴ Melvin

²⁶² Lizzie Dearden, 'Russia to withdraw from International Criminal Court amid calls for Syria air strikes investigation' (*The Independent*, November 2017) <http://www.independent.co.uk/news/world/europe/russia-international-criminal-court-icc-leaves-pulls-out-withdraws-putin-assad-syria-war-aleppo-a7420676.html> accessed 10 February 2017.

²⁶³ Andrei Richter, 'Restrictions on media ownership in post-Soviet countries' [2008] Communications Law 197.

²⁶⁴ 'Uzbekistan country profile' (*BBC News*, 14 December 2016) <http://www.bbc.co.uk/news/world-asia-16218112> accessed 11 April 2017.

documents four key areas of reform that Karimov put in place after his election victory:

First, the creation of a single system of power based around the institution of the presidency and person of Islam Karimov. Second, a set of initiatives designed to forge a strong centralised state and to assert Tashkent's control over the regions. Third, the Uzbekistani leadership has promoted Uzbek nationalism as a means to unite society. Fourth, the government has been careful to suppress the development of all potential supporters of opposition, particularly Islam...

[T]hese policies have produced a highly authoritarian regime hinged upon the almost unlimited powers of the president. President Karimov has made ruthless use of the security forces to crush opposition and the media are tightly controlled by the state.²⁶⁵

This model of power is highly dangerous to Uzbek citizens, especially to those who disagree with Karimov's style of rule. Yet, despite the similarities with USSR rule, it does not seem that Karimov's Uzbekistan wishes to re-join a Soviet-style pact in the 21st century. Uzbekistan has been an independent sovereign state since 1989, and there are no indications that it wishes to regress on that front. Rather, the modern-day Uzbekistan appears keen to enhance its reputation as its own state, whilst improving relations with surrounding Middle Eastern states, notably Kazakhstan. At the same time, it also appears to be shadily keeping on friendly terms with the US with regards to its treatment of terror suspects. Danilovich and Insebayeva illustrate this:

Kazakhstan and Uzbekistan have been competing for regional influence since their independence in 1991. In the late 1990s, Uzbekistan seemed to be ahead of its neighbour in this competition, significantly, thanks to its cordial relationship with the United States. Later, Kazakhstan took the lead and has continued to impress the region and the world by its economic reform and performance. Notwithstanding their regional ambitions, the two countries have maintained friendly bilateral relations and the two leaders, Nursultan Nazarbayev and Islam Karimov, have always demonstrated mutual respect.²⁶⁶

²⁶⁵ Neil J. Melvin, *Uzbekistan – Transition to Authoritarianism on the Silk Road* (Harwood Academic Publishers 2000) 29-30.

²⁶⁶ Alex Danilovich and Sabina Insebayeva, *International Journal of Refugee Law* 26 (1): 'International Humanitarian Law and Raison D'Etat: the Balance Sheet of Kazakhstan's Ratification of the Geneva Convention on Refugees' (2014) 112.

Further enforcing its reputation as a 'crossroads state', Uzbekistan is geographically neighboured by states with a reputation for home-grown terror organisations (including Pakistan and Afghanistan both of which have strong ties with Al-Qaeda) and it also has its own home-grown radical Islamist organisation, the Islamic Movement of Uzbekistan, which is influenced by both the Islamic State (IS or Daesh) and Al-Qaeda.²⁶⁷

Herein lies the main source of suspects who are, in turn, subjected to the Uzbek torture system before extradition. Danilovich and Insebayeva provide more detail on this:

Uzbek authorities actively request extradition of Uzbek asylum seekers in the name of national security and the 'war on terror'. They argue that Uzbek asylum seekers belong to banned Islamic movements and organize and participate in terrorist acts in Uzbekistan.²⁶⁸

Since May 2005, Uzbek authorities have been even more emphatic in their attempts to crack down on supposed Islamist terrorists. It is often the case that officials make major security concerns known to the public to aid the process of seeking out those attached to Islamist groups or supporters of Islamists who are particularly opposed to the government. Danilovich and Insebayeva again explain:

When authorities manage to get them back to Uzbekistan, the returnees are held in incommunicado detention where the risk of being tortured or ill-treated is very high. In recent years, many cases of forcible return or extradition have been documented by Amnesty International, who also report torture, and unfair trials resulting in death sentences.²⁶⁹

²⁶⁷ Bill Roggio and Caleb Weiss, 'Islamic Movement of Uzbekistan faction emerges after group's collapse' (*FDD's Long War Journal*, 14 June 2016) <http://www.longwarjournal.org/archives/2016/06/islamic-movement-of-uzbekistan-faction-emerges-after-groups-collapse.php> accessed 11 April 2017.

²⁶⁸ Alex Danilovich and Sabina Insebayeva, *International Journal of Refugee Law* 26 (1): 'International Humanitarian Law and Raison D'Etat: the Balance Sheet of Kazakhstan's Ratification of the Geneva Convention on Refugees' (2014) 112.

²⁶⁹ Alex Danilovich and Sabina Insebayeva, *International Journal of Refugee Law* 26 (1): 'International Humanitarian Law and Raison D'Etat: the Balance Sheet of Kazakhstan's Ratification of the Geneva Convention on Refugees' (2014) 112.

Strengthening of Current Uzbek Laws

One of the ways in which torture could be reduced in Uzbekistan has already been discussed in this chapter; through offering a genuine alternative to torture by way of advanced psychological talking techniques, and using subtle clues to make the suspect being 'interrogated' feel in control of the situation. In order for this alternative to work, interrogators in Uzbekistan would have to be re-trained and taught how to use newer questioning techniques, whilst perhaps greater investment in specialist body monitoring equipment could indicate clues as to when the suspect feels open to reveal vital intelligence (ECGs, sweat level monitors, polygraphs for example).²⁷⁰ It could even be suggested that western states offer their expertise in return for commitments.

Another such route could be to propose a restructuring of the current legislation Uzbekistan already has in place to combat torture. Whilst the relevant safeguards in Uzbek legislation which specifically deal with the topic of torture have already been discussed in chapter 3 of this thesis, they need to be considered in further detail if they are to be theoretically developed to decrease their levels of permeability.

To reiterate, there are currently two main areas of Uzbek law which prohibit the use of torture and inhuman or degrading treatment in relation to suspects under state police custody; the national Constitution, and the Criminal Code. Under the COU,²⁷¹ Article 26 of Chapter 7 outlines: 'No one may be subject to torture, violence, other cruel or humiliating human dignity treatment'.²⁷² The prohibition is clear – the word torture is used, in conjunction with 'humiliating human dignity treatment', which can be interpreted as having roughly the same legal meaning as 'inhuman or degrading treatment', which is the standard set in both the UNDHR and ECHR.

Similarly, Article 17 of the CCRU 1994²⁷³ states:

²⁷⁰ 'The Polygraph Technique Part II: Value During an Investigation' (*Police Link – The Nation's Law Enforcement Community* 2017) <<http://policelink.monster.com/training/articles/1947-the-polygraph-technique-part-ii-value-during-an-investigation>> accessed 20th April 2017.

²⁷¹ Constitution of Uzbekistan 1992.

²⁷² Constitution of Uzbekistan 1992, Article 26 <https://www.gov.uz/en/constitution/english#26>.

²⁷³ Criminal Procedure Code for the Republic of Uzbekistan 1994.

Nobody may be subject to violence, torture, or other cruel or degrading treatment.

Acts or decisions, which degrade dignity, violate privacy, endanger health, and cause unjustified physical or moral suffering, shall be strictly prohibited.²⁷⁴

Paragraph 1 of this prohibition is again very similar to the international laws on torture, and this almost duplicates those laws to the letter. Paragraph 2, however, goes into surprisingly close detail, even to the extent proscribing 'moral suffering', something which is neither defined nor protected in other international conventions. It is ironic that a state with such a poor history of torture has arguably some of the most meticulous wording in its laws which are meant to prevent the practice from being carried out.

It also needs to be established why national Uzbek laws have such poor records of enforceability, and whether it is possible to improve such levels. Another bewildering move by Karimov came in 2011, when he approved new laws which supposedly gave even more protection to those in police custody.

President Karimov permitted a new law to be passed in September 2011, which involved improving the levels of police access to suspects in pre-trial custody, as well as easing the process of independent monitoring. The new law also allowed for lawyers and family members of suspects to have unrestricted access to custody centres, and the steps required to be granted such access were reduced in number.²⁷⁵

It is becoming apparent that there are no real flaws with Uzbek legal provision itself; rather, the levels of enforceability, particularly from the judiciary, are the main areas of concern. As Amnesty report:

[J]udges rarely exercise their discretionary power to draw to the prosecutor's attention any evidence that torture may have occurred or that a confession or other testimony may be tainted by torture...

[J]udges rarely admit challenges to the admissibility of evidence on the grounds that it was extracted under torture. This failure,

²⁷⁴ *ibid* Chp 2, Art 17.

²⁷⁵ Amnesty International, 'Secrets and Lies: Forced Confessions Under Torture in Uzbekistan' (April 2015) 36, 37.

like the failure to respect other safeguards against torture, reflects the central role that torture plays in the Uzbekistani criminal justice system. Torture is not an occasional, tolerated aberration in Uzbekistan. It is an essential tool for the extraction of confessions, upon which convictions frequently depend.²⁷⁶

Nevertheless, such is the problem that torture has become in the country, its significance arguably warrants the attention of its own, independently tailored torture statute.

One of the overriding issues with relevant laws regarding torture, whether international or national, is that they often appear to be somewhat vague and subjective. In *Ireland v UK*,²⁷⁷ the ECtHR was inexperienced at ruling on accusations of torture, and as such, the threshold to uphold a conviction was set very high, the Court ruling that the 'five techniques' employed by British troops on Irish nationals, constituted inhuman treatment but not torture. The Court, when ruling on Article 3, voted by 16 to 1 that the use of the 5 interrogation techniques amounted to inhuman and degrading treatment, which constituted a breach. It also ruled by 13 to 4 that the use of the 5 techniques were not severe enough to constitute a practice of torture within the scope of Article 3.²⁷⁸

The ECtHR even went on to express its own opinion that the fifth of the five techniques, the deprivation of food and drink, did not constitute torture within the scope of Article 3, despite agreeing that the others did. The Court then held by 14 votes to 3 that the 'last-mentioned practice was not one of torture within the meaning of Article 3'.²⁷⁹

Despite the ruling in *Ireland* arguably being outdated in certain respects and the threshold on torture having been lowered since the 1970s, the point remains that a certain stigma still comes attached to torture, and that, perhaps even if unintended, a level of subjectiveness still remains. Physical torture appears easy to envisage, but levels of severity are subjectively different for each person, notably in relation to both the torturer (how much coercion should be

²⁷⁶ *ibid* 37,38.

²⁷⁷ *Ireland v United Kingdom* ECHR (1978) App no. 5310/71.

²⁷⁸ *ibid* para 246.

²⁷⁹ *ibid* para 246.

applied?) and the tortured (how painful does this coercion feel?); such comparisons oneself are ineffective, as each individual is different and has their own threshold for pain and mental anguish. Conceivably, the phrasing of torture laws helps to perpetuate this trend. Rumney furthers this notion, commenting on Bagaric and Clarke he observes that:

Bagaric and Clarke argue that: '[t]here is no bright line that can be drawn concerning the point at which the "torture threshold" should be set' and recognise that this creates a significant degree of imprecision.²⁸⁰

Rumney then goes on to explain the dangers of vaguely-worded torture laws, noting that:

Vague wording... may increase the possibility that extraneous factors (such as fear or animosity), will influence the decision-making... [I]t is inevitable that a torture law would be the subject of litigation, as any statutory language is likely to give rise to competing interpretations. This may lead to further delay or uncertainty.²⁸¹

Therefore, it is advisable if a new torture statute for Uzbekistan were to be drafted, in an ideal world, it should be as clear as possible for all, including both the public using it as a defence, and the judiciary using it as a guide for their own decision making. The law on torture should be detailed explicitly, and there should not be too much distinction between torture and other 'softer' words which suggest treatment less than that of torture, such as inhuman, degrading and immoral. There should be no sliding scale, simply a clear-cut ruling that any form of torture is illegal. The statute should be entrenched and enshrined into Uzbek national law, and placed as one of the fundamental rights of man.

However, it is of course recognisable that much of this is unattainable in reality, and nothing is as simple as suggested here. The scope of such a statute would need to be very clear. The conclusion to this thesis will clarify the realities of the steps Uzbekistan now needs to take, as these ideas are admittedly very optimistic goals.

²⁸⁰ Philip N.S. Rumney, *Torturing Terrorists: Exploring the Limits of Law, Human Rights and Academic Freedom* (Routledge 2015) 128-129.

²⁸¹ *ibid* 128-129.

The Role of Judges

Uzbek judges may be advised to use appropriate aids to direct their decision making, for example, using Foley's manual on torture as guidance on how they should treat cases of torture and how to recognise both the national and international significance of the laws on torture. The role of evidence should also be treated with extreme care, as evidence obtained by torture should be struck out immediately. Foley asserts that:

The basic role of judges is to uphold national law – including international law when this has been incorporated into domestic legislation – and to preside independently and impartially over the administration of justice.²⁸²

Foley also states that the responsibility of ensuring defendants, witnesses and victims are treated fairly also resides with the judiciary and that defendants must always receive a fair trial. Rights must be continuously respected in full, and inadmissible evidence should be struck out as soon as possible.²⁸³ Foley continues by saying that:

Judges should at all times be alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment. If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge at the end of a period of police custody, it is incumbent upon the judge to record the allegation in writing, immediately order a forensic medical examination and take all necessary steps to ensure the allegation is fully investigated.²⁸⁴

Perhaps most importantly, Uzbek judges must be reminded at all times of the universal jurisdiction that applies to torture. Foley continues by stating:

While legal systems vary in some respects in different parts of the world, the legal prohibition of torture is universal. The primary role of judges in preventing acts of torture, therefore, is to ensure that the law is upheld at all times.²⁸⁵

In addition to the advice given to the judiciary of Uzbekistan, it is also advisable that the national court system and the proceedings during a trial are altered so

²⁸² Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Human Rights Centre, University of Essex 2003) 3.4, 28.

²⁸³ *ibid* 3.5 28.

²⁸⁴ *ibid* 3.5 28.

²⁸⁵ *ibid* 3.6 29.

as to give greater parity between prosecutors and defendants. As the current situation stands, Uzbek prosecutors are given numerous advantages, (disregarding the bias of judges towards admitting torture tainted evidence and eagerness to convict terror suspects) including psychological cues such as placing the defendant in a cage during his/her trial, giving the impression that they are already a convict and are guilty until proven innocent. This is observed by Berg, who also accounts for other scenarios in the courtroom which do not favour the defendant:

Defendants in criminal hearings in Uzbekistan, as in other countries in the region, are held in cages guarded by either police men in uniform or soldiers in camouflage, creating an environment not conducive to the presumption of innocence... defendants are not allowed to talk to their lawyers during the trial... In general, courts are laid out in a way that lawyers sit with their back to the defendants making even eye contact impossible.²⁸⁶

Additionally, Berg also sheds light on an example where a national judge unequivocally ignored the claim that evidence presented was obtained by torture during the trial of suspected terrorists:

[I]n 2006, Human Rights Watch monitored two group trials of alleged religious extremists where the defendants testified that they had been subjected to torture. In neither case did the judges start an investigation nor did they exclude the testimony alleged to have been obtained by torture.

For example, Judge Shermukhamedov of the Tashkent Province Court asked defendant Mansur Kholikov about his torture allegations and showed him a report from the investigation period...

Kholikov: No, when I signed this protocol there was neither a lawyer nor an investigator there, only *operativniki*.

Judge: The *operativniki* do not have the right to conduct an interrogation.

Kholikov: But they forced me.

Judge: This was not an interrogation but an explanatory meeting. Did you tell your lawyer about the beatings?

²⁸⁶ Andrea Berg, *Nowhere to Turn: Torture and Ill-Treatment in Uzbekistan* (Human Rights Watch 2007) 46.

Kholikov: I did not have confidential meetings [with my lawyer]... There was no point in telling my lawyer about the beatings. He was going to leave and I had to stay there.²⁸⁷

These revelations expose a deep fault line running through the centre of Uzbekistan's judiciary, police and criminal justice system, and since national judges are appointed by the President,²⁸⁸ there is little hope for change unless a political change takes place. The President appointing judges is not necessarily a problem in itself, but issues arise concerning the type of tenure and how easy it is to dismiss them or take away certain privileges, such as pensions.

Fresh hopes for this, however, arose in September 2016 when it was announced that President Karimov had died of a brain haemorrhage.²⁸⁹ Although it is too early to predict whether this development will bring about significant change for the plight of Uzbek nationals and for the state of human rights in the country, the appointment of former Prime Minister Shavkat Mirziyoyev as the new President²⁹⁰ could signify some variation in the region, as the Karimov era came to an abrupt end after over two and a half decades of control.²⁹¹

The task at hand now is to draw up a substantive list of recommendations for Uzbekistan, and draw conclusions on how the background on torture, taking into account all examples of past regimes and the various justifications for its use, give substantive clues as to what direction Uzbekistan takes from here.

²⁸⁷ *ibid* 47.

²⁸⁸ Bella Waters, *Uzbekistan in Pictures* (Lerner Publications Company 2007) 35.

²⁸⁹ Sarah Rainsford, 'Islam Karimov: Uzbekistan president's death confirmed' (*BBC News*, 2 September 2016) <<http://www.bbc.co.uk/news/world-asia-37260375>> accessed 14 February 2017.

²⁹⁰ Agence France-Presse, 'Shavkat Mirziyoyev becomes acting president of Uzbekistan' (*The Guardian*, 8 September 2016) <<https://www.theguardian.com/world/2016/sep/08/shavkat-mirziyoyev-acting-president-of-uzbekistan>> accessed 14 February 2017.

²⁹¹ Newly elected President Mirziyoyev won 88.62% of votes in the December 2016 general election, Jagran Josh, *Current Affairs January 2017 eBook* (January 2017) 75.

Chapter 7

Conclusions and Recommendations

It can be concluded, based on the foregoing analysis, that torture is a crime that has, is, and unfortunately most likely always will be, committed in certain states, by certain authorities for several differing reasons. It is also a crime with differing definitional issues, given that it can be classed as a general international crime, a crime against humanity and also a war crime.

Several examples of historic regimes of torture have been highlighted,²⁹² as have the steps taken in an attempt to either reduce or completely eliminate the use of torture in such states. The challenge now is to consolidate those lessons and use them to inform a series of recommendations aimed at Uzbekistan with the underlying aim that they can influence or help bring about the change in attitude needed to improve the treatment that Uzbek citizens, suspects and prisoners have become accustomed to at the hands of their own government and other state authorities.

It must be noted, however, that whilst further domestic legal prohibitions, economic and political pressures from other states, and the examples provided by 'model leaders' - both individually and combined - offer potential catalysts for change, completely eradicating torture in a state where its use is so entrenched may be a near impossible task. The reality is that there is no perfect example to follow, as has already been illustrated in this thesis. Indeed, few states have truly clean hands, even the likes of the UK,²⁹³ other western European states,²⁹⁴ and the USA,²⁹⁵ given its history with regards to Abu Ghraib, Guantanamo Bay and the worrying aspirations of President Trump with regard to the treatment of terror suspects.

Given, therefore, that there is no 'silver bullet' for reliably eliminating the use of all forms of torture in Uzbekistan, the next best thing is perhaps to use lessons

²⁹² See chapters 1 and 2 of this thesis.

²⁹³ See chapter 1 of this thesis regarding *Ireland v UK* [1979].

²⁹⁴ See chapter 4 of this thesis regarding use of torture in Europe.

²⁹⁵ See chapter 6 of this thesis regarding use of torture in the USA.

from the past in combination with these economic and political pressures and further domestic laws in order to determine progress. In addition, new technology could be used to monitor and track state officials.

Before these recommendations are listed, however, the landscape on torture as a whole needs summarising.

The use of, and purported rationales for, torture have evolved over time, from its earliest establishment as a tool for punishment and assertion of state power and authority, to the modern day usage as an illegal method of gathering intelligence from suspects.

Some of the earliest documented uses of torture and the reasons behind them are not indistinguishable from Uzbekistan's intentions today. Uzbekistan has framed the use of torture within its borders so that the laws render it unclear when the use of physical and psychological coercion is a permissible tool of law enforcement and when such practices constitute prohibited acts of torture. Human Rights Watch, for example, have noted that 'torture continues to be a practice endemic to the criminal justice system' and is 'ignored and overlooked by investigators, prosecutors, judges, and sometimes lawyers, and generally hushed up by the media and the government'.²⁹⁶

To compare this with what torture was used for in Germany during the Middle-Ages, there are similarities in terms of using it as a means of keeping order amongst the citizens of the state and instilling a sense of 'justice'. Stokes, Plummer and Barnes identify that:

The earliest traces of torture in Germany are found in urban communities such as Cologne and Freiburg. The cities' struggle to establish and defend a degree of sovereignty resulted in some of the earliest German legal documents referring explicitly to torture: fourteenth-century imperial privileges granted to the cities that testify to their right to use torture in criminal trials.²⁹⁷

²⁹⁶ Human Rights Watch, *Nowhere to Turn, Torture and Ill-Treatment in Uzbekistan* (November 2007) Vol 19, No.6, 1.

²⁹⁷ Marjorie Elizabeth Plummer, Robin Barnes and Laura Stokes, *Ideas and Cultural Margins in Early Modern Germany: Essays in Honour of H.C. Erik Midelfort* (Ashgate 2009) 239.

This indicates that although torture comes in many forms, its fundamental justifications have barely changed in certain states that continue to employ its use, and so it can be suggested that Uzbekistan is using medieval practices in order to both control and limit the freedoms of its citizens.

In terms of suggestions regarding how to move forward and provide feasible remedies to the situation on Uzbekistan, one area which is clearly in dire need of reform is the level of access that non-Uzbek monitoring bodies are afforded when visiting the country, most notably state officials and the representatives of various international human rights NGOs.

Currently, there are no structured prison monitoring systems in place for outsiders, and this 'shutdown' on visiting is applicable to all Uzbek places of detention. As a result of this, very few people see first-hand what exactly is happening to Uzbek suspects; how extensive the levels of torture are, and the deplorable treatment that so many of those who are illegally detained are subjected to. The relatively sparse accounts that have filtered out of Uzbekistan have come from survivors of torture, those who have fled the country, and the relatives of those who are being processed by the system. As Amnesty International confirm:

Uzbekistan has no independent monitoring mechanisms in place to inspect all places of detention. Due to government-imposed restrictions, no independent non-governmental organisations, domestic or international, carry out any form of regular, un announced and unsupervised prison monitoring...

Foreign diplomats, while granted access to some detention facilities, are usually accompanied by prison or law enforcement officials during their visit. The same applies to human right defenders who have on rare occasions been allowed to visit imprisoned colleagues.²⁹⁸

It has also been revealed that in November 2014, Human Rights Watch sent a delegation to review the Uzbek prison system, but their requests were denied by the authorities.²⁹⁹

²⁹⁸ Amnesty International, *Secrets and Lies: Forced Confessions Under Torture in Uzbekistan* (April 2015) 61.

²⁹⁹ *ibid* 61.

If the situation, however bleak currently, is to improve, then Uzbek officials must be seen to be making a genuine and concerted effort to reform and allow regular visits, the results of which should show gradual improvements over time with possibly national incentives after each successful appointment, perhaps in the form of beneficial international trade deals or praise in international forums, such as the UN, for example.

Another key area to investigate in the future is the role of Uzbek judges and the levels of impartiality amongst the judiciary. Concerning reports coming out of the country by NGOs have demonstrated that criminal verdicts are heavily weighted towards the prosecution,³⁰⁰ and, as has been discussed in Chapter 6 of this thesis, the levels of enforceability of Uzbek laws on torture currently leave much to be desired. One possible solution to this could be some of the work of the OSCE,³⁰¹ of which Uzbekistan is a member. The 'Fight against Torture' manual³⁰² 'is a handbook for practitioners that assembles the OSCE's experience in torture prevention work and identifies best practices and strategies'.³⁰³ Its section dedicated to the prevention of torture in Central Asia, which encompasses the area of Uzbekistan amongst other states, suggests means of improvement:

Additionally, some field operations in Central Asia have directed their efforts towards other activities considered viable. Examples include providing financial support for or organizing public meetings to discuss torture and ill-treatment within the context of detention monitoring and criminal justice reform in general, providing information to international treaty monitoring bodies, and training and supporting other organizations politically.³⁰⁴

In conjunction with the OSCE handbook, the Istanbul Protocol 2009³⁰⁵ may also provide assistance. This guide delivers instructions on how to document the use

³⁰⁰ Andrea Berg, *Nowhere to Turn: Torture and Ill-Treatment in Uzbekistan* (Human Rights Watch 2007) 45.

³⁰¹ Organisation for Security and Co-operation in Europe.

³⁰² OSCE, 'The Fight Against Torture' – Guide/Manual/Handbook (OSCE 10 July 2009) <<http://www.osce.org/odihr/37968>>.

³⁰³ *ibid.*

³⁰⁴ *ibid.* 15.

³⁰⁵ Redress, 'Istanbul Protocol Handbook for Medical Professionals, Legal Professionals, Investigators, State Officials, Civil Society' <http://www.redress.org/downloads/publications/istanbul-protocol-handbook.pdf>.

of torture, the response to torture in certain areas including The Maldives, considerations to be made when gathering evidence of torture, forms of ill-treatment leading to physical and psychological manifestations of torture, and also information for the role of prosecutors, judges and the police in cases of torture. Again, this guidance may be invaluable, particularly for Uzbek judges and prosecutors in need of clarification of what systems should be followed in torture cases.

There is, however, some hope. According to the UN, over the past 9 years several reforms to the judiciary have been made. Habeas corpus was introduced in 2008, and decrees relating to ‘improvement of court activity’³⁰⁶ and ‘radical improvement of social protection of the judicial system employees’³⁰⁷ were passed in 2012. Whilst encouraging, these reforms do not fully address the questions which still surround judges in cases regarding the use of evidence obtained by torture, or why conviction rates remain abnormally high. There remains an unhealthy connection between the supposedly independent judiciary and the controlling executive. As a paper commissioned by the ICCPR³⁰⁸ observes:

Uzbekistan’s judiciary is *de jure* independent from but *de facto* subordinate to the executive branch of government. Formally, the judges are elected by the Senate, the upper chamber of parliament. But in reality, the appointment of judges is under strict control of the presidential administration and may be dismissed from their posts at the request of this administration. As a result, judges following orders from the executive branch of power cast a blind eye on complaints of torture.³⁰⁹

It appears that because of this level of control from the executive, Uzbek judges’ main concerns are the prospect of instant dismissal if there were to be a decline in conviction rates, and so the pressure of job security often sadly comes before

³⁰⁶ ‘On the way to improve the judicial system’ (UN, *The Permanent Mission of the Republic of Uzbekistan to the United Nations*, 8 September 2015) <https://www.un.int/uzbekistan/news/way-improve-judicial-system> accessed 12 May 2017.

³⁰⁷ *ibid.*

³⁰⁸ International Covenant on Civil and Political Rights.

³⁰⁹ 98th session of the Committee on Civil and Political Rights, *Torture in Uzbekistan: still systematic and unpunished* (Torture report for the ICCPR) http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/UZB/INT_CCPR_NGO_UZB_98_10291_E.pdf 4.

justice. An overhaul of this system must be initiated if progress is to be made, because the current situation is untenable and effectively undermines what a judiciary should be; independent and fair.

When all of these factors are taken into account, they indicate a growing sense that none of the potential reforms to the Uzbek system will work on their own. It is becoming clear that a wide-ranging approach is necessary if there is to be any chance of improving the plight of the citizens of Uzbekistan having their human rights regularly suppressed. If there is to be a time where Uzbeks can live in a society where they are not afraid of speaking out, or having peace of mind that they are not to be arrested for alleged terror offences despite a lack of evidence, but that such evidence miraculously appears when tortured in the confines of a police station (which in turn is used as the main line of argument for the prosecution in court), then the fault-lines within the system need to be addressed on several fronts.

Therefore, a list of recommendations is to be made in reference to Uzbek authorities:

Recommendations to the Government of Uzbekistan:

Short-term

1. Sign and ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This will help further the notion that Uzbekistan is serious about torture reform and provide further safeguards for prisoners. This is likely achievable because signing a convention is a relatively straightforward process, and Uzbekistan has willingly signed similar documents in the past including the 1984 UNCAT.³¹⁰

Likely achievable

2. Adhere to national laws which explicitly ban torture, with particular reference to Articles 24, 25 and 26 of the Constitution, Article 235 of the

³¹⁰ United Nations Treaty Collection
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en>
accessed 5th October 2017.

Penal Code and Article 17 of the Criminal Procedure Code. Additionally, recognition should be made of Article 6 of the supranational ICCPR which guarantees the right to life. This is possibly achievable on the one hand, because the laws are national and do not require any lengthy integration into Uzbek law. However, conversely, the chances of serious adherence are not so great given past experiences. At present, Uzbekistan has regarded its own anti-torture laws as essentially worthless legislation and has carried out repeated flagrant breaches.³¹¹ Additionally, it needs to be considered that realistically, extra funding for resources and training would need to be generated; it is currently unknown how this would be achieved.

Possibly achievable

Medium-term

- 3 Agree to incentives offered by other countries in return for annual reductions in the levels of torture conducted in prisons,³¹² and aim to genuinely want to reform the way in which prisoners are treated behind closed doors. This is more likely achievable, based on past examples. Jordan agreed to similar incentives given by the UK in the Abu-Qatada case.³¹³ Additionally, external pressures are more likely to invoke a response from Uzbekistan than simple criticisms, as they have an active rather than passive effect. A recent change in the head of state is also a positive development, and offers opportunity for change.

Likely achievable

- 4 Routinely retrain and re-educate Uzbek police and prison officers in order to make clear the current legislation regarding torture, and regularly assess the type and lawfulness of the custodial treatment such officers

³¹¹ See Chapter 3 of this thesis for more information on Uzbek anti-torture laws and the protection of such.

³¹² Richard Falk, Balakrishnan Rajagopal and Jaqueline Stevens, *International Law and the Third World: Reshaping Justice* (Routledge Cavendish 2008) 177.

³¹³ See Chapter 4 Part I for more information on this case.

are administering to suspects. Any officer who falls below the threshold of humane treatment should be threatened with dismissal.

This is less realistically achievable. The actual requirements for re-training state officials should not be too complex or require any particularly exceptional skills, yet the chances of Uzbekistan agreeing to such a change in the way it carries out such processes are far less likely. The funding required for re-training could also be an issue.

Currently less realistically achievable

- 5 Allow foreign parties, including governmental dignitaries from other states, human rights defenders and representatives from NGOs regular access to prison facilities without being shadowed and the right to interview prisoners in private. This is unfortunately less than realistic, given that Uzbekistan up until now has repeatedly rejected missionary inspections and has effectively administered a closed door policy to most foreign institutes, even to media organisations. However, there has been some encouraging news recently in that the BBC, which had been banned from Uzbekistan since October 2005 re-opened its office in the country in July 2017, indicating a potential thaw in relations between Uzbekistan and the world media.³¹⁴ Whilst currently less likely a recommendation, this could perhaps change over the coming years given the changeable dynamics of Uzbekistan's new President.

Currently less realistically achievable

- 6 The UN Special Rapporteur on Torture should be freely invited to the country to observe the mechanisms behind Uzbekistan's custodial systems. Again, this is unlikely, given Uzbekistan's resistance to foreign 'interference'. Human Rights Watch stated in their most recent world report on this matter, that:

Since 2002, the government has ignored requests by at least 14 UN rights experts to visit the country. In September, the UN high commissioner for human rights singled out Uzbekistan in a

³¹⁴ The Calvert Journal, *BBC to re-open Uzbekistan office* (6th July 2017) <<https://www.calvertjournal.com/news/show/8547/bbc-to-re-open-uzbekistan-office>> accessed 4th October 2017.

list of country that failed to cooperate with his office for having refused access to the country.³¹⁵

Currently less realistically achievable

- 7 Victims of torture should be allowed to speak out about their ill-treatment without fear of oppression or further torture, and complaints from these individuals should be dealt with extremely seriously. A tribunal specifically for the victims of torture by Uzbek authorities should be set up in order to seek justice and compensation, and punishment for the perpetrators, perhaps in the form of a truth and reconciliation committee. Since Uzbekistan is reluctant to admit its hand in torture and propose change, agreeing for this recommendation to happen would require admission of guilt or at least some wrongdoing on behalf of the Uzbek government, something which currently seems unattainable.

Currently less realistically achievable

- 8 Any situation whereby torture is deemed to have been used in a national court as evidence should be struck out, or where necessary, retrials should be arranged where it is obvious that the defendant has been tortured before giving evidence. A new law should be implemented explicitly outlawing the admissibility of torture-tainted evidence. Since the Uzbek judiciary is currently being heavily influenced by the executive,³¹⁶ either a significant split between the two would need to happen before this recommendation could take effect, or just as importantly, a change in stance of the executive, neither of which look like plausible routes as of yet.

Currently less realistically achievable

³¹⁵ Human Rights Watch, World Report 2017: Uzbekistan – Events of 2016 <<https://www.hrw.org/world-report/2017/country-chapters/uzbekistan>> accessed 5th October 2017.

³¹⁶ See Chapter 6 of this thesis for more developed information on the relationship between the Uzbek executive and judiciary.

Long-term

- 9 Overhaul the way in which the judiciary operates, including the process of selecting judges, so as to promote greater disconnection between the judiciary and the executive. Judges should not be dismissed based on unfavourable conviction statistics gathered by the government; there should be complete independence between the two. Again, this is unfortunately a purely speculative recommendation, and would require greater separation between the executive and judiciary before any progress could be made. This is a requirement for change that the Organisation for Economic Co-operation and Development (OECD) has singled out in particular.³¹⁷

Currently less realistically achievable

- 10 Should these points fail, or be deemed ineffective in addressing the problem, early steps should be taken by the Uzbek government to draft a new national torture statute which amalgamates all provisions from existing national and international constitutional, conventional and chartered provisions which it is already subject to, with new additions to be made where necessary to strengthen the new law(s). This would not be too complex a task, but would once more require the Uzbek government to acknowledge that it tortures, and also that its current anti-torture legislation is inadequate, something which currently looks unfeasible until a change in attitude is considered.

Currently less realistically achievable

Final Conclusions

Many of these recommendations are admittedly optimistic, and can be criticised themselves in their own right. The aspirational tone should be acknowledged and considered alongside the context. However, they nevertheless highlight the extent of the situation Uzbekistan currently faces in its illegal use of torture. The reality of the situation is that torture has been, and will be, used, not just in

³¹⁷OECD, 'Uzbekistan must enforce anti-corruption laws and strengthen public sector integrity' <<http://www.oecd.org/corruption/uzbekistan-must-enforce-anti-corruption-laws-and-strengthen-public-sector-integrity.htm>> accessed 5th October 2017.

Uzbekistan but in other states for the foreseeable future. Currently, torture is recognised as a crime within international law, yet unlike other crimes against humanity which it is often drafted into the same bracket as, it is often overlooked in favour of condemning only the most despicable acts. In the Rome Statute, the founding treaty of the ICC,³¹⁸ torture is listed as such with other crimes, but comes after murder, extermination, enslavement, deportation and imprisonment/deprivation of liberty.³¹⁹

So, despite the definition of torture transcending several international statutes, treaties and charters, and being defined under several different headings, the attitude of global powers towards it seems to be mixed; some indicate a degree of indifference, whilst others robustly adhere to the laws against it. It is already clear that the Bush administration greatly misused its powers to torture inmates at Abu Ghraib and Guantanamo Bay, yet US use of torture stretches far beyond that. As Miller comments:

...America's intelligence agencies began a history of physical and mental torture that was present in Vietnam during the Vietnam War (i.e. the Phoenix Programme), in Central America during the 1980s, and in the Middle East since 2001 (i.e. Abu Ghraib and Guantanamo Bay). The recent revelations of the extraordinary rendition program and the secret overseas prisons run by the CIA affirm the continued involvement of the CIA in torture.³²⁰

These international attitudes towards torture underlie one of the major issues with torture; apathy. It is almost impossible to set a benchmark for a state like Uzbekistan to follow when countries which should be leading by example and paving the way for human rights reform continually break international laws in order to satisfy their own agendas.

It is therefore evident that in order to improve Uzbekistan's plight, there must be efforts made on several levels, internally and externally. Uzbekistan must drastically improve its own legal system and the independence of its judiciary, limit the scope of the President's powers, and refresh its *modus operandi*

³¹⁸ International Criminal Court.

³¹⁹ Rome Statute of the International Criminal Court (1999) Art 7 1. (f).

³²⁰ Wilbur R. Miller, *The Social History of Crime and Punishment in America – An Encyclopaedia* (SAGE Publications Inc. 2012) 1813.

towards in order to reduce torture in the region. On the other hand, external pressures from other states must be more forceful, and sanctions for Uzbekistan's failure to improve its human rights records must be harsher. Uzbekistan must be given a reason to stop torturing, because without an incentive, it has no reason to stop, given the support it gains from the US in stabilising the threat from terrorism in the East and given the level of control the Executive has over its citizens. It is simply not enough to hope that the Uzbek government will suddenly have a change of heart and realise that what it has been doing is morally wrong.

Ultimately, the battle against torture may never truly end. In the 21st century, wherever there is the opportunity to extract information from a suspect who is alleged to possess vital intelligence, especially when time is of the essence, torture seems like the cheap, effective and necessary solution. It is also a crutch to fall back on by dictators in need of spreading fear and instilling discipline and order. It is a tool of terror, which whilst often brutally effective in the short-term, can never be justified as an appropriate means of controlling the population. Perhaps one day there can be optimism of looking towards a future where its use is halted for good.

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