OLDER PEOPLE, DIGNITY AND HUMAN RIGHTS: TOWARDS THE DEVELOPMENT OF THE RULE AGAINST TORTURE AND ILL-TREATMENT

by

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ABSTRACT

This thesis examines whether the rule against torture and ill-treatment in international human rights law could be interpreted to provide more effective protection to older people from key forms of mistreatment which they frequently experience. The thesis' inquiry is prompted by the current disagreement at the United Nations over whether the universal human rights framework contains 'normative gaps' or merely 'implementation gaps' regarding older people.

The thesis argues that there are doctrinal shortcomings in the anti-torture framework as currently understood, which prevent the norm from effectively protecting older people in contexts of deprivation of liberty, lack of access to adequate care and impunity for 'historic' torture or ill-treatment. The thesis contends that these doctrinal limitations stem from conceptual paradigms developed without consideration of older people's experiences and from the tendency for discriminatory structures and attitudes in society and law to obscure older people's rights violations.

The thesis proposes that dignity reasoning could guide and facilitate the norm's interpretation in order to more effectively protect older people. Maintaining that dignity is the core value underpinning the norm, the thesis proffers a substantive conception of a dignity violation that would shed light on older people's human experiences of torture or ill-treatment, thus challenging the norm's current formalistic constraints. A cornerstone of the proposed conception of a dignity violation is the idea of vulnerability. The thesis argues that an understanding of vulnerability as inherent or situational powerlessness would allow for the identification of structural causes of older people's mistreatment, which could be addressed by adaptation of the norm's positive obligations.

By investigating the need and potential to address doctrinal shortcomings within the existing international human rights normative framework, the thesis provides a perspective that has been missing from the debate over a dedicated instrument on the rights of older people. The thesis also makes a unique contribution to scholarly analysis of the meaning and functions of dignity and vulnerability in human rights adjudication.

In memory of my grandparents

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Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 83 (1992)

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Ireland

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INTRODUCTION

I. Thesis Question

This thesis examines whether the rule against torture and ill-treatment in international human rights law[1] could be interpreted to provide more effective protection to older people from key forms of mistreatment that they commonly experience. Specifically, the thesis investigates whether the treaty bodies and other actors responsible for the norm's implementation could harness the concepts of dignity and vulnerability to recognise and respond to abuses of older people in contexts of deprivation of liberty, lack of access to adequate care and impunity for 'historic' torture or ill-treatment.

A number of sub-inquiries flow from this question.

First, the thesis seeks to establish where adaptation is needed within the existing normative framework. It examines the extent to which various doctrinal aspects of the norm limit the norm's application in practice to older people in the situations mentioned above. The causes of these doctrinal constraints are investigated. The thesis explores the conceptions underpinning the current doctrine and considers the perceptual barriers that such underlying conceptions may create. The thesis further explores whether discriminatory structures and attitudes have impeded the norm's embrace of older people's experiences of mistreatment.

Second, the thesis attempts to discern the functions of dignity and vulnerability under the norm. The thesis also examines how dignity and vulnerability might be conceptualised under the norm in order to enhance their functions. The thesis seeks to establish conceptions of dignity and vulnerability that would allow for recognition of and responses to older people's lived experiences of mistreatment and the structural causes of their mistreatment.

Third, the thesis endeavours to determine what new doctrinal content could be added to the normative framework as a result of the dignity and vulnerability analysis proposed. In other

[1] The thesis frequently uses the phrase 'the anti-torture norm' as shorthand to refer to the rule against torture and ill-treatment. The thesis' use of the shorthand 'anti-torture' is always meant to include ill-treatment.

words, the thesis aims to find out how the norm could better protect older people in practice as well as in theory.

II. Older People and the Universal Human Rights Framework

There is broad agreement across the international community that older people are suffering wide-ranging violations of their human rights and that the problem is growing.[2] The most recent United Nations (UN) General Assembly (UNGA) resolution on 'Follow-up to the Second World Assembly on Ageing', for example, noted the 'high incidence of poverty' among older persons in many parts of the world and the 'multiple forms of discrimination that may affect older persons and their enjoyment of human rights and fundamental freedoms'.[3] The UN Human Rights Council's (UNHRC) Social Forum in 2014 concluded that many older people 'continued to suffer from neglect, abuse, social exclusion, discrimination, deprivation, stigmatization, poverty and inability to meet their basic needs'.[4]

The UNGA and UNHRC have both recognised that older women face particularly acute poverty and compounded discrimination.[5] These inter-governmental bodies have also drawn attention to the fact that the global population is ageing rapidly and that problems of older people's rights violations are therefore becoming increasingly widespread.[6] According to the most recent statistical projections from the UN Department of Economic and Social Affairs

[2] See generally Claudia Martin, Diego Rodriguez-Pinzon and Bethany Brown, *Human Rights of Older People: Universal and Regional Legal Perspectives* (Springer 2015).

[3] United Nations General Assembly (UNGA) Resolution (Res) 71/164 (19 December 2016) UN Doc A/RES/71/164.

[4] United Nations (UN) Human Rights Council (UNHRC), 'Report of the 2014 Social Forum (Geneva, 1–3 April 2014)' (14 May 2014) UN Doc A/HRC/26/46, para 69. The Report also recognises, at para 71, older people's experiences of 'employment discrimination, inadequate systems for long-term care, violations of informed consent, scarcity and inadequacy of services for persons with dementia, restricted autonomy and decision-making [and] partial or total lack of pension coverage'.

[5] See, for example, UNGA Res 71/164 (n3); UNHRC, 'Report of the 2014 Social Forum' (n4). See also UNGA Res 69/146 (18 December 2014) UN Doc A/RES/69/146; UN Economic and Social Council (ECOSOC), 'Second review and appraisal of the Madrid International Plan of Action on Ageing, 2002: report of the Secretary-General' (28 November 2012) UN Doc E/CN.5/2013/6, paras 14 and 27; UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (8 July 2016) UN Doc A/HRC/33/44, para 53. See also UN Open-ended Working Group on Ageing (OEWGA), 'Chair's summary of the key points of the discussions at the eighth session of the Open-ended Working Group on Ageing established for the purpose of strengthening the protection of the human rights of older persons' Eighth Working Session (5–7 July 2017) 7 <https://social.un.org/ageing-working-group/documents/eighth/ChairSummary.pdf> accessed 27 August 2017; UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (4 July 2011) UN Doc A/HRC/18/37 para 17.

[6] See, for example, UNGA Res 71/164 (n3); UNHRC, 'Report of the 2014 Social Forum' (n4) paras 68 and 72. See also OEWGA, 'Chair's Summary' (n5) 2.

Population Division, by 2050 nearly a quarter or more of the populations in all major areas of the world except Africa will be aged 60 or over.[7] This will represent more than a doubling of the number of people aged 60 and over between 2015 and 2050.[8]

This rhetoric aside, however, the human rights violations commonly experienced by older people have not yet received mainstream attention in either states' domestic policies and laws or the human rights framework of the UN. This is despite the promulgation of the soft law 1991 UN Principles for Older Persons[9] and the human rights-focused 2002 Madrid International Plan of Action on Ageing.[10]

According to the UN Secretary-General, the second review and appraisal of the Madrid International Plan of Action showed that '10 years after its adoption, the Madrid Plan of Action has made only limited headway in national and international development plans'.[11] The UN High Commissioner for Human Rights (OHCHR) has noted, similarly, that '[o]lder persons' human rights are often invisible in national and international legislation and policymaking'.[12]

A 2012 report by the OHCHR to the UN Economic and Social Council (ECOSOC) asserted the concomitant failure of the UN human rights mechanisms, as a whole, to integrate older people's experiences into their work. The OHCHR noted, for example, that '[o]nly a handful of international human rights mechanisms have devoted attention to older persons over the years or developed the guidance and specific tools to provide to Governments and other stakeholders that such a large population group would entail'.[13] Her report highlighted, further, that during the first cycle of universal periodic reviews for all states, 'when compared with other population segments, older persons' issues were rarely addressed by Member States' and '[w]here they were mentioned, older persons were listed among various vulnerable groups'.[14] The Secretary-General reported to the UNGA in 2014 that despite the Committee on Economic,

[7] UN Department of Economic and Social Affairs (UNDESA) Population Division, 'World Population Prospects: The 2015 Revision, Key Findings and Advance Tables' (2015) Working Paper No ESA/P/WP.241, 7.
[8] UNDESA, 'World Population Prospects' (n7) 9.
[9] UN Principles for Older Persons, UNGA Res 46/91, Annex (16 December 1991) UN Doc A/RES/46/91.
[10] UN, Political Declaration and Madrid International Plan of Action on Ageing (New York, 2012).
[11] ECOSOC, 'Second review and appraisal of the Madrid International Plan of Action on Ageing, 2002: report of the Secretary-General' (28 November 2012) UN Doc E/CN.5/2013/6 para 84.
[12] ECOSOC, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (20 April 2012) UN Doc E/2012/51 para 3.
[13] ibid.
[14] ibid para 16.

Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) having devoted a General Comment and General Recommendation, respectively, to older people,[15] a keyword search of their observations on states parties' periodic reports 'exposed that issues of older persons were mentioned quite randomly, in low numbers, and even then were very context-specific'.[16]

In 2010, the UNGA established an Open-ended Working Group on Ageing (OEWGA) with a mandate to identify possible gaps in the existing international human rights framework's protection of older people's human rights and to propose how best to address them.[17] Since 2012, the OEWGA has had the additional, specific mandate to propose the contents of a potential 'international legal instrument to protect the rights and dignity of older persons, which are not currently addressed sufficiently by existing mechanisms and therefore require further international protection'.[18] This specific mandate has dominated many of the OEWGA's discussions since 2012. However, despite the agreement among states involved in the OEWGA that the existing international human rights framework is flawed,[19] the notion of a dedicated instrument to protect the rights of older people is controversial. The 2012 General Assembly resolution which requested the OEWGA to produce a draft instrument was adopted by 53 votes

[15] uniquely among UN human rights treaty bodies. See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 6, 'The Economic, Social and Cultural Rights of Older Persons' (8 December 1995) UN Doc E/1996/22; Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No 27, 'Older women and protection of their human rights' (19 October 2010) UN Doc CEDAW/C/2010/47/GC.1.

[16] UNGA, 'Follow-up to the Second World Assembly on Ageing, Report of the Secretary-General' (24 July 2014) UN Doc A/69/180 para 12.

[17] UNGA Res 65/182 (21 December 2010) UN Doc A/RES/65/182. See also OEWGA <https://social.un.org/ageing-working-group/> accessed 27 August 2017.

[18] See UNGA Res 67/139 (20 December 2012) UN Doc A/RES/67/139, which, pursuant to paras 1 and 2, respectively, requires the Open-Ended Working Group to 'consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons' and to 'present to the General Assembly, at the earliest possible date, a proposal containing, inter alia, the main elements that should be included in an international legal instrument to promote and protect the rights and dignity of older persons, which are not currently addressed sufficiently by existing mechanisms and therefore require further international protection'.

[19] See UNGA, 'Report of the Open-ended Working Group on Ageing, Sixth Working Session' (29 July 2015) UN Doc A/AC.278/2015/2. The 'Chair's summary of the key points of the discussions at the sixth session of the Open-ended Working Group on Ageing' states, at page 8 of the Report:

> …there continued to be important common positions to all participants, namely:
>
> …(b) That the existing mechanisms designed to guarantee the full exercise of the civil, political, social, economic and cultural rights of older people have flaws, either because there are deficiencies in terms of their implementation, as some States maintain, or because there is a normative gap at the international level that must be filled through the adoption of a universal legally binding instrument to address issues such as ill treatment, exclusion, stigmatization, discrimination and the satisfaction of basic needs of older persons.

to three with 109 abstentions,[20] and at the last OEWGA session in July 2017 the drafting process still had not begun.[21]

The primary disagreement among the states participating in the OEWGA appears to concern the question of whether there are 'normative gaps' in the protection of older people's human rights. European Union (EU) member states, the United States and Canada are among those that oppose a new convention on the basis that there are no significant normative gaps in the universal human rights framework. At the 2014 session of the OEWGA, for example, the EU's opening statement asserted that 'the whole spectrum of internationally recognized human rights standards and principles naturally also covers and protects older persons without discrimination', and that 'although it is important to discuss the implementation and protection gaps, they are not of a normative nature'.[22] Canada similarly rejected the need for a new instrument on the basis that '[n]ew conventions are to be reserved solely for the resolution of obvious and significant gaps in the human rights system' and that 'a new convention will duplicate the work being done by other conventions'.[23]

This group of states advocates greater implementation of existing norms; one of the EU's suggestions is that the existing human rights treaty bodies and special procedures should increase their focus on age 'as a specific perspective when monitoring existing human rights instruments'.[24] They have also welcomed the Human Rights Council's appointment of an Independent Expert on the enjoyment of all human rights by older persons (Independent Expert on older persons' human rights) with a mandate to, among other things, identify gaps in implementation of existing law and best practices to achieve implementation.[25] It is clear,

[20] See Léon Poffé, 'Towards a New United Nations Human Rights Convention for Older Persons?' (2015) 15(3) Human Rights Law Review 591, 594.
[21] See OEWGA, 'Chair's summary' (n5) 10.
[22] OEWGA, 'Opening statement by the European Union, delivered by Mr Pit Koehler' (30 July 2014) Fifth working session (30 July–1 August 2014) <https://social.un.org/ageing-working-group/documents/fifth/European%20Union_Opening%20Statement.pdf> accessed 27 August 2017.
[23] OEWGA, 'Statement by Sara Jiwani, Employment and Social Development Canada, Open-ended Working Group on Ageing' (30 July 2014) Fifth working session (30 July–1 August 2014) <https://social.un.org/ageing-working-group/documents/fifth/Canada_Opening%20Statement_En.pdf> accessed 27 August 2017.
[24] OEWGA, 'Opening statement by the European Union' (n22).
[25] The mandate of the Independent Expert on the enjoyment of all human rights by older persons was created by UNHRC Res 24/20 (27 September 2013) UN Doc A/HRC/RES/24/20. The EU welcomed the Independent Expert's work in OEWGA, 'Statement delivered by Johan ten Geuzendam, Directorate of Equality, DG Justice and Consumers, European Commission' (16 July 2015) Sixth working session (14–16 July 2015) <http://statements.unmeetings.org/media2/7650794/eu.pdf> accessed 27 August 2017.

however, that financial concerns are also driving their resistance to a new instrument.[26] So too are concerns about 'over-burdening' the UN human rights treaty monitoring system.[27]

On the opposite side of the debate are many other states, including several from Central and South America and other regions that have formed a 'Group of Friends of Older Persons' at the OEWGA with the aim of garnering support for a new convention.[28] At the most recent OEWGA session, numerous states, non-governmental organisations (NGOs) and national human rights institutions argued that a dedicated instrument is required to 'provide coherence to an otherwise fragmented, uneven and incomplete landscape of legal norms'.[29] The states and organisations asserting that there are normative gaps in the universal human rights framework necessitating a convention base this assertion on several grounds. They point to the paucity of specific references to age or older people in the existing universal human rights instruments.[30] They highlight the lack of explicit, older people-specific guarantees of equality and non-discrimination in the existing universal human rights framework.[31] They further argue that the universal human rights mechanisms' failure to thoroughly consider the experiences of older people is the result of the absence of 'international universally applicable standards related to

[26] See OEWGA, 'Statement by Sara Jiwani' (n23), expressing Canada's 'desire to dedicate resources to the implementation of human rights and not to the lengthy negotiation of a document'; and OEWGA, 'Opening statement by the European Union' (n22): 'At the same time we are convinced that in order to achieve concrete progress for older people, our efforts and our inherently limited resources should focus on the implementation of the existing instruments.' See also Poffé, 'Towards a New United Nations Human Rights Convention for Older Persons?' (n20) 600: 'Outside their formal contributions to the discussions in the OEWGA, several delegations have pointed out that the main obstacle to raising political will within their government is the fear that a new human rights convention would entail legal obligations to financially support older persons'.

[27] See OEWGA, 'Statement by Sara Jiwani' (n23).

[28] See, for the list of countries included in the 'Group of Friends of Older Persons', UNGA, 'Report of the Open-ended Working Group on Ageing, Seventh Working Session' (15 December 2016) UN Doc A/AC.278/2016/2 para 24. Other states including Brazil, Colombia, Costa Rica, the Dominican Republic, Malawi and the Philippines have also stated their support for a new international instrument to protect and promote the rights and dignity of older persons: see OEWGA, Statements from Member States, Fifth Working Session (30 July–1 August 2014) <http://social.un.org/ageing-working-group/govstatementfifth.shtml> accessed 28 August 2017.

[29] OEWGA, 'Report of the Open-ended Working Group on Ageing on its eighth working session' (28 July 2017) UN Doc A/AC.278/2017/2, 9.

[30] See, for example, OEWGA, 'Report of the Open-ended Working Group on Ageing on its eighth working session' ibid; OEWGA, 'Statement by HE Ambassador Antonio de Aguiar Patriota, Permanent Representative of Brazil to the United Nations' (14 July 2015) <http://statements.unmeetings.org/media2/7650746/brazil.pdf> accessed 14 September 2017. The only universal human rights instrument that explicitly includes age as a protected characteristic in its non-discrimination provision is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) (1991) 30 ILM 1517 (art 1). In addition, the Convention on the Rights of Persons with Disabilities explicitly mentions age, older persons and age-sensitive measures with respect to the elimination of stereotypes, access to justice, the right to freedom from exploitation, violence and abuse, the right to health and the right to an adequate standard of living and social protection: Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 (CRPD) arts 8, 13, 16, 25, 28.

[31] OEWGA, 'Report of the Open-ended Working Group on Ageing on its eighth working session' (n 29).

the human rights of older persons'.[32] In addition, a joint statement by a large group of NGOs participating in the 2015 OEWGA session pointed to 'conceptual limitations in existing instruments' and 'a lack of provisions addressing explicitly and in detail situations and barriers of particular concern to the enjoyment of human rights by older persons'.[33]

The asserted normative gaps are not the only reason for these states' and organisations' support for a new instrument. They also argue that there is a 'lack of expertise and awareness of older persons' experience within existing treaty bodies and special procedures',[34] and that 'a comprehensive and systematic approach to the protection of the human rights of older persons…would promote to [*sic*] enhancing the visibility of older persons and the promotion of their rights'.[35] Demonstrating their belief that the protection of older people's human rights requires further legal guarantees, the Organization of American States and the African Union have both recently adopted specialised regional instruments on the rights of older people.[36]

Arguably, the disagreement between states over whether the UN should adopt a convention on the rights of older people has caused the OEWGA's exploration of the meaning and existence of normative gaps and implementation gaps in the international human rights framework to be overly simplistic.

On the one hand, the states that favour the creation of a new convention on the rights of older people appear to use the concept of a 'normative gap' as shorthand for the need for a dedicated instrument. They are anxious to gain support for the drafting process and so they have not examined in depth whether, in fact, some of the so-called 'normative gaps' that they have identified could be ameliorated within the confines of the existing human rights framework.

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[32] ibid. See also OEWGA, 'Statement made by El Salvador on behalf of the Group of Friends of Older Persons, V Session of the Open-ended Working Group on Ageing on Agenda Item "The Way Forward"' (1 August 2014) Fifth working session (30 July–1 August 2014) <https://social.un.org/ageing-working-group/govstatementfifth.shtml> accessed 28 August 2017.

[33] OEWGA, 'NGOs Political Declaration: Call for action on the drafting of a new convention on the human rights of older persons' (16 July 2015) Sixth working session (14–16 July 2015) <https://www.age-platform.eu/images/stories/Publications/papers/NGOs_DECLARATION_OEWGA_Jul2015.pdf> accessed 28 August 2017.

[34] ibid.

[35] OEWGA, 'Chair's Summary' Eighth Working Session (2017) (n5) 5.

[36] Inter-American Convention on Protecting the Human Rights of Older Persons (adopted 15 June 2015, entered into force 11 January 2017) (2016) 55(5) ILM 985; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (adopted 31 January 2016) <https://au.int/sites/default/files/treaties/31391-treaty-protocol_on_the_rights_of_older_persons_e.pdf> accessed 28 August 2017.

On the other hand, the states that oppose the creation of a new convention do so on the basis that there are no significant normative gaps in the existing universal human rights framework as it relates to older people. As noted above, they state that there should simply be a greater focus on age 'as a specific perspective when monitoring existing human rights instruments'.[37] This position also appears to have precluded a proper exploration of whether there are major conceptual barriers and/or doctrinal limitations in the existing framework that need to be addressed by existing treaty bodies and special procedures. These states' conception of the 'implementation' of existing norms appears not to take into account the possibility (and indeed necessity) of implementation through significant adaptation of doctrines flowing from the existing human rights norms through the interpretation and application of those existing norms.

There is, therefore, a danger that the focus on a prospective UN convention and the juxtaposition of the concepts of normative and implementation gaps in the accompanying debate may prevent consideration of the extent to which the existing international human rights framework needs to structurally adapt to achieve better 'implementation' of existing rights protections in the lives of older people.

The need and potential for significant doctrinal adaptation within the existing normative framework has not been thoroughly explored in the academic literature either. Various commentators have pointed to a range of factors that, they argue, warrant the adoption of a dedicated universal instrument on the rights of older people.[38] Similarly to states and NGOs that favour a convention, some authors have highlighted the absence of explicit equality and non-discrimination guarantees for older people,[39] the scarcity of specific references to older

[37] OEWGA, 'Opening statement by the European Union' (n22) 3.
[38] See Diego Rodriguez-Pinzon and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003) 18 American University International Law Review 689; Kwong-Leung Tang and Jik-Joen Lee, 'Global social justice for older people: The case for an international convention on the rights of older people' (2006) 36(7) British Journal of Social Work 1135; Israel Doron and Itai Apter, 'The Debate Around the Need for an International Convention on the Rights of Older Persons' (2010) 50(5) The Gerontologist 586; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) Human Rights Law Review 37; Paul De Hert and Eugenio Mantovani, 'Specific Human Rights for Older Persons?' (2011) 4 European Human Rights Law Review 398; Beverley Clough and Margaret Brazier, 'Never too old for health and human rights?' (2014) 14(3) Medical Law International 133; Haris Kountouros and Nicola Rees, 'Dignity as a Theoretical and Legal Construct in the Context of Care for Older Persons and the Developing Human Rights Agenda for Older Persons' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016).
[39] Diego Rodriguez-Pinzon and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003) 18 American University International Law Review 689, 945.

people in existing international human rights instruments[40] and the absence of a comprehensive system of standards expressly addressing older people's rights.[41]

Other authors have made more nuanced arguments. Mégret,[42] De Hert and Mantovani,[43] and Clough and Brazier[44] contend that the existence or otherwise of express mentions of older people in rights guarantees should not be the primary reason for adopting a convention. They base their support for a convention on the notion that older people suffer rights violations in particular ways that current rights guarantees do not address in practice, as evidenced by the jurisprudence of international human rights treaty bodies.[45] Mégret states that 'there is hardly a right whose understanding is not challenged by the issue of ageing and how societies deal with their older members'.[46] These authors argue that a dedicated instrument could provide the means to ensure that rights protections respond to older people's lived experiences, for example, by requiring 'a more positive conception of rights and responsibilities towards them'[47] and a 'more substantive approach to rights'[48] understood as 'the basic yet vital capabilities which ought to be secured to all individuals'.[49] Notwithstanding that some, or all, of these arguments in favour of a dedicated instrument may be sound (it is not possible to explore them thoroughly in this thesis), there appears to have been no detailed academic consideration of the extent to which existing norms could be made to respond to older people's lived experiences through the conscious efforts of existing treaty bodies and other human rights actors to interpret those norms in new ways.

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[40] Kwong-Leung Tang and Jik-Joen Lee, 'Global social justice for older people: The case for an international convention on the rights of older people' (2006) 36(7) British Journal of Social Work 1135, 1138; Rodriguez-Pinzon and Martin, 'The international human rights status of elderly persons' (n 39) 920–921, 1007.
[41] Israel Doron and Itai Apter, 'The Debate Around the Need for an International Convention on the Rights of Older Persons' (2010) 50(5) The Gerontologist 586, 588; Haris Kountouros and Nicola Rees, 'Dignity as a Theoretical and Legal Construct in the Context of Care for Older Persons and the Developing Human Rights Agenda for Older Persons' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016), 185-210, 205; Rodriguez-Pinzon and Martin, 'The international human rights status of elderly persons' (n 39) 920–921, 1007.
[42] Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) Human Rights Law Review 37, 51–60, 64.
[43] Paul De Hert and Eugenio Mantovani, 'Specific Human Rights for Older Persons?' (2011) 4 European Human Rights Law Review 398, 407, 418.
[44] Beverley Clough and Margaret Brazier, 'Never too old for health and human rights?' (2014) 14(3) Medical Law International 133, 145–56.
[45] See (n 42), (n 43) and (n 44).
[46] Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (n 42) 64.
[47] De Hert and Mantovani, 'Specific Human Rights for Older Persons?' (n 43) 407, 418.
[48] Clough and Brazier, 'Never Too Old for Health and Human Rights?' (n 44) 156.
[49] ibid 155.

The OHCHR argues that the failure of the overall universal human rights framework to mainstream older people's experiences evidences the need for a dedicated convention.[50] However, in a report to the OEWGA in 2011, the OHCHR drew attention to a range of instances where existing treaty bodies and special procedures *have* explicitly recognised the application of existing norms to older people's experiences.[51] Rodriguez-Pinzon and Martin, too, have acknowledged that universal and regional human rights treaty bodies 'have creatively used' existing norms to protect the rights of older people.[52] Indeed, even as Mégret argues that older people experience rights violations in ways that are not captured by existing norms, he also alludes to the potential for existing norms to address older people's experiences.[53] In examining the capacity for adaptation within the existing international human rights normative framework, therefore, the thesis explores an avenue of rights protection for older people that has been acknowledged to an extent but not thoroughly pursued.

[50] ECOSOC, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (n 12).

[51] See UN Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights of Older Persons: International Human Rights Principles and Standards: Background Paper-Revised and Updated, Open-ended Working Group, GA resolution 65/182' (New York, 2011). The efforts noted by the OHCHR included CESCR, General Comment No 4, 'The right to adequate housing' (13 December 1991) UN Doc E/1992/23 para 8(e); CESCR, General Comment No 6, 'The Economic, Social and Cultural Rights of Older Persons' (n 15); CESCR, General Comment No 12, 'The right to adequate food' (12 May 1999) UN Doc E/C.12/1999/5 para 13; CESCR, General Comment No 14, 'The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4 paras 12, 25; CESCR, General Comment No 15, 'The right to water' (20 January 2003) UN Doc E/C.12/2002/11 para 16(h); CESCR, General Comment No 19, 'The right to social security' (4 February 2008) UN Doc E/C.12/GC/19 para 15; CESCR, General Comment No 20, 'Non-discrimination in economic, social and cultural rights' (10 June 2009) UN Doc E/C.12/GC/20 para 29; CEDAW Committee, General Recommendation No 27, 'Older women and protection of their human rights' (n 15) and numerous Concluding Observations of the CEDAW Committee on the states' periodic reports; Committee Against Torture (CAT), Genearl Comment No 2, 'Implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2 para 15; UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' (5 February 2010) UN Doc A/HRC/13/39/Add.5 paras 231, 237, 257; UNHRC, 'Report of the Speical Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt' (31 January 2008) UN Doc A/HRC/7/11 para 42; UNHRC, 'Report of the Independent Expert on Human Rights and Extreme Poverty, Magdalena Sepúlveda' (18 March 2010) UN Doc A/HRC/14/31.

[52] Diego Rodriguez-Pinzon and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003) 18 American University International Law Review 689, 921.

[53] Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (n 42). Without delving into detail, Mégret suggests, for example, that the right to freedom from torture and inhuman treatment is relevant to abuse and neglect in care settings, including in institutional care (at 55). He suggests that 'circumstances when the elderly are interned in institutions against their will, or even interned when independent living arrangements would be available and suitable' may fall under the right to be free from arbitrary detention (at 55). He further suggests, for example, that the right to family life is relevant to the frequent separation of older couples by the placement of one partner in a care setting without the other (at 57). Mégret also argues that the Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 may be of relevance to many older people (at 60).

III. Older People and the Rule against Torture and Ill-treatment

The thesis' inquiry focuses on the anti-torture norm for three reasons. These are, first, the prominence and relative strength of the norm within the international human rights framework; second, the norm's history of progressively expansive interpretation and application; and third, the nature of the human rights violations that have been to the forefront of discussions at the UN regarding the need for more effective human rights protections for older people.

A. *Character of the norm*

In principle, assuming that a person's experiences fall within the remit of the norm, the rule against torture and ill-treatment offers particularly strong protection against mistreatment when compared to other human rights norms.

The identification of conduct as torture or ill-treatment, or otherwise as a violation of the anti-torture norm, sends a powerful message that such conduct is unacceptable. Steiner, Alston and Goodman contend that the anti-torture norm stands out from other human rights norms: 'It occupies a vital place in the human rights lexicon, a "no" strongly and universally felt and expressed'.[54] The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is widely understood to be a norm of customary international law.[55] As such, the prohibition applies to all states regardless of whether or not they are bound by a particular treaty provision outlawing these practices. Furthermore, the customary law status of the rule may result in any reservation to a treaty provision prohibiting torture and ill-treatment being deemed null and void.[56] In addition, several courts and commentators have recognised the

[54] Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford University Press 2008) 224.
[55] See, for example, American Law Institute, *Restatement of the Law, the Third, the Foreign Relations Law of the United States* (Vol 2, 1987) 16 para 702; Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 393–94; Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, Oxford University Press 2009) 80; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291; Nigel Rodley and Matt Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrdaing Treatment or Punishment' (2006) 2 European Human Rights Law Review 115; UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer: Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' (20 July 2017) UN Doc A/72/178 para 17 (citations omitted).
[56] UN Human Rights Committee (HRC) General Comment No 24, 'Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 para 8.

prohibition of torture as having the status of a peremptory, or *jus cogens*, norm of international law.[57] The *jus cogens* status of the norm means that conflicting treaties are void, and that the norm may not be derogated from by any treaty provision or ordinary customary law process which does not possess similar *jus cogens* character.[58] According to the UN Human Rights Committee, the prohibition of cruel, inhuman or degrading treatment or punishment also has *jus cogens* character under international law.[59]

The manner in which the rule against torture and ill-treatment is enshrined in international legal instruments and elaborated in both legal instruments and jurisprudence makes it a particularly useful vehicle for challenging human rights abuses. The norm is included not just in the earlier articles of all major international treaties on civil and political rights[60] and in numerous treaties on the rights of specific groups,[61] but it also receives the attention of several dedicated instruments. The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[62] and the Inter-American Convention to Prevent and

[57] See, for example, UN Committee Against Torture (CAT) General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007) UN Doc CAT/C/GC/2 para 1; *Prosecutor v Anto Furundzija* (IT-95-17/1-T), Trial Chamber Judgment, 10 December 1998 para 153; Inter-American Court of Human Rights (IACtHR), *Maritza Urrutia v Guatemala*, Judgment of 27 November 2003 (Merits, Reparations and Costs) Series C No 103 para 112; J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) 12.

[58] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53. See also Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 199.

[59] See HRC General Comment No 24 (n4) para 8.

[60] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 United Nations Treaty Series 222 (ECHR) art 3; American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (ACHR) art 5; African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 ILM 58 (African Charter) art 5; Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1 (EU Charter) art 4; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 International Human Rights Reports 893 (Arab Charter) art 8. See also Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 5.

[61] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 5 March 1995) (1994) 33 ILM 1534 art 4; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005) reprinted in (2001) 1 African Human Rights Law Journal 40, art 4; Inter-American Convention on Protecting the Human Rights of Older Persons (adopted 15 June 2015, entered into force 11 January 2017) (2016) 55(5) ILM 985, art 10; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) arts 37(a) and 39; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) (1991) 30 ILM 1517, art 10; Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 (CRPD) art 15.

[62] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT). Burgers and Danelius explain that the UNCAT's 'adoption followed the concerted efforts of non-governmental organisations and individuals to

Punish Torture[63] are both devoted to the norm. In addition, the UN Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[64] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[65] establish systems of visits to places of detention with the aim of preventing torture and ill-treatment. The norm's absolute nature precludes states from justifying torture or ill-treatment on any grounds or from derogating from the rule under any circumstances.[66] In addition, the norm contains numerous well-developed positive obligations, which are enshrined explicitly in the UNCAT and elaborated in a large body of universal and regional treaty body jurisprudence and soft law instruments.

Notwithstanding these strengths, however, there are still areas of ambiguity within the norm, and of formalistic limitations on the reach of some of the established obligations under the norm. The fact that the anti-torture norm offers strong protection to individuals from rights violations makes it all the more important to examine these areas of ambiguity, and limitations, so as to assess whether some older people are being excluded unjustifiably from the norm's protection.

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highlight ongoing practices of torture and ill-treatment worldwide, and a UN Commission on Human Rights Commission drafting process which coincided with the promulgation of professional codes of conduct and ethics by several international bodies': Burgers and Danelius, *The United Nations Convention against Torture: A Handbook* (n5) para 13–113.

[63] Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 83 (1992) (IACPPT).

[64] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT).

[65] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1 February 1989) ETS 126 (ECPT).

[66] The ICCPR, UNCAT, ECHR, ACHR and Arab Charter all state explicitly that the prohibition cannot be derogated from under any circumstances: ICCPR (n 60) art 4(1), (2); UNCAT (n 62) art 2(2); ECHR (n 60) art 15(2); ACHR (n 60) art 27(1); Arab Charter (n 60) art 4. The African Charter does not contain any provision relating to derogation or suspension of rights or obligations under the Charter in times of emergency; however, Heyns notes that 'in several cases, the African Commission has held that the lack of a derogation clause means that States cannot derogate from the rights in the Charter at any time, whether during war, situations of emergency or peace': Christof Heyns, 'Civil and Political Rights in the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press 2000) 137, 139, citing African Commission on Human and Peoples' Rights (AfrCmHPR), *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Communication No 74/92 (11 October 1995). Although the EU Charter does not refer to the absolute nature of the prohibition, according to Article 52(3) of the Charter, the prohibition of torture and ill-treatment in the Charter has the same meaning and scope as in the ECHR: Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1 (EU Charter) art 52(3). Regarding the absoluteness of the prohibition of torture and ill-treatment under the EU Charter, see further Joined Cases C-404/15 and C-659/15 Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen (2016) EU:C:2016:198, [2016] QB 921, para 86; Manfred Nowak and Anne Charbord, 'Prohibition of torture and inhuman or degrading treatment or punishment' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 61, 92.

B. *History of progressively expansive interpretation of the norm*

The rule against torture and ill-treatment was first enshrined in the 1948 Universal Declaration of Human Rights (UDHR) in response to methods used by totalitarian regimes between the first and second World Wars to terrorise their populations and the inmates of their prisons and concentration camps.[67] Since then, however, the anti-torture norm has demonstrated the capacity to adapt in response to broadening consciousness of the suffering experienced by individuals in many other circumstances, including in settings previously considered 'private' and not the concern of international human rights law.

The anti-torture norm's evolving response to violence against women is an example of the norm's history of progressively expansive interpretation and application. In 1996, the Inter-American Commission on Human Rights (IACmHR) became the first human rights treaty body to hold that rape by a state official amounted to torture.[68] The European Court of Human Rights (ECtHR) followed suit in 1997.[69] Since then, universal and regional treaty bodies have classified numerous forms of violence against women and girls as torture or ill-treatment, and the treaty bodies' emerging consciousness of these forms of treatment has gone hand-in-hand with their progressive recognition of positive obligations under the norm, particularly in respect of torture or ill-treatment perpetrated by non-state actors.[70] For example, in a 2008 General Comment, the UN Committee against Torture (CAT) recalled its jurisprudence[71] where it had

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[67] J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) 10.

[68] Inter-American Commission on Human Rights (IACmHR), *Raquel Martí de Mejía v Perú*, Report No 5/96, Case 10.970 (1 March 1996).

[69] *Aydin v Turkey* (1998) 25 EHRR 251 para 82.

[70] See, for example UN Committee Against Torture (CAT) General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007) UN Doc CAT/C/GC/2 para 18. Here, the CAT recalled its jurisprudence (mainly in the form of Concluding Observations) where it had established that a failure to exercise due diligence to prevent, investigate, prosecute and punish torture or ill-treatment by non-State officials or private actors would result in the State being considered as the author, 'complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts'. The CAT further noted that it had 'applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking'. Edwards notes, meanwhile, that 'the HRC has condemned domestic violence, rape and sexual violence, female genital mutilation, clandestine abortions, unequal treatment in relation to punishment for adultery, the failure to outlaw marital rape or levirate, 'honour' crimes, and early marriage': Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 216–17 (citations omitted).

[71] primarily in the form of Concluding Observations on the periodic reports of States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).

established that a failure to exercise 'due diligence' to prevent, investigate, prosecute and punish torture or ill-treatment by non-state officials or private actors would result in the State being considered as the author, 'complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts'.[72] The CAT noted that it had 'applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking'.[73]

The emergence of 'due diligence' obligations upon states to protect individuals from torture or ill-treatment by non-state actors was a monumental development within the international anti-torture framework. In their Handbook on the UNCAT, published in 1988, Burgers and Danelius stated that 'the Convention does not deal with cases of ill-treatment which occur in an exclusively non-governmental setting. It only relates to practices which occur under some sort of responsibility of public officials or other persons acting in an official capacity'.[74] By 1993, in his Commentary on the jurisprudence of the HRC, Nowak acknowledged that 'the Committee has recognized, at least in principle, a duty on States Parties … to protect by law the right to personal integrity against *interference by private parties*'.[75] Nowak opined that '[h]ere, the Committee has gone beyond Art. 1 of the UN Convention against Torture, which only prohibits torture committed by public officials or at least attributable to the latter'.[76] Nowak cautioned, therefore, that 'this duty should not be interpreted broadly'.[77] The CAT's willingness to assert the existence of positive obligations on states to protect against domestic violence, female genital mutilation and other torture or ill-treatment that occurs in the so-called 'private' sphere was clearly unforeseen at one time.

The expanding interpretation of the anti-torture norm has been further propelled by the fact that treaty bodies and states have acknowledged that the minimum threshold of severity required for a finding of torture or ill-treatment can shift over time in accordance with changes in social standards. For example, in *Selmouni v France*,[78] the ECtHR stated that forms of treatment which it had previously considered not to amount to torture could, in future, be classified as torture, 'having regard to the fact that the Convention is a "living instrument which

[72] CAT General Comment 2 (n70) para 18.
[73] ibid.
[74] Burgers and Danelius, *The United Nations Convention against Torture* (n 67) 1.
[75] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel 1993) 136.
[76] ibid 136.
[77] ibid.
[78] *Selmouni v France* (2000) 29 EHRR 403.

must be interpreted in the light of present-day conditions"'.[79] In a similar vein, the UN Standard Minimum Rules for the Treatment of Prisoners, which contain the authoritative international baseline standards for the humane treatment of individuals in detention, have recently undergone revision pursuant to a UNGA resolution requesting that they 'reflect recent advances in correctional science and best practices'.[80]

C. *Human rights violations particularly affecting older people*

Among the human rights violations that have been raised most frequently and prominently in UN discussions regarding the inadequate protection of older people's human rights are violence, abuse and neglect of older people particularly in care settings, and the related problem of older people's lack of access to adequate care.

Prima facie, issues of violence, abuse and neglect come within the remit of the rule against torture and ill-treatment. However, the specific problems of mistreatment by carers and suffering due to inadequate systems of care are not familiar to the anti-torture norm. Two former UN Special Rapporteurs on torture have published reports arguing that abuses in healthcare and social care contexts that ostensibly constitute violations of the anti-torture norm are frequently ignored under the norm.[81] Former Special Rapporteur Juan E Méndez contends that this is because 'the denial of health-care has often been understood as essentially interfering with the "right to health"'.[82] The Special Rapporteurs' reports suggest the need to investigate the relationship between the anti-torture norm and care-related mistreatment of older people, given the thesis' aims and the Special Rapporteurs' argument that the anti-torture norm has the potential to provide greater protection in this arena.

Since 2009, in its annual Resolutions on Follow-up to the Second World Assembly on Ageing, the UNGA has repeatedly called on governments to 'address the issue of the well-being and

[79] *Selmouni v France*, ibid para 101. The Court cited *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 para 31, *Soering v United Kingdom* (1989) 11 EHRR 439 para 102 and *Loizidou v Turkey* (1995) 20 EHRR 99 para 71.
[80] United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Res 70/175 (17 December 2015) UN Doc A/RES/65/230 para 10.
[81] UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (28 July 2008) UN Doc A/63/175; UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53.
[82] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (n81) para 11.

adequate health care of older persons, as well as any cases of neglect, abuse and violence against older persons, by designing and implementing more effective prevention strategies and stronger laws and policies'.[83] The most recent of these resolutions added that states should address older women's experiences of neglect, abuse and violence 'in particular'.[84]

In a report to the ECOSOC in 2012 on the human rights situation of older persons, the OHCHR highlighted 'gaps in the international protection regime' in a number of areas.[85] The first four areas discussed were age discrimination, legal capacity and equal recognition before the law, long-term care, and violence and abuse. The OHCHR explained that all of these areas are interrelated.

Regarding legal capacity, the OHCHR contended that 'guardianship and substitute decision-making' are routinely imposed on older people,[86] and that older people 'point to degrading attitudes by caregivers…or relatives in which they are "treated like children"'.[87] She highlighted older people's frequent experiences of 'involuntary internment linked to an apparent or diagnosed disability'.[88] The OHCHR noted that older people commonly suffer mistreatment in care settings including 'intimidation, aggression, inappropriate behaviour control methods, negligence or a failure to provide the appropriate or necessary care'.[89] Regarding violence and abuse generally, the OHCHR drew attention to physical violence towards older people in care,[90] and to the physical, psychological, sexual and emotional abuse of older people—which, she noted, is 'often a hidden phenomenon'.[91] She further highlighted financial exploitation of older people, including 'fraudulent loss of the enjoyment and exercise of their legal capacity, with the purpose of taking control of their financial affairs'.[92] The OHCHR also drew attention to the neglect of older people's needs for home care to provide

[83] UNGA Res 64/132 (18 December 2009) UN Doc A/RES/64/132 para 13; UNGA Res 65/182 (21 December 2010) UN Doc A/RES/65/182 para 17; UNGA Res 66/127 (19 December 2011) UN Doc A/RES/66/127 para 20; UNGA Res 67/143 (20 December 2012) UN Doc A/RES/67/143 para 19; UNGA Res 68/134 (18 December 2013) UN Doc A/RES/68/134 para 30; UNGA Res 69/146 (18 December 2014) UN Doc A/RES/69/146 para 30; UNGA Res 71/164 (19 December 2016) (n 3) para 30.
[84] UNGA Res 71/164 (19 December 2016) (n 3) para 30.
[85] ECOSOC, 'Report of the United Nations High Commissioner for Human Rights' (n 12).
[86] ibid para 21.
[87] ibid para 22.
[88] ibid paras 28 and 25.
[89] ibid para 27.
[90] ibid para 33.
[91] ibid para 32.
[92] ibid para 34.

'support in activities of daily living like feeding, dressing, walking, bathing, using the bathroom, taking medication, shopping and coping with household tasks'.[93]

The OHCHR stated that overarching all of these issues is the problem of 'ageism', which 'has not been explicitly defined in human rights treaties'.[94] The OHCHR described 'ageism' to mean 'the discrimination and stigmatization of individuals as they grow older', and noted that '[o]ften it is at the root of isolation and exclusion of older persons, who are considered unproductive and therefore irrelevant'.[95] She argued, further, that ageism 'is intimately related to violence and abuse in public and private spheres' and that it 'is often exacerbated by other grounds for discrimination'.[96]

According to the OHCHR, the international human rights framework is failing to protect older people from violence and abuse, including in relation to their long-term care needs and right to legal capacity and equal recognition before the law, because 'systematic monitoring of [care] institutions and clear standards and criteria for their functioning, reporting and hiring policy has too long been off the radar of most national and international human rights monitoring mechanisms'.[97] In addition, the OHCHR noted that 'aspects of long-term care that are connected to personal aspects of daily life have yet not been sufficiently covered by the work of human rights bodies'.[98] She further argued that '[m]easures should be adopted to ensure support for older persons in exercising their legal capacity, including effective safeguards to prevent abuse',[99] and that the 'paradigm shift towards supported decision-making provided for by article 12 of the Convention on the Rights of Persons with Disabilities' (CRPD) needs to be extended to older people'.[100]

Recent reports from the Independent Expert on older persons' human rights have echoed the OHCHR's concerns. The Independent Expert's first thematic report in 2015 focused on autonomy and care. The report urged states to ensure quality of care, including through

[93] ibid para 31.
[94] ibid para 19.
[95] ibid para 18.
[96] ibid.
[97] ibid para 26.
[98] ibid para 31.
[99] ibid para 22
[100] ibid para 21.

professional training and better treatment of care workers,[101] to guarantee access to care services, including in the home and community,[102] to provide for supported decision-making for older people with disabilities,[103] and to legislate to ensure free and informed consent in care settings.[104] In 2016, the Independent Expert issued a 'comprehensive report' assessing the 'implementation of existing international instruments with regard to older persons while identifying best and good practices and gaps in the implementation of existing laws related to the promotion and protection of the rights of older persons'.[105] In this report, the Independent Expert stated that she had received 'little or no information' from states 'on some crucial issues such as legal capacity, quality of care, long-term care, palliative care, assistance to victims of violence and abuse, available remedies [or] independence and autonomy'.[106] She concluded that '[e]ach of the aforementioned areas raises a set of issues and protection concerns that deserve in-depth analysis'.[107]

Although it has not received the same degree of attention at the international level as the above-mentioned issues, older people's access to justice is a further area of concern to the international community and various human rights actors. In the OHCHR's 2012 report to the ECOSOC on gaps in the international human rights framework relating to older people, the OHCHR highlighted that older people's access to justice is frequently hampered by 'their dependency on the abuser, concern for repercussions, anxiety over a lack of support or lack of familiarity with reliable mechanisms'.[108] The most recent UNGA Resolution on Follow-up to the Second World Assembly on Ageing highlighted access to justice as a challenge to older people's enjoyment of their human rights.[109] In addition, the CEDAW Committee's 2010 General Recommendation on older women emphasised the need for states to take specific measures to make information, legal services, effective remedies and reparation available to older women, including older women with disabilities.[110] As discussed further in Chapter 1,

[101] UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 paras 76–80.
[102] ibid paras 72–75.
[103] ibid paras 99–101.
[104] ibid paras 99–101, 121.
[105] UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (8 July 2016) UN Doc A/HRC/33/44.
[106] ibid para 122.
[107] ibid.
[108] ECOSOC, 'Report of the United Nations High Commissioner for Human Rights' (n 12) para 62.
[109] UNGA Res 71/164 (19 December 2016) (n 3) para 4.
[110] CEDAW Committee, General Recommendation No 27, 'Older women and protection of their human rights' (19 October 2010) UN Doc CEDAW/C/2010/47/GC.1 para 33.

the rights to accountability, access to justice and redress are fundamental components of the rule against torture and ill-treatment in international law. This fact, combined with the concerns outlined in this paragraph regarding older people's access to justice in general, suggests that issues of accountability, access to justice and redress for violations of older people's right to freedom from torture and ill-treatment are also important for the thesis to examine.

IV. Methodology and Terminology

There are four key aspects to the methodology adopted in the thesis.

First, the thesis is concerned with the question of whether the law as it is (*lex lata*)[111] could better protect older people through new approaches to its interpretation. The 'rule against torture and ill-treatment' to which the thesis refers is the human right to be free from torture and cruel, inhuman and degrading treatment and punishment enshrined in Article 5 of the Universal Declaration of Human Rights[112] and echoed in numerous universal and regional instruments. The thesis does not examine whether, or suggest that, this norm (the 'anti-torture norm' as the thesis frequently describes it) is insufficient at its most basic level, or at its core, to protect older people from key forms of mistreatment which they commonly experience. Rather the aim of the thesis is to explore the extent to which the core of the norm has not yet been translated – and could be translated – into the doctrines and other aspects of the legal framework designed to ensure the norm's effective implementation. That said, the thesis does engage with numerous doctrinal aspects of the norm that might be understood (and seem to be understood by many states at the OEWGA) to be 'sub-norms' within the legal framework designed to implement the rule against torture and ill-treatment. In its examination of whether the anti-torture norm could be interpreted in ways that more effectively respond to older people's experiences, the thesis frequently uses the term 'adaptation' to refer to changes in the doctrines and potentially also the legal instruments that are intended to *implement* the overarching rule against torture and ill-treatment. It is important to note that the use of the term 'adaptation' is not intended to mean that the overarching norm – that is, the human right to be free from torture and ill-treatment – needs to change.

[111] See Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 19-20; Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 24-26.

[112] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Second, the thesis considers the field of international human rights law in its broadest and most fluid sense when investigating the anti-torture norm's current application to older people's experiences and the potential avenues for its interpretation. Although the present debate at the UN regarding the need or otherwise for a dedicated instrument focuses on the universal human rights framework, the thesis goes beyond the universal framework because of the capacity for many different sources of law to influence each other in the interpretation and development of human rights norms. The 'rule against torture and ill-treatment in international human rights law', as understood in the thesis, is a constantly developing product of the intermingling of universal and regional legal instruments and treaty body jurisprudence, and domestic jurisprudence, concerning the anti-torture norm. In other words, the thesis responds to De Schutter's recognition of a developing 'transnational *jus commune* of human rights', evidenced by 'increasingly frequent cross-references between various international and domestic courts interpreting provisions which, although found in different treaties or domestic constitutions, are similarly worded and have their common inspiration in the Universal Declaration of Human Rights'.[113]

As the thesis' aim is to examine what the anti-torture norm is capable of, the approaches of individual treaty bodies or other human rights actors, whether at the universal, regional or domestic level, are relevant to the broader international human rights field because they demonstrate what may be possible on a larger scale. In addition, because references in existing international law and jurisprudence to older people's experiences of torture or ill-treatment are sparse, the thesis has to extrapolate from those references an understanding of what underlies the current gaps in protection more broadly and how they might be ameliorated. Admittedly, the thesis' capacity to consider all of the sources of law that influence each other to make up the 'transnational *jus commune* of human rights' is limited. It has not been possible due to time and space constraints to delve into every potentially relevant detail of universal and regional law and jurisprudence—and certainly not all domestic jurisprudence—that could be of use to

[113] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 31. De Schutter refers to Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 Indiana Law Journal 819; Sarah H Cleveland, 'Our International Constitution' (2006) 31 Yale Journal of International Law 1; Louis Henkin, 'The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation' (2001) 114 Harvard Law Review 2049; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499-532; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

the future interpretation of the norm. It is also important to acknowledge that the thesis engages only with materials available in English.

The third major methodological aspect of the thesis is that it uses the concepts of dignity and vulnerability as a theoretical framework through which to assess the potential for the anti-torture norm to be interpreted in ways that respond to older people's experiences of mistreatment. The thesis engages with claims that dignity is substantively incapable of guiding the development of international human rights norms; it answers these by exploring dignity's established role in the interpretation and application of the rule against torture and ill-treatment and the meanings that have been ascribed to the concept in both law and philosophy. The thesis further engages with criticisms of the concept of vulnerability from both legal and philosophical angles: namely, that its substantive content is not clear and that it is a label that invites paternalism and discrimination. Through an examination of philosophical theories of vulnerability and existing anti-torture jurisprudence, the thesis proposes a conception of vulnerability that responds to these criticisms and forms an integral component of a dignity interference sufficient in principle to violate the rule against torture and ill-treatment. Thus, the thesis' theoretical framework operates not just to clarify the anti-torture norm's potential to provide more effective protection to older people, but also to strengthen the concepts of dignity and vulnerability as tools for the interpretation and application of the anti-torture norm, *per se*.

The fourth aspect of the thesis' methodology is that the thesis considers three specific areas of mistreatment of older people in order to make the examination of the thesis question concrete and focused. These are: deprivation of liberty in care contexts, lack of access to adequate care and prolonged impunity for 'historic' torture or ill-treatment. One reason for focusing on these areas, apart from the anti-torture norm's apparent failure to respond to them, is that the extension of the norm's protection to older people's experiences in these areas would require significant conceptual and doctrinal shifts within the normative framework. In other words, these appear to be examples of what many states at the OEWGA understand to be 'normative gaps', which may not be ameliorated simply by treaty bodies and other actors responsible for the implementation of the anti-torture norm increasing their focus on 'age as a specific perspective'[114] but otherwise continuing to apply the norm exactly as before. Another reason for the focus on these areas of mistreatment is that they relate to three of the most important

[114] OEWGA, 'Opening statement by the European Union' (n22).

doctrinal aspects of the norm: the heightened scrutiny that attaches to state conduct where individuals are deprived of their liberty, the existence of positive obligations on the state to prevent and protect from torture and ill-treatment, and the right to accountability and redress for violations of the norm.

Before proceeding, a further note is required regarding some of the terminology employed in the thesis. The thesis does not seek to specify the exact circumstances in which torture or any of the discrete forms of ill-treatment will arise. Rather, the aim of the thesis is to develop a conceptual approach to evaluating the nature of the treatment of older people and to discerning the positive obligations that exist in respect of it under the anti-torture norm. Therefore, the thesis uses the phrases 'torture or ill-treatment' and 'ill-treatment' freely to refer to treatment that may, depending on the particular circumstances of a case, reach the minimum threshold of severity required for a finding of a substantive violation of the anti-torture norm (without specifying which category the violation may fall within). It is also worth stating that the thesis does not set out to specifically consider the 'punishment' aspects of ill-treatment. Relatedly, at all times when the thesis uses the term 'anti-torture' (for example, 'anti-torture norm' and 'anti-torture jurisprudence'), this is intended as shorthand for 'anti-torture and ill-treatment'. Where the thesis refers to 'dignity', this is intended to mean 'human dignity'. Finally, it should be noted that the term 'jurisprudence', when used in relation to universal human rights treaty bodies, is intended to include not only individual complaints jurisprudence but also General Comments and Concluding Observations, where relevant.

V. Thesis Argument

The thesis claims that, at present, the rule against torture and ill-treatment provides inadequate protection to older people in the three contexts selected for examination: deprivation of liberty, lack of access to adequate care and impunity for 'historic' torture or ill-treatment. Doctrinal limitations in the existing normative framework are exposed and conceptual and structural explanations for such limitations proffered.

Bearing in mind the norm's current doctrinal and conceptual constraints, the thesis argues that dignity and vulnerability reasoning could enable the human rights treaty bodies and other relevant actors to use the anti-torture norm more effectively, to respond to older people's

experiences of mistreatment. It is contended that dignity is the core value underpinning the rule against torture and ill-treatment and, as such, is both a powerful lens through which to focus the treaty bodies' and other actors' attention on older people's lived experiences and a powerful conceptual tool with which to extend or otherwise shift doctrinal aspects of the norm. The thesis acknowledges, however, the widely held view that dignity is in need of further substantive conceptualisation if its functions in human rights adjudication are to be preserved. Therefore, a substantive conception of a dignity violation sufficient in principle to meet the minimum threshold of severity for a finding of torture or ill-treatment is proposed: an interference with a core aspect of the personality, in respect of which the person is powerless. The powerlessness aspect of the proposed dignity violation is conceptualised in the thesis as vulnerability, and vice versa. The thesis argues that a dignity frame offers the potential for the developing interpretive and adaptive functions of vulnerability under the anti-torture norm to be harnessed and conceptualised in a way that avoids discrimination and instead enhances the protection of dignity by acting as a warning sign that violations may occur. It is further maintained that identification of the various forms of powerlessness giving rise to dignity violations produces the blueprint for the adaptation of the anti-torture norm's positive obligations in order to address the structural causes of mistreatment of older people.

The thesis uses its proposed conception of a dignity violation to analyse the experiences of older people in the contexts of deprivation of liberty, lack of access to adequate care and impunity for 'historic' torture or ill-treatment. This analysis demonstrates the practical application of the thesis' theoretical argument and reveals a range of doctrinal adaptations that, it is argued, would ensure more effective protection of older people under the anti-torture norm.

VI. Thesis Structure

Chapter 1 of the thesis outlines key aspects of the rule against torture and ill-treatment as currently understood, in order to lay the foundation for the subsequent chapters' analysis of the norm's shortcomings in practice and the potential for adaptation through new interpretations of the norm. In addition to providing an overview of the negative and positive obligations under the norm and the operation of the minimum threshold of severity assessment, the chapter pays attention to aspects of the norm that appear relevant to older people's experiences in the contexts selected for examination in the thesis. The chapter argues that recognition of deprivation of liberty causes the treaty bodies to demonstrate heightened sensitivity to the

existence of torture or ill-treatment and to impose heightened or tailored positive obligations on states, including obligations to provide the resources necessary to meet basic needs. It is claimed that recognition of 'vulnerability' in various contexts other than deprivation of liberty has somewhat similar effects. The chapter contends that suffering arising from socio-economic deprivation is an area where the treaty bodies' willingness to recognise the existence of torture or ill-treatment or to impose positive obligations is limited. The chapter further argues that the normative framework demonstrates uncertainty and an apparent lack of coherence with the CRPD regarding the meaning of informed consent and the circumstances in which non-consensual medical interventions are permitted under the anti-torture norm.

Chapter 2 establishes the theoretical framework for the thesis' analysis of the anti-torture framework's capacity to adapt through new ways of interpreting the norm. This chapter argues that respect for dignity is the underpinning purpose of the rule against torture and ill-treatment, and that dignity's interpretive and adaptive functions under the anti-torture norm are well established. Bearing in mind criticisms of judicial use of dignity in the absence of sufficient substantive conceptualisation, the chapter develops a conception of a dignity violation sufficient in principle to constitute torture or ill-treatment. The proposed conception draws on Luban's theoretical work[115] and existing anti-torture jurisprudence. As mentioned above, it is an interference with a core aspect of the personality, in respect of which the person is powerless. The chapter explains that the concept of vulnerability is a cornerstone of its conception of a dignity violation. The vulnerability theories of a number of philosophers[116] and their relationship to the vulnerability reasoning in existing anti-torture jurisprudence are explored in order to arrive at a conception of vulnerability as powerlessness—whether inherent, situational or pathogenic.[117] The chapter argues that understanding vulnerability as the powerlessness element of a dignity violation provides a way of strengthening both dignity and vulnerability reasoning under the norm.

Chapter 3 of the thesis examines whether the anti-torture framework could adapt to better protect older people who are deprived of their liberty in care contexts. The chapter maintains

[115] David Luban, 'Treatment of Prisoners and Torture' in Duwell M and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014).
[116] including Martha Fineman, Catriona Mackenzie, Wendy Rogers, Susan Dodds and Sarah Clark Miller. See Chapter 2, Part II.
[117] See Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013).

that the doctrinal framework currently fails to understand older people's experiences of involuntary confinement and restraint in care settings as deprivations of liberty due to the paradigmatic conception of deprivation of liberty as state custody, and the obscuring of older people's experiences by discriminatory structures and attitudes. The chapter argues that the treaty bodies could adapt the doctrinal framework to provide the heightened protection intended towards individuals who are deprived of their liberty by focusing on the powerlessness of older people involuntarily confined and restrained in care settings. The chapter contends that not just physical confinement, but also dependency and denial of capacity (together), should be recognised as indicative of a deprivation of liberty in the care context.

Chapter 4 investigates whether dignity and vulnerability reasoning could enable the adaptation of the anti-torture framework to protect older people from suffering experienced due to inadequate care. The chapter uses lack of access to adequate continence care as a case study through which to undertake this analysis. The chapter argues that dignity reasoning has the potential to shed light on the human experience of suffering that inadequate continence care can cause, piercing through the existing formalistic limitations on the norm's application to situations of socio-economic deprivation and highlighting the discriminatory structures and attitudes that make such suffering invisible. It is contended that the forms of powerlessness that render older people unable to avoid interferences with core aspects of their personality through inadequate continence care serve as a blueprint for the positive obligations that the anti-torture framework could and should espouse in order to protect older people more effectively.

Chapter 5 considers whether a dignity analysis could enable the adaptation of the anti-torture framework to better protect older people from impunity for 'historic' torture or ill-treatment. The chapter contends that the 'comprehensive reparative concept' developed in the CAT's General Comment No 3 on the right to redress under Article 14 UNCAT[118] could be applied more effectively to older people by the recognition of a right to redress for torture or ill-treatment regardless of when in the past the violations occurred. It is argued that the CAT, which has begun to recognise such a right, should re-conceptualise the basis for this right in order to comply with the doctrine of non-retroactivity of treaty obligations. The chapter

[118] CAT General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3 para 2 referring to UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

maintains that dignity and vulnerability reasoning could enable recognition of a 'continuing situation' of torture or ill-treatment where the state has continued to act in a manner that renders a person powerless to avoid the interference with their moral standing in relation to others that both torture or ill-treatment and impunity create. The chapter draws on Walker's theory of 'moral vulnerability'[119] to make the connection between dignity, accountability and redress.

VII. Importance of the Thesis

This thesis provides an analysis of doctrinal gaps in the existing international human rights framework as it relates to older people that is missing in the current debate on the need or otherwise for a dedicated instrument. By examining whether there are significant doctrinal and conceptual limitations in the anti-torture norm as currently understood, the thesis adds a dimension to the argument that older people require better 'implementation' of existing human rights norms. Equally, by investigating how these gaps could be ameliorated by the adaptation of the anti-torture framework through new ways of interpreting the overarching norm, the thesis provides an insight into the possibilities for addressing so-called 'normative gaps' that exist alongside the prospect of a dedicated instrument.

The thesis also provides an original contribution to academic discussion on the meaning and functions of the concepts of dignity and vulnerability within the anti-torture framework. The thesis responds to widespread calls for further substantive conceptualisation of dignity as an instrument of legal reasoning. In addition, it provides a unique perspective on how vulnerability's developing influence on legal reasoning under the rule against torture and ill-treatment could be moulded in order to avoid stereotyping, discrimination and exclusion.

[119] Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013).

CHAPTER 1: THE RULE AGAINST TORTURE AND ILL-TREATMENT

Introduction

This chapter outlines key doctrinal aspects of the rule against torture and ill-treatment in international human rights law as it is currently understood, including areas where there is uncertainty and/or divergence among the treaty bodies. The purpose of the chapter is to lay the groundwork for the subsequent chapters' analysis of how various doctrinal elements of the norm contribute to older people's lack of effective rights protection or have the potential to act as levers through which the anti-torture framework could be adapted.

As discussed in the Introduction to the thesis, the rule against torture and ill-treatment is enshrined in numerous universal and regional treaties, including the United Nations (UN) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[1] International Covenant on Civil and Political Rights (ICCPR),[2] American Convention on Human Rights (ACHR),[3] Inter-American Convention to Prevent and Punish Torture (IACPPT),[4] European Convention on Human Rights (ECHR),[5] African Charter on Human and Peoples' Rights (African Charter),[6] Charter of Fundamental Rights of the European Union[7] and Arab Charter on Human Rights.[8] This chapter attempts to broadly summarise and analyse the doctrinal positions under all of these treaties, excepting the latter two due to the relative paucity of jurisprudence under these two newer instruments.

[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).
[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.
[3] American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (ACHR) art 5.
[4] Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 83 (1992) (IACPPT).
[5] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 United Nations Treaty Series 222 (ECHR) art 3.
[6] African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 ILM 58 (African Charter) art 5.
[7] Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1 (EU Charter) art 4.
[8] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 International Human Rights Reports 893 art 8. See also Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 5.

Part I of the chapter discusses general aspects of the normative framework. It first discusses the concept of state responsibility for torture or ill-treatment. It sets out the circumstances in which states are deemed directly responsible for acts of torture or ill-treatment. It explains that states may also be held indirectly responsible for torture or ill-treatment where they fail to exercise 'due diligence' to prevent and protect from such conduct by non-state actors. Part I then spells out a range of positive obligations under the anti-torture norm that are additional to or constitutive of the 'due diligence' positive obligation. Having broadly discussed the negative and positive obligations under the norm, Part I turns to the question of how the treaty bodies identify torture or ill-treatment such that the norm's obligations are engaged. Among other aspects of the definitions of torture and cruel, inhuman and degrading treatment, this part examines the factors that contribute to the treaty bodies' assessment of whether or not particular conduct meets the 'minimum threshold of severity' required for a finding of torture or ill-treatment.

Part II of the chapter discusses how particular contexts affect the treaty bodies' specification[9] of torture or cruel, inhuman or degrading treatment, and their specification of positive obligations under the norm. This part argues that where the treaty bodies recognise individuals to be deprived of their liberty, they tend to demonstrate greater sensitivity to the existence of torture or ill-treatment and impose heightened positive obligations on states under the norm. Part II argues that the treaty bodies' recognition of the 'vulnerability' of particular groups and individuals has similar effects to their recognition of deprivation of liberty. Part II contends that there is a lack of clarity, and the potential for normative development, regarding the extent to which states are obliged to prevent and protect from suffering arising from socio-economic deprivation under the anti-torture norm. Finally, Part II argues that there is both incoherence and the potential for conceptual and doctrinal adaptation in the treaty bodies' positions regarding non-consensual medical treatment.

[9] The term 'specification' is borrowed from Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014). Mavronicola uses the term 'specification' to describe the ECtHR's process of identifying the content of positive obligations under the anti-torture norm and the meaning of the concepts of torture, inhuman treatment and degrading treatment.

I. General Aspects of the Normative Framework

A. *State responsibility*

Much of this thesis is concerned with the treatment of older people in care settings. While many older people are cared for by state-employed carers and/or in state-run institutions, many others receive care from private individuals, agencies and institutions.[10] This section of the chapter explains that states are responsible for torture and ill-treatment not only where they are directly involved in such conduct but also where they fail to exercise 'due diligence' to prevent or protect from torture or ill-treatment by non-state actors.

i. *Direct state responsibility*

The rule against torture and ill-treatment in international human rights law obliges states first and foremost to refrain from engaging in acts of torture or ill-treatment. Under the UNCAT and IACPPT, state responsibility for torture (and under the UNCAT, for ill-treatment) arises where a public official or person acting in an official capacity instigates, induces[11] or consents to such treatment.[12] The Committee Against Torture (CAT) has interpreted the state actor element to include 'officials and others, including agents, private contractors, and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law'.[13]

The above-mentioned treaties also hold the state responsible for torture or ill-treatment where a public official or person acting in an official capacity acquiesces in torture or ill-treatment (UNCAT) or, being able to prevent torture, fails to do so (Article 3(a) IACPPT). The CAT uses the concept of 'acquiescence' to place direct responsibility on the state for torture or ill-treatment where state actors 'know or have reasonable grounds to believe' that non-state actors are perpetrating torture or ill-treatment and the State actors 'fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors'.[14] The

[10] See United Nations Human Rights Council (UNHRC), 'Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation of Older Persons' (20 April 2012) UN Doc E/2012/51 para 24.
[11] IACPPT (n 4) art 3.
[12] UNCAT (n 1) arts 1, 16; IACPPT ibid art 3.
[13] Committee Against Torture (CAT) General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007) UN Doc CAT/C/GC/2 para 15.
[14] ibid para 18.

CAT contends that '[s]ince the failure of the State to exercise due diligence to intervene…enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission'.[15] In *Dzemajl et al v Yugoslavia*,[16] the CAT applied the term 'acquiescence' to find the State responsible for ill-treatment where the police knowingly failed to prevent a racially motivated mob of private individuals from burning the homes of Roma residents to the ground. The CAT held that 'although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, [the police] did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention'.[17]

Article 2 UNCAT contains a broader preventive obligation than the prohibition of 'acquiescence'; it requires states to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction' (and the CAT has stated that this same obligation applies to ill-treatment).[18] The CAT ties this broad preventive obligation to direct state responsibility for torture or ill-treatment. The CAT's General Comment No 2 indicates that where a state fails to comply with the Article 2 obligation, it will be considered the 'author' of the resulting torture or ill-treatment.[19]

ii. *Indirect state responsibility*

Besides the CAT, other treaty bodies have also interpreted the rule against torture and ill-treatment to include a positive obligation on the state to prevent torture or ill-treatment by non-state actors. Unlike the CAT, however, the Inter-American Court of Human Rights (IACtHR), European Court of Human Rights (ECtHR) and African Commission on Human and Peoples' Rights (AfrCmHPR) appear to find that a state's failure to comply with this preventive obligation gives rise to a violation of the anti-torture norm indirectly, rather than due to direct

[15] ibid.
[16] CAT, *Hajrizi Dzemajl et al v Yugoslavia*, Communication No 161/00 (21 November 2002) UN Doc CAT/C/29/D/161/2000.
[17] ibid para 9.2.
[18] CAT General Comment No 2 (n 13) para 3.
[19] ibid para 18.

perpetration of torture or ill-treatment.[20] In *Velásquez-Rodríguez v Honduras*,[21] the IACtHR for the first time espoused the 'due diligence' concept, which it applies to torture and ill-treatment in violation of Article 5, as well as other violations of the ACHR. Demonstrating its conception of indirect state responsibility for torture or ill-treatment, the Court stated that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[22]

In *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*,[23] where circumstances were similar to the CAT case of *Dzemajl*, above, the ECtHR reiterated that:

> the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals … This protection calls for reasonable and effective

[20] See, for example, IACtHR, *González et al ('Cotton Field') v Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs) Series C No 205 para 236; *Z and others v United Kingdom* (2002) 34 EHRR 3 paras 72-75; AfrCmHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No 245/2002 (15 May 2006) para 143.

[21] IACtHR, *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988 (Merits) Series C No 4; (1989) 28 ILM 291.

[22] ibid para 172. See also Inter-American Commission on Human Rights (IACmHR), *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (2011), where the Commission explained at para 74 that:

> the Inter-American Court has established that the States' obligations *erga omnes* to respect and ensure the norms of protection, and to ensure the effectiveness of the rights, have effects beyond the relationship between its agents and the persons subject to its jurisdiction. These effects are manifested in the positive obligation of the State to adopt the necessary measures to ensure, in certain circumstances, the effective protection of human rights in relations among individuals. Hence, omissions in its duty to prevent human rights violations committed by third persons may give rise to the international responsibility of the State (citing, among others, IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006 (Merits, Reparations and Costs) Series C No 149 paras 85–86).

[23] *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* (2008) 46 EHRR 30.

measures, including with regard to children and other vulnerable individuals, in order to prevent ill-treatment of which the authorities were or ought to have been aware.[24]

In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,[25] meanwhile, the AfrCmHPR referred extensively to the IACtHR's judgment in *Velásquez Rodríguez* and held that:

> Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.[26]

The Human Rights Committee's (HRC) General Comment on Article 7 ICCPR, similarly,

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[24] ibid para 96, citing *Pretty v United Kingdom* (2002) 35 EHRR 1 paras 50–51; *Okkalı v Turkey* App no 52067/99 (ECtHR, 17 October 2006) para 70; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23 para 53. See also *Watts v United Kingdom* (2010) 51 EHRR 66 para 93:

> The Court recalls that, like Article 2, Article 3 of the Convention imposes negative and positive obligations on the State. Positive obligations require States to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment reaching the threshold of Article 3 (citing *A v the United Kingdom* (1999) 27 EHRR 611 para 22; *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73). These measures should provide effective protection, in particular of vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (citing *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73).

See also *A v United Kingdom* (1999) 27 EHRR 611 para 22:

> The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

[25] AfrCmHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No 245/2002 (15 May 2006).

[26] ibid para 143. In addition to citing the IACtHR's judgment in *Velasquez Rodriguez* (n 21), the Commission also acknowledged:

> The standard of due diligence has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.' Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

states that 'States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power'.[27]

B. *Positive obligations*

The anti-torture norm's positive obligations are largely what make the rule against torture and ill-treatment practically effective, in that they comprise specific measures that states are required to take in order to prevent and respond to torture and ill-treatment. Many of the positive obligations that have been established in international instruments and through the treaty bodies' jurisprudence can be understood as specific (although not necessarily exhaustive) contents of the Article 2 UNCAT preventive obligation and the 'due diligence' obligation outlined above. Naturally, the anti-torture norm's positive obligations also apply to torture and ill-treatment by state actors.

Some of the positive obligations under the anti-torture norm are overtly proactive and preventive in nature: for example, the obligations under UNCAT to ensure that torture is a criminal offence[28] and to educate state officials about the rule against torture and ill-treatment.[29] Other positive obligations are reactive: for example, the obligations under UNCAT to investigate alleged or suspected torture or ill-treatment,[30] to ensure access to complaints mechanisms,[31] and to ensure redress.[32] It is worth noting that several treaty bodies have acknowledged that the reactive positive obligations also have an important preventive function. Chapter 5 of the thesis discusses the ECtHR's and IACtHR's understanding that the obligations to investigate and to ensure accountability for torture and ill-treatment exist in order to prevent impunity for such acts.[33] The CAT has stated that 'the provision of reparation has an inherent preventive and deterrent effect in relation to future violations'[34] and that all of the positive

[27] HRC General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 8.
[28] UNCAT (n 1) art 4.
[29] ibid art 10.
[30] ibid art 12.
[31] ibid art 13.
[32] ibid art 14.
[33] See Chapter 5, Part III Section A.
[34] CAT General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3 para 6.

obligations listed in the UNCAT 'constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment'.[35]

This thesis argues that in order to prevent torture or ill-treatment of older people, it is necessary to combat the structural causes of such treatment. As acknowledged in the Introduction, the UN High Commissioner for Human Rights (OHCHR) contends that the widespread mistreatment of older people in the care context is caused by ageism, often compounded by discrimination on other grounds (such as disability-based discrimination).[36] The sections on deprivation of liberty and vulnerability in Part II of this chapter demonstrate that the anti-torture norm's positive obligations, including the reactive obligations, are frequently fashioned by specific treaty provisions or in the treaty bodies' jurisprudence to respond to the structural causes of torture and ill-treatment in particular contexts. With this in mind, the thesis' remaining chapters explore the potential for the norm's positive obligations to be adapted in order to tackle ageism, disability-based discrimination and a range of other systemic and structural barriers to older people's enjoyment of their rights under the rule against torture and ill-treatment.

Before analysing this potential, however, it is necessary to outline the positive obligations that have been established under the norm, in addition to and as elements of the Article 2 UNCAT and 'due diligence' obligations discussed above.

i. *UNCAT*

Articles 3 to 15 UNCAT enshrine a range of specific positive obligations,[37] which the CAT characterises as elements of the overarching preventive obligation in Article 2 UNCAT.[38] The CAT's General Comment No 2 clarifies that Articles 3 to 15 UNCAT are 'obligatory as applied

[35] ibid para 18.
[36] See text to (n 95) and (n 96) in the Introduction.
[37] UNCAT (n 1). The UNCAT obliges states to, among other things: ensure that torture is an offence under the criminal law (Article 4); educate law enforcement personnel and other officials regarding the prohibition against torture (Article 10); ensure a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed (Article 12); ensure the right of individuals to complain to, and have cases promptly and impartially examined by, competent authorities, free from ill-treatment or intimidation (Article 13); ensure that victims of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible (Article 14); and ensure that statements made as a result of torture are not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made (Article 15).
[38] CAT General Comment No 2 (n 13) para 25.

to both torture and ill-treatment'.[39] Joseph et al argue that 'most if not all of the explicit positive duties outlined in CAT are implicitly contained in Article 7 [ICCPR]'.[40]

In addition to the obligations mentioned in the section just above, those enshrined in the UNCAT include the obligations to investigate and take into custody alleged perpetrators of torture and ill-treatment[41] and to prosecute perpetrators.[42] Notably, the CAT has stated that it does not consider Articles 3 to 15 to be an exhaustive list of the positive obligations arising from Article 2 UNCAT.[43]

Chapter 5 of the thesis examines the present failure of the anti-torture framework to effectively ensure older people's access to redress for so-called 'historic' torture or ill-treatment. The CAT's General Comment No 3 on the content and scope of the positive obligation to ensure redress under Article 14 UNCAT[44] is therefore of particular interest. This General Comment clarifies that 'redress' in Article 14 means the 'comprehensive reparative concept' outlined in the UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[45] In other words, redress under Article 14 UNCAT requires restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[46]

Recognising that Articles 12 and 13 UNCAT are essential aspects of redress under Article 14,[47] the CAT's General Comment No 3 also interprets the positive obligations under Articles 12 and 13 UNCAT. According to the General Comment, Article 12 requires that 'a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment'.[48] The CAT declares that states must 'promptly initiate a process to ensure that victims obtain

[39] ibid para 6.
[40] Sarah Joseph and others, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Boris Wijkstrom ed, OMCT 2006) 186.
[41] UNCAT, (n 1) art 6.
[42] UNCAT, ibid art 7.
[43] ibid.
[44] CAT General Comment No 3 (n 34).
[45] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.
[46] CAT General Comment No 3 (n 34) para 2.
[47] ibid paras 16, 23.
[48] ibid para 25.

redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place'.[49]

The Article 13 UNCAT obligation to ensure access to an effective complaints mechanism requires, among other things, that complaints mechanisms are known and accessible, including in places of deprivation of liberty and to 'persons belonging to vulnerable or marginalized groups, including those who may have limited communication abilities'.[50]

ii. *IACtHR*

In a similar vein to the UNCAT's provisions, the IACtHR has found the 'due diligence' obligation espoused in *Velásquez Rodriguez* to comprise a wide range of specific positive obligations. In *González et al ('Cotton Field') v Mexico*, the IACtHR stated that the 'obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights'.[51] The Court explained that the preventive obligation requires 'that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences'.[52] The Court also held that the obligation 'to guarantee' the Article 5 ACHR right to freedom from torture and ill-treatment requires the state to 'initiate, ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the perpetrators'.[53] In the *Cotton Field* case, the IACtHR further held that, in circumstances where violence against women was widespread, the due diligence obligation required 'comprehensive measures' to deal with the structural causes of such violence and the culture of impunity for it.[54]

The IACtHR further relies on the 'right of access to justice' under Articles 8 and 25 ACHR to espouse specific positive obligations to respond to torture or ill-treatment. In *Garcia Lucero v Chile*, for example, the Court held that Articles 8 and 25 ACHR require the state to investigate

[49] ibid para 27.
[50] ibid para 23.
[51] IACtHR, *'Cotton Field'* (n 20) para 252.
[52] ibid para 252.
[53] ibid para 290.
[54] ibid paras 258, 285.

suspected torture or ill-treatment 'once the State authorities are aware of the facts'[55] and even in the absence of a complaint,[56] and also to make available 'legal and institutional mechanisms that allow those affected to claim reparation'.[57] The Court in *Garcia Lucero* also drew attention to Articles 1, 6 and 8 of the IACPPT, which, respectively, require States to prevent and punish torture,[58] ensure that torture is punishable by law and is in fact punished,[59] and ensure access to an effective complaints mechanism and an investigation whenever there is 'an accusation or well-grounded reason to believe that an act of torture has been committed'.[60] The IACtHR holds that states are obliged to provide reparation for torture or ill-treatment pursuant to Article 63(1) ACHR, which enshrines the right to a remedy for any breach of the Convention. In both the *Cotton Field* case and *Garcia Lucero*, the IACtHR demonstrated an expansive understanding of the concept of reparation, similar to the CAT's; the judgments referred to elements of reparation including investigation, prosecution and punishment of those responsible;[61] measures of satisfaction;[62] guarantees of non-recurrence;[63] rehabilitation;[64] and compensation.[65]

iii. *ECtHR*

The ECtHR has in numerous cases elaborated specific positive obligations which inhere in the overarching positive obligation 'to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals'.[66] In fact, in *Premininy v Russia,* the ECtHR characterised the overarching positive obligation arising from Articles 1 and 3 ECHR, taken together, as an obligation 'to prevent *and provide redress for* torture and other forms of ill-treatment' (emphasis added).[67] In *A v United Kingdom*, the

[55] IACtHR, *García Lucero et al v Chile*, Judgment of 28 August 2013 (Preliminary objection, merits and reparations) Series C No 267 para 122.
[56] ibid para 124.
[57] ibid paras 182–183.
[58] IACPPT (n 4) art 1.
[59] ibid art 6.
[60] ibid art 8.
[61] IACtHR, *'Cotton Field'* (n 20) paras 454–55; IACtHR, *García Lucero et al v Chile* Judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No 267 para 220.
[62] IACtHR, *'Cotton Field'* (n 20) paras 468–471; IACtHR, *García Lucero et al v Chile* (n 61) para 226.
[63] IACtHR, *'Cotton Field'* (n 20) paras 502–543.
[64] IACtHR, *'Cotton Field'* (n 20) para 549; IACtHR, *García Lucero et al v Chile* (n 61) paras 230–33.
[65] IACtHR, *'Cotton Field'* (n 20) paras 561–83; IACtHR, *García Lucero et al v Chile* (n 61) paras 243–46.
[66] See text to (n 23).
[67] *Premininy v Russia* (2016) 62 EHRR 18 para 72.

ECtHR held that the preventive obligation includes the requirement to ensure 'effective deterrence' against torture and ill-treatment.[68] This specific obligation was held in *MC v Bulgaria* to require the state 'to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.[69] In *Premininy*, as in many other cases, the ECtHR held that the overarching positive obligation includes the requirement 'to carry out a thorough and effective investigation'[70] of incidents of torture or ill-treatment, which investigation 'should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.'[71] In *Ananyev v Russia*, the Court held that the right to an effective remedy under Article 13 ECHR, when considered together with Article 3 ECHR, requires the state to ensure both preventive and compensatory remedies.[72] In other words, the state has to establish 'an effective mechanism in order to put an end to any such treatment rapidly'[73] and also ensure 'an enforceable right to compensation for the violation that has already occurred'.[74]

iv. *AfrCmHPR*

The African Commission holds that states are obliged to investigate allegations of torture or ill-treatment,[75] although some commentators have noted that 'this duty to investigate has been interpreted more restrictively by the African Commission than by other regional bodies'.[76] In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission stated that '[a] single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State. Rather, the test is whether the State undertakes its duties seriously'.[77] The Commission added that 'actions by State employees, the police, justice, health and welfare departments, or the existence of government programmes to prevent and protect

[68] *A v United Kingdom* (1999) 27 EHRR 611 para 22.
[69] *MC v Bulgaria* (2005) 40 EHRR 20 para 153.
[70] *Premininy v Russia* (n 67) paras 72, 74.
[71] ibid para 74.
[72] *Ananyev v Russia* (2012) 55 EHRR 18 paras 96–98.
[73] ibid para 98.
[74] ibid para 97.
[75] See Association for the Prevention of Torture (APT) and Center for Justice and International Law (CEJIL), 'Torture in International Law: A Guide to Jurisprudence' (2008) 132, citing AfrCmHPR, *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, Communication No 74/92 (11 October 1995) para 22; AfrCmHPR, *Amnesty International and Others v Sudan*, Communication Nos 48/1990, 50/1991, 52/1991, 89/1993 (15 November 1999) para 56; AfrCmHPR, *Law Office of Ghazi Suleiman v Sudan,* Communication Nos 222/1998 and 229/1999 (29 May 2003) para 46; AfrCmHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 25) para 146.
[76] APT and CEJIL (n 75) 132.
[77] AfrCmHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 25) para 158.

victims of violence are all concrete indications for measuring due diligence'.[78] The Commission added that the 'due diligence requirement encompasses the obligation both to provide and enforce sufficient remedies to survivors of private violence', and that 'the existence of a legal system criminalizing and providing sanctions for assault and violence would not in itself be sufficient; the Government would have to perform its functions to "effectively ensure" that such incidents…are actually investigated and punished'.[79]

C. *Identifying torture or ill-treatment*

The key to triggering the obligations summarised above is the identification of conduct as torture or ill-treatment. In other words, once torture or ill-treatment is recognised as such, states are absolutely prohibited from perpetrating it and absolutely bound by their positive obligations in respect of it (albeit the precise content of positive obligations is subject to interpretation depending on context[80]).

The problem that this thesis addresses is the international human rights treaty bodies' and other actors' failure to deal with various forms of mistreatment of older people through the rule against torture and ill-treatment. As stated above, the first step in employing the anti-torture normative framework to tackle rights violations is to recognise the experiences of those who are suffering rights violations as torture or ill-treatment. Chapters 3, 4 and 5 use concrete examples of the mistreatment of older people to analyse whether dignity and vulnerability reasoning could enable the treaty bodies and other human rights actors to recognise instances of torture or ill-treatment of older people more effectively. The analytical framework according to which the treaty bodies currently assess whether experiences amount to torture or ill-treatment is therefore of vital relevance to the thesis' examination. One of the thesis' aims is to establish whether the concepts of dignity and vulnerability could fit into this framework as lenses that enhance the framework's functioning.

[78] ibid (n 25) para 159.
[79] ibid.
[80] See Natasa Mavronicola, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723, 738.

This section first discusses some overarching aspects of the analytical framework that the treaty bodies use to define torture and cruel, inhuman and degrading treatment. It then examines the 'minimum threshold of severity' concept and the factors that are relevant to it.

i. *General definitional aspects*

The question of what conduct amounts to torture or ill-treatment, either by states or by non-state actors, is a thorny one. Identifying torture and cruel, inhuman and degrading treatment, respectively, is a notoriously fact-specific and 'relative'[81] endeavour. Edwards opines that '[a]rticulating the meaning of "torture" and other forms of inhuman treatment under international law continues to be one of the greatest juridical challenges for the UN treaty bodies, and other international courts and tribunals'.[82] The uncertainty regarding what constitutes torture and ill-treatment appears to be of both disadvantage and potential benefit to older people. On the one hand, Chapters 3, 4 and 5 of the thesis argue that the treaty bodies' understandings of torture and ill-treatment and other key concepts under the anti-torture norm are open to influence by discriminatory and paternalistic attitudes and societal behaviours. On the other hand, the thesis also argues that the malleability of the concepts of torture and ill-treatment presents an opportunity for dignity and vulnerability reasoning to influence the treaty bodies' and other actors' assessment of older people's experiences of mistreatment.

The ECtHR appears to be unique among the human rights treaty bodies in its regular practice of explicitly identifying torture, inhuman treatment or punishment and degrading treatment or punishment in its judgments.[83] The HRC, by contrast, is generally reluctant to distinguish between torture and other forms of ill-treatment, preferring to pronounce, simply, violations of Article 7.[84] Tobias Kelly notes the CAT's similar approach, explaining that members of the CAT 'argue, for example, that they do not want to create a clear distinction between torture

[81] See *Ireland v United Kingdom* (1979-80) 2 EHRR 25 para 162.
[82] Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 205.
[83] The ECtHR has repeatedly stated that it must have regard to the distinction because 'it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering': *Ireland v United Kingdom* (n 81) para 167; *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 1030 para 426; *Selmouni v France* (2000) 29 EHRR 403 para 97.
[84] See HRC General Comment No 20 (n 107) para 4: 'The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.'

and cruel, inhuman or degrading treatment or punishment, as this will create a line to which states will automatically move'.[85] The CAT states that '[i]n practice, the definitional threshold between ill-treatment and torture is often not clear'.[86] Burgorgue-Larsen and Úbeda De Torres opine of the IACtHR's approach that '[t]he criteria necessary to identify forms of treatment other than torture that are prohibited under Article 5(2) have not been (and maybe never will be) developed with…analytical rigour'.[87] They contend that, even though the IACtHR has made efforts to delineate cruel and inhuman treatment from degrading treatment by referring to ECtHR case law, 'the conclusions [that the Court] reaches are always all-encompassing rather than precise, and the differences that were originally highlighted disappear'.[88]

Most of the treaties that prohibit torture and ill-treatment do not contain a definition of either torture or ill-treatment ('cruel, inhuman or degrading' treatment or punishment in the UN, Inter-American and African Union systems;[89] 'inhuman or degrading' in Europe;[90] and 'cruel, degrading, humiliating or inhuman' in the Arab Charter[91]). However, the UNCAT defines both torture and ill-treatment[92] and the IACPPT defines torture.[93] The universal and regional treaty

[85] Tobias Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (University of Pennsylvania Press 2012) 153.
[86] CAT General Comment No 2 (n 13) para 3.
[87] Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights* (n 94) 379.
[88] ibid. The authors' contention is exemplified by the judgment of the IACtHR in *Loayza Tamayo v Peru*, Judgment of 17 September 1997 (Merits) Series C No 33. The Court held at para 58 that each of the following was a form of 'cruel, inhuman and degrading treatment': being held incommunicado; being exhibited through the media wearing a degrading garment; being held in solitary confinement in a cell with no natural light; suffering blows and maltreatment, including total immersion in water and threats of further violence; and having a restrictive visiting schedule.
[89] UNCAT (n 1) art 16; ICCPR (n 2); ACHR (n 3); African Charter (n 6).
[90] ECHR (n 5).
[91] Arab Charter (n 8).
[92] UNCAT (n 1) art 1(1) defines torture as follows:

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

UNCAT (n 1) art 16 defines ill-treatment, which does not amount to torture but is nonetheless prohibited, as:

> other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

[93] IACPPT (n 4):

> Article 2
> For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended

bodies all draw on the UNCAT definitions of torture and ill-treatment in their jurisprudence, and the IACmHR and IACtHR also refer to the IACPPT.[94]

Intent and purpose are key features distinguishing torture from other forms of ill-treatment. These factors are, perhaps, the only bright dividing lines in the definitional framework. Intentional infliction of pain and suffering and intent to inflict it for a specific, prohibited purpose are both requirements of torture as it is defined in the UNCAT[95] and the IACPPT.[96] The same is true in the European and African systems.[97] According to the CAT, the 'elements of intent and purpose in Article 1 [UNCAT] do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances'.[98] The CAT's General Comment No 2 states that 'the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act

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to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Article 3

The following shall be held guilty of the crime of torture:

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

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

[94] Burgorgue-Larsen and Úbeda De Torres note that, in addition to the UNCAT, the IACPPT 'is considered by the Inter-American Court as an appropriate instrument for the interpretation of Article 5(2) [ACHR]…provided the defendant State has ratified it': Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Rosalind Greenstein tr, Oxford University Press 2011) 375.

[95] UNCAT (n 1) art 1. Nowak explains that 'Intent must intend that the conduct inflict severe pain or suffering and intend that the purpose be achieved by such conduct… If severe pain or suffering is inflicted, for instance, in the course of a fully justified medical treatment, such conduct cannot constitute torture because it lacks both the purpose and intent enumerated in Article 1 CAT': Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 Human Rights Quarterly 809, 830 citing J. Hermann Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) 119.

[96] IACPPT (n 4) art 2.

[97] The ECtHR has held that torture under Article 3 ECHR requires 'deliberate inhuman treatment causing very serious and cruel suffering': *Ireland v United Kingdom* (n 81) para 167. The ECtHR has also held that the purposive element in Article 1 UNCAT applies to the definition of torture under Article 3 ECHR: *Ilhan v Turkey* (2002) 34 EHRR 869 para 85. See also David Harris and others, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 238.

In the case of *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, the African Commission relied on the Article 1 UNCAT definition of torture to evaluate whether the respondent State Party had violated Article 5 of the African Charter: AfrCmHPR, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication No 334/06 (1 March 2011) para 162.

[98] CAT General Comment No 2 (n 13) para 9. Joseph, Schultz & Castan opine that 'acts that would not cause extreme pain and suffering to an ordinary person are normally outside the definition [of torture, as] the requisite intent would be missing, unless the torturer was aware of the victim's special susceptibilities': Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, Oxford University Press 2005) 197.

constitutes torture'.[99] A 2008 report of the UN Special Rapporteur on Torture argued that '[i]n regard to violence against women, the purpose element is always fulfilled, if the acts can be shown to be gender-specific, since discrimination is one of the elements mentioned in the CAT definition'.[100] The Special Rapporteur on Torture, in his 2013 report on abuses in health-care settings, noted that intent under Article 1 UNCAT 'can be effectively implied where a person has been discriminated against on the basis of a disability'.[101]

By contrast, it appears that the Article 16 UNCAT definition of ill-treatment can be satisfied by the unintentional effects of conduct. This is relevant to the mistreatment of older people in care settings or through the absence of care, given that care practices and care systems may be characterised as resulting from benevolent intentions and/or from a state's desire to use its limited resources wisely. Both Nowak and Juan Mendez (in his capacity as Special Rapporteur on torture) have reached the conclusion that negligent conduct may constitute ill-treatment.[102] This conclusion seems justified by the absence of any reference to intent in Article 16 UNCAT.[103] Several commentators have highlighted case law where ill-treatment was identified notwithstanding the absence of intent.[104] The ECtHR, meanwhile, has held that in considering whether treatment is degrading, 'one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned,

[99] CAT General Comment No 2 (n 13) para 20.
[100] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (15 January 2008) UN Doc A/HRC/7/3 para 30.
[101] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 para 20.
[102] See Nowak, 'What Practices Constitute Torture?' (n 95) 830; UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (n 101) para 20, citing UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (28 July 2008) UN Doc A/63/175 para 49.
[103] UNCAT (n 1).
[104] For example: Joseph notes the HRC's decision in *Rojas Garcia v Colombia*, finding the author and his family to have suffered ill-treatment contrary to Article 7 ICCPR where State officials mistook his identity and stormed his house: Joseph and others, *Seeking Remedies for Torture Victims: A Handbook* (n 40) 157, citing HRC, *Rafael Armando Rojas García v Colombia*, Communication No 687/1996 (3 April 2001) UN Doc CCPR/C/71/D/687/1996; Nowak cites the example of a 'notorious case' where the Austrian Supreme Court made a finding of cruel or inhuman treatment in circumstances where a person taken into custody was forgotten about by the authorities and survived twenty days without food or water in constant fear of slowly starving to death: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel 1993) 130, citing the decision of the Supreme Court of Austria in EuGRZ 571 (20 May 1981); Joseph, Schultz and Castan also point to the HRC's findings of Article 7 ICCPR violations where mothers have suffered mental anguish as a result of the enforced disappearance of their adult children (they note that the 'authorities probably had no particular intention to cause severe pain and suffering to the mother, so the treatment would not fall within Article 1 CAT'): Joseph and others, *Seeking Remedies for Torture Victims: A Handbook* (n 40) 219 citing HRC, *María del Carmen Almeida de Quinteros et al v Uruguay*, Communication No 107/1981 (21 July 1983) UN Doc CCPR/C/OP/2 and HRC, *Jegatheeswara Sarma v Sri Lanka*, Communication No 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000.

although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3'.[105] In *Price v United Kingdom*, the ECtHR found inadequate prison conditions to amount to degrading treatment despite there being 'no evidence… of any positive intention to humiliate or debase the applicant'.[106]

Physical pain or suffering is not essential for a finding of torture or ill-treatment; the treaty bodies agree that psychological pain or suffering is sufficient.[107] For example, the HRC has found violations of Article 7 ICCPR where family members have suffered mental anguish following their relative's disappearance and the authorities' refusal to provide information.[108] The IACtHR has found violations of Article 5 ACHR,[109] and the ECtHR has found violations of Article 3 ECHR,[110] in similar circumstances. In *Aydin v Turkey*, the ECtHR held that the rape of a 17-year-old girl in detention by a state official amounted to torture, not just because of the circumstances of the rape and the 'acute physical pain of forced penetration' but also because 'rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence'.[111] The AfrCmHPR has held that the African Charter's prohibition of torture and ill-treatment 'includes actions which cause serious physical or psychological suffering or humiliate the individual or force him or her to act against his will or conscience'.[112]

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[105] *Price v United Kingdom* (2002) 34 EHRR 53 para 24. See also *Peers v Greece* (2001) 33 EHRR 51 paras 67–68 and 74.
[106] *Price v United Kingdom* (n 105) para 30.
[107] See, for example, HRC General Comment No 20, 'Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev 9 (Vol I) paras 2, 5. See also David Harris and others, *Law of the European Convention on Human* Rights (3rd edn, Oxford University Press 2014) 238, citing *Ireland v United Kingdom* (n 81) para 167; *Tyrer v United Kingdom* (1979–80) 2 EHRR 1; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293; *Soering v United Kingdom* (1989) 11 EHRR 439.
[108] See, for example, Joseph and others, *Seeking Remedies for Torture Victims: A Handbook* (n 40) 171 citing HRC, *del Carmen Almeida de Quinteros, María et al v Uruguay*, Communication No 107/1981 (21 July 1983) UN Doc CCPR/C/OP/2; HRC, *Bousroual v Algeria*, Communication No 1085/2002 (15 March 2006) UN Doc CCPR/C/86/D/1085/2002 para 9.8; HRC, *Sarma, Jegatheeswara v Sri Lanka,* Communication No 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000 para 9.5; HRC, *Natalia Schedko v Belarus*, Communication No 886/1999 (3 April 2004) UN Doc CCPR/C/77/D/886/1999; HRC, *Mariam Sankara et al v Burkina Faso*, Communication No 1159/2003 (28 March 2006) UN Doc CCPR/C/86/D/1159/2003.
[109] See, for example, IACtHR, *Blake v Guatemala*, Judgment of 24 January 1998 (Merits) Series C No 36; IACtHR, *Goiburú et al v Paraguay*, Judgment of 22 September 2006, Series C No 153.
[110] See, for example, *Kurt v Turkey* (1999) 27 EHRR 373; *Gongadze v Ukraine* (2006) 43 EHRR 967; *Bazorkina v Russia* (2008) 46 EHRR 15; *Yandiyev and others v Russia* App nos 34541/06, 43811/06 and 1578/07 (ECtHR, 10 October 2013). In *Çakici v Turkey* (2001) 31 EHRR 5, however, the ECtHR held (at para 98) that an Article 3 violation in respect of a relative of a 'disappeared' person 'will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.'
[111] *Aydin v Turkey* (1998) 25 EHRR 251 para 83.
[112] See, for example, AfrCmHPR, *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v* Nigeria, Communication Nos 137/94, 139/94, 154/96 and 161/97 (31 October 1998) para 79.

ii. *Minimum threshold of severity*

Although the human rights treaty bodies do not provide a definitive list of what acts constitute torture or ill-treatment, they agree that conduct and/or suffering must reach a minimum level of 'severity' in order to amount to torture or one of the classes of ill-treatment.[113] The treaty bodies have espoused some conceptual approaches that help them to assess the severity of a person's experience of mistreatment. The below paragraphs discuss the notion of the 'relativity' of 'severity', and the particular forms of suffering that the treaty bodies tend to associate with torture and each category of ill-treatment.

The treaty bodies agree that the severity of a given form of conduct is relative and that it depends on various objective and subjective factors. In *Pretty v United Kingdom*, the ECtHR explained that the minimum threshold of severity assessment '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'.[114] In other judgments, the ECtHR has added the 'nature and context of the treatment' as further factors to consider.[115] The HRC's jurisprudence is similar: in *Vuolanne v Finland*, the HRC held that 'what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as

[113] The ECtHR stated this principle in *Ireland v United Kingdom* (1979-80) 2 EHRR 25 at para 162: 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'. See also, for example, *Kudla v Poland* (2002) 35 EHRR 11 para 91; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 para 94; *Pretty v United Kingdom* (2002) 35 EHRR 1 para 52. The African Commission has approved the ECtHR's statement of principle in *Ireland v United Kingdom*: see, for example, AfrCmHPR, *Huri-Laws v Nigeria*, Communication No. 225/1998 (6 November 2000) para 41. The HRC and CAT have also stated that the classification of various forms of ill-treatment relates to their severity: see HRC General Comment No 20 (n 107) para 4 ('the distinctions [between the different kinds of punishment or treatment] depend on the nature, purpose and severity of the treatment applied') and CAT General Comment No 2 (n 13) para 10 ('In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes'). The IACtHR has related the classification of torture and other forms of ill-treatment to the 'different degrees of intensity' of their physical and psychological consequences: see, for example, IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006, Series C No 149 para 127; IACtHR, *Loayza-Tamayo v Peru* (n 88) para 57.

[114] *Pretty v United Kingdom* (2002) 35 EHRR 1 para 52. See also, for example, *Ilaşcu and Others v Moldova and Russia* (n 83) para 427; *Ireland v United Kingdom* (n 81) para 162; *Mouisel v France* (2004) 38 EHRR 34 para 37. David Harris and others, *Law of the European Convention on Human* Rights (3rd edn, Oxford University Press 2014) cite (at 236) as to age and sex, *Aydin v Turkey* (n 111); as to mental health, *Keenan v United Kingdom* (2001) 33 EHRR 38 and as to other personal circumstances, *Selçuk and Asker v Turkey* (1998) 26 EHRR 477.

[115] For example, *Kudla v Poland* (n 113) para 91.

well as the sex, age and state of health of the victim'.[116] Likewise, in *Bueno Alves v Argentina*, the IACtHR held that the 'degree of suffering endured by the victim' is determined by reference to 'objective' factors such as the duration, manner and physical or psychological effects of the relevant conduct, and 'subjective' factors such as the person's age, gender, state of health or other personal circumstances.[117]

Section C(i) above argued that the flexibility of the definitions of torture and ill-treatment has the potential to both disadvantage older people and allow for greater protection of their rights. The inclusion of a range of objective and subjective factors in the minimum threshold of severity assessment holds similar double-edged potential. The analysis in Chapters 3 and 4 of the thesis suggests that 'objective' factors such as the nature and context of a person's treatment may provide vehicles through which discriminatory practices and attitudes can influence the minimum threshold of severity assessment and draw attention away from the person's human experience. However, the thesis also argues that dignity and vulnerability reasoning, used as part of the minimum threshold of severity assessment, could highlight the 'objective' dignity violations that older people experience and thus combat discriminatory attitudes to older people that are based on assumptions about their 'subjective' characteristics.

In addition to the ECtHR's regular practice of identifying a specific category of ill-treatment, or torture, some of the other treaty bodies' case law distinguishes between torture and cruel, inhuman and degrading treatment. Where distinctions are made, it is possible to discern general understandings of the type of suffering required to meet the minimum threshold of severity for the various categories of prohibited conduct.

Torture generally involves acts of deliberate brutality causing extreme physical pain or mental anguish.[118] Nowak argues that severe physical or mental suffering is particularly important to

[116] HRC, *Antti Vuolanne v Finland* (n 113) para 9.2. Edwards notes that the Committee against Torture, in its lists of issues for state party reports, 'has referred to gender, age, and geographical location as relevant to a determination of torture': Edwards, *Violence against Women under International Human Rights Law* (n 82) 253.
[117] IACtHR, *Bueno Alves v Argentina,* Judgment of 11 May 2007 (Merits, Reparations and Costs) Series C No 164 at para 83.
[118] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel 1993). Of the cases where the HRC has expressly found torture to have occurred, Nowak highlights (at 131) several communications against Uruguay, Colombia and Bolivia, 'where the victims had been subjected to a variety of practices during interrogations in the initial period of (usually "incommunicado") detention: systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersion in a mixture of blood, urine, vomit and excrement ("submarino"), standing for great lengths, threats [and] simulated executions or amputations'. The ECtHR has found torture to have occurred in cases involving rape by a State agent while in

the definitions of cruel and inhuman treatment, too.[119] According to Nowak, the terms 'cruel' or 'inhuman' treatment capture 'all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements.'[120]

The treaty bodies' jurisprudence suggests that intense physical or mental suffering is required for a finding of cruel treatment or inhuman treatment. In *Jalloh v Germany*, for example, the ECtHR recalled previous findings of inhuman treatment where 'inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering'.[121] The ECtHR's decision in *Fedotov v Russia* provides another example of inhuman treatment: here, the applicant was unlawfully detained for 22 hours in a cell unfit for an overnight stay, without food or drink or unrestricted access to a toilet. The Court held that '[t]hese unsatisfactory conditions exacerbated the mental anguish caused by the unlawful nature of his detention'.[122]

Joseph, Schultz and Castan[123] note that the HRC has found 'cruel and inhuman' treatment to have occurred, for example, in cases involving beatings, mock execution, and solitary confinement without adequate bedding, sanitation, light, food, recreational facilities or medical care. [124] Heyns notes that the African Commission has found 'inhuman treatment of both the

custody (*Aydin v Turkey* (n 111)); stripping naked and suspension by the arms, tied behind the back (*Aksoy v Turkey* (1997) 23 EHRR 553); force feeding of a prisoner using restraints and a tube when not medically necessary (*Nevmerzhitsky v Ukraine* (n 113)); complete isolation and severe physical neglect in solitary confinement on death row (*Ilaşcu and Others v Moldova and Russia* (n 83)); and electric shock treatment for the purpose of obtaining a confession (*Mikheyev v Russia*, App no 77617/01 (ECtHR, 26 January 2006)). The African Commission applied the Article 1(1) UNCAT definition and found torture to have occurred in the case of *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication No 334/06 (1 March 2011), where the victims were subjected to 'repeated electrical shocks, beatings, prolonged hanging by the leg, binding and blindfolding aimed at their complete disorientation' (para 164). In the case of *Bueno Alves v Argentina* (n 117), the IACtHR took account of the definition of torture in the IACPPT and in universal instruments and found that the applicant had suffered torture where he had been beaten on the ears and stomach by police agents, insulted because of his nationality and deprived of his medication (para 74). The Court arrived at this conclusion by considering the intentional nature of the treatment, the fact that its purpose was to force the applicant to make a confession, and fact that it had caused the applicant 16.7 percent hearing loss and deep psychological suffering (para 84).

[119] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (n 118) 131.

[120] ibid.

[121] *Jalloh v Germany* (2007) 44 EHRR 32 para 68, citing *Labita v Italy* (2008) 46 EHRR 50 para 120.

[122] *Fedotov v Russia* (2007) 44 EHRR 26 para 68.

[123] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press 2005) 214.

[124] HRC, *Linton v Jamaica*, Communication No 255/1987 (22 October 1992) UN Doc CCPR/C/46/D/255/1987; HRC, *Michael Bailey v Jamaica*, Communication No 334/1988 (31 March 1993) UN Doc CCPR/C/47/D/334/1988; HRC, *Dwayne Hylton v Jamaica*, Communication No 407/1990 (15 July 1994) UN Doc CCPR/C/51/D/407/1990; HRC, *Fray Deidrick v Jamaica*, Communication No 619/1995 (9 April 1998) UN Doc CCPR/C/62/D/619/1995.

detainee and the family' to have occurred in circumstances of 'holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held'.[125]

Degrading treatment has a particular connection with humiliation. Surveying the HRC jurisprudence regarding degrading treatment, Nowak contends that the 'severity of the suffering imposed is of less importance here than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself'.[126] The AfrCmHPR demonstrated a similar understanding of (inhuman and) degrading treatment in *Doebbler v Sudan*, where it stated: 'Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.'[127] In *Loayza Tamayo v Peru*, the IACtHR held that '[t]he degrading aspect [of treatment in violation of Article 5 ACHR] is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance'.[128]

Feelings of humiliation and debasement are, likewise, key to the ECtHR's understanding of degrading treatment, as expressed in *Jalloh v Germany*.[129] In several cases, the ECtHR has held that 'it is sufficient if the victim is humiliated in his or her own eyes'.[130] The ECtHR's decision in *Price v United Kingdom* demonstrates that the Court does not require evidence of 'any

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[125] Christof Heyns, 'Civil and Political Rights in the African Charter' in Evans M and Murray R (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press 2000), citing AfrCmHPR, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Communication Nos 48/90, 50/91 and 89/93 (15 November 1999) para 54.

[126] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (n 118) 133 citing *Tyrer v United Kingdom* (n 107).

[127] AfrCmHPR, *Curtis Francis Doebbler v Sudan*, Communication No. 236/2000 (4 May 2003) para 36.

[128] IACtHR, *Loayza-Tamayo v Peru* (n 88) para 57, citing *Ireland v United Kingdom* (n 81) para 167.

[129] *Jalloh v Germany* (n 121) para 68:

> Treatment has been considered 'degrading' when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience. Furthermore, in considering whether treatment is 'degrading' within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (citing, among others, *Keenan v United Kingdom* (n 114) para 110; *Raninen v Finland* (1998) 26 EHRR 563 para 55; *Peers v Greece* (n 105) paras 68, 74; *Price v United Kingdom* (n 105) para 24).

[130] See, for example, *Tyrer v United Kingdom* (n 107) para 32; *Smith and Grady v the United Kingdom* (2000) 29 EHRR 493 para 120; *Budina v Russia* (Admissibility), App no 45603/05 (ECtHR,18 June 2009) 6.

positive intention to humiliate or debase the applicant'[131] in order to find that degrading treatment has occurred. Here, the Court held that the applicant, who suffered from quadriplegia, was subjected to degrading treatment as a result of being detained for several nights in inadequately equipped conditions, where she could not use the bed, was forced to rely on the assistance of male officers to lift her on and off the toilet, and 'had to be catheterised because the lack of fluid intake and problems in getting to the toilet had caused her to retain urine'.[132]

In addition to humiliation, the concept of degrading treatment also appears to have a particular connection with the concept of human dignity, at least according to the ECtHR's jurisprudence. The link between the rule against torture and ill-treatment and dignity is examined in further detail in Chapter 2 of the thesis. In numerous cases, the ECtHR has highlighted the 'particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of art.3 of the Convention and respect for "dignity"'.[133] In much of its recent Article 3 ECHR case law, the Court has held that treatment will be considered degrading 'when it humiliates or debases an individual, showing a lack of respect for, *or diminishing, his or her human dignity*, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'[134] (emphasis added).

In *Svinarenko and Slyadnev v Russia*,[135] the ECtHR demonstrated dignity's potential to draw attention to the objectively degrading nature of the State's conduct. Here, the defendants in criminal proceedings were placed unnecessarily in metal cages during court appearances.[136] The Court concluded that 'holding a person in a metal cage during a trial constitutes in itself—having regard to its objectively degrading nature which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society—an affront to human dignity in breach of Article 3'.[137] The relevance of dignity to the identification of forms of torture or

[131] *Price v United Kingdom* (n 105) para 30.
[132] ibid paras 27–30.
[133] *Bouyid v Belgium* (2016) 62 EHRR 32 para 90, citing *Kudla v Poland* (n 113) para 94; *Valasinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001) para 102; *Yankov v Bulgaria* (2005) 40 EHRR 36 para 114; *Svinarenko and Slyadnev* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 138.
[134] *Svinarenko and Slyadnev* (n 136) para 115, citing *MSS v Belgium and Greece* (2011) 53 EHRR 2 para 220 and *El-Masri v Macedonia* (2013) 57 EHRR 25 para 202.
[135] *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014).
[136] See, for example, *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014); HRC, *Mikhail Pustovoit v Ukraine*, Communication No 1405/2005 (20 March 2013) UN Doc CCPR/C/110/D/1405/2005; HRC, *Víctor Alfredo Polay Campos v Peru*, Communication No 577/1994 (6 November 1997) UN Doc CCPR/C/61/D/577/1994.
[137] ibid.

ill-treatment is discussed in detail in the next chapter of the thesis.

II. Contextual Aspects of the Norm

This part of the chapter examines how particular contexts affect the treaty bodies' specification of torture and ill-treatment, and of positive obligations, under the anti-torture norm. The term 'specification' is borrowed from Mavronicola, who uses it to describe the ECtHR's process of determining both the meaning of torture or ill-treatment and the content of the anti-torture norm's positive obligations in any given situation.[138] This part of the chapter focuses on contexts of particular relevance to older people's frequent experiences of mistreatment.

Section A addresses contexts of deprivation of liberty. This section contends that deprivation of liberty, at least in the form of state custody, prompts the treaty bodies to undertake a more sensitive minimum threshold of severity assessment and to impose heightened positive obligations on states. One result of this, which the section points out, is that states' omissions to provide the basic resources necessary to meet individuals' health and personal needs are deemed capable of constituting acts of ill-treatment.

Section B focuses on further contexts where the treaty bodies recognise the particular 'vulnerability' of individuals and groups. This section argues that, similarly to deprivation of liberty, the treaty bodies' recognition of 'vulnerability' sensitises their minimum threshold of severity assessment and intensifies their scrutiny of states' compliance with their positive obligations, with the effect of heightening or making more specific states' positive obligations under the norm.

Section C addresses suffering arising from socio-economic deprivation. This section argues that there is a general ideological resistance to the notion of using the anti-torture norm to respond to suffering caused by socio-economic conditions. It argues that the treaty bodies understand torture and ill-treatment through the paradigm of deliberate, targeted state actions rather than as societal conditions that the state has the power to influence. This section claims, however, that the treaty bodies' reluctance to recognise socio-economic deprivation as capable

[138] See Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014) generally and at 12 in particular.

of constituting ill-treatment is already challenged and is open to further challenge by vulnerability reasoning under the anti-torture norm. This section also highlights several treaty bodies' and commentators' contentions that concern for human dignity demands an approach to recognising torture and ill-treatment that responds to human experience rather than being limited by the cause of suffering.

Section D discusses situations of non-consensual medical treatment. It argues that the treaty bodies' traditional approach to specifying torture and ill-treatment in this context is fundamentally challenged by the Convention on the Rights of Persons with Disabilities (CRPD).[139] The section argues that although there is significant confusion among a number of treaty bodies regarding the circumstances in which non-consensual medical treatment is permitted under the rule against torture and ill-treatment, the CRPD presents a mandate for the norm to adapt to provide more effective human rights protection.

A. *Deprivation of liberty*

Within the anti-torture framework, individuals who are deprived of their liberty are considered to be particularly 'vulnerable' in the sense of being at risk of experiencing violations of the norm.[140] Detainees' vulnerability is understood to arise from their powerlessness,[141] which is recognised as deriving from others' physical control over them and their dependence on others for the environment and resources necessary to meet their basic needs.[142]

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[139] Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 (CRPD).

[140] See, for example, HRC General Comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' (10 April 1992) UN Doc HRI/GEN/1/Rev 9 (Vol 1) para 3; *MS v United Kingdom* (2012) 55 EHRR 23; *Bouyid v Belgium* (2016) 62 EHRR 32 para 107; IACtHR, *'Street Children' (Villagran Morales et al) v Guatemala*, Judgment of 19 November 1999 (Merits) Series C No 63 para 166; IACtHR, *Laoyza Tamayo v Peru* (n 88) para 57. See further Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2014) 154.

[141] See, for example, Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23 Netherlands Quarterly of Human Rights 674, 678: 'it is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure'.

[142] See, for example, *Bouyid v Belgium* (n 133) para 107, where the ECtHR explained the vulnerability of detainees as deriving from the control which is exercised over them: 'persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning…and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability.' See further IACtHR, *Case of 'Juvenile Reeducation Institute' v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 para 152: 'there is a special relationship and interaction of subordination between the person deprived of his liberty and the State; typically the State can be rigorous in regulating what the prisoner's rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity.'

The international community's recognition of detainees' vulnerability led to its enshrinement of Article 10 ICCPR, which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.[143] The HRC appears to understand Article 10 ICCPR to be an integral element of the Article 7 ICCPR prohibition of torture and ill-treatment.[144] Indeed, other human rights treaty bodies have recognised this positive obligation towards detainees to be part of the absolute and non-derogable rule against torture and ill-treatment.[145] The ACHR includes a provision broadly equivalent to Article 10 ICCPR in the text of its prohibition of torture and ill-treatment.[146]

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[143] ICCPR (n 2) art 10. See HRC General Comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' (10 April 1992) UN Doc HRI/GEN/1/Rev 9 (Vol 1) para 3: 'Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty'. See also UNGA, 'Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (3 August 2009) UN Doc A/64/215 para 47: 'Any deprivation of personal liberty, even if justified for certain reasons, such as the investigation of crime and the punishment of convicts, carries the risk of directly interfering with human dignity, as it severely restricts individual autonomy and makes detainees powerless. This is the reason why international human rights law establishes strict limits on the power of States to deprive human beings of personal liberty and guarantees the right to human dignity for all detainees.'

[144] See HRC General Comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' (10 April 1992) UN Doc HRI/GEN/1/Rev 9 (Vol 1) para 7, which states that Article 10 ICCPR 'complements for [persons who are deprived of their liberty] the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant'. The General comment further characterises the obligation in Article 10 ICCPR as absolute, similarly to the rule against torture and ill-treatment: see HRC General Comment No 21, ibid para 4 ('Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.') For a contrary opinion, see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights* (n 123) 277; the authors opine that 'article 10 prohibits a less serious form of treatment than that prohibited by article 7'.

[145] See AfrCmHPR, *Huri-Laws v Nigeria,* Communication No 225/1998 (6 November 2000) para 40, referring to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988) UN Doc A/RES/43/173, Principles 1 and 6; *Renolde v France* (2009) 48 EHRR 42 para 120, citing *Kudla v Poland* (n 113) para 94; *Salman v Turkey* (2000) 34 EHRR 17 para 99; IACtHR, *'Juvenile Reeducation Institute' v Paraguay* Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 paras 152–153.

[146] ACHR (n 3) art 5:

> Article 5. Right to Humane Treatment
>
> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> 3. Punishment shall not be extended to any person other than the criminal.
>
> 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
>
> 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
>
> 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

See Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights* (n 94) 370: 'The importance of the "integrity" of every individual cannot be overestimated and, contrary to the European Convention where the concept does not exist as such, is very well protected under Article 5. Similarly, the

This section argues that Article 10 ICCPR and its universal and regional equivalents affect the treaty bodies' specification of torture or ill-treatment in contexts of deprivation of liberty. It is argued that the positive obligation to ensure that detainees are treated humanely and with respect for their dignity intensifies the treaty bodies' scrutiny of states' conduct towards detainees while making the treaty bodies more sensitive to the impact of treatment on the person. The paragraphs in part (i) below outline how the treaty bodies have demonstrated particular sensitivity in their minimum threshold of severity assessments concerning the following: the suffering caused to some individuals by detention in itself, the impact of the use of force on detainees, and the impact of states' failures to provide the basic resources necessary to meet the health and personal needs of detainees.

Following the discussion of the treaty bodies' specification of torture and ill-treatment in contexts of deprivation of liberty, the section briefly argues in part (ii) that the deprivation of liberty context also influences the treaty bodies' specification of positive obligations arising under the umbrella obligation to prevent and protect from torture and ill-treatment. Part (ii) discusses the CAT's General Comment No 2,[147] which reveals the CAT's heightened scrutiny of states' compliance with their preventive obligation where individuals are detained, with the effect of specifying tailored positive obligations within the overarching preventive obligation. Part (ii) also discusses the obligations arising under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[148] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[149]

This section's analysis requires a caveat. Chapter 3 contends that deprivation of liberty has been largely understood under the rule against torture and ill-treatment to mean detention in state custody or detention that has been authorised by the state. It is unclear, therefore, to what extent the methods of specification and the associated positive obligations discussed below apply to individuals who are deprived of their liberty in contexts that the state does not regulate

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treatment of detained people is expressly mentioned so it wasn't necessary for the Inter-American Court itself to enshrine a new right, the right to humane treatment while in detention'.

[147] CAT General Comment No 2 (n 13) para 13.

[148] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT).

[149] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1 February 1989) ETS 126 (ECPT).

or that are otherwise considered private. Section B below argues that the treaty bodies have recognised the particular 'vulnerability' of individuals in situations other than detention and that the treaty bodies' recognition of vulnerability appears to have somewhat similar effects on their specification of prohibited conduct and positive obligations as deprivation of liberty. Chapter 3, meanwhile, argues that all deprivations of liberty experienced by older people, whether in state or non-state settings, should be recognised under the anti-torture norm as deprivations of liberty. Therefore, the thesis contends, the treaty bodies' current approach to the specification of prohibited conduct and positive obligations in the deprivation of liberty context is a template that has significant potential for expansion. The section now turns to examining that template.

i. *Specifying torture or ill-treatment in the detention context*

a. *Impact of detention per se*

The mere fact of being detained does not usually constitute torture or ill-treatment where such detention is legitimate and not in contravention of the right to liberty.[150] However, the ECtHR has demonstrated sensitivity to the effects of detention on individuals with certain characteristics, with the result that sometimes detention in itself will reach the minimum threshold of severity.[151] In *Mouisel v France*, for example, the ECtHR held that the continued detention in prison of a 53-year-old man who was suffering from cancer amounted to inhuman and degrading treatment because it 'undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer'.[152]

Some human rights actors have recognised that arbitrary detention can amount to torture or ill-treatment. In *C v Australia*, for example, the HRC held that the arbitrary detention of an asylum

[150] See, for example, HRC, *Michael Jensen v Australia*, Communication No 762/1997 (22 March 2001) UN Doc CCPR/C/71/D/762/1997 para 6.2; *Nevmerzhitsky v Ukraine* (n 113) para 81.
[151] In *Mouisel v France* (n 114) at para 38, the ECtHR held that '[h]ealth, age and severe physical disability are now among the factors to be taken into account under Article 3 of the Convention…in assessing a person's suitability for detention'.
[152] ibid para 48. Along similar lines, Mavronicola states that in *Farbtuhs v Latvia*, App no 4672/02 (ECtHR, 2 December 2004), the ECtHR 'concluded that the detention of a disabled seventy-nine-year-old applicant was in breach of Article 3 on account of his age, infirmity and state of health': Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014) 103.

seeker violated not only Article 9 ICCPR but also Article 7 ICCPR because of its psychological impact.[153] The Committee recognised that the author had developed a psychiatric illness as a result of the 'protracted period of immigration detention', and that 'there was a conflict between the author's continued detention and his sanity'.[154] Meanwhile, the former Special Rapporteur on torture, Juan E Méndez, argued in a 2013 report that torture or ill-treatment may occur in healthcare settings in the form of 'institutionalization of individuals who do not meet appropriate admission criteria, as is the case in most institutions which are off the monitoring radar and lack appropriate admission oversight'.[155] According to the Special Rapporteur, '[i]nappropriate or unnecessary non-consensual institutionalization of individuals may amount to torture or ill-treatment as use of force beyond that which is strictly necessary'.[156]

b. *Treatment of detained individuals*

Sensitivity to the impact on detained individuals of others' treatment of them has led both the ECtHR and the IACtHR to hold that 'in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3'.[157] The ECtHR has held that where this occurs, it is not necessary to show that the use of force caused injury.[158]

The extension of this principle to the use of restraint in contexts of detention for psychiatric treatment is of particular relevance to the thesis, given older people's frequent experiences of restraint in care settings (discussed in Chapter 3). The IACtHR has held that restraint 'should be used as a last resort and with the only purpose of protecting the patient, or else the medical staff or third persons, when the behavior of the patient involved is such as to pose a threat to their safety'.[159] The Court has added that 'health care staff should apply the least restrictive

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[153] HRC, *C v Australia*, Communication No 900/1999 (28 October 2002) UN Doc CCPR/C/76/D/900/1999.
[154] ibid para 8.4.
[155] UNHRC, 'Report of the Special Rapporteur on torture' (n 101) para 70.
[156] ibid, citing *Mouisel v France* (n 114) para 48 and Nell Monroe, 'Define acceptable: how can we ensure that treatment for mental disorder in detention is consistent with the UN Convention on the Rights of Persons with Disabilities?' (2012) 16(6) The International Journal of Human Rights 902.
[157] See, for example, *Menesheva v Russia* (2007) 44 EHRR 56 para 56; *Selmouni v France* (n 83) para 99; IACtHR, *Loayza-Tamayo v Peru* (n 88) para 57.
[158] *Bures v Czech Republic* App no 37679/08 (ECtHR, 18 October 2012) paras 78, 80.
[159] IACtHR, *Ximenes Lopes v Brazil* Judgment of 4 July 2006 (Merits, Reparations and Costs) Series C No 149 para 134, citing the UN Principles for the Protection of People with Mental Illness and the Improvement of Health Care, UNGA Res 46/119 (17 December 1991) UN Doc A/RES/46/119, Principle 11(11).

possible restraint techniques and only for such period of time as it is absolutely necessary and under conditions which respect the patient's dignity and minimize the risks of impairing his or her health'.[160] The ECtHR has, similarly, held that physical restraint in the detention context 'is a serious measure which must always be justified by preventing imminent harm to the patient or the surroundings and must be proportionate to such an aim'.[161]

A further example of the ECtHR's heightened sensitivity to the impact of others' conduct on a person who is deprived of their liberty is its judgment in *Slyusarev v Russia*.[162] Here, the state authorities took the applicant's glasses when they broke upon his arrest and the applicant then spent five months in detention without glasses despite making several requests to have his old pair returned to him. There was no evidence that his eyesight had deteriorated as a result. The ECtHR held that degrading treatment had occurred because '[t]aking the applicant's glasses could not be explained in terms of the "practical demands of imprisonment"'[163] and 'even if having no glasses had no permanent effect on the applicant's health…it is clear that he could not read or write normally, and, besides that, it must have created a lot of distress in his everyday life, and given rise to a feeling of insecurity and helplessness'.[164]

c. *Omissions as 'acts' of ill-treatment*

The obligation to ensure that detainees are treated humanely and with respect for their dignity has been interpreted by the human rights treaty bodies as requiring states to provide detainees with the resources necessary to meet their basic health and personal needs. The treaty bodies' jurisprudence makes clear that states' omissions to provide resources to individuals in detention may amount directly to acts of ill-treatment.[165] According to the IACmHR, it may be necessary to consider 'the cumulative effect or impact of the conditions of imprisonment to which a

[160] IACtHR, *Ximenes Lopes v Brazil* (n 159) para 134.
[161] *Bures v Czech Republic* (n 158) para 96.
[162] *Slyusarev v Russia* (2013) 57 EHRR 33.
[163] ibid para 43.
[164] ibid para 36.
[165] See, for example, IACmHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (n 22) para 433, citing decisions of the IACmHR (IACmHR, *Dexter Lendore v Trinidad y Tobago* Report No 28/09, Case 12.269 (Merits) (20 March 2009) para 34; IACmHR, *Dave Sewell v Jamaica* Report No 76/02, Case 12.347 (Merits) (27 December 2002) para 116; IACmHR, *Benedict Jacob v Grenada* Report No 56/02, Case 12.158 (Merits) (21 October 2002) para 94; IACmHR, *Whitley Myrie v Jamaica* Report No 41/04, Case 12.417 (Merits) (12 October 2004) para 46) and decisions of the IACtHR (IACtHR, *Vélez Loor v Panama*, Judgment of 23 November 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 218 para 227; IACtHR, *Boyce et al v Barbados*, Judgment of 20 November 2007 (Preliminary Objection, Merits, Reparations and Costs) Series C No 169 para 94). See also, for example, *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 paras 86–87.

person is subjected, in order to determine whether such conditions as a whole have constituted a form of cruel, inhuman and degrading treatment'.[166]

The guiding principle of Article 10 ICCPR, according to the HRC, is that detainees may not be 'subjected to any hardship or constraint other than that resulting from the deprivation of liberty' and that 'respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons'.[167] The ECtHR and IACtHR have both espoused a similar principle.[168] In practice, the treaty bodies interpret the Article 10 ICCPR obligation and its regional equivalents by reference to internationally agreed minimum standards for the treatment of persons deprived of their liberty.[169]

The treaty bodies have found that the obligation to ensure that detainees are treated humanely and with respect for their dignity requires states to ensure, among other things, adequate sanitary facilities, clothing and food; minimum floor space, air and natural light; a separate bed; and opportunity for recreation and contact with the outside world.[170] The treaty bodies

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[166] IACmHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (n 22) ibid.

[167] HRC General Comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' (10 April 1992) UN Doc HRI/GEN/1/Rev 9 (Vol 1) para 3. See also UNGA, 'Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (3 August 2009) UN Doc A/64/215 para 51.

[168] The ECtHR set out its view of the treatment required by Article 3 when people are in detention in *Nevmerzhitsky v Ukraine* (n 113), at para 81:

> the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured (citing *Kudla v Poland* (n 113) paras 92–94), with the provision of the requisite medical assistance and treatment (citing *Aerts v Belgium* (2000) 29 EHRR 50 para 64).

The IACtHR elaborated the obligation as follows, in *Case of 'Juvenile Reeducation Institute' v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 at paras 152 and 153:

> Given [the] unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.

[169] These include the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Res 70/175 (17 December 2015) UN Doc A/RES/65/230 and the European Prison Rules, Council of Europe (CofE) Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies (European Prison Rules). See *Mouisel v France* (n 114) and Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights* (n 123) 283.

[170] See, for example, *Nevmerzhitsky v Ukraine* (n 113) paras 86–87. Regarding the CAT, see APT and CEJIL, 'Torture in International Law: A Guide to Jurisprudence' (n 75) 185, citing CAT, Concluding Observations on Japan (3 August 2007) UN Doc CAT/C/JPN/CO/1; CAT, Concluding Observations on Croatia (11 June 2004) UN Doc CAT/C/CR/32/3; CAT, Concluding Observations on Chile (14 June 2004) UN Doc CAT/C/CR/32/5;

have further interpreted the positive obligation as requiring the provision of healthcare.[171] The Nelson Mandela Rules state that '[p]risoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status'.[172] In *Tibi v Ecuador*, the IACtHR approved the ECtHR's position that the rule against torture and ill-treatment requires the provision of the requisite medical assistance to a person in detention,[173] and added that under Article 5 ACHR '[t]he State must also allow and facilitate examination of the detainees by a physician of their choice or chosen by their legal representative or custodian'.[174]

In numerous cases, the ECtHR has tailored the obligation to provide healthcare to individual needs. For example, in *Renolde v France*, the Court held that 'prisoners known to be suffering from serious mental disturbance and to pose a suicide risk require special measures geared to their condition in order to ensure compatibility with the requirements of humane treatment'.[175] In *MS v United Kingdom*, the ECtHR held that a failure over four days to provide urgent psychiatric treatment to a man being held in police custody amounted to degrading treatment, because it was clear 'throughout the entire time at the police station' that he was 'in dire need' of treatment.[176]

The ECtHR has also held that 'the State's obligation to ensure adequate conditions of detention

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CAT, Concluding Observations on Moldova (27 May 2003) UN Doc CAT/C/CR/30/7; CAT, Concluding Observations on the Russian Federation (6 June 2002) UN Doc CAT/C/CR/28/4. Regarding the HRC, see, for example, HRC, *Womah Mukong v Cameroon*, Communication No 458/1991 (21 July 1994) UN Doc CCPR/C/51/D/458/1991 para 9.3. Regarding the IACtHR, see, for example, IACtHR, *Caesar v Trinidad and Tobago*, Judgment of 11 March 2005 (Merits, Reparations and Costs) Series C No 123 para 96; IACtHR, *Raxcacó Reyes v Guatemala*, Judgment of 15 September 2005 (Merits, Reparations and Costs) Series C No 134 para 95; IACtHR, *Berenson-Mejía v Peru*, Judgment of 25 November 2004 (Merits, Reparations and Costs) Series C No 119 para 102; IACtHR, *Tibi v Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 114 para 150. Regarding the AfrCmHPR, see APT and CEJIL, 'Torture in International Law: A Guide to Jurisprudence' (n 75) 140 citing, inter alia, AfrCmHPR, *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communication Nos 64/92, 68/92 and 78/92 (27 April 1994) para 7; AfrCmHPR, *Malawi African Association and Others v Mauritania*, Communication Nos 54/91, 61/91, 98/93. 164/97, 196/97 and 210/98 (11 May 2000) paras 116, 118; AfrCmHPR, *Huri-Laws v Nigeria* Communication No. 225/1998 (6 November 2000) paras 40–41.

[171] See, for example, *Aerts v Belgium* (2000) 29 EHRR 50; *Kudla v Poland* (n 113) para 94; *Nevmerzhitsky v Ukraine* (n 113) para 81; AfrCmHPR, *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (n 170) para 7; AfrCmHPR *Malawi African Association and Others v Mauritania* (n 170) paras 116, 118.

[172] UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Res 70/175 (17 December 2015) UN Doc A/RES/65/230, Rule 24.

[173] IACtHR, *Tibi v Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 114 para 150, referring to *Kudla v Poland* (n 113) paras 93–94.

[174] IACtHR, *Tibi v Ecuador* (n 173) para 155.

[175] *Renolde v France* (2009) 48 EHRR 42 para 128.

[176] *MS v United Kingdom* (2012) 55 EHRR 23 para 44.

includes provision for the special needs of prisoners with a physical disability',[177] and in *Grimailovs v Latvia*, the Court tied this positive obligation under Article 3 ECHR to the 'reasonable accommodation' obligation in Article 14 CRPD.[178] In a similar vein, in *Hamilton v Jamaica*, the HRC found a violation of Article 10 ICCPR where a prisoner received no mobility assistance to dispose of his slop bucket.[179]

The IACtHR and ECtHR have both recognised that where children are detained, the positive obligation to ensure humane treatment requires states to provide them with resources tailored to their needs, including education.[180]

ii. *Specifying positive obligations under the umbrella preventive obligation*

The CAT's General Comment No 2 suggests that states' compliance with their overarching positive obligation to prevent and protect from torture and ill-treatment is subject to intensified scrutiny when individuals are deprived of their liberty, with the result that states' obligations are made more specific and therefore effectively heightened. In its General Comment No 2, the CAT set out the 'baseline' of what the 'effective measures' required by Article 2 UNCAT mean in the detention context.[181] The specific positive obligations identified by the CAT include the maintenance of an official register of detainees; informing detainees of their rights; the provision of prompt, independent legal assistance and medical assistance; the facilitation of contact with relatives; the establishment of 'impartial mechanisms for inspecting and visiting places of detention and confinement'; and the provision of remedies that that allow 'detainees and other persons at risk of torture and ill-treatment…to have their complaints promptly and

[177] See, for example, *Grimailovs v Latvia* App no 6087/03 (ECtHR, 25 June 2013) para 161.
[178] ibid para 78.
[179] HRC, *Zephiniah Hamilton (represented by counsel of the London law firm Macfarlanes) v Jamaica*, Communication No 616/1995 (28 July 1999) UN Doc CCPR/C/66/D/616/1995 para 8.2.
[180] In *'Juvenile Reeducation Institute' v Paraguay*, the IACtHR held that '[t]he standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children' (IACtHR, *'Juvenile Reeducation Institute' v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 para 162, citing IACtHR, *Gómez Paquiyauri Brothers v Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs) Series C No 110 para 170.) and that '[r]egarding to children deprived of their liberty and thus in the custody of the State, the latter's obligations include that of providing them with health care and education, so as to ensure to them that their detention will not destroy their life plans' (para 161.) In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, meanwhile, the ECtHR recognised an unaccompanied five-year-old girl in immigration detention as being 'in an extremely vulnerable situation' (para 55). The Court held that she had experienced inhuman treatment on account of being held in adult conditions, which were not adapted to her needs and where she received no counselling or educational assistance from qualified personnel (paras 50–59).
[181] CAT General Comment No 2 (n 13) para 13.

impartially examined, to defend their rights, and to challenge the legality of their detention or treatment'.[182]

The OPCAT and ECPT both recognise and reinforce states' heightened positive obligation (carrying with it a range of specific obligations) to prevent and protect from torture and ill-treatment in places of deprivation of liberty.

The OPCAT requires states parties to establish a national preventive mechanism (NPM) that is independent and has the powers to regularly examine the treatment of people who are deprived of their liberty and to make recommendations to the state authorities with the aim of preventing torture or ill-treatment in places of detention.[183] In addition, the OPCAT created the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT).[184] Among other things, the SPT visits places of deprivation of liberty and makes recommendations to states parties aimed at improving the prevention of torture and ill-treatment.[185] The SPT has published guidance documents specifying the measures required to comply with states' preventive obligation regarding a range of issues arising in the detention context, including non-consensual medical treatment,[186] prevention of torture and ill-treatment of women,[187] due process in the criminal justice system,[188] corruption,[189] and prevention of torture and ill-treatment of lesbian, gay, bisexual, transgender and intersex persons.[190]

The ECPT, meanwhile, created the European Committee for the Prevention of Torture and

[182] ibid.
[183] OPCAT (n 148) arts 18, 19; see also arts 3, 17, 20–23.
[184] OPCAT, ibid art 2.
[185] ibid art 11. Article 11 also mandates the SPT to provide advice and assistance regarding the work of the NPMs, and to cooperate with other international, regional and national entities working towards more effective protection from torture and ill-treatment. See also Rachel Murray and others, *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press 2011) 90.
[186] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (26 January 2016) UN Doc CAT/OP/27/2.
[187] SPT, 'Prevention of torture and ill-treatment of women deprived of their liberty' (18 January 2016) UN Doc CAT/OP/27/1.
[188] SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012) UN Doc CAT/OP/2.
[189] CAT, 'Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (20 March 2014) UN Doc CAT/C/52/2, Section V.
[190] CAT, 'Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (22 March 2016) UN Doc CAT/C/57/4, Section V.

Inhuman or Degrading Treatment or Punishment (CPT) with a mandate to visit places of deprivation of liberty in states parties and make recommendations for the improvement of torture and ill-treatment prevention.[191] The CPT has published a large body of standards, identifying the specific obligations arising from states' preventive obligation under Article 3 ECHR in the contexts of police custody, prisons, immigration detention, psychiatric and social care institutions, juvenile detention and settings where women are detained.[192] The standards specify obligations similar to those listed in the CAT's General Comment No 2[193] among many others. The ECtHR has relied on the CPT's standards and reports in adjudicating complaints under Article 3 ECHR.[194]

B. *Vulnerability*

Under the anti-torture norm, 'vulnerable' is a label paradigmatically attached to individuals who are deprived of their liberty.[195] However, the label 'vulnerable' is not reserved solely for those who are deprived of their liberty. When applying the rule against torture and ill-treatment, several treaty bodies have recognised the vulnerability of individuals in a range of other situations and who are members of other groups. The sources of vulnerability acknowledged by the treaty bodies under the anti-torture norm are discussed in detail in Chapter 2. Chapters 3, 4 and 5 examine whether there is potential for the treaty bodies to recognise more effectively the sources of vulnerability which older people frequently encounter.

This section contends that recognition of vulnerability appears to have somewhat similar effects on the treaty bodies' specification of torture or ill-treatment, and of positive obligations, as deprivation of liberty. The section argues, first, that recognition of vulnerability can heighten the treaty bodies' sensitivity to the impact of the state's conduct, sometimes resulting in the interpretation of omissions as conduct amounting to torture or ill-treatment. The section argues, second, that recognition of vulnerability can lead the treaty bodies to recognise heightened or specific positive obligations to prevent and protect from torture or ill-treatment. These two

[191] ECPT (n 149) arts 1, 2, 10, 11
[192] Council of Europe, CPT Standards (compiled from the annual reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment <www.coe.int/en/web/cpt/standards> accessed 25 September 2017.
[193] CAT General Comment No 2 (n 13) para 13.
[194] See, for example, *Dougoz v Greece* (2002) 34 EHRR 61 paras 40, 46, 47; *Mouisel v France* (n 114) paras 27, 28; *Ramirez Sanchez v France* (2007) 45 EHRR 49 paras 83, 130.
[195] See (n 140).

effects are inter related, especially bearing in mind the CAT's view that the state's failure to comply with its overarching preventive obligation may amount to direct 'acquiescence' in torture or ill-treatment.

Peroni and Timmer reach a similar conclusion regarding the operation of vulnerability reasoning in the ECtHR's jurisprudence. They argue that 'the ill treatment inflicted on the applicant may take a greater dimension if she or he belongs to a particularly vulnerable group' and that '[g]roup vulnerability therefore acts as a magnifying glass: the ill treatment caused to the applicant looks bigger through the vulnerability lens'.[196] They add that 'the Court's recognition of positive obligations towards members of particularly vulnerable groups has often involved "special consideration to" or "special protection of" their "specificities" and "needs"'.[197]

i. *Heightened sensitivity to the impact of conduct*

The impact of the treaty bodies' recognition of vulnerability on their minimum threshold of severity assessments is most apparent, perhaps, in cases concerning children. In *Juvenile Reeducation Institute v Paraguay*, the IACtHR referred to children generally as 'vulnerable'[198] and held that '[t]he standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children'.[199] The ECtHR echoed this position in *Bouyid v Belgium*, stating that '[p]olice behaviour towards minors may be incompatible with the requirements of art.3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults'.[200] In *Rosendo Cantu v Mexico*, where the rape of a 17-year-old girl was held to constitute torture,[201] the IACtHR found the intensity of the applicant's suffering to be increased by the fact that she was a child.[202] Similarly, in *Aydin v Turkey*, the ECtHR referred several times to the 17-year-old applicant's youth, sex and the

[196] Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056, 1079.
[197] ibid 1076, citing *Chapman v United Kingdom* (2001) 33 EHRR 18 para 96; *MSS v Belgium and Greece* (n 134) para 251; *Yordanova v Bulgaria,* App no 25446/06 (ECtHR, 24 April 2012) paras 128–129.
[198] IACtHR, '*Juvenile Reeducation Institute*' *v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 para 212.
[199] ibid para 163.
[200] *Bouyid v Belgium* (n 133) paras 109–110. In *Bouyid v Belgium*, the ECtHR defined children as vulnerable; the Court referred at para 110 to the 'vulnerability inherent in their young age'.
[201] IACtHR, *Rosendo Cantu v Mexico* (n 229) para 121.
[202] ibid para 115.

conditions in which she was held when finding that she had been tortured through rape and other 'terrifying and humiliating experiences while in custody'.[203]

A further example of vulnerability's impact on the minimum threshold of severity assessment is the CAT's judgment in *Dzemajl et al v Yugoslavia*,[204] which (as discussed above in Part I, Section A) concerned the State's failure to prevent a racist mob burning the homes of a group of Roma residents. The CAT held that the 'nature of these acts' was 'aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racist motivation'.[205]

The ECtHR considers asylum seekers to be a vulnerable group and in several cases—including ones concerning children—the Court has used vulnerability reasoning to find that the state's failure to provide resources constitutes ill-treatment. In *Tarakhel v Switzerland*, which concerned the question of whether a family of asylum seekers could be returned to Italy, the ECtHR held that asylum seekers are a 'particularly underprivileged and vulnerable population group' who require 'special protection' under Article 3 ECHR.[206] The Court added that '[t]his requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability'.[207] The Court held that 'the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create…for them a situation of stress and anxiety, with particularly traumatic consequences"'.[208] The outcome in *Tarakhel* was a finding that returning the family to Italy would violate Article 3 without 'individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner

[203] *Aydin v Turkey* (n 111) para 84. See also *Menesheva v Russia* (n 157), where the ECtHR made a finding of torture where a 19-year-old woman was beaten up and subjected to other physical and psychological violence by the police. The Court observed at para 58 that 'at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable'. *Rahimi v Greece*, App no 8687/08 (ECtHR, 5 July 2011) is another example of the ECtHR increasing its sensitivity to the existence of a dignity violation following recognition of a person's vulnerability. There, the Court held that, even allowing for the fact that his detention had lasted for only two days, the applicant had suffered a dignity violation amounting to degrading treatment, in large part because of his 'extreme vulnerability' as a young, unaccompanied, illegal immigrant (para 86).
[204] CAT, *Dzemajl et al v Yugoslavia* (n 16)
[205] ibid para 9.2.
[206] *Tarakhel v Switzerland* (2015) 60 EHRR 28 para 118, citing *MSS v Belgium and Greece* (n 134) para 251.
[207] *Tarakhel v Switzerland*, ibid para 119, citing *Popov v France* (2016) 63 EHRR 8 para 91.
[208] *Tarakhel v Switzerland* (n 206) para 119, citing *Popov*, ibid para 102.

adapted to the age of the children and that the family would be kept together'.[209]

In *MSS v Belgium and Greece*,[210] the ECtHR found Greece's failure to provide any socio-economic resources to an asylum seeker to amount to degrading treatment. In coming to this conclusion, the Court highlighted 'the applicant's vulnerability as an asylum seeker'.[211] The Court also based its decision on the existence of a domestic law (transposing a European Directive) requiring the State to provide asylum seekers with a minimum standard of living, and the State's actions in delaying its decision on the asylum application and depriving the applicant of the opportunity to work.[212] These additional aspects are discussed further in Section C, below.

ii. *Heightened or specific positive obligations*

In numerous cases, the ECtHR has held that states' overarching positive obligation to protect from torture and ill-treatment, including by non-state actors, incorporates a specific requirement to take measures which 'provide effective protection in particular of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[213] The ECtHR's judgments in *O'Keeffe v Ireland*[214] and *Opuz v Turkey*[215] make clear that, in practice, this principle means that the Court will scrutinise more intensely the measures which states take in order to comply with the overarching positive obligation where the individuals concerned are 'vulnerable'.[216] This intensified scrutiny effectively creates a heightened obligation on states to protect individuals

[209] *Tarakhel v Switzerland* (n 206) para 122.
[210] *MSS v Belgium and Greece* (n 134).
[211] ibid para 263.
[212] ibid para 263.
[213] For example, *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73; *O'Keeffe v Ireland* (2014) 59 EHRR 15 para 144; *X and Y v The Netherlands* (1986) 8 EHRR 235 paras 21–27; *A v United Kingdom* (1999) 27 EHRR 611 para 22.
[214] *O'Keeffe v Ireland* (n 213).
[215] *Opuz v Turkey* (2010) 50 EHRR 28 para 159.
[216] In *O'Keeffe v Ireland* (n 213) the ECtHR explained at para 144:

> This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

See also *Opuz v Turkey* (2010) 50 EHRR 28 para 159 and *A v United Kingdom* (1999) 27 EHRR 611 para 22.

considered to be 'vulnerable' by way of specific measures that respond to their experiences, because the ECtHR is less willing in these contexts to leave the question of compliance with the overarching positive obligation in the state's operational discretion.

For example, in *O'Keeffe v Ireland*, on the basis that young children under the exclusive control of school authorities are 'especially vulnerable',[217] the ECtHR held that the general 'positive obligation to protect' from torture or ill-treatment includes a specific obligation to establish 'useful detection and reporting mechanisms' to guard against child sexual abuse at school.[218] In *Opuz v Turkey*, the ECtHR acknowledged the 'vulnerability' of the applicant as a woman who had suffered violence in the past and lived in a part of Turkey where violence against women was tolerated.[219] The Court found that the State's positive obligation to protect included a specific obligation to ensure that the domestic legislative framework allowed for the prosecution of serious acts of violence even where the victim had withdrawn her complaints.[220] In *Z and others v United Kingdom*,[221] meanwhile, the Court found that the failure to provide alternative care to children who were experiencing serious neglect and abuse in their family home violated the State's preventive obligation.

According to Burgorgue-Larsen and Úbeda De Torres, the IACtHR, similarly, understands vulnerability to give rise to heightened, specific positive obligations on the state to prevent and protect from torture and ill-treatment. Burgorgue-Larsen and Úbeda De Torres contend that '[a] good way to sum up the case law of the Court in this area would be to say that where a person is vulnerable, the obligations are specific.'[222] They point to the IACtHR's statement in *Juvenile Reeducation Institute v Paraguay* concerning children, that 'the State had special obligations regarding to them, over and above those it has regarding to adults'.[223] They further highlight the state's heightened positive obligations to protect individuals in detention who are additionally vulnerable: 'As guarantor of the rights of individuals under its custody, the State is under a particular obligation as far as detainees are concerned, and in the case of the most vulnerable detainees (women, children, the mentally ill), it has a role as a "special

[217] *O'Keeffe v Ireland* (n 213) para 145.
[218] *O'Keeffe v Ireland* (n 213) paras 144–148, 168–169.
[219] *Opuz v Turkey* (2010) 50 EHRR 28 para 160.
[220] ibid para 168.
[221] *Z and Others v United Kingdom* (n 213).
[222] Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights* (n 94) 494.
[223] IACtHR, *'Juvenile Reeducation Institute' v Paraguay* (n 198) para 302.

guarantor"'.[224]

The IACtHR's imposition of heightened, specific positive obligations on states under Article 5 ACHR to protect those considered vulnerable is exemplified by the Court's judgment in *Ximenes Lopes v Brazil.*[225] Here, the IACtHR held that the vulnerability of patients in psychiatric institutions requires 'the strict supervision of such institutions', both public and private.[226] The Court noted that torture and ill-treatment, 'when inflicted on these people, affect their psychic, physical and moral integrity, entail an insult to their dignity, and seriously restrict their autonomy, which could aggravate their condition'.[227] It therefore held that 'States have the duty to supervise and guarantee that in all psychiatric institutions, either public or private, the patients' right to receive a worthy, human, and professional treatment be preserved and that said patients be protected against exploitation, abuse, and degradation.'[228]

The IACtHR has further used vulnerability reasoning to specify positive obligations on the state to ensure access to justice for particular individuals under Articles 8 and 25 ACHR. In *Rosendo Cantu v Mexico*, finding that a torture victim's right of access to justice had been violated, the IACtHR held that 'in order to guarantee access to justice to members of indigenous communities, it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability'.[229] The State had 'not consider[ed] Ms Rosendo Cantu's situation of vulnerability based on her language and ethnicity' due to its failure to provide a translator when she was receiving medical care and filing a complaint, and its failure to provide information in her language about subsequent steps regarding her complaint.[230]

The CAT has also found that states have heightened, specific positive obligations to prevent

[224] Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights* (n 94) 494.
[225] IACtHR, *Ximenes Lopes v Brazil* (n 159).
[226] ibid para 108.
[227] ibid para 107.
[228] ibid para 108.
[229] IACtHR, *Valentina Rosendo Cantu et al v Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 216 para 184, citing IACtHR, *Yakye Axa Indigenous Community v Paraguay,* Judgment of 17 June 2005 (Merits, Reparations and Costs) Series C No 125 para. 63; IACtHR, *Comunidad Indígena Sawhoyamaxa v Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs) Series C No 146, para 83; IACtHR, *Saramaka People v Suriname*, Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations and Costs) Series C No 172 para. 178; IACtHR, *Tiu Tojín v Guatemala*, Judgment of 26 November 2008 (Merits, Reparations and Costs) Series C No 190 para. 96.
[230] IACtHR, *Rosendo Cantu v Mexico*, ibid para 185.

torture and ill-treatment of 'vulnerable' individuals—as noted by the former UN Special Rapporteur on torture, Juan E Méndez.[231] The CAT's General Comment No 2 states that '[t]he protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment'.[232] The General Comment asserts that states must ensure that 'their laws are in practice applied to all persons' and that they 'ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection'.[233] The CAT's General Comment No 3 on the right to redress under Article 14 UNCAT specifies a number of positive obligations on states to ensure that individuals who are 'vulnerable' obtain redress.[234]

C. *Suffering arising from socio-economic deprivation*

Chapters 3 and 4 of the thesis discuss the suffering that many older people experience because of their lack of access to adequate healthcare or assistance with the tasks of everyday living. Chapter 3 explains that older people are frequently institutionalised against their will and unnecessarily as a result of their inability to obtain community-based care, and Chapter 4 explains that older people frequently suffer physically, psychologically and socially due to their lack of access to adequate continence care. This section discusses the current doctrinal position regarding the anti-torture norm's application to situations of suffering due to socio-economic

[231] UNHRC, 'Report of the Special Rapporteur on torture' (n 101) para 26:

> Ensuring special protection of minority and marginalized groups and individuals is a critical component of the obligation to prevent torture and ill-treatment. Both the Committee against Torture and the Inter-American Court of Human Rights have confirmed that States have a heightened obligation to protect vulnerable and/or marginalized individuals from torture, as such individuals are generally more at risk of experiencing torture and ill-treatment' (citing CAT General Comment No 2 (n 13) para 21; *Ximenes Lopes v Brazil* (n 159) para 103).

[232] CAT General Comment No 2 (n 13) para 21.

[233] CAT General Comment No 2 (n 13) para 21.

[234] CAT General Comment No 3 (n 34). These obligations include the requirements to ensure that 'effective rehabilitation services and programmes are established in the State', without discrimination (para 15); to ensure that complaints mechanisms are known and accessible to 'persons belonging to vulnerable or marginalized groups, including those who may have limited communication abilities' (para 23); to adopt 'special measures' to ensure that 'groups which have been marginalized or made vulnerable' have access to mechanisms for obtaining redress (para 29); to ensure, including through training for judicial personnel, that in judicial and non-judicial proceedings sensitivity is exercised towards individuals who are 'marginalized or made vulnerable' in order to 'avoid re-victimization and stigmatization of victims of torture or ill-treatment' (para 34); and to take measures to 'ensure both de jure and de facto access to timely and effective redress mechanisms for members of groups marginalized and/or made vulnerable' and 'address formal or informal obstacles that they may face in obtaining redress' (para 39).

deprivation. The section focuses primarily (though not entirely) on ECtHR jurisprudence as the issue has been considered in greatest detail by this treaty body.

This section argues that the anti-torture norm imposes some obligations on states to provide resources of a socio-economic nature to prevent and alleviate suffering. However, part (i) of the section contends that before imposing such obligations and finding omissions to provide resources to constitute ill-treatment, the ECtHR requires that the state is bound by domestic legislation to respond to the person's suffering or that the state has taken steps to put that particular person in their situation of deprivation. Part (ii) of the section highlights some treaty body jurisprudence and commentary suggesting that the concepts of vulnerability and dignity may assist in the expansion or adaptation of this doctrinal approach.

i. *Current doctrinal approach*

The idea that the anti-torture norm might require states to provide the resources necessary for individuals to meet their basic human needs is controversial. The partly dissenting opinion of Judge András Sajó in *MSS v Belgium and Greece*, criticising the majority's finding that Greece had violated Article 3 ECHR by failing to provide any resources to an asylum seeker who was living in extreme poverty, exemplifies a commonly held attitude: that the rule against torture and ill-treatment is not an appropriate vehicle for the protection of 'social rights'[235] and was not intended to achieve a 'welfare revolution'.[236] Indeed, in *MSS v Belgium and Greece*, the majority prefaced its conclusion by insisting that 'art.3 cannot be interpreted as obliging the high contracting parties to provide everyone within their jurisdiction with a home. Nor does art.3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living'.[237]

[235] *MSS v Belgium and Greece* (n 134), Partly Concurring and Partly Dissenting Opinion of Judge Sajó para O-III11.
[236] ibid para O-III14.
[237] *MSS v Belgium and Greece* (n 134) para 249, citing *Chapman v United Kingdom* (n 197) para 99 and *Muslim v Turkey* (2006) 42 EHRR 16 para 85. O'Cinneide notes that 'In interpreting the text of the ECHR, the Court has taken the view that the Convention rights are in the main not capable of being extended so as to provide individuals with a home, or specific forms of welfare support, or particular types of health care': Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 EHRLR 583, 585 (citations omitted). O'Cinneide notes further that 'the Convention case law on Art.3 has established that states are not subject to a general duty to rescue the destitute': O'Cinneide, ibid 589, citing *O'Rourke v United Kingdom*, App no 39022/97 (ECtHR, 26 June 2001).

Nonetheless, as the chapter has demonstrated so far, the anti-torture norm is understood to contain a range of settled positive obligations which require states to expend resources, including in some cases to provide for individuals' basic needs. This shows that a requirement to provide resources is not, per se, a barrier to the anti-torture norm's imposition of obligations on states. Indeed, the norm's absolute nature compels this conclusion.

The ECtHR's judgment in *Z and others v United Kingdom*,[238] discussed in Section B(ii) of Part II above, demonstrates that the overarching preventive obligation under the anti-torture norm may require states to provide for the basic needs of individuals who are suffering torture or ill-treatment at the hands of those upon whom they are dependent for care. However, the question arises: if a person is suffering, not because another individual is perpetrating torture or ill-treatment on them, but because they do not have access to the socio-economic resources required to meet their basic needs, can the state's failure to intervene to ameliorate that suffering constitute torture or ill-treatment in itself?

Nowak and numerous other commentators referenced in the below paragraphs reach the conclusion that, positive obligations to prevent and protect from torture and ill-treatment aside, a state's omissions can constitute direct 'acts' of torture or ill-treatment. However, these commentators base their conclusion upon the established positive obligation on states to provide for the basic needs of prisoners and the consequent, potential characterisation of failures to provide for those needs as torture or ill-treatment.[239] It is not clear that all omissions are understood to have similar potential to amount to torture or ill-treatment.

According to Nowak, the drafting history of Article 7 ICCPR demonstrates that state responsibility for 'treatment' can arise only in respect of 'an act or an omission of an individual, one done at his request, or one that can at least be attributed to him or her'.[240] Nowak asserts that 'treatment' under Article 7 ICCPR was not intended to include degrading situations arising

[238] *Z and Others v United Kingdom* (n 213).
[239] See Nowak, 'What Practices Constitute Torture?' (n 95) 819; Nigel Rodley and Mark Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 European Human Rights Law Review 115, 120, citing Burgers and Danelius, *The United Nations Convention against Torture* (n 95) 118; Maxime Tardu, 'The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 Nordic Journal of International Law 303, 304; Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999), 9–15; Chris Ingelse, The *UN Committee against Torture: An Assessment* (The Hague, 2001) 208.
[240] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (n 118) 128.

from socio-economic conditions.[241] A 2009 report by Nowak, in his capacity as Special Rapporteur on torture, explains that the state's action in detaining individuals makes subsequent omissions to provide resources 'attributable' to the state: '[s]ince State authorities deprived [detainees] of personal liberty, it is an obligation of States (and not of families) to ensure that detainees can effectively enjoy their right to human dignity and all other human rights'.[242]

However, contrary to Nowak's dismissal of the possibility of state responsibility for 'degrading situations arising from socio-economic conditions', there is some ECtHR jurisprudence indicating that the European Court understands states' failures to respond to suffering arising from a lack of socio-economic resources to be capable of constituting acts of ill-treatment in certain circumstances, beyond the state custody context.

In 2002, in an admissibility decision in *Larioshina v Russia*, the ECtHR stated that 'a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment'.[243] Similarly, in a further admissibility decision in 2009, in *Budina v Russia*, the ECtHR opined that it could not in principle exclude that 'State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.[244] These statements by the ECtHR suggest an expansive view of the circumstances in which states' omissions may, in principle, be capable of constituting ill-treatment. Cassese, writing a decade before *Larioshina*, supported such an approach; he argued that 'It stands to reason that the scope of Article 3 is very broad; nothing could warrant its possible limitation to only physical or psychological mistreatment in the area of civil rights'.[245] However, the ECtHR's statements in the above cases were obiter. In both cases, the Court found the complaint inadmissible on the basis that the applicant had not provided evidence that the level of her state old-age pension had caused her suffering capable

[241] ibid.
[242] UNGA, 'Interim report of the Special Rapporteur on torture' (n 167) para 47.
[243] *Larioshina v Russia* (Admissibility), App no 56869/00 (ECtHR, 23 April 2002) para 3.
[244] *Budina v Russia* (n 130) 6.
[245] Antonio Cassese, 'Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?' (1991) 2 EJIL 141, 143.

of reaching the minimum level of severity for a finding of inhuman or degrading treatment. The line of reasoning in *Larioshina* and *Budina* has not yet been developed.

Notwithstanding that *Larioshina* and *Budina* might hint at a broader approach, it appears from the limited number of substantive ECtHR judgments concerning access to socio-economic resources that the ECtHR requires the person's suffering to be in some way 'attributable' to the state (to borrow Nowak's phrase) before an obligation to intervene, and the potential for the classification of an omission to provide resources as an 'act' of ill-treatment, will exist. Mavronicola analyses a number of cases in which the ECtHR has found the state to be under a positive obligation outside the detention context to provide healthcare or the resources necessary to meet basic needs where suffering arises from the lack of such resources[246] (rather than from acts of torture or ill-treatment by others, such as in *Z and others v United Kingdom*[247]). She concludes that the Court has recognised positive obligations only where (a) the state is already under a domestic legislative duty to act, and/or (b) the State has acted in a way that has exacerbated the person's suffering[248]—or, as O'Cinneide puts it, 'positive state action' has 'driven' the person into destitution.[249]

This assessment chimes with the ECtHR's statement in *Pretty v United Kingdom*, that

> suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or *other measures, for which the authorities can be held responsible*[250] (emphasis added).

[246] See Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014) 167–171, analysing *RR v Poland* (2011) 53 EHRR 31; *MSS v Belgium and Greece* (n 134); *D v United Kingdom* (1997) 24 EHRR 423.
[247] *Z and Others v United Kingdom* (n 213).
[248] Mavronicola, DPhil thesis (n 246) 170-171. Mavronicola cites Ellie Palmer, 'Protecting Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) Erasmus Law Review 397, 410–14. Palmer explains (at 414) that 'under Articles 3 and 8 ECHR, a principled jurisprudence has begun to emerge whereby states may be held responsible for extreme socio-economic deficits in circumstances where it can be shown that there are direct and verifiable links between the conduct of the state or its agents *and* the origins or continuation of conduct that has caused intolerable harm'.
[249] Colm O'Cinneide, 'A modest proposal: destitution, state responsibility and the European Convention on Human Rights' (2008) 5 EHRLR 583, 602.
[250] *Pretty v United Kingdom* (2002) 35 EHRR 1 para 52. See also *Keenan v United Kingdom* (n 114) para 116.

Thus, as Mavronicola notes,[251] in *MSS v Belgium and Greece* the ECtHR found Greece responsible for a violation of Article 3 ECHR by focusing on the State's obligation under the European Reception Directive (which had been transposed into domestic law) to provide for the basic needs of asylum seekers, and the authorities' delay in considering the applicant's asylum application and the administrative barriers which prevented the applicant from seeking employment.[252]

ii. *Adaptive potential of vulnerability and dignity reasoning*

On the face of the judgment in *MSS v Belgium and Greece*, the ECtHR's recognition of the applicant's 'vulnerability as an asylum seeker'[253] was also a distinct and important factor in the Court's decision to recognise Greece's failure to provide resources as degrading treatment. The ECtHR's more recent judgment in *Tarakhel v Switzerland*[254] confirms this. In *Tarakhel*, the ECtHR recalled that, in *MSS*, 'the obligation to provide accommodation and decent material conditions to impoverished asylum seekers had entered into positive law' and that '[w]hat the applicant held against the Greek authorities…was that, because of their deliberate actions or omissions, it had been impossible in practice for him to avail of those rights and provide for his essential needs'.[255] However, the ECtHR's judgment in *Tarakhel* went on to note that '[i]n the same judgment [in *MSS*], the Court attached considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'.[256]

In *Tarakhel*, as discussed above in Part II, Section B(i), the ECtHR found that returning an asylum seeking family to Italy without guarantees that they would be accommodated together and 'taken charge of in a manner adapted to the age of the children' would violate Article 3 ECHR.[257] The Court based its decision largely on 'the child's extreme vulnerability', and the

[251] Mavronicola, DPhil thesis (n 246) 170.
[252] See *MSS v Belgium and Greece* (n 134) paras 249–64. O'Cinneide points to the United Kingdom House of Lords decision in *R (Limbuela, Tesema and Adam) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 as an example of the ECtHR's approach in practice. Here, the Lords interpreted Article 3 ECHR to place responsibility on the State for failing to provide resources to asylum seekers who were destitute as a result of legislation prohibiting them from working or accessing other forms of social support. See O'Cinneide, 'A modest proposal' (n 249) 593–96.
[253] *MSS v Belgium and Greece* (n 134) para 263.
[254] *Tarakhel v Switzerland* (n 206).
[255] ibid para 96.
[256] ibid para 97.
[257] ibid para 122.

notion that '[c]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status'.[258] Because *Tarakhel* was a non-refoulement case, the State's responsibility was engaged and therefore the judgment does not undo the ECtHR's position that the State must have some element of involvement in the person's actual or potential deprivation before a positive obligation to provide socio-economic resources will be capable of existing. However, the judgment in *Tarakhel* arguably demonstrates the growing significance of vulnerability reasoning in the Court's assessment of the circumstances in which a failure to protect from suffering due to socio-economic deprivation may constitute an act of ill-treatment.

Notably, in the IACtHR case of *'Street Children' (Villagran Morales et al) v Guatemala*,[259] concurring Judges Cançado Tindade and Abreu-Burelli connected the State's positive obligation to ensure a 'right to live with dignity' (as part of the right to life) with vulnerability. They opined that '[t]he duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets'.[260]

O'Cinneide argues that suffering of an intensity sufficient to reach the minimum threshold of severity required for a finding of ill-treatment 'cannot be intelligibly differentiated'[261] by its source; he suggests, in other words, that the human experience of suffering does not necessarily depend on the level of state involvement in it. Yet, he acknowledges that the widespread acceptance of the separation between civil and political rights and socio-economic rights would require 'root-and-branch reappraisal' before the anti-torture norm could be said to provide 'protection against destitution' in general.[262]

O'Cinneide suggests that the ECtHR's current requirement of state responsibility for suffering arising from socio-economic deprivation could be interpreted more expansively by the Court paying greater attention to the ways in which suffering which may seem to result from 'natural' processes is in fact caused (at least in part) by state actions. O'Cinneide notes, for example,

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[258] ibid para 99.
[259] IACtHR, *'Street Children' (Villagran Morales et al) v Guatemala*, Judgment of 19 November 1999 (Merits) Series C No 63.
[260] IACtHR, *'Street Children*', ibid, Joint Concurring opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli para 4.
[261] O'Cinneide, 'A modest proposal' (n 249) 588.
[262] ibid 585; see also 597.

that 'extreme poverty is not a natural phenomenon, or one that is always generated in every case by the misdeeds of the poor, or by the inevitable and unavoidable operation of social processes'.[263]

O'Cinneide argues further that state responsibility for the provision of socio-economic resources could derive from a person's vulnerability where the state knows or ought to know of such vulnerability.[264] He proposes that 'a particular and distinct relationship of dependence…between the state and vulnerable individuals who are subject to…degrading living conditions' should be sufficient to engage the state's responsibility for suffering as a result of socio-economic deprivation.[265] O'Cinneide bases this conclusion on the ECtHR's recognition of the vulnerability of a person with a disability in detention (*Price v United Kingdom*[266]) and the vulnerability of children being abused in their home (*Z and others v United Kingdom*[267]). However, as noted above, these are contexts of already-recognised state responsibility. The impact of vulnerability reasoning on the question of state responsibility for suffering ostensibly arising from socio-economic deprivation, in contexts other than prison and those in which the state has legislated to oblige itself to provide resources, remains to be explored.

In *Budina v Russia*, the ECtHR drew a connection between a state's potential responsibility for the provision of socio-economic resources and respect for human dignity.[268] The ECtHR and the IACtHR (as noted above, in *'Street Children'*[269]) have each referred to the concepts of dignity and vulnerability when considering the question of state responsibility for suffering arising from deprivation. In addition, Mr Justice Munby, of the English High Court, has recognised vulnerability's demand that states provide resources where necessary to enable people to live with dignity.[270] Chapters 2 and 4 of the thesis, in particular, examine whether a

[263] ibid 589.
[264] ibid 597.
[265] ibid 585.
[266] *Price v United Kingdom* (n 105).
[267] *Z and Others v United Kingdom* (n 213).
[268] *Budina v Russia* (n 130). See also *Larioshina v Russia* (n 243).
[269] IACtHR, *'Street Children' (Villagran Morales et al) v Guatemala* (n 259).
[270] See James Munby, 'Dignity, Happiness and Human Rights' (2011) Elder Law Journal 32, 34:

> What …do we mean by dignity? Before moving on to the specifics there is a preliminary point which needs to be emphasised: the enhanced degree of protection called for when the human dignity at stake is that of someone who is disabled. To avoid discrimination we may need to treat the disabled differently, precisely because their situation is significantly different from that of the able-bodied. The positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under Article 8 – in particular, I would say, the positive obligation of the state to secure their essential

conception of dignity in which vulnerability plays a key role could enable the rule against torture and ill-treatment to be interpreted to more effectively protect from the suffering experienced by many older people as a result of their inability to meet their basic needs.

D. *Non-consensual medical treatment*

Chapter 3 explains that older people with dementia are frequently chemically restrained with anti-psychotic medication as a way of dealing with behavioural and psychological symptoms of the disease. Several authors and a number of NPMs have raised concerns that older people may be harmed by such use of anti-psychotic medication,[271] that there are other, therapeutic (often non-pharmacological) methods of responding to the behavioural symptoms of dementia,[272] and that the administration of such medication is not adequately regulated.[273] In addition, evidence suggests that sedating medication is commonly administered to older people with dementia without their consent and often without providing information to relatives, representatives or carers.[274] This practice clearly raises the question of whether, and in what

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human dignity – calls for human empathy and humane concern as society seeks to try to ameliorate and compensate for their disabilities (citing *Price v United Kingdom* (2002) 34 EHRR 53, Separate Opinion of Judge Greve, discussed in *R (on the application of A) v East Sussex CC* R (A) v East Sussex CC (No 2) [2003] EWHC 167 (Admin), (2003) 6 CCL Rep 194 para 93). As Baroness Hale of Richmond said in her 2004 Paul Sieghart Memorial Lecture: 'human dignity is all the more important for people whose freedom of action and choice is curtailed, whether by law or by circumstances such as disability. The Convention is a living instrument…We need to be able to use it to promote respect for the inherent dignity of all human beings but especially those who are most vulnerable to having that dignity ignored.'

[271] See, for example, Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 6, 25–28; Rosie Harding and Elizabeth Peel, '"He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 Medical Law Review 243, 245, citing Lon S Schneider, Karen S Dagerman and Philip Insel, 'Risk of Death with Atypical Anti-psychotic Drug Treatment for Dementia: Meta-analysis of Randomized Placebo-controlled Trials' (2005) 294 Journal of the American Medical Association 1934; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83.

[272] See, for example, Feng Z and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross-national study' (2009) 24 International Journal of Geriatric Psychiatry 1110; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83.

[273] See, for example, Harding and Peel, '"He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 Medical Law Review 243, 271; Czech Republic, Public Defender of Rights (Ombudsman), 'Annual Report on the Activities of the Public Defender of Rights' (2013) 88.

[274] See Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 84: 'The commissions have uncovered cases where drugs were prescribed in the case of "restlessness" without a traceable diagnosis. In almost all of the incidents monitored in detail, the documentation in the nursing homes did not contain any indication whatsoever of a medical briefing or explanation or the patient's consent. In many cases, the staff did not even realise that giving sedatives with the purpose of tranquilising or immobilizing the person affected could be a measure depriving them of their liberty, that there were drugs with fewer side effects, etc. Accordingly, there were also no reports made to the residents' representatives.' See also Banerjee, *The Use of Antipsychotic Medication for People with Dementia* (n 271) 30;

circumstances, non-consensual medical treatment may be permitted under the anti-torture norm. In addition, the non-consensual institutionalisation of many older people and several other examples of mistreatment mentioned in the Introduction[275] raise questions regarding how informed consent is defined and what, if any, positive obligations exist in relation to informed consent under the anti-torture norm. This section discusses the current approaches under the anti-torture norm to the issue of non-consensual medical intervention in order to provide the basis for subsequent chapters' exploration of the how the norm might be interpreted to respond to mistreatment of older people in the care context.

The rule against torture and ill-treatment does not impose a blanket prohibition on the use of force against a person. As discussed in Part II Section A above, for example, lawful detention does not violate the norm in the absence of aggravating factors. Indeed, Article 1 UNCAT explicitly excludes from the definition of torture 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'.[276] The physical restraint of individuals in custody and enforced searches, for example, may avoid characterisation as ill-treatment on the basis that they are necessary for security reasons.[277]

Under the anti-torture norm as it is currently understood, medical treatment performed without consent, likewise, does not necessarily violate the rule against torture and ill-treatment. However, this section argues that there is a considerable lack of clarity at present regarding the circumstances in which non-consensual medical treatment will avoid violating the norm. The section argues that Article 12 CRPD, which protects the right of persons with disabilities to equal enjoyment of legal capacity,[278] presents a fundamental challenge to the current doctrine

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Harding and Peel, '"He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (n 273) 265.

[275] For example, the Introduction to the thesis noted that the UN High Commissioner for Human Rights (OHCHR) has expressed concern at the widespread denial of older people's legal capacity: see Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation of Older Persons (20 April 2012) UN Doc E/2012/51, paras 21, 22, 25, 28. In addition, the OHCHR and Independent Expert on the enjoyment of all human rights by older persons have also highlighted the need for states to ensure through legislation and regulation that older people's right to free and informed consent is respected in care settings: Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation of Older Persons (20 April 2012) UN Doc E/2012/51, paras 22, 26; UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 paras 99–101, 121.

[276] UNCAT (n 1) art 1.

[277] See, for example, HRC, *Carlos Cabal and Marco Pasini Bertran v Australia*, Communication No 1020/2001 (7 August 2003) UN Doc CCPR/C/78/D/1020/2001 para 8.2; *Güler and Öngel v Turkey*, App nos 29612/05 and 30668/05 (ECtHR, 4 October 2011) para 28.

[278] CRPD (n 139) art 12:

> Article 12 - Equal recognition before the law

regarding consent to medical treatment under the anti-torture norm. Part (i) of the section discusses the traditional approach of the ECtHR and HRC. Part (ii) addresses the requirements of the CRPD and the differing responses to the CRPD by treaty bodies, special procedures and commentators. Part (iii) then discusses the meaning of informed consent under the anti-torture norm.

i. *Approach of the ECtHR and HRC*

The below paragraphs demonstrate that the ECtHR adopts different tests for the permissibility of non-consensual medical treatment under the anti-torture norm depending on whether or not it deems the person to have the capacity to provide informed consent. The HRC appears to follow the ECtHR's approach.

The ECtHR's well-established position regarding medical treatment under the anti-torture norm is that 'a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading' but that the Court 'must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist'.[279] However, the ECtHR's understanding of 'necessity' and its requirement for procedural safeguards do not apply equally to individuals who are receiving psychiatric treatment and those whom the Court deems 'mentally competent'[280].

In *VC v Slovakia*, where the applicant complained of involuntary sterilisation, the ECtHR held that '[a]s there was no emergency involving imminent risk of irreparable damage to the

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

[279] See, for example, *VC v Slovakia* (2014) 5 9EHRR 29 para 103; *Jalloh v Germany* (n 121) para 69; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 para 94; *Herczegfalvy v Austria* (1993) 15 EHRR 437 para 83.
[280] *VC v Slovakia*, ibid para 110.

applicant's life or health, and since the applicant was a mentally competent adult patient, her informed consent was a prerequisite to the procedure'.[281] The Court stated that this was the case 'even assuming that the [procedure] was a "necessity" from a medical point of view'.[282] By operating on the applicant in the absence of her informed consent, the ECtHR held, the medical staff in *VC* had 'displayed gross disregard for her right to autonomy and choice as a patient'[283] and the Court duly found a violation of Article 3 ECHR. The fact that there was 'no indication that the medical staff acted with the intention of ill-treating the applicant' was not a bar to the Court's finding of ill-treatment.[284] In *Nevmerzhitsky v Ukraine*, the ECtHR held that, in order for force-feeding of a detainee 'who consciously refuse[d] to take food' to have been permissible under Article 3 ECHR, the State authorities needed to show that such force-feeding was necessary to save the person's life, and that 'procedural guarantees for the decision to force-feed' were complied with.[285] In the absence of evidence of necessity, the Court held that the force-feeding had constituted torture.

However, the ECtHR's earlier judgment in *Herczegfalvy v Austria*[286] demonstrates a markedly less stringent approach in the psychiatric treatment context. Here, the applicant complained of the forcible administration of food and neuroleptics while attached to a bed with handcuffs over a period of weeks in a psychiatric hospital.[287] The ECtHR acknowledged that 'the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with'.[288] However, the Court then proceeded to defer to 'the psychiatric principles generally accepted at the time' as the test for 'necessity',[289] without any statement similar to those in *VC v Slovakia*[290] or *Nevmerzhitsky v Ukraine*,[291] regarding the need to preserve life or to avert an imminent threat of irreparable damage to health, or the need for procedural safeguards. The Court in *Herczegfalvy* stated:

[281] ibid.
[282] ibid.
[283] ibid para 119.
[284] ibid.
[285] *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 paras 94, 96.
[286] *Herczegfalvy v Austria* (1993) 15 EHRR 437
[287] ibid para 79.
[288] ibid para 82.
[289] ibid para 83.
[290] *VC v Slovakia* (2014) 5 9EHRR 29.
[291] *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32.

> it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible.[292]

The ECtHR's approach in *Herczegfalvy* has been reiterated in more recent ECtHR judgments.[293] It is similar to the decision of the HRC in *Brough v Australia*.[294] In *Brough*, the HRC focused solely on whether the forced medical treatment was intended by the administering medical professional to be therapeutic. Here, a 16-year-old boy with a mild mental disability[295] was administered anti-psychotic medication while in prison. The Committee accepted that the medication was 'intended to control the author's self-destructive behaviour' and held that '[i]n the absence of any elements which would indicate that the medication was administered for purposes contrary to article 7 of the Covenant' it did not violate the rule against torture and ill-treatment.[296]

ii. *The challenge presented by the CRPD*

In a 2013 report on abuses in healthcare settings, the then Special Rapporteur on torture, Juan E Méndez, argued that it was 'appropriate to question the doctrine of "medical necessity" established by the ECHR in the case of *Herczegfalvy v Austria*'.[297] The Special Rapporteur highlighted Article 12 CRPD, which requires as part of the right to equal recognition before the law that states ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.[298] The Special Rapporteur noted that '[m]illions of people with disabilities are stripped of their legal capacity worldwide, due to stigma and discrimination, through judicial declaration of incompetency or merely by a doctor's decision that the person "lacks capacity" to make a decision'.[299] The Special Rapporteur argued that '[t]he doctrine of medical necessity continues to be an obstacle to protection from arbitrary

[292] ibid.
[293] For example, *Bures v Czech Republic* (n 158) para 87.
[294] HRC, *Corey Brough v Australia*, Communication No 1184/2003 (17 March 2006) UN Doc CCPR/C/86/D/1184/2003.
[295] ibid para 2.1.
[296] ibid para 9.5.
[297] UNHRC, 'Report of the Special Rapporteur on torture' (n 101) para 34.
[298] ibid para 27, highlighting CRPD art 12 (n 278).
[299] UNHRC, 'Report of the Special Rapporteur on torture' (n 101) para 65.

abuses in health-care settings'.[300] He concluded that 'criteria that determine the grounds upon which treatment can be administered in the absence of free and informed consent should be clarified in the law, and no distinction between persons with or without disabilities should be made'.[301]

The Special Rapporteur's position, that no distinction may be made on the basis of disability regarding the circumstances in which forced medical treatment is permissible under the anti-torture norm, is supported by the Committee on the Rights of Persons with Disabilities' (CRPD Committee) General Comment No 1, which explains Article 12 CRPD. The General Comment states that 'a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity'.[302] It explains that, rather than denying persons with disabilities their capacity, states must 'provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect'.[303] The General Comment explains, further, that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities' and that the individual autonomy and capacity of persons with disabilities to make decisions must be respected '[a]t all times, including in crisis situations'.[304] The CRPD Committee's General Comment No 1 does envisage situations where 'after significant efforts have been made, it is not practicable to determine the will and preferences of an individual'.[305] In these situations, the General Comment states, the '"best interpretation of will and preferences" must replace the "best interests" determinations'.[306]

Article 12 CRPD raises the following question regarding the anti-torture norm and non-consensual medical treatment: if all people are to be treated equally with regard to their legal capacity (and, where necessary, individuals are provided with support to exercise their legal capacity), what, if any, are the circumstances in which forced or non-consensual medical treatment may nonetheless be considered justified and therefore not capable of constituting torture or ill-treatment?

[300] ibid para 35.
[301] ibid para 66.
[302] Committee on the Rights of Persons with Disabilities (CtteeRPD) General Comment No 1, 'Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1 para 9.
[303] ibid para 16.
[304] ibid para 18.
[305] ibid para 21.
[306] ibid.

The ECtHR's judgment in *VC v Slovakia* suggests that an 'emergency involving imminent risk of irreparable damage to […] life or health'[307] may be sufficient to justify non-consensual medical treatment under Article 3 ECHR. *Nevmerzhitsky v Ukraine*, on the other hand, suggests that the emergency needs to be life-threatening.[308] According to *Nevmerzhitsky*, procedural safeguards must also be followed[309] (in that case, the State failed to demonstrate medical necessity because it did not produce the professional assessments required under German law to demonstrate a threat to life[310]).

The 2013 report of the Special Rapporteur on torture states that '[o]nly in a life-threatening emergency in which there is no disagreement regarding the absence of legal capacity may a health-care provider proceed without informed consent to perform a life-saving procedure'.[311] This position is identical to an earlier statement by the former Special Rapporteur on the right to health, Anand Grover, in a 2009 report on informed consent.[312] The Special Rapporteur on the right to health explained that an example of a situation 'in which there is no disagreement regarding the absence of legal capacity' is where a person is sedated in hospital and unable to express any view.[313] Tina Minkowitz argues that the Special Rapporteurs' 'criterion "absence of legal capacity" is problematic under the CRPD and should not be used'.[314] She understands the Special Rapporteurs to mean, rather, that the 'person is expressing no choice', in which case she argues that 'there should be a default assumption in favor of preserving life'.[315] This approach appears to prohibit any non-consensual intervention where a person objects (with

[307] *VC v Slovakia* (n 279) para 110.
[308] *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 paras 94, 96.
[309] *Nevmerzhitsky v Ukraine* (n 279) para 93.
[310] ibid para 96.
[311] UNHRC, 'Report of the Special Rapporteur on torture' (n 101) para 66.
[312] UNGA, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on informed consent' (10 August 2009) UN Doc A/64/272 para 12.
[313] ibid, citing the English High Court decision in *Re T* [1992] 4 All ER 649 (UK). In *Re T*, the woman at the centre of the case was 'sedated and in a critical condition' (para 16) and the Court held that 'As Miss T. was no longer able to express any view, it was a classic "emergency" situation in which it was lawful for the doctors to treat her in whatever way they considered, in the exercise of their clinical judgment, to be in her best interests' (para 20).
[314] Tina Minkowitz, 'A Response to the Report by Juan E Mendez, Special Rapporteur on Torture, Dealing with Torture in the Context of Healthcare, as it Pertains to Nonconsensual Psychiatric Interventions' in American University, Washington College of Law, Center for Human Rights and Humanitarian Law, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington, February 2014) 237.
[315] ibid.

support where necessary to enable the exercise of legal capacity) to treatment. It also appears to prohibit all but life-saving treatment where a person has not expressed a choice.

This extremely limited view of when non-consensual medical treatment will be justified and not capable of amounting to torture or ill-treatment contradicts the ECtHR's and HRC's jurisprudence and is controversial among some commentators and medical professionals. Dinerstein raises what he calls a 'vexing conundrum', which he says the Special Rapportuer on torture has not addressed. He asks: 'If we posit that everyone has legal capacity, and that no one can receive treatment to which he has not given free, informed consent, do we have any legitimate way to intervene in the lives of people whose very illness may prevent them from the desirability of seeking treatment?'[316] Ginbar and Welsh, meanwhile, argue that 'loss of capacity to make decisions…may occur in a wide variety of situations', whether acute or chronic, and that 'humanity, compassion and urgency' may require action not just to avoid death but to avoid 'irreparable harm' or 'severe suffering'.[317] They contend that '[t]he fact that informed consent at times cannot be obtained due to communication problems rather than to the person's clear opposition to the treatment further militates against placing an absolute requirement for informed consent…where delayed treatment could have serious consequences'.[318]

The American Psychiatric Association (APA) and World Psychiatric Association (WPA) issued a detailed response to the Special Rapporteur's 2013 report, stating that they were 'greatly concerned that the adoption of these perspectives and recommendations may be detrimental to the interests of individuals with serious mental disorders, and likely to cause serious harm to the very groups it intends to protect'.[319] They argue that 'involuntary treatment used in appropriate circumstances and when medically indicated, can restore the functional and decisional capacity of persons with severe psychiatric disorders, and can protect them and others from the behavioural consequences of their conditions'.[320]

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[316] Robert Dinerstein, 'On Torture, Ill-Treatment and People with Psychosocial and Intellectual Disabilities: Some Thoughts About the Report of the Special Rapporteur', in American University, *Torture in Healthcare Settings* (n 314) 225.
[317] Yuval Ginbar and James Welsh, 'Torture in Health Care Settings: Urgent Issues and Challenging Questions' in American University, *Torture in Healthcare Settings* (n 314) 272.
[318] ibid.
[319] Letter from the American Psychiatric Association and the World Psychiatric Association to the President of the United Nations Human Rights Council and the Special Rapporteur on Torture, date 9 December 2013, in American University, *Torture in Healthcare Settings* (n 314) 141.
[320] ibid 142.

In response to the APA and WPA's concerns, the Special Rapporteur provided some clarifications to his 2013 report.[321] The Special Rapporteur stated that he 'did not mean to propose an absolute ban on non-consensual interventions (including institutionalization and restraints) under any and all circumstances'.[322] He explained that he 'meant to restrict [his] condemnation to non-consensual treatment based exclusively on discrimination against persons with disabilities…the fact that a person is diagnosed as having a psychosocial disability should not by itself be enough to justify non-consensual treatment'.[323] The Special Rapporteur then stated that 'involuntary detention and treatment is legitimate if its purpose is to prevent the patient harming him or herself or causing serious harm to others, and then for the limited time and scope necessary to prevent such harm'.[324]

The Special Rapporteur's revised position appears to be that anybody (if the grounds for forced interventions are to be applied equally, according to Article 12 CRPD) can be medicated non-consensually for the purpose of preventing harm to themselves or serious harm to others. This goes far beyond what was stated in his 2013 report, which echoed the stance of the Special Rapporteur on the right to health. It also appears to go beyond the currently accepted position under the anti-torture norm regarding individuals who are not considered to have a mental disability.

The SPT set out its position regarding the compatibility of non-consensual medical treatment with the rule against torture and ill-treatment in a 2016 report.[325] It does not address the question of medical intervention to prevent harm to others. Otherwise, it appears to respond to the concerns of the APA and WPA, Dinerstein, and Ginbar and Welsh, outlined above. The SPT states that '[a]n expert decision regarding psychiatric disease cannot in itself override the right to refuse medical treatment' but that:

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[321] Letter from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to Dr Jeffrey Lieberman, President, American Psychiatric Association, Dr Pedro Ruiz, President, World Psychiatric Association and Dr Saul Levin, CEO/Medical Director, American Psychiatric Association, dated 22 January 2014, in American University, *Torture in Healthcare Settings* (n 314) 151.
[322] Ibid 152.
[323] Ibid.
[324] ibid.
[325] UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (26 January 2016) UN Doc CAT/OP/27/2.

Exceptionally, it may be necessary to medically treat a person deprived of liberty without her or his consent if the person concerned is not able to:

(a) Understand the information given concerning the characteristics of the threat to her or his life or personal integrity, or its consequences;
(b) Understand the information about the medical treatment proposed, including its purpose, its means, its direct effects and its possible side effects;
(c) Communicate effectively with others.[326]

The SPT argues that '[i]n such a situation, the withholding of medical treatment would constitute inappropriate practice and could amount to a form of cruel, inhuman or degrading treatment or punishment. It may also constitute a form of discrimination'.[327] The SPT outlines a number of substantive and procedural requirements that the non-consensual medical treatment must comply with.[328]

The position of the IACtHR in *Ximenes Lopes v Brazil* appears similar to that of the SPT. In *Ximenes Lopes*, the Court stated that 'mental illness should not be understood as a disability for determination and the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail'.[329] However, the Court added that this principle is 'not absolute, since the patients' needs themselves may sometimes require the adoption of measures without their consent'.[330] The Court stated that '[w]hen the patients' inability to give their consent has been proven, their next of kin, legal representatives or pertinent authorities will give the consent required as regards to the treatment to be administered thereto'.[331]

[326] ibid 3.
[327] ibid.
[328] ibid. It must: (a) it must be a last resort to avoid irreparable damage to the life, integrity or health of the person concerned; (b) it must be mandated by a competent authority within a strict framework that sets out the criteria and duration for the treatment and review and supervision mechanisms; (c) it should be subject to review before an independent authority and/or a complaint mechanism as soon as this is practicable; (d) it must never be used for the convenience of staff, next of kin or others; (e) it must be precisely recorded and subject to administrative accountability and judicial review; and (f) the person must be debriefed by a medical doctor as soon as her or his condition permits it and must have access to the medical record and be informed of complaint mechanisms and means of redress
[329] IACtHR, *Ximenes Lopes v Brazil* (n 159) para 130.
[330] ibid.
[331] ibid (citations omitted).

The position of the SPT and IACtHR appears to contradict Article 12 CRPD, in that it continues to view some individuals in certain circumstances as being incapable of providing consent to medical treatment and allows for substitute decision-making by medical professionals. The next section argues that a change to the meaning of informed consent under the anti-torture norm could potentially allow for a shift in the position of the SPT and IACtHR (and potentially other treaty bodies) so that Article 12 CPRD is respected and the circumstances in which non-consensual medical treatment is permitted are the same for all.

iii. *Meaning of free and informed consent*

The SPT's definition of informed consent in its 2016 report on the medical treatment of persons deprived of their liberty is particularly detailed.[332] The SPT is of a similar mind-set to the CRPD Committee in its appreciation of informed consent as 'fundamental to respecting an individual's autonomy, self-determination and human dignity'.[333] In addition, the SPT agrees with the CRPD Committee that there is a need for safeguards to ensure that the right to informed consent is respected in practice.[334] However, there is a fundamental clash between the SPT and Article 12 CRPD in the sense that the SPT's conception of informed consent requires, in the traditional manner, that the person is 'able to' understand the information given concerning their health, understand the information about the proposed medical treatment, and communicate effectively with others.[335] The SPT does not appear to provide for, nor indeed require, supported decision-making processes where necessary to enable every person to provide informed consent to medical treatment or other intervention.

Arguably, the SPT's informed consent requirements could be adapted in light of Article 12 CRPD to provide for a conception of free and informed consent that can, and must where necessary, be satisfied through supported decision-making. Depending on the degree of support

[332] SPT, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (n 325) 3. Chapter 3 argues that the ECtHR has failed to espouse any detailed conception of informed consent in the context of institutionalisation for care purposes.
[333] ibid.
[334] ibid, stating that '[e]very person…who requires medical treatment should be fully informed about the diagnostic reasons for recommending a particular medical treatment and about existing alternatives, and given the opportunity to decline or receive the suggested treatment'. See also CtteeRPD General Comment No 1 (n 302) para 29(h), stating that '[s]afeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected'.
[335] ibid.

necessary to enable a person to provide free and informed consent, the SPT's detailed procedural constraints on the permissibility of non-consensual medical treatment (discussed above) could be adapted to also form part of the supported decision-making process.

Notwithstanding this suggestion and some further suggestions in subsequent chapters regarding the potential for the anti-torture norm to adapt to meet the requirements of the CRPD, the impact of the CRPD on both older people and the anti-torture normative framework is impossible to explore in detail in the space available in this thesis. The thesis aims to demonstrate, at least, that older people's experiences need to be considered in the re-evaluation of doctrinal and conceptual aspects of the anti-torture norm that the CRPD promises to ignite. Tina Minkowitz suggests that this is a worthwhile aim; she argues that '[a]ge discrimination within the disability sector has meant that older persons, particularly those with age-related impairments, have not been fully involved in implementation of the CRPD'.[336] Meanwhile, she states:

> Disability discrimination in the aging sector has created a double standard where the promotion of "active, healthy aging" guarantees equal rights and opportunities for older persons who are relatively free from impairments, but institutionalization and guardianship are planned for those who are deemed ineligible to live independently and manage their own affairs.[337]

Conclusion

The following chapters in the thesis proceed to further investigate aspects of the norm discussed in this chapter from the perspective of their relationship to the mistreatment of older people in contexts of deprivation of liberty for care purposes, lack of access to adequate continence care and impunity for so-called 'historic' torture or ill-treatment.

The next chapter draws heavily on this chapter's exposition of vulnerability's impact on the specification of torture or ill-treatment and positive obligations in considering how the concept may enhance the conceptualisation of a dignity violation under the anti-torture norm.

[336] Tina Minkowitz, 'A Response to the Report by Juan E Mendez' (n 314) 241.
[337] ibid 242.

Chapter 3 examines the impact that recognition of deprivation of liberty has on the treaty bodies' and other actors' understanding of the norm and how a shift in the conceptualisation of deprivation of liberty could affect the norm's doctrine. Chapter 3 also considers the need for deprivation of liberty to be conceptualised in a way that takes account of the right to respect for legal capacity and anti-torture norm's role in ensuring enjoyment of this right.

Chapter 4 analyses the relationship between suffering arising from lack of access to adequate care and this chapter's explanation of the constraints imposed on the norm's application to situations of socio-economic deprivation and the relevance of factors such as the 'context' and 'nature' of treatment to the minimum threshold of severity assessment.

Finally, Chapter 5 examines whether the right to redress as discussed in this chapter, with its numerous specific positive obligations, can be understood to apply to torture or ill-treatment perpetrated prior to entry into force of the relevant treaty obligations in respect of a state, and indefinitely (i.e. without expiring due to the passage of time).

CHAPTER 2: DIGNITY, VULNERABILITY AND THE ANTI-TORTURE NORM

Introduction

This chapter explores the potential for the concept of dignity to guide and facilitate the interpretation of the anti-torture norm to respond more effectively to older people's experiences of mistreatment. As part of this exploration, the chapter also examines the potential for the concept of vulnerability to strengthen a dignity-based approach to interpreting and applying the anti-torture norm, and for a dignity frame to likewise strengthen vulnerability's functions under the norm.

As stated in the Introduction, the anti-torture framework appears to require major conceptual shifts in order for older people to be more effectively protected from mistreatment in the contexts examined in the thesis. Chapter 1 exposed some general doctrinal limitations and areas of uncertainty in the normative framework. This chapter argues that dignity and vulnerability could be used as conceptual tools to shift the doctrinal limitations identified already and further in Chapters 3, 4 and 5, thus expanding the remit of the anti-torture norm as understood, to embrace older people's experiences of mistreatment. The chapter argues that a dignity violation sufficient, in principle, to reach the minimum threshold of severity for a finding of torture or ill-treatment should be conceptualised as an interference with a core aspect of the personality, in respect of which the person is powerless. The chapter further argues that vulnerability should be conceptualised within a dignity frame: specifically, as the powerlessness aspect of a (potential) dignity violation under the anti-torture norm.

Part I of the chapter discusses the concept of dignity. This part begins, in Section A, by tracing dignity's foundational role in the international human rights framework while acknowledging the concept's wide variation in meaning within the framework as a whole. Section A takes note of McCrudden's view, among others, that dignity's usefulness to judicial interpretation of human rights lies in its 'institutional function'[1] rather than in its substantive content. Section B then challenges the notion that dignity is devoid of agreed-upon substance by arguing that the concept is widely understood to be particularly closely connected with the rule against torture

[1] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655, 724.

and ill-treatment. Section C contends that, notwithstanding dignity's settled connection with the anti-torture norm in particular, more work needs to be done to conceptualise dignity so that it can guide the norm's interpretation in response to older people's experiences. Section D proposes a conception of a dignity violation sufficient in principle to reach the minimum threshold of severity under the anti-torture norm. The proposed conception draws on Luban's theoretical work and existing anti-torture jurisprudence.

Part II of the chapter discusses the concept of vulnerability. Section A recalls the exploration in Chapter 1 of vulnerability's capacity to sensitise the treaty bodies to the existence of torture or ill-treatment and to reveal heightened or specific positive obligations on states. Section A notes that, notwithstanding vulnerability's established functions under the anti-torture norm, various commentators and judges have criticised both the treaty bodies' failure to define the concept and the concept's emerging association with group membership. In an attempt to discern a substantive conception of vulnerability that coheres to some extent with the existing practice of the treaty bodies but avoids characterising group membership as the source of vulnerability, Section B explores a number of philosophical theories of vulnerability. Section C argues that the treaty bodies' use of vulnerability in practice in fact demonstrates their latent understanding of vulnerability as powerlessness. Specifically, Section C argues that existing anti-torture jurisprudence recognises, and thus demonstrates the potential for the conscious conceptualisation of, vulnerability as understood by Mackenzie, Rogers and Dodds: as inherent, situational and pathogenic powerlessness (including dependency).

The chapter contends that a dignity analysis could assist the treaty bodies and other actors to pierce through the structures that currently obscure the impact of mistreatment on older people, and thus to see more clearly the extent to which older people's experiences meet the minimum threshold of severity under the norm. The chapter concludes, further, that including vulnerability (understood as powerlessness) within a dignity analysis could assist in distinguishing anti-torture norm violations from violations of other human rights norms, and in responding to the structural causes of torture or ill-treatment of older people. The chapter also concludes that understanding vulnerability within a dignity frame could help to avoid the danger of paternalistic responses to the identification of vulnerability.

I. Dignity

A. *Dignity's role in the international human rights framework*

From a philosophical perspective, the inherent dignity of the human person has been considered by many before and since Kant to be the reason that individuals have rights.[2] The Preambles to the 1948 Universal Declaration of Human Rights (UDHR) and all of the subsequent universal human rights instruments reflect this idea,[3] as do the Preambles to a large number of the regional human rights instruments.[4] At the same time, these instruments also communicate

[2] See, for example, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 544; Paulo Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply', (2008) 19 EJIL 931, 932; Sigrid Graumann, 'Human dignity and people with disabilities' in Duwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 484; Peter Atterton, 'Dignity and the Other: dignity and the phenomenological tradition' in Duwell and others, *The Cambridge Handbook of Human Dignity*, ibid 276; Rutger Claassen, 'Human dignity in the capability approach' in Duwell and others, *The Cambridge Handbook of Human Dignity*, ibid 240. For an alternate view, that human dignity has a more limited role with respect to human rights than the 'foundational importance often claimed for it', see Govert den Hartogh, 'Is Human Dignity the Ground of Human Rights?' in Duwell and others, *The Cambridge Handbook of Human Dignity,* ibid 200.

[3] Universal Declaration of Human Rights (adopted 10 December 1948) UN (United Nations) GA (General Assembly) Res 217 A(III) (UDHR) preamble; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS (UN Treaty Series) 195 (CERD) preamble; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR) preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 (CEDAW) preamble; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) preamble; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) preamble; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/HRC/1/L.10, preamble; Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 International Legal Materials (ILM) 441 (CRPD) preamble.

[4] American Convention on Human Rights (entered into force 18 July 1978) Organisation of American States (OAS) Treaty Series No 36, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (ACHR) preamble, arts 6 and 11; Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 83 (1992) (IACPPT), preamble; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 5 March 1995) (1994) 33 ILM 1534, preamble; African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 ILM 58 (African Charter) preamble; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), reprinted in (2005) 12 International Human Rights Reports 893 (Arab Charter) preamble. Although there is no explicit reference to dignity in the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 United Nations Treaty Series 222 (ECHR), the European Court of Human Rights (ECtHR) has stated in numerous judgments that respect for human dignity is 'the very essence' of the Convention. See, for example, *SW v United Kingdom* (1996) 21 European Human Rights Review (EHRR) 363 para 44/42; *Vinter v United Kingdom* (2016) 63 EHRR 1 para 113; *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 118.

that, rather than being unassailable and ever-present, dignity requires protection from injury and is therefore contingent to varying degrees on States' compliance with human rights norms.[5] The South African Constitution, for example, espouses a similarly bifurcated notion of dignity: Lourens Ackermann, former Justice of the South African Constitutional Court, has noted 'the recognition by the Constitution that human dignity is not merely a protected and entrenched right, but that the concept of human dignity is definitional to what it means to be a human'.[6]

From the text of international human rights instruments, dignity appears to be a universally agreed-upon aspect of personhood. Its role as the basis for, or at least as a core value underpinning, human rights appears to be similarly agreed. However, McCrudden observes that the consensus of states in 1948 that dignity is foundational to human rights (and the subsequent ubiquity of dignity as an underpinning concept in human rights instruments) masked widely differing ideologies regarding the detail of that claim. McCrudden notes that, in the process of drafting the UDHR, the dignity theory was used as a 'placeholder'[7] for any part of a discussion or text where 'the absence of a theory of human rights would have been embarrassing', and where disagreement would have hampered progress.[8] Thus, while the concept of dignity holds an important place not just in universal and regional human rights law but also in many domestic constitutional orders today,[9] it does so in different ways.

[5] For a discussion of the difference between conceptualising dignity as intrinsic to existence and unassailable, and as contingent, dependent on external factors or conditions, see Lata Mani, 'Human Dignity and Suffering: Some Considerations' (2011) 46(36) Economic and Political Weekly 23; Viviana Bohorquez Monsalve and Javier Aguirre Roman, 'Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law (2009) 6(11) Sur – International Journal on Human Rights 39. See also UDHR (n 3) art 22 ('Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'); *Prosecutor v Anto Furundzija* (IT-95-17/1-T), Trial Chamber Judgment, 10 December 1998, para 183 ('The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law…This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person'); Clapham, *Human Rights Obligations of Non-State Actors* (n 2) 535 ('One of the major justifications for the protection of human rights is the need to protect and enhance human dignity').

[6] Lourens W H Ackermann, 'The Legal Nature of the South African Constitutional Revolution' in Drucilla Cornell, Stu Woolman, Sam Fuller, Jason Brickhill, Michael Bishop and Diana Dunbar, *The Dignity Jurisprudence of the Constitutional Court of South Africa* (Fordham University Press 2013) 43. See also Roger Berkowitz, 'Dignity Jurisprudence: Building a New Law on Earth' in Cornell and others, *The Dignity Jurisprudence of the Constitutional Court of South Africa*, ibid 65.

[7] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655, 675.

[8] Rights' ibid 678.

[9] See ibid 664–65; Anton Fagan, 'Human dignity in South African law' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 401; Cornell and others, *The Dignity Jurisprudence of the Constitutional Court of South Africa* (n 6) xiii.

Comparative analysis of legal instruments and jurisprudence reveals significant variation in legal understandings of dignity's meaning and its role regarding human rights – in other words, the rights dignity demands and the obligations it creates.[10]

McCrudden observes that, beyond the general references to dignity in their preambles, the provisions of regional human rights instruments explicitly tie dignity to differing, 'culturally relative',[11] norms when compared with each other and with the universal human rights framework. He cites examples of dignity's appearance in contrasting provisions regarding socio-economic rights, women's rights, individual duties to the community, self-determination and national liberation, freedom of religion, the protection of honour and reputation, and freedom of speech.[12] He notes that regional and domestic courts, too, have drawn upon dignity in varying contexts.[13] He highlights that in different jurisdictions, in similar factual contexts concerning abortion, incitement to racial hatred, obscenity and socio-economic rights, 'the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.'[14] Other commentators have also noted the contrasts between the norms which are explicitly linked to dignity in various universal and regional human rights instruments.[15] The literature further highlights the recent development of norms in universal and regional legislation which explicitly place dignity at their core for the first time.[16] Hennette-Vauchez points out that, within the same court, judicial

[10] See, for example, McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 679–80; Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2016) 4; Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2) 937; Zachary Davis, 'Scheler and human dignity' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 269; Christian Byk, 'Is human dignity a useless concept?' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 363; David Luban, 'Treatment of Prisoners and Torture' in Duwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 446.

[11] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 673.

[12] ibid 674.

[13] McCrudden, ibid, notes (at 684) that the Supreme Court of the United States has used the concept of human dignity to interpret, inter alia, the Eighth Amendment, the Due Process Clause, privacy rights concerning abortion context and the First Amendment. McCruddennotes further (at 693) that 'the European Court of Human Rights has drawn on dignity…in the contexts 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' (citations omitted). McCrudden (at 693) also discusses how the Inter-American Court of Human Rights (IACtHR), Indian Supreme Court and Hungarian and South African Constitutional Courts have used the concept of human dignity to support socio-economic rights.

[14] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 698. In particular, for example, McCrudden points (at 704) to the use of dignity in some jurisdictions to limit free speech in a manner which would never be allowed by the United States Supreme Court.

[15] See, for example, Viviana Bohorquez Monsalve and Javier Aguirre Roman, 'Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law' (2009) 6(11) Sur – International Journal on Human Rights 39, 45–47.

[16] See, for example, Clapham, *Human Rights Obligations of Non-State Actors* (n 2) 541 ('Another arena where one encounters international norms concerning the protection of dignity is that of working conditions. The European Union has adopted a series of directives concerned with sex discrimination, racial discrimination and

understandings of dignity's role in curbing or supporting the exercise of civil liberties can change within a relatively short period of time.[17] There is also clear tension between some domestic jurisdictions' treatment of dignity as an absolute right,[18] and the position in many other legal orders whereby dignity, as a right in itself or as a value underpinning other rights, may be lawfully interfered with.[19]

McCrudden concludes that, due to the diverging ways in which human rights instruments and courts around the world use dignity, the concept has no settled meaning beyond a basic 'minimum core', which is essentially synonymous with the general notion of human rights. He cites Feinberg's similar view, that '[r]espect for persons may simply be respect for their rights, so that there cannot be one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims'.[20] The agreed-upon 'minimum core' of human dignity which McCrudden detects comprises three propositions: first, 'that every human being possesses an intrinsic worth, merely by being human'; second, 'that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth'; and third, 'that recognizing the intrinsic

discrimination based on religion or belief, disability, age, or sexual orientation. These Directives include violations of dignity in the definition of discrimination and state that such violations amount to harassment – footnotes omitted; dignity and employment rights' (citations omitted)); McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 684.

[17] Stephanie Hennette-Vauchez, 'Human dignity in French law' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 371.

[18] For example, in the German Constitution: see Horst Dreier, 'Human dignity in German law' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 374. Dreier explains that:

> The German Federal Constitutional Court has always characterised human dignity as the 'highest value' and 'central constitutional principle' and sometimes as the 'fundamental rule' of the Constitution… The expression 'inviolable' is not intended to be descriptive, but prescriptive… What is granted or at least intended is an absolute guarantee, which has neither exceptions nor legitimate restrictions… Accordingly, the Federal Constitutional Court has repeatedly confirmed that human dignity can never be relativized or balanced against some other constitutional right or constitutional value (citing BVerfGE 93 (1995) 266 (293); 107 (2003) 275 (283f)).

[19] See the jurisprudence of the ECtHR, for example, *McDonald v United Kingdom* (2015) 60 EHRR 1, which suggests that certain interferences with dignity may be permissible where it does not reach the minimum threshold of severity required for a finding of ill-treatment under Article 3 ECHR. In *Bouyid v Belgium*, a group of partly dissenting judges stated that 'there are forms of treatment which, while interfering with human dignity, do not attain the minimum level of severity required to fall within the scope of art.3': *Bouyid v Belgium* (2016) 62 EHRR 32, Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney para OI-5, cited in Natasa Mavronicola, '*Bouyid v Belgium*: The "Minimum Level of Severity" and Human Dignity's Role in Article 3 ECHR' (2017) Cyprus Human Rights Law Review (forthcoming) 10. See also Anton Fagan, 'Human dignity in South African law' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 405: 'the [South African] Constitution does not preclude the possibility that the constitutional right to dignity may be justifiably and reasonably limited… the Constitutional Court has explicitly held that "like all constitutional rights, [the right to dignity] is not absolute and may be limited in appropriate cases"' (citations omitted). See too McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 698–99.

[20] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 680, citing Joel Feinberg, 'The Nature and Value of Rights' (1970) Journal of Value Inquiry 243, 252.

worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa'.[21] This 'minimum core' is to McCrudden, however, a 'relatively empty shell'.[22] He claims that there is significant disagreement regarding the implications of the three elements, and that, therefore, 'in the judicial interpretation of human rights there is no common substantive *conception* of dignity, although there appears to be an acceptance of the *concept* of dignity'.[23]

What, according to McCrudden, is the consequence of the absence of any international consensus regarding the normative content of dignity beyond its demand for human rights? Essentially, he seems to contend that dignity is not capable of forming the normative basis for the coherent development of human rights protections at the transnational or international level. He states that 'when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting conceptions'.[24] McCrudden argues that the importance and usefulness of dignity to human rights adjudication lies, rather, in its widespread 'institutional function'—that is, in its provision of 'a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights'.[25]

It is argued in the section directly below that, particularly with respect to the rule against torture and ill-treatment, McCrudden's assessment of dignity as a substantively vacuous, and therefore normatively useless, concept is called into question to a certain extent by other commentators and by the content of the principal international human rights instruments. However, even McCrudden's acknowledgement that dignity has a widely agreed-upon function as a tool with which questions of human rights violations are examined and pulled apart, and as a lens through which previously unrecognised human rights violations may be seen, suggests that the concept of dignity has an important role to play in the thesis' exploration of whether the anti-torture framework is capable of adapting to respond to mistreatment of older persons.

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[21] ibid 679.
[22] ibid 698.
[23] ibid 712.
[24] ibid 698. See also 710–713.
[25] ibid 724. This interpretive function is enshrined explicitly in the South African Constitution. See Anton Fagan, 'Human dignity in South African law' (n 9) 402.

One of the functions of dignity which McCrudden identifies is that it acts as a 'source from which new rights may be derived, and existing rights extended'.[26] Other commentators agree. Dupré contends that dignity has operated in the European context as a 'hermeneutic' concept, revealing new ways in which existing norms ought to be applied in order to protect those who have not traditionally benefitted from the norm's protection.[27] Dupré opines that 'reliance on human dignity makes discursive space to consider alternative and new ways of interpreting the law',[28] and that the concept has 'provided judges with a key to unlock a difficult situation and to open up a new path in human rights protection'.[29] Noting, for example, the European Court of Human Rights' (ECtHR) first explicit and significant use of dignity, to ground the impermissibility of marital rape in *SW v United Kingdom*,[30] Dupré argues that the concept assisted the court in bringing 'a most intimate sphere of life' into the democratic realm.[31]

Both Judge Christian Byk, of the Paris Court of Appeal, and Mr Justice James Munby (as he then was), of the English High Court, have acknowledged dignity's role in helping courts to interpret the requirements of human rights norms in light of changing social standards. Recalling 'Professor Ronald Dworkin's distinction between the "concept" which does not change and changing "conceptions of the concept"',[32] Munby J opined in a decision relating to Articles 3 and 8 of the European Convention on Human Rights (ECHR) that '[t]he concept of human dignity may be the same as ever, but… [c]hanges in social standards demand better provision for the disabled if their human dignity is not to be impaired'.[33] Byk has argued that human dignity is 'a powerful concept precisely because—much like fundamental legal or philosophical concepts such as family, love, good, justice etc.—it may be interpreted in various ways and serve as a guiding value—and not a dogma—to face a changing world'.[34] McCrudden's analysis is similar: he notes that 'the general principle may continue to generate more rights over time as its implications are better understood or changes occur which give

[26] ibid 721.
[27] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2016).
[28] ibid 159.
[29] ibid 159.
[30] *SW v United Kingdom* (1996) 21 EHRR 363.
[31] Dupré, *The Age of Dignity* (n 27) 100–02.
[32] *R (on the application of A) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCL Rep 194 para 95 (Munby J), citing *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FLR 146 paras 324–25 (Munby J).
[33] *R (on the application of A) v East Sussex CC* (n 32) para 98.
[34] Christian Byk, 'Is human dignity a useless concept?' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 363.

rise to new situations that require the application of the general principle for the first time'.[35] The German Constitutional Court, in the 1977 *Life Imprisonment Case* (discussed in detail below), opined in the same vein: 'any decision defining human dignity in concrete terms must be based on our present understanding of it, and not on any claim to a conception of timeless validity'.[36]

More specifically, within the context of the interpretation of norms, one of the other uses of dignity that McCrudden highlights is arguably a further function-based, or 'institutional', reason for exploring this thesis' questions through a focus on dignity. McCrudden contends that dignity is often used to afford particular weight to a certain right or value when courts are seeking to 'balance' seemingly incommensurable rights, and/or when they are undertaking proportionality assessments.[37] He notes that '[w]hen a particular right or other value is described as engaging dignity, this indicates that the court considers that considerable (even in some cases overwhelming) weight should be attributed to it'.[38] McCrudden's assessment of numerous courts' jurisprudence is that the attachment of dignity to a right or value can 'tip the scales' of the balancing exercise, or can lead to the application of 'strict scrutiny' in the proportionality assessment.[39]

There is, of course, no balancing exercise or proportionality assessment to undertake in determining whether the rule against torture and ill-treatment applies in a given circumstance, in the sense that there are no exceptions to the rule against torture and ill-treatment. However, what Mavronicola terms the question of 'specification'[40]—in other words, the determination of whether or not a particular experience amounts to torture or ill-treatment, and of what measures are required by positive obligations once triggered—is a relative one, requiring value judgements to be made. It is argued in the remaining chapters that a range of legal and social structures have obscured older people's lived experiences of mistreatment and that, as such, the anti-torture norm has failed to respond effectively to them. Dignity has the potential to play

[35] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 681.
[36] *Life Imprisonment Case* (1977) 45 BVerfGE 187, as translated in Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press 1997) 308.
[37] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 715–16.
[38] ibid 716 (citations omitted).
[39] ibid 717.
[40] Natasa Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723, 730–31; 738–39. See also Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014).

a crucial role in focusing the attention of the treaty bodies and other human rights actors responsible for the implementation of the anti-torture norm on older people's human experiences of suffering. Indeed, dignity surely requires that the human experience is the paramount concern in the interpretation and application of the anti-torture norm.

B. *Dignity and the rule against torture and ill-treatment*

Despite the contestation over dignity's meaning in relation to a range of international human rights norms, in fact there appears to be considerable agreement that dignity has a settled connection with the rule against torture and ill-treatment, over and above its connection to other norms.

Carozza argues that McCrudden 'is a little too quick to declare the minimum core unhelpfully vacuous'.[41] For Carozza, the agreed-upon content—which he describes similarly to McCrudden's 'minimum core'—does give rise to some widely accepted rules, including the prohibition of torture and ill-treatment. Carozza folds McCrudden's three elements into what he understands to be two agreed-upon ideas: first, that all human beings have equal moral worth; and second, that all human beings are entitled to have this status of equal moral worth respected by others and therefore also have a duty to respect it in all others.[42] Carozza seems to argue that, while the 'minimum core' would not shed light on dignity's connection to, or normative demands in, certain situations involving human rights claims,[43] some of the most basic human rights norms do relate closely to, and clearly gain their normative force from, the settled 'minimum core' of human dignity. Carozza contends that 'the problems of extrajudicial killings, arbitrary detentions, systematic discrimination, disappearances, torture, or unspeakably inhuman prison conditions—to name just a few… are extremely close to the inviolable core of human dignity'.[44]

Other commentators agree with Carozza's account, that notwithstanding dignity's uncertain

[41] Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2) 936.
[42] ibid 935.
[43] See Carozza, ibid 937, opining that the 30 Articles of the Universal Declaration of Human Rights 'by themselves still do not give us the specificity necessary to make hard choices about how to balance, say, the right to education or freedom of association against other aspects of the common good (including the rights of others), so the greater detailing of the content of human dignity does not obviate the need for judicial interpretation which reaches beyond the minimum core of the concepts'.
[44] ibid 936.

role regarding a range of human rights and the widely divergent approaches to dignity in the context of limited rights, the concept does appear to have a fairly settled connection with the absolute and non-derogable human rights norms, including the rule against torture and ill-treatment. Nowak notes that 'the prohibition of torture, cruel, inhuman or degrading treatment or punishment has taken on a special status in the protection of human rights under international law', and argues that '[t]his exceptional status is usually explained by the fact that torture, as slavery, constitutes a direct attack on the core of the human dignity and personality'.[45] Byk argues, similarly, that there is a difference between the absolute prohibitions and the limited rights in their relationship to dignity. Bky contends that 'international law recognizes the absolute character of certain prohibitions (torture, slavery), which find their basis in the concept of dignity, but for the implementation of other rights (in particular the right to private life or freedom of expression), the influence of dignity must be appreciated in light of factual circumstances'.[46]

Dupré contends that '[a]ccepting a certain conceptual malleability and openness is not to say…that human dignity has no legal definition'; she states that 'European constitutionalism arguably offers… a very precise definition (as a constellation of absolute prohibitions well established in case law since the post-war years)'.[47] Dreier, analysing the connection between human dignity as 'supreme rule of constitutional law' in Germany and 'torture, stigmatization, human trafficking [and] slavery', opines that '[i]t is a salient feature of these groups of cases that they are defined by an obvious violation of human dignity, and precisely because of their overwhelming plausibility are supported by a broad consensus'.[48] Feldman takes a similar view. While acknowledging that 'there is arguably no human right which is unconnected to human dignity', Feldman argues that the 'right to be free of inhuman or degrading treatment' seems to have 'a particularly prominent role in upholding human dignity'.[49] He states that international human rights case-law demonstrates that torture and inhuman or degrading treatment 'are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity'.[50]

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[45] Manfred Nowak, 'Challenges to the Absolute Prohibition of Torture and Ill-Treatment' (2005) 23 Netherlands Quarterly of Human Rights 674, 678.
[46] Byk, 'Is human dignity a useless concept?' (n 34) 366.
[47] Dupré, *The Age of Dignity* (n 27) 17.
[48] Dreier, 'Human dignity in German law' (n 18) 377–78.
[49] David Feldman, 'Human dignity as a legal value: Part 1' (1999) *Public Law* 682, 690.
[50] Feldman, ibid 690–91.

The text of international human rights instruments and human rights treaty body jurisprudence reinforces the notion that the concept of dignity is particularly strongly connected to the rule against torture and ill-treatment. Several regional instruments, including the African Charter on Human and People's Rights,[51] the American Convention on Human Rights (ACHR)[52] and the EU Charter of Fundamental Rights,[53] explicitly link the rule against torture and ill-treatment to the protection of dignity in their texts. In addition, the International Covenant on Civil and Political Rights (ICCPR)[54] and Arab Charter on Human Rights[55] both mention dignity in their absolute and non-derogable provisions requiring the humane treatment and respect for the inherent dignity of persons in detention. Although dignity is not mentioned in the text of the ECHR, the ECtHR has stated that 'the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity',[56] and that a person's dignity and physical integrity is 'precisely that which it is one of the main purposes of Article 3 to protect'.[57] The ECtHR has also noted the 'particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of art.3 of the Convention and respect for "dignity"'.[58] Similarly, the United Nations Human Rights Committee's (HRC) most recent general comment on Article 7 ICCPR stated that the 'aim of the provisions of article 7… is to protect both the dignity and the physical and mental integrity of the individual' and that Article 10 ICCPR complements Article 7 in this respect.[59]

To the extent that there is a settled connection between human dignity and the rule against torture and ill-treatment, this arguably makes the 'institutional' functions of dignity all the more important in the anti-torture context, and further supports the thesis' focus on dignity as a concept through which to explore the possibilities for interpretation of the anti-torture norm in international human rights law. Indeed, there are many examples in domestic and international

[51] African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 ILM 58 (African Charter) art 5.
[52] ACHR (n 4) art 5.
[53] Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1 (EU Charter) Title I: Dignity.
[54] ICCPR (n 3) art 10.
[55] Arab Charter (n 5) art 20.
[56] *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 para 33.
[57] *Bouyid v Belgium* (2016) 62 EHRR 32 para 81.
[58] *Bouyid v Belgium*, ibid para 90, citing *Kudla v Poland* (2002) 35 EHRR 11 para 94; *Valasinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001) para 102; *Yankov v Bulgaria* (2005) 40 EHRR 36 para 114; and *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 138.
[59] UN Human Rights Committee (HRC) General Comment No 20, 'Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev 9 (Vol I) para 2.

anti-torture jurisprudence of references to dignity facilitating the interpretation of the norm's meaning, and expansion of its doctrinal remit.

The concept of dignity has on numerous occasions been used to assess whether particular experiences meet the minimum threshold of severity for a finding of torture or ill-treatment. Several courts have reached the conclusion that the death penalty[60] and mandatory life imprisonment[61] amount to torture or ill-treatment on the basis that these practices violate human dignity. In much of its recent Article 3 ECHR case law, the ECtHR has explicitly tied dignity into its definition of degrading treatment. The test that the Court commonly espouses is that treatment will be considered degrading 'when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[62] The ECtHR's judgments in *Peers v Greece*,[63] *Svinarenko and Slyadnev v Russia*,[64] *Rahimi v Greece*,[65] *MSS v Belgium and Greece*[66] and *Bouyid v Belgium*[67] are all examples of the Court making findings of degrading treatment in newly considered circumstances, on the explicit basis of a dignity violation (while often wrapped up in broader reasoning regarding suffering and other factors relevant to the minimum threshold of severity assessment).

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[60] For example, *Furman v Georgia* 408 US 238 (1972); *Kindler v Canada* [1991] 2 SCR 779 (albeit obiter); *S v Makwanyane and Anor* 1995 (3) SA 391 (CC).

[61] For example, *Life Imprisonment* case 45 BVerfGE 187 (21 June 1977); *S v Dodo* 2001 (3) SA 6 (CC) para 38; *Vinter v UK* (2016) 63 EHRR 1.

[62] See, for example, *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 115, citing *MSS v Belgium and Greece* (2011) 53 EHRR 2 para 220 and *El-Masri v Macedonia* (2013) 57 EHRR 25 para 202.

[63] *Peers v Greece* (2001) 33 EHRR 51. In this case, the ECtHR found, despite there being 'no evidence that there was a positive intention of humiliating or debasing the applicant' (para 74), that prison conditions constituted degrading treatment because they 'diminished the applicant's dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance' (para 75).

[64] *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014). As discussed above in Chapter 1, Part I, in this case the ECtHR found the unnecessary holding of accused persons in cages during court appearances to constitute degrading treatment. The Court held (at para 138) that 'holding a person in a metal cage during a trial constitutes in itself—having regard to its objectively degrading nature which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society—an affront to human dignity in breach of Article 3'.

[65] *Rahimi v Greece*, App no 8687/08 (ECtHR, 5 July 2011). Here, the ECtHR found the immigration detention of an unaccompanied 15-year-old boy over two days to amount to degrading treatment. The Court explicitly based its decision on the impact of the detention conditions on the boy's dignity, bearing in mind his situation of extreme vulnerability (para 86).

[66] *MSS v Belgium and Greece* (n 62) .

[67] *Bouyid v Belgium* (n 57). Here, the ECtHR found that a slap to the face by a police officer while in custody constituted degrading treatment because it was not made necessary by the applicants' conduct and therefore diminished their dignity (see paras 103, 111).

In some of the ECtHR's jurisprudence, explicit consideration of dignity has contributed to, or at least accompanied, the adoption of new principles (rather than simply case-by-case analysis) regarding the minimum threshold of severity assessment under Article 3 ECHR. In *Tyrer v United Kingdom*, in which the Court made an explicit finding of a dignity violation constituting degrading punishment,[68] the ECtHR espoused the principle that degrading treatment may arise where 'the victim is humiliated in his own eyes, even if not in the eyes of others'.[69] This subjective test for whether a form of treatment meets the minimum threshold of severity has been re-stated in later judgments which focus explicitly on dignity under Article 3 ECHR, including *MSS v Belgium and Greece*[70] and *Bouyid v Belgium*.[71] An explicit focus on dignity has also led the ECtHR to state in several judgments that the assessment of whether the minimum threshold of severity has been met may rely predominantly or even entirely on the objective nature of the treatment.[72] A further significant leap in the principles that apply under Article 3 ECHR took place in *MSS v Belgium and Greece*, where a State's failure to provide socio-economic resources outside of the detention context was found to violate dignity and to amount to degrading treatment.[73] Gearty comments that '[g]one are the days (if they ever existed) when [Article 3] was a long-stop against unthinkably appalling systematic state violence…[t]his is a respect for human dignity, that is on the move, expanding the moral

[68] *Tyrer v United Kingdom* (n 56) para 33.
[69] ibid para 32.
[70] *MSS v Belgium and Greece* (n 62) para 220.
[71] *Bouyid v Belgium* (n 57) para 87.
[72] See, for example, *Keenan v United Kingdom* (2001) 33 EHRR 38 para 113:

> While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

See, similarly, *Bouyid v Belgium* (n 57) para 101. See further *Tyrer v United Kingdom* (n 56) para 33:

> The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted 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. Neither can it be excluded that the punishment may have had adverse psychological effects.

[73] *MSS v Belgium and Greece* (n6266) para 263:

> The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of art.3 of the Convention.

dictates of civilized society ever outwards, bringing more and more persons within its field of vision'.[74]

C. *The importance of conceptualising dignity*

Having established that dignity has settled 'institutional' functions, that it has a 'minimum core' of content, and that it is widely understood to be intimately connected with the rule against torture and ill-treatment, the question arises: does more need to be understood about dignity before treaty bodies, courts and other actors can use the concept as an analytical lens which assists them to interpret and apply the anti-torture norm to better protect older people's rights?

This section argues that further conceptualisation of dignity is required, beyond the propositions that constitute McCrudden's or Carozza's 'minimum core' and beyond the notion that respect for dignity is the basis of the rule against torture and ill-treatment. The preceding sections have demonstrated that dignity is widely used in the interpretation and application of the anti-torture norm. It is argued here, however, that the concept's substantive meaning in the legal field (including under the anti-torture norm) is still unclear, and that many commentators are concerned about the potential negative consequences of the continued judicial use of dignity without its further theorisation. This section notes Carozza's and Gearty's arguments that dignity's meaning will never be clear-cut or static and that this should not preclude engagement with questions of its substance. Encouragement is taken from these authors' arguments. The thesis adopts the view that, given dignity's established role within the anti-torture normative framework as both a foundational value and interpretive tool, better protection of older people's rights is more likely to be gained from engaging with dignity's substance than from refraining from the task because of its complexity.

McCrudden's and Carozza's 'minimum core', which they argue represents the agreed-upon substance of dignity in the legal field so far, is the starting point for this section's discussion of dignity's under-theorisation. These authors' 'minimum core' provides that individuals should be treated as though they have an 'intrinsic worth' (to quote McCrudden) or 'moral worth' (to quote Carozza). The minimum core also mandates that individuals are treated as if they have

[74] Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) 96.

equal intrinsic, or moral, worth. However, McCrudden's questions regarding the precise meaning and implications of these general propositions remain. The 'minimum core' does not reveal 'what the intrinsic worth of the individual human consists in', or 'what forms of treatment are inconsistent with this worth', or 'what the detailed implications of accepting the ontological and relationship claims are for the role of the state *vis-à-vis* the individual'.[75] In the anti-torture context, these questions might translate to: what is it about the intrinsic worth of the person that makes torture or ill-treatment an affront to human dignity; what is it about certain forms of treatment and their impact on dignity that gives them the character of torture or ill-treatment, rather than another, potentially lesser and not absolutely prohibited infringement of dignity; and what is it about dignity that demands the existence of positive obligations to prevent and protect against torture and ill-treatment?

Several commentators contend that, while numerous judgments of domestic and international courts have made powerful symbolic references to dignity when interpreting the law in a new way or expanding rights protections, they have often (though not always) failed to explain what they understand the concept to mean.[76] Dupré notes, for example, that in the European context, '[i]n numerous rulings the word "dignity" is mentioned in passing, without having any apparent impact on the reasoning, while in other cases, where judges seem to focus more on dignity, they do not develop it'.[77] Lima Marques and Lixinski state that, in South American law, 'human dignity has become more of a rhetorical tool in legal (particularly judicial) reasoning than a well-structured, carefully used legal mechanism'.[78] Bedford, meanwhile, criticises the ECtHR's judgment in *MS v United Kingdom*, holding that the failure to provide timely psychiatric treatment to a person in police custody was a violation of the State's positive obligations under Article 3 ECHR.[79] He states that '[t]he concept of human dignity is the concept that is the most ill-defined in *MS*…Each time the Court refers to the concept, the

[75] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 680.
[76] In the South African context, see, for example, Anton Fagan, 'Human dignity in South African law' (n 9) 404: 'Notwithstanding the many occasions on which human dignity has been invoked by the South African courts, South African law has yet to develop a *concept* of human dignity capable of explaining the multiple roles accorded it by the South African Constitution.' See also Roger Berkowitz, 'Dignity Jurisprudence: Building a New Law on Earth' in Cornell and others, *The Dignity Jurisprudence of the Constitutional Court of South Africa* (n 6) 67, citing Dennis David, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116(2) SALJ 398, 413: 'The Constitutional Court [of South Africa] has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of a jurisprudential Lego-land—to be used in whatever form and shape is required by the demands of the judicial designer.'
[77] Dupré, *The Age of Dignity* (n 27) 84.
[78] Claudia Lima Marques and Lucas Lixinski, 'Human dignity in South American law' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 394.
[79] *MS v United Kingdom* (2012) 55 EHRR 23.

situation of the applicant is cited, and it is held to be an affront to human dignity without a connecting explanation that makes sense of why dignity is violated'.[80]

Despite arguing that there is no agreed-upon conception of human dignity which could provide the basis for the principled transnational or international development of human rights law, McCrudden himself draws attention to the danger of seeing dignity only in terms of its 'institutional' functions, and of failing to pay attention to, or elucidate, its content. McCrudden remarks that if the use of dignity is understood to be 'merely rhetorical', and if it is used 'merely to disguise, for example, the absence of a theory on how to resolve conflict between incommensurable values', then '[s]ome may well consider that this approach obscures the moral issues which give rise to conflicts of rights'.[81] McCrudden warns of the possibility of dignity being viewed as 'a smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable'.[82] He argues that some may view this use of dignity 'as a breach of the Rule of Law…as conceptualized by Raz' or as 'anti-democratic'.[83] Carozza echoes this concern. He contends, with regard to the 'institutional' functions of dignity elucidated by McCrudden, that 'in each case the idea of human dignity is capable of performing the designated function *only* because it appeals to, draws its authority from, and claims to be the bearer of some extra-legal and supra-positive value'.[84] Making a broader point about the inability of human rights norms to retain their significance solely on the basis of the paper upon which they are written, Carozza argues that 'a *substantive*, not merely procedural, bureaucratic-institutional, or formal and legalistic, dialogue on the meaning of human dignity is…vital to the future of the human rights experiment'.[85]

Others agree that in order for dignity to operate effectively as an interpretive principle that can guide future cases, its content needs to be theorised because frequent references to dignity without consideration of the meaning and importance of the concept may lead to its trivialisation.[86] Bedford argues, with regard to the ECtHR's jurisprudence, that 'if the primary principle that has been infringed is dignity, it is incumbent on the Court to provide indicators

[80] Daniel Bedford, '*MS v United Kingdom*: article 3 ECHR, detention and mental health' (2013) 1 European Human Rights Law Review 72, 79, citing *MS v United Kingdom* (2012) 55 EHRR 23 paras 44–45.
[81] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 722.
[82] ibid.
[83] ibid.
[84] Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2) 939.
[85] ibid 943.
[86] See, for example, Dreier, 'Human dignity in German law' (n 18) 373; Lima Marques and Lixinski, 'Human dignity in South American law' (n 78) 394.

concerning the way in which it is using that concept, as a basis for providing sufficient guidance in future cases'.[87] Dreier states that in German jurisprudence, 'human dignity is in jeopardy of being used in a random fashion'.[88] He argues that the increasing incidence of judgments where 'the right to human dignity is used as a justification, or even in place of a justification in order to give more force to one's own conclusions, potentially based on completely different arguments'[89] constitutes a 'threat to both its exceptional status in the legal order as well as its claim to prevail over all other rules'.[90] Lima Marques and Lixinski contend, of the use of dignity in South American law, that the 'under-comprehension' of the concept…has led to the reduction of its normative value and even threatens to nullify it altogether, at least before the eyes of society at large'.[91]

Regarding dignity's potential to contribute to greater protection of older people's rights in particular, Kountouros and Rees maintain that dignity's under-theorisation in the legal field undermines the concept's capacity to drive the structural changes that are required in order to better protect older people from mistreatment.[92] Kountouros and Rees argue that legal conceptualisation of dignity lags behind theoretical understandings of dignity in the field of ethics, for example.[93] They contend that 'theoretical literature on the issue shows dignity to be an explicitly multidimensional concept, pertaining to the physical, mental and emotional state of older persons', whereas '[t]he legal understanding of dignity is neither as sophisticated, nor as wide encompassing as the theoretical discourse shows it to be'.[94] Kountouros and Rees conclude that, within the legal context, 'dignity is ultimately a metaphor for standards and structures which can properly address [older people's] needs'.[95]

According to Carozza, and contrary to McCrudden's apparent view, the fact that dignity is subject to numerous interpretations by national courts is not a bar to its substantive usefulness

[87] Bedford, '*MS v United Kingdom*: article 3 ECHR, detention and mental health' (n 80) 79. See, in a similar vein, Clapham, *Human Rights Obligations of Non-State Actors* (n 2) 545 citing Gavin W Anderson, 'Rights and the Art of Boundary Maintenance' (1997) 60(1) Modern Law Review 120, 131.
[88] Dreier, 'Human dignity in German law' (n 18) 380.
[89] ibid.
[90] ibid.
[91] Lima Marques and Lixinski, 'Human dignity in South American law' (n 78) 394.
[92] See Haris Kountouros and Nicola Rees, 'Dignity as a Theoretical and Legal Construct in the Context of Care for Older Persons and the Developing Human Rights Agenda for Older Persons' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016), 203–04.
[93]ibid.
[94] ibid 204.
[95] ibid.

at the transnational level and should not deter courts and other actors from seeking to further develop their substantive understandings of the concept.[96] Carozza argues that dignity is similar to other major principles of human rights adjudication in having a 'multiplicity of possible valences and implications which can diverge significantly in context'.[97] To Carozza, the diversity of meanings that are given to dignity in different legal, political and cultural contexts is not necessarily evidence of the concept's failure, or inadequacy, as a value which underpins supposedly universal human rights norms. Rather, Carozza appears to see all efforts to specify dignity's substantive content as potentially leading to a 'cross-cultural convergence of understandings at some level, but only over a very long horizon'.[98] Furthermore, Carozza argues that, although 'we do and must seek consensus on fundamental principles in order to secure widespread acceptance and effective realisation of human rights', this 'does not mean…that consensus is itself the basis for the truth of any assertion of the requirements of human dignity'.[99]

Gearty also accepts the malleability of dignity[100] and acknowledges that decisions about what dignity means in practice are 'bound to be controversial'.[101] Gearty, referring to Sypnowich's work, suggests that it is entirely legitimate for attempts to be made to achieve new understandings of dignity, because the nature of dignity is that its meaning is in flux. Gearty notes that Sypnowich shows 'that socialists need not…be frightened off the concept altogether, but rather they need to…fight for the supremacy of their version of human rights. In this battle all options are open'.[102] Gearty quotes Sypnowich's argument that '[i]f human rights are shaped by social factors, there can be no ultimate, timeless "core" of negative human rights, to which positive rights stand as dispensable extras'.[103]

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[96] See Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2).
[97] ibid 932.
[98] ibid 940. In another article, '"My Friend Is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2008) 81(4) Texas Law Review 1031, Carozza develops the notion of the *ius commune* of human rights. At 1042, he notes that:

> Those who have identified and described this phenomenon have consistently emphasized that it is characterized by a continued multiplicity and pluralism of local laws rather than their unification or equivalence, in any strong sense. The details of the *ius commune* of human rights do not necessarily have formal constitutional status in any one national legal system, and thus even while they serve as a unifying element, they are subject to each national system using its own particular methods of incorporation, interpretation, and implementation (citations omitted).

[99] Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2) 937.
[100] Gearty agrees with David Feldman's argument that respect for human dignity is 'a notion which is culturally dependent and eminently malleable': Gearty, *Principles of Human Rights Adjudication* (n 74) 86, citing Feldman, 'Human dignity as a legal value: Part 1' (n 49) 698.
[101] Gearty, *Principles of Human Rights Adjudication* (n 74) 86–87.
[102] ibid 88, citing Christine Sypnowich, *The Concept of Socialist Law* (Clarendon Press 1990) 111.
[103] ibid.

The thesis takes the above assessments of both dignity's under-theorisation and its flexibility of substance to mean that the human rights treaty bodies and other relevant actors need to develop substantive conceptions of dignity in order to make the most of, and indeed preserve, dignity's capacity to facilitate and guide the development of the anti-torture norm. With this in mind, the following section seeks to identify a conception of a dignity violation that could form the basis of the anti-torture norm's response to older people's experiences of mistreatment.

D. *Proposed conception of a dignity violation*

This section of the chapter proposes that a dignity violation sufficient, in principle, to constitute torture or ill-treatment could be conceptualised as an interference with a core aspect of the personality, in respect of which the person is powerless. It is contended that some of the dignity-focused anti-torture jurisprudence of the ECtHR and Inter-American Court of Human Rights (IACtHR), among other courts and treaty bodies, reveals this conception although the treaty bodies do not explicitly theorise their use of dignity in these terms.

This section refers to Luban's theory of the connection between violations of the anti-torture norm and human dignity. It is argued that Luban's conception of a dignity violation in the anti-torture context sheds light on the reasoning of various courts and human rights treaty bodies in cases where they have detected dignity violations sufficient to constitute torture or ill-treatment. By examining existing jurisprudence and extrapolating from it a concrete conception of a dignity violation, the section responds to McCrudden and Carozza's suggestions that there may exist more consensus than they have acknowledged in their commentaries regarding the meaning of dignity in relation to norms whose close connection with dignity is generally accepted.[104]

The conception of a dignity violation developed in this section is intended to encompass not just drastic dignity interferences, such as the death penalty and life imprisonment, but also less extreme dignity interferences that may constitute degrading treatment or another form of ill-treatment. As a result, it is argued, the proposed conception could help to identify violations of

[104] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 7) 711–12; Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 2) 938.

the anti-torture norm that have traditionally been understood only as interferences with qualified or limited rights (such as the right to respect for one's private life, or the right to the highest attainable standard of health). As the Introduction suggested, and as the remaining chapters discuss in further detail, older people's experiences of rights violations appear to have been overlooked within the international human rights framework to date. Two former UN Special Rapporteurs on torture have argued that mistreatment occurring in healthcare contexts is often understood to violate only the right to health, when in fact it ought to be recognised as torture or ill-treatment.[105] In order to respond to older people's experiences of mistreatment, particularly in care contexts, it is therefore necessary to develop a conception of a dignity violation that is capable of identifying the forms of ill-treatment that are not currently obvious to the treaty bodies and other human rights actors, and/or are not seen as extreme violations of the norm.

Turning to Luban's theory of dignity violations under the anti-torture norm: Luban argues that the connection between torture or ill-treatment and human dignity 'lies in the fact that cruel practices assault basic aspects of the human personality, and do so to deny the equal dignity of the victim'.[106]

Luban explains that the first aspect of his conception of a dignity violation—an assault on a basic aspect of the human personality—is concerned with 'psychological integrity'.[107] In other words, Luban contends, the first aspect reflects 'a personal and existential meaning of individual human dignity'.[108] The view of the former Special Rapporteur on torture, Manfred Nowak, that dignity is 'grounded in the uniqueness of human beings, their free will, their capacity for moral choice and their individual autonomy',[109] chimes with Luban's description of the first aspect of a dignity violation under the anti-torture norm.

[105] UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (28 July 2008) UN Doc A/63/175; UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53.
[106] David Luban, 'Treatment of Prisoners and Torture', in Duwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 447.
[107] ibid 448.
[108] ibid.
[109] UNGA, 'Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (3 August 2009) UN Doc A/64/215 para 47.

Luban explains that the second aspect of his conception of a dignity violation—the denial of the equal dignity of the victim—arises where a person is treated 'as a lesser being than his fellows',[110] or 'subordinated'.[111] Luban notes that 'the UDHR systematically ties "inherent dignity" to "equal rights"' and argues that, in addition to the 'psychological integrity' aspect of human dignity, the 'emphasis on equality means that human dignity is the common possession of all human beings in equal measure—a relational sense of human dignity'.[112]

Arguably, in a significant number of existing dignity-focused judgments under the anti-torture norm it is possible to discern the court's or treaty body's reasoning operating in accordance with Luban's conception of a dignity violation sufficient to amount to torture or ill-treatment. As demonstrated below, Luban's second characteristic of a dignity violation—inequality—seems to materialise in a number of judgments as powerlessness or subordination. This observation, supported by Luban's characterisation of inequality as 'subordination' and MacKinnon's theory that unequal power relations are the substance of inequality,[113] leads to this thesis' proposed conception of a dignity violation as an interference with a core aspect of the personality, in respect of which the person is powerless.

Probably the best known judgments to use dignity reasoning to interpret the rule against torture and ill-treatment are those concerning the death penalty[114] and whole life imprisonment.[115] In a number of these cases, concern for 'psychological integrity' is not clearly distinguished from concern for 'equal dignity', but it is nonetheless possible to interpret the court's or treaty body's understanding of dignity as encompassing both of these elements. Many of the judgments conceptualise dignity from a Kantian perspective—as requiring that individuals are treated as

[110] Luban, 'Treatment of Prisoners and Torture' (n 106) 447–48.
[111] ibid 448.
[112] ibid 448.
[113] See, for example, Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 Minnesota Law Review 1; Catharine A MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14(3) International Journal of Constitutional Law 739, 740.
[114] For example, *Furman v Georgia* 408 US 238 (1972) 270; *Kindler v Canada* [1991] 2 SCR 779; *S v Makwanyane and Anor* 1995 (3) SA 391 (CC); Inter-American Commission on Human Rights (IACmHR), *Rudolph Baptiste v Grenada*, Report No 38/00 Case 11.743 (13 April 2000); *Life Imprisonment Case* (1977) 45 BVerfGE 187, as translated in Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press 1997) 306–11; *S v Dodo* 2001 (3) SA 6 (CC); *Vinter v United Kingdom* (2016) 63 EHRR 1
[115] For example, *Life Imprisonment Case* (1977) 45 BVerfGE 187, as translated in Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press 1997) 306–11; *S v Dodo* 2001 (3) SA 6 (CC); *Vinter v United Kingdom* (2016) 63 EHRR 1.

ends and not means, or (in other words), prohibiting the treatment of individuals as 'objects'.[116] From this perspective, the assault on the personality is bound up with powerlessness. Luban acknowledges that it is not always easy to separate out the two core aspects of a dignity violation under the anti-torture norm; he argues that '[t]he two go together: destroying someone's personality reduces her to a lower level, and systematic subordination assaults the personality'.[117]

In some other dignity-focused anti-torture jurisprudence of the ECtHR and IACtHR, however, there is a clear focus on both the interference with a core aspect of the personality and the person's experience of powerlessness.

The ECtHR's recent interpretation of a dignity infringement amounting to degrading treatment in *Bouyid v Belgium*[118] demonstrates a conception of a dignity violation which clearly involves both an interference with the personality and the powerlessness of the victim. In *Bouyid*, two brothers (one aged 17 and therefore a minor) were slapped by police officers while under the officers' control in a police station. In the course of its judgment the ECtHR held that 'a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity'.[119] The Court also held that 'in respect of a person who is deprived of his liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity'.[120] Ultimately, the Court found degrading treatment to have occurred because 'the slap administered to each of the applicants by the police officers while they were under their control…did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and thus diminished their dignity'.[121]

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[116] See, for example, *Furman v Georgia* (n 114) 272; *S v Makwanyane* (n 114) para 26; *Life Imprisonment Case* (n 114) 305, 308; *S v Dodo* (n 114) para 38 (Ackermann J); *Vinter v United Kingdom* ibid para 69. In a different context, see *Tyrer v United Kingdom* (1979–80) 2 EHRR 1, where judicially imposed corporal punishment was found to assault dignity and constitute degrading treatment. The ECtHR described the victim as having been made an 'object in the power of the authorities' (para 33).
[117] Luban, 'Treatment of Prisoners and Torture' (n 106) 448.
[118] *MSS v Belgium and Greece* (n 62) para 220.
[118] *Bouyid v Belgium* (n 57).
[119] ibid para 103.
[120] ibid para 88, citing *Ribitsch v Austria* (1996) 21 EHRR 573 para 38; *Mete and others v Turkey* App no 294/08 (ECtHR, 4 October 2011) para 106; *El-Masri v Macedonia* (n 62) para 207.
[121] *ibid* para 111.

Demonstrating its recognition of the first aspect of the thesis' proposed conception of a dignity violation, the ECtHR highlighted the impact of a slap on the personality: '[a] slap to the face affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses—sight, speech and hearing—which are used for communication with others'.[122] The Court also acknowledged the second aspect of the proposed conception of a dignity violation sufficient to violate the anti-torture norm. The Court stated that 'when the slap is inflicted by law-enforcement officers on persons under their control…it highlights the superiority and inferiority which by definition characterise the relationship between the former and the latter in such circumstances'.[123] Where the victims 'know that such an act is unlawful, constituting a breach of moral and professional ethics by those officers and…also being unlawful', the Court noted, this 'may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness'.[124]

There is a similar pattern to the ECtHR's judgment in *VC v Slovakia*, where the subjection of a Roma woman to forced sterilisation was found to be 'incompatible with the requirement of respect for human freedom and dignity'[125] and in violation of Article 3 ECHR. The ECtHR focused first on the fact that the procedure had interfered with 'one of the essential bodily functions of human beings, [which] bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life'.[126] It further noted that 'the sterilisation procedure grossly interfered with the applicant's physical integrity as she was thereby deprived of her reproductive capability'.[127] The Court then focused on the fact that the applicant had not been given an opportunity to provide informed consent, which rendered her powerless to prevent the interference and subordinated her to the decision-making power of the medical professionals. The Court stated: 'in the case of imposition of such medical treatment without the consent of a mentally competent adult patient[,] [s]uch a way of proceeding is to be regarded as incompatible with the requirement of respect for human freedom and dignity, one of the fundamental principles on which the Convention is based'.[128] The Court demonstrated sensitivity to the individual experience of the applicant, noting that, even though '[t]he documents available indicate that

[122] *ibid* para 104.
[123] ibid para 106.
[124] ibid.
[125] *VC v Slovakia* (2014) 5 9EHRR 29 para 107.
[126] ibid para 106.
[127] ibid para 116.
[128] ibid para 107.

the applicant was asked to give her consent in writing', this had happened 'two and a half hours after she had been brought to hospital, while she was in the process of established labour and in a supine position'.[129] The Court held that 'such an approach [was] not compatible with the principles of respect for human dignity and human freedom embodied in the Convention and the requirement of informed consent laid down in the international documents…',[130] nor was it compatible with the 'principle of patients' autonomy in their relationship with health care professionals'.[131] It had been in 'gross disregard for [the applicant's] right to autonomy and choice as a patient'.[132]

In *Rosendo Cantu v Mexico*, the IACtHR held that the rape of a 17 year-old girl constituted torture and a violation of the 'rights to personal integrity and to private life and personal dignity'.[133] In this judgment, the IACtHR focused on both the interference with the girl's personality and her powerlessness in the face of such an interference. The Court held that the rape of the applicant 'annulled her right to decide freely with whom to have intimate relations, causing her to lose complete control over this most personal and intimate decision, and over her basic bodily functions'.[134] The IACtHR connected the girl's powerlessness with her inequality; directly following the Court's finding that the rape had violated her dignity sufficiently to amount to torture, it drew attention to the opinion of the Committee on the Elimination of Discrimination Against Women, that '[v]iolence against women is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[135]

There are other judgments of the ECtHR and IACtHR under the anti-torture norm that mention dignity but do not demonstrate the treaty bodies' understanding of the concept as clearly as the judgments discussed above.[136] Among the jurisprudence that does not fully explain these two treaty bodies' conceptions of a dignity violation under the anti-torture norm are numerous

[129] ibid para 111.
[130] ibid para 112.
[131] ibid para 115.
[132] ibid para 119.
[133] IACtHR, *Valentina Rosendo Cantu et al v Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 216 para 121.
[134] ibid para 119.
[135] ibid para 120.
[136] See Bedford, '*MS v United Kingdom*: article 3 ECHR, detention and mental health' (n 80) criticising the ECtHR's shallow use of dignity in *MS v United Kingdom* (2012) 55 EHRR 23 paras 44–45. See also the cases mentioned in Chapter 1 at (n 153) and below in Part II Section A.

judgments referring to both dignity and vulnerability. The next part of the chapter acknowledges that vulnerability has been under-theorised, while it has also been used widely to interpret and apply the rule against torture and ill-treatment. Part II of the chapter contends that vulnerability could be conceptualised as a key element of a (potential) dignity violation sufficient to amount to torture or ill-treatment. Specifically, the next part argues that vulnerability could be understood as the powerlessness aspect of the thesis' proposed conception of a dignity violation.

In the death penalty and whole life imprisonment cases, powerlessness derives from the total physical control that others hold over the person. The most recent report of the Special Rapporteur on torture to the UNGA, on extra-custodial use of force, defines torture as the 'deliberate instrumentalization of the pain or suffering inflicted on a powerless person as a vehicle for achieving a particular purpose'.[137] Powerlessness is defined as a situation where 'someone is overpowered, in other words, has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering'.[138] The next part of the chapter argues that understanding vulnerability as powerlessness (and vice versa) within the proposed conception of a dignity violation sufficient in principle to constitute torture or ill-treatment would open up new ways of understanding powerlessness under the anti-torture norm, particularly in relation to ill-treatment. Specifically, it is argued, such conceptualisation of vulnerability and dignity would reveal the many ways including *and additional to* physical control in which older people 'los[e] the capacity to resist or escape the infliction of pain or suffering' (to use the Special Rapporteur's words). Recognition of the many ways in which older people may experience powerlessness is key, it is contended, to the interpretation of the anti-torture norm in order to more effectively protect older people from mistreatment that they frequently suffer.

II. Vulnerability

This part of the chapter develops the argument that a substantive conception of a dignity violation that includes vulnerability could assist the treaty bodies and other human rights actors

[137] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer: Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' (20 July 2017) UN Doc A/72/178 para 31.
[138] ibid.

to interpret the anti-torture norm to better protect older people from mistreatment. In particular, this part develops the argument that the *powerlessness* aspect of the thesis' proposed conception of a dignity violation under the anti-torture norm should be understood as vulnerability, and vice versa.

Chapter 1 demonstrated that the concept of vulnerability has an established role in enabling the anti-torture framework to adapt to context-specific aspects of torture and ill-treatment. Specifically, Chapter 1 argued that vulnerability reasoning appears to sensitise the treaty bodies and other human rights actors to the existence or risk of torture or ill-treatment, and, as a consequence, also prompts their identification of specific positive obligations to prevent and protect from torture and ill-treatment, including in some instances through the provision of socio-economic resources. Like dignity, however, the use of vulnerability under the anti-torture norm has been criticised on the basis that the human rights treaty bodies have not adequately theorised the concept.[139]

This part of the chapter contends that vulnerability's ability to guide and enable the effective application of the anti-torture norm to individuals who have not traditionally benefitted from the norm's protection could be strengthened by conceptualising vulnerability in the manner proposed by ethical theorists Mackenzie, Rogers and Dodds: that is, as inherent, situational or pathogenic powerlessness, which may be either dispositional or occurrent.[140] This part contends that vulnerability is already used under the anti-torture norm in ways that correspond to Mackenzie, Rogers and Dodds' taxonomy—although the treaty bodies and other human rights actors have not conceptualised vulnerability as such. It is argued that recognition of vulnerability as inherent or situational (including pathogenic) powerlessness would allow for the identification of the powerlessness experienced by any person, rather than entrenching the emerging and frequently harmful notion that vulnerability is a group characteristic. It is further argued that this approach would highlight the many ways in which older people, among others, are rendered powerless by the state's direct conduct and by societal conditions—aspects of human experience that are often mistaken for 'inherent' vulnerability in the treaty bodies' current approach under the anti-torture norm.

[139] as explained in Section A below.
[140] See Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013).

Section A of this part discusses the treaty bodies' references to vulnerability in conjunction with dignity in existing anti-torture jurisprudence, and various commentators' criticisms of the treaty bodies' under-developed understanding of vulnerability's substantive meaning. Section B explores various philosophical theorists' understandings of vulnerability in an effort to shed light on the possible meaning(s) of the concept as it is currently used under the anti-torture norm. Section C applies Mackenzie, Rogers and Dodds' taxonomy of vulnerability to existing anti-torture jurisprudence and argues that, in fact, the treaty bodies appear to use vulnerability to refer to various forms of powerlessness that may be experienced by any person, rather than requiring group membership.

This part of the chapter leads to the chapter's overall conclusion that understanding vulnerability as a fundamental component of a dignity violation sufficient, in principle, to violate the anti-torture norm would strengthen dignity reasoning under the norm by enabling it to be more sensitive to the lived experiences of older people, and would simultaneously strengthen vulnerability's interpretive and adaptive functions under the norm.

A. *Criticisms of the current conception of vulnerability*

In numerous judgments under the anti-torture norm, the ECtHR and IACtHR have referred to vulnerability and dignity in connection with each other. Recognition of a person's vulnerability has frequently appeared to be foundational to the treaty bodies' finding of a dignity violation sufficient to amount to torture or ill-treatment, and/or their espousal of specific positive obligations to prevent or protect from dignity violations.

For example, in *Rahimi v Greece*, the ECtHR held that 'even allowing for the fact that his detention had lasted for only two days', a 15 year-old applicant had suffered a dignity violation amounting to degrading treatment, in large part because of his 'extreme vulnerability' as a young, unaccompanied, illegal immigrant.[141] In *Rosendo Cantu v Mexico*, where the rape by military personnel of a 17 year-old girl was held to amount to torture and a violation of the 'rights to personal integrity and to private life and personal dignity',[142] the IACtHR referred to

[141] *Rahimi v Greece* (n 65) para 86.
[142] IACtHR *Rosendo Cantu v Mexico* (n 133) para 121.

the applicant's vulnerability and the coercion to which she was subjected, which the Court found 'exacerbated the context of sexual violence perpetrated against the victim'.[143] The Court also held that her suffering was increased by the fact that she was a child.[144] In both *Renolde v France*[145] and *Keenan v United Kingdom*,[146] the ECtHR's recognition of the 'vulnerability' of 'mentally ill persons' was foundational to its position that '[t]reatment of a mentally ill person may be incompatible with the standards imposed by art.3 in the protection of human dignity, even though that person may not be able or in a position to point to any specific ill-effects'.[147] In *Ximenes Lopes v Brazil,* the IACtHR held that the vulnerability of patients in psychiatric institutions requires 'the strict supervision of such institutions'[148] because torture and ill-treatment, 'when inflicted on these people, affect their psychic, physical and moral integrity, entail an insult to their dignity, and seriously restrict their autonomy, which could aggravate their condition'.[149] Finally, as noted in Chapter 1, the ECtHR's decision in *MSS v Belgium and Greece*, which found Greece's failure to provide socio-economic resources to constitute degrading treatment, made reference to both vulnerability and dignity.[150]

The treaty bodies' use of vulnerability reasoning is open to the same criticism as is frequently directed at the treaty bodies' use of dignity reasoning: that the concept of vulnerability is under-theorised in their jurisprudence. Several commentators (in the European context at least) complain that, despite the widespread use of vulnerability to interpret and apply human rights norms, it is not clear what the concept of vulnerability means in substance.[151] Al Taminimi analyses the ECtHR's substantial vulnerability jurisprudence and contends that, although the ECtHR has engaged in vulnerability analysis under the anti-torture norm for many years, the Court has not yet provided a definition of the concept.[152]

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[143] ibid para 115.
[144] ibid.
[145] *Renolde v France* (2009) 48 EHRR 42.
[146] *Keenan v United Kingdom* (2001) 33 EHRR 38.
[147] *Renolde v France* (n 145) para 121; *Keenan v United Kingdom* (n 146) para 113.
[148] IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006 (Merits, Reparations and Costs) Series C No 149 para 108.
[149] ibid para 107.
[150] *MSS v Belgium and Greece* (n 62) paras 251, 259, 263.
[151] See Yusef Al Tamimi, 'The protection of vulnerable groups and individuals by the European Court of Human Rights (LLM thesis, Vrije Universiteit Amsterdam 2015) 11; Michael O'Boyle, 'The notion of "vulnerable groups" in the case law of the European Court of Human Rights' (Conference on the Constitutional Protection of Vulnerable Groups: A Judicial Dialogue, Santiago, Chile, 4–5 December 2015) <www.venice.coe.int/webforms/documents/?pdf=CDL-LA(2016)003-e> accessed 31 August 2017; Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056.
[152] Al Tamimi, 'The protection of vulnerable groups and individuals by the European Court of Human Rights' (n 151).

Peroni and Timmer argue that, to the extent that the ECtHR has conceptualised vulnerability, the Court's jurisprudence displays an 'emerging concept' of 'vulnerable groups'.[153] These authors note that the ECtHR has recognised the 'particular vulnerability' of members of the Roma minority, people with mental disabilities, people living with HIV, and asylum seekers.[154] As explained below, the ECtHR's jurisprudence suggests that children and people in detention should be added to this list. The IACtHR, similarly to the ECtHR, has recognised the vulnerability of certain groups including people in detention,[155] people with mental disabilities[156] and children.[157] Timmer acknowledges that the ECtHR has also on occasion recognised the vulnerability of individuals in other contexts, including women who have suffered domestic violence,[158] individuals lacking legal capacity,[159] individuals holding unpopular views,[160] and people who are pregnant and seeking medical information or treatment.[161] The IACtHR has also recognised some instances of more individualised, or context-specific, vulnerability, including where particular individuals have experienced a climate of impunity regarding violence towards them.[162]

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[153] Peroni and Timmer, 'Vulnerable groups' (n151) 1064.
[154] ibid.
[155] See, for example, IACtHR, *Loayza Tamayo v Peru*, Judgment of 17 September 1997 (Merits) Series C No 33 para 57; IACtHR, *'Street Children' (Villagran Morales et al) v Guatemala*, Judgment of 19 November 1999 (Merits) Series C No 63 para 166. See also Laurence Burgorgue-Larsen, 'The rights of detainees' in Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Rosalind Greenstein tr, Oxford University Press 2011) 494.
[156] See IACtHR, *Ximenes Lopes v Brazil* (n 148) paras 101–11, 129.
[157] IACtHR, *'Juvenile Reeducation Institute' v Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs) Series C No 112 paras 175, 212, 225. See also IACtHR, *Bulacio v Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs) Series C No 11. Note, in particular, the Concurring Opinion of Judge Sergio García Ramírez, para 18:

> It is indispensable for the procedural system to establish and ensure various measures of control regarding the conduct and legality of the proceeding and due performance by the authorities involved in it. Such measures are, essentially, acts and guarantees of due process. This is especially the case with respect to minors, who are in a situation of special defenselessness and vulnerability and who therefore face a specific and greater risk of abridgment of their fundamental rights and of detriment to their existence, sometimes irreparably.

[158] Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2014) 155 citing *Opuz v Turkey* (2010) 50 EHRR 28 para 132; *Bevacqua and S v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008) para 65; *Hajduová v Slovakia* (2011) 53 EHRR 8 para 46.
[159] ibid 157 citing *Zehentner v Austria* (2011) 52 EHRR 22.
[160] ibid 157 citing *Baczkowski and Others v Poland* (2009) 48 Eur HRR 19 para 64; *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 70*; Congadze v Ukraine* App no 34056/02 (ECtHR, 8 November 2005) para 168; *Gazeta Ukraina-Tsentr v Ukraine* App no 16695/04 (ECtHR, 15 July 2010) para 51.
[161] ibid 156 citing *Tysiac v Poland* (2007) 45 EHRR 42 para 127; *RR v Poland* (2011) 53 EHRR 31 para 159; *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) paras 110, 162–66.
[162] For example, IACtHR, *Rosendo Cantu v Mexico* (n 133) paras 70-71; IACtHR, *'Street Children'* (n 155).

Peroni and Timmer, and others, criticise the ECtHR's group-based conceptualisation of vulnerability on several grounds. First, Peroni and Timmer argue that simply connecting vulnerability with group membership is not a substantive enough conception to guide the interpretation and application of human rights norms. Peroni and Timmer state that, in the ECtHR's case law on vulnerable groups, 'what exactly ties all these groups together is still not entirely clear'.[163] This argument is echoed by the Former Deputy Registrar of the ECtHR, Michael O'Boyle; he contends that the ECtHR's jurisprudence contains 'no overarching definition that seeks to set out what the inherent elements of a vulnerable group are or in what circumstances such a group exists'.[164] Several ECtHR judges have also expressed dissatisfaction with the Court's automatic attachment of the label 'vulnerable' to some individuals without any explicit basis beyond their group membership. For example, in *Bouyid v Belgium*,[165] the majority's designation of a 17 year-old as vulnerable, without explanation as to why he was vulnerable beyond his being a child, drew the criticism of a group of partly dissenting judges. The judges argued that '[r]eferring simply to the first applicant's age as a basis for concluding that he was a vulnerable person towards whom the police officers should have shown "greater vigilance and self-control" is in our view an overly theoretical approach...[which] risks being completely at odds with reality'.[166] Similarly, in *MSS v Belgium and Greece*, Judge Sajó strongly criticised the Court's blanket classification of asylum seekers as 'a particularly vulnerable group', noting that '[a]sylum seekers are far from being homogeneous, if such a group exists at all'.[167]

Peroni and Timmer proffer a second, more substantive, criticism of the ECtHR's group-based conceptualisation of vulnerability; they argue that such conceptualisation may cause harm to both those who are designated vulnerable and those who are not.[168] Peroni and Timmer argue that the ECtHR's 'increasing reliance on the vulnerable-group concept…risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, victimizing, and paternalizing them'.[169] They note, by way of example, the ECtHR's 'misplaced paternalism' in a judgment concerning the education of Roma children, where the Court assumed that their parents were

[163] Peroni and Timmer, 'Vulnerable groups' (n151) 1056, 1064.
[164] O'Boyle, 'The notion of "vulnerable groups" in the case law of the European Court of Human Rights' (n151) 2
[165] *Bouyid v Belgium* (n 57).
[166] *ibid* (n 57) Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney para OI-8.
[167] *MSS v Belgium and Greece* (n 62), Partly Concurring and Partly Dissenting Opinion of Judge Sajó para O-III7.
[168] Peroni and Timmer, 'Vulnerable groups' (n151) 1070–72.
[169] ibid 1070.

not 'capable of weighing up all the aspects of the situation and the consequences of giving their consent'.[170] Peroni and Timmer highlight the possibility of vulnerability taking on a 'master status', whereby it overshadows all other aspects of the person.[171] They further argue that in some ECtHR judgments the Court has 'policed' the boundaries of the vulnerable group, excluding some similarly situated individuals from recognition as vulnerable,[172] and threatening the creation of 'competition among groups for recognition of their vulnerability'.[173]

Ethical and legal philosophical theorists of vulnerability share Peroni and Timmer's concerns that the group-based conceptualisation of vulnerability can compound the experiences of exclusion and discrimination to which the concept ostensibly seeks to respond. Mackenzie, Rogers and Dodds argue that 'discourses of vulnerability and protection and the labelling of individuals, groups, or whole populations as *vulnerable* can lead to discrimination, stereotyping, and unwarranted paternalistic interventions'.[174] Fineman, likewise, argues that frequently in government policy 'designated "vulnerable populations"…are susceptible to monitoring, discipline, and supervision'.[175] Fineman contends that when groups are defined as vulnerable, 'paternalism guides society's response—which is to withhold agency, as is the case with children, or take away agency based on assumptions about lack of capacity, as we do with many of the elderly'.[176] Fineman also shares the concern of Peroni and Timmer that group-based conceptualisation of vulnerability can compound exclusion. She contends that a group-based understanding of vulnerability 'constructs relationships of difference and distance between individuals and groups within society'[177] and that, when it comes to the 'relatively scant resources' set aside for social welfare support in the United States, 'vulnerable populations are placed in opposition to and in competition with each other'.[178]

The remaining sections in this part examine whether certain philosophical theories of vulnerability might suggest a substantive conception of vulnerability that the human rights

[170] ibid 1072 citing *DH and others v the Czech Republic* (2008) 47 EHRR 3 para 203.
[171] ibid 1072.
[172] ibid 1071.
[173] ibid 1072.
[174] Mackenzie, Rogers and Dodds, 'Introduction' (n140) 16.
[175] Martha A Fineman, '"Elderly" as vulnerable: Rethinking the nature of individual and societal responsibility' (2012) 20(1) Elder Law Journal 71, 84.
[176] ibid 85.
[177] ibid 84 citing Martha A Fineman, 'The vulnerable subject and the responsive state' (2010) 60(2) Emory Law Journal 266–67.
[178] ibid 86.

treaty bodies and other actors could use to interpret the anti-torture norm in response to the lived experiences of older people (among others). In particular, the remaining sections seek to develop a conception of vulnerability that coheres to some extent with existing anti-torture jurisprudence but does not rely on the limiting criterion of group membership. This examination provides an opportunity to explore both the treaty bodies' group-based vulnerability jurisprudence and their other jurisprudence explicitly recognising individualised circumstances of vulnerability.

Section B explores philosophical theories of vulnerability that posit, among other things, that vulnerability is universal, that vulnerability is experienced in different ways by differently embodied and differently situated individuals, and that vulnerability can and often does cause powerlessness. Section B also briefly considers what various vulnerability theorists argue are the appropriate state responses to vulnerability. This section focuses on the work of Mackenzie, Rogers, Dodds, Fineman and Miller, in particular.

Section C then applies the perspectives of these theorists to a range of international anti-torture jurisprudence, demonstrating that, in fact, the ECtHR's and IACtHR's existing approach and the approaches of several UN special procedures could be (re-)conceptualised according to MacKenzie, Rogers and Dodds' taxonomy of vulnerability: as inherent, situational or pathogenic powerlessness, including but not limited to dependency.

B. *Philosophical theories of vulnerability*

Many philosophers understand vulnerability to be an inherent, and therefore universal, human attribute. Mackenzie, Rogers and Dodds note that the theorists who understand vulnerability to be an 'ontological condition of our humanity' arising from human embodiment include

Fineman,[179] Butler,[180] MacIntyre,[181] Nussbaum,[182] Ricoeur,[183] Schildrick[184] and Turner.[185] Fineman, for example, advocates a 'concept of vulnerable detached from specific subgroups', which 'define[s] the very meaning of what it means to be human'.[186] Fineman explains that '[t]he idea of the vulnerable subject is anchored in the fact that we are all born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration'.[187] She argues that '[e]very actual adult human being, no matter how strong and independent he or she may seem, is both presently and has been in the past reliant on others and on social institutions'.[188] Fineman warns that applying the vulnerable label only to certain groups perpetuates the 'myth' that the 'liberal subject' is the norm, or ideal, and the vulnerable subject an aberration.[189]

Mackenzie, Rogers and Dodds point out that other theorists, including Goodin,[190] use the notion of vulnerability to refer to the specific threats faced by particular individuals in relation to others. This alternative view, they explain, 'stresses the ways that inequalities of power, dependency, capacity, or need render some agents vulnerable to harm or exploitation by others'.[191] Mackenzie, Rogers and Dodds also note, however, that several theorists who understand vulnerability to be an ontological condition of our humanity also recognise that some individuals experience more acute vulnerability than others, depending on their situation. For example, they acknowledge that Judith Butler, while arguing that vulnerability is universal,

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[179] Mackenzie, Rogers and Dodds(n 174) citing Martha A Fineman, 'Cracking the foundational myths: Independence, autonomy and self-sufficiency' (2000) 8(13) American University Journal of Gender, Social Policy and Law 12; Martha A Fineman, 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20(1) Yale Journal of Law and Feminism 1; Fineman, 'The vulnerable subject and the responsive state' (n 177) 251.

[180] Mackenzie, Rogers and Dodds (n 174) citing Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004); Judith Butler, *Frames of War: When is Life Grievable*? (Verso 2009).

[181] ibid citing Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court Chicago 1999).

[182] ibid citing Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006).

[183] ibid citing Paul Ricoeur, 'Autonomy and vulnerability' in Paul Ricoeur (ed), *Reflections on the Just* (David Pellauer, tr, University of Chicago Press 2007) 72–90.

[184] ibid citing Margrit Schildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (SAGE 2002).

[185] ibid citing Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press 2006).

[186] Fineman, 'The vulnerable subject and the responsive state' (n 177) 251, 266.

[187] Fineman, '"Elderly" as vulnerable', (n 175) 71, 89.

[188] ibid 88.

[189] See generally Martha A Fineman, 'Cracking the foundational myths: Independence, autonomy and self-sufficiency' (2000) 8(13) American University Journal of Gender, Social Policy and Law 12; Fineman, 'Anchoring equality in the human condition' 1 (n 179); Fineman, 'The vulnerable subject and the responsive state' (n 177); Fineman, '"Elderly" as vulnerable' (n 175).

[190] Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press 1985), cited in Mackenzie, Rogers and Dodds, 'Introduction' (n 174) 6.

[191] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 6.

also 'stresses that we are not all affected by it to the same degree. Some individuals and populations are disproportionately precarious, namely, those exposed to social and political violence and the ills associated with poverty'.[192] Fineman, too, acknowledges that 'while human vulnerability is universal, constant, and complex, it is also particular'.[193] She notes that '[w]e have different forms of embodiment and also are differently situated within webs of economic and institutional relationships. As a result, our vulnerabilities range in magnitude and potential at the individual level.'[194]

Regarding what vulnerability consists in, Mackenzie explains that '[v]ulnerability is often defined as being at increased risk of harm or having reduced capacity or power to protect one's interests'.[195] Due to their belief that vulnerability arises from human embodiment, many vulnerability theorists focus on bodily needs and human susceptibility to physical harm and destruction. Mackenzie, Rogers and Dodds note that dependency and care needs are a common focal point of many vulnerability theories.[196] In addition, however, Mackenzie, Rogers and Dodds include in their conception of vulnerability that '[a]s social and affective beings we are emotionally and psychologically vulnerable to others in myriad ways: to loss and grief; to neglect, abuse, and lack of care; to rejection, ostracism, and humiliation'.[197] They add: '[a]s socio-political beings, we are vulnerable to exploitation, manipulation, oppression, political violence, and rights abuses'.[198]

Having considered a range of theories, Mackenzie, Rogers and Dodds conclude that there are three recognisable types of vulnerability: inherent, situational and pathogenic.[199] Mackenzie argues that all three types of vulnerability 'can engender a troubling sense of powerlessness, loss of control, or loss of agency'.[200] While acknowledging the value in recognising

[192] ibid 3, discussing Butler, *Precarious Life* (n 180) and Butler, *Frames of War* (n 180).
[193] Fineman, 'The vulnerable subject and the responsive state' (n 177)268.
[194] ibid.
[195] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Mackenzie, Rogers and Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 174) 33–34.
[196] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 2, citing Virginia Held, 'Non-contractual society' in Marsha Hanen and Kai Nielsen (eds), *Science, Morality and Feminist Theory* (University of Calgary Press 1987); Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999); MacIntyre, *Dependent Rational Animals* (n 181); Nussbaum, *Frontiers of Justice* (n 182).
[197] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 1.
[198] ibid.
[199] ibid 7–9.
[200] Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' (n 195) 46.

embodiment and dependence as sources of vulnerability, due to their universality,[201] Mackenzie warns against placing too much emphasis on sources of vulnerability which are 'inherent'—in other words, those which are 'intrinsic to the human condition'.[202] She argues that 'many kinds of vulnerability are primarily the result not of unavoidable biological processes but of interpersonal and social relationships or economic, legal, and political structures'.[203] Mackenzie refers to Goodin's contention that '[a]ny dependency or vulnerability is arguably created, shaped, or sustained, at least in part, by existing social arrangements. None is wholly natural.'[204] Mackenzie argues that the ability to see and distinguish between different sources of vulnerability is crucial to the achievement of 'just social policies' which provide 'targeted responses to these specific vulnerabilities'.[205]

Mackenzie, Rogers and Dodds explain 'situational' vulnerabilities to mean vulnerabilities that are context specific, which 'may be caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups'.[206] They define 'pathogenic' vulnerabilities, meanwhile, as a 'particularly ethically troubling' subset of situational vulnerabilities.[207] Pathogenic vulnerabilities may derive from 'morally dysfunctional or abusive interpersonal and social relationships and socio-political oppression or injustice', or 'may also arise when a response intended to ameliorate vulnerability has the paradoxical effect of exacerbating existing vulnerabilities or generating new ones'.[208]

Mackenzie provides several examples of situational vulnerability. She explains that 'an asylum seeker incarcerated in a detention center is vulnerable to mental illness, but the sources of his vulnerability are his political status and social circumstances'.[209] She continues: 'A woman at the receiving end of domestic violence is vulnerable to a range of physical and psychological harms, but the source of her vulnerability is…her relationship with an abusive partner. And the extent of her vulnerability will be determined by the social supports and legal protections

[201] ibid 37, discussing the theories of Martha Fineman, Judith Butler, Bryan S Turner and Eva Feder Kittay.
[202] ibid 38.
[203] ibid.
[204] ibid citing Goodin, *Protecting the Vulnerable* (n 190) 191.
[205] ibid 56.
[206] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 7.
[207] ibid 9.
[208] ibid.
[209] Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' (n 195) 38.

available to her.'[210] Mackenzie explains pathogenic vulnerability by reference, again, to the situation of an asylum seeker in immigration detention. Acknowledging that 'his innate resilience and baseline physical and mental health will have inherent elements', Mackenzie argues that his vulnerability is pathogenic in the sense that it has arisen from 'the political persecution from which he originally fled and the government policies in the country of asylum that, rather than ameliorating his social and political vulnerability, compound it, in the process giving rise to new vulnerabilities'.[211]

Dodds explains situational vulnerability from the perspective of 'dependency', which, she contends, is 'vulnerability that requires the support of a specific person (or people)—that is, care'.[212] Dodds argues that '[w]hether or not an older person becomes dependent will depend on a range of inherent and situational factors, such as their genetic makeup, their socioeconomic status, and the social and welfare supports available to them'.[213] She explains that a person whose physical mobility is limited 'may or may not be able to live independently within the community depending on her range of abilities' but also depending on 'factors external to her in the social and legal domains, such as the physical characteristics of the built environment, discriminatory employment practices, the availability of resources to assist her employer to reduce arbitrary impediments…and the availability of support at times of specific need'.[214] Pointing to further examples of potential situational dependence, Dodds argues that whether or not an adult who experiences mobility impairment is dependent may be contingent on whether 'his workplace and home [have] been designed or modified so that he can live and work independently, and the public transport system that he uses [allows] him to move readily between work, home, and his other activities'.[215]

In philosophical thought, vulnerability creates moral demands for certain responses from individuals towards each other, and/or from the State towards individuals.[216] Mackenzie,

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[210] ibid.
[211] ibid 40.
[212] Susan Dodds, 'Dependence, Care, and Vulnerability' in Mackenzie, Rogers and Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (n 174) 182–83.
[213] ibid 183.
[214] ibid 186.
[215] ibid.
[216] See, for example, Rutger Claassen, 'Human dignity in the capability approach' in Duwell and others, *The Cambridge Handbook of Human Dignity* (n 2) 240, discussing Martha Nussbaum's capability theory and in particular, Martha Nussbaum, 'Human Dignity and Political Entitlements', in President's Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington DC, 2008). See also Graumann, 'Human dignity and people with disabilities' (n 2) 484; Mackenzie, Rogers and Dodds,

Rogers and Dodds understand the literature to reveal two strands of theoretical explanation for why vulnerability gives rise to moral obligations and 'duties of justice'.[217] The first strand of thought is that vulnerability itself is the source of obligation,[218] whereas the alternative explanation is that vulnerability 'alert[s] us to the presence of other morally salient claims'.[219] Mackenzie, Rogers and Dodds prefer the theory that moral obligations arise from harm or need, for example, with vulnerability highlighting the existence of these claims. They pay particular attention to Miller's theory that human needs give rise to moral obligations, while needs arise from our universal vulnerability.[220] From the point of view of the present study, it is interesting to note that Miller ties her argument that there is a moral obligation to respond to needs to the concept of human dignity. Miller argues that meeting individuals' fundamental needs enables those individuals 'to determine and seek their own subjective ends'.[221] Miller further contends that how needs are met determines whether or not human dignity is respected. She argues that '[t]he how of needs response carries with it the power of conferring or denying both equal moral worth and inclusion in a moral community' and that '[m]oral agents are responsible for meeting fundamental needs in a manner indebted to forms of what I call *dignifying care*'.[222]

C. *(Re)conceptualising vulnerability*

Bearing in mind the above exploration of philosophical theories, this section examines existing anti-torture jurisprudence to establish whether it is possible to discern or devise from it a conception of vulnerability that does not rely on group membership, but rather could respond to the experiences of any person and thus to older people.

The section argues that, in practice, the human rights treaty bodies and other actors appear to use the notion of vulnerability to refer to the full range of vulnerabilities that Mackenzie, Rogers and Dodds identify: inherent, situational and pathogenic powerlessness or dependency.

'Introduction' (n 140)) 3, referring to Butler, *Precarious Life* (n 180) and Butler, *Frames of War* (n 180) and stating that 'Butler suggests that precariousness – our human vulnerability to the actions of others – generates ethical obligations to ameliorate suffering and redress the inequities that exacerbate vulnerability.' See also Goodin, *Protecting the Vulnerable* (n 190).

[217] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 10.

[218] Mackenzie, Rogers and Dodds highlight the following work: Goodin, *Protecting the Vulnerable* (n 190); Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999); Nussbaum, *Frontiers of Justice* (n 182).

[219] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 12.

[220] ibid 12–13, citing Sarah Clark Miller, *The Ethics of Need: Agency, Dignity and Obligation* (Routledge, 2012).

[221] Sarah Clark Miller, *The Ethics of Need: Agency, Dignity and Obligation* (Routledge, 2012) 4.

[222] ibid 5.

It is argued that the treaty bodies' tendency to refer to groups as vulnerable has camouflaged the fact that the vulnerabilities experienced by members of those groups are generally not vulnerabilities that derive from group characteristics, but are in fact vulnerabilities that any person can experience (but which affect people differently and may be exacerbated by discrimination). Furthermore, the treaty bodies' references to groups as vulnerable gives the impression that some vulnerabilities are inherent when in fact they are situational. Timmer's own reading of the ECtHR's vulnerability jurisprudence demonstrates the potential for situational vulnerabilities to be elided by the group-based approach. Timmer contends that 'children and people with a mental disability' are 'the two types of applicants that the Court considers to be inherently and constantly vulnerable'.[223] She notes that '[t]he Court does not often make it explicit why it conceives of their vulnerability in this way' but that 'the case law contains many references to their dependency on the care of others,[224] and their difficulty or inability to complain of abuse or of their treatment more generally'.[225] In fact, as argued below, both the dependency of children and the inability of some people with disabilities to complain of their treatment is likely to constitute a combination of inherent and situational vulnerabilities (the extent of the situational vulnerabilities depending on their relationships with others and their environment, and the resources available to them).

The remainder of this section discusses the use of vulnerability in existing anti-torture jurisprudence with a view to highlighting the extent to which the concept already reflects, and therefore could be consciously conceptualised by reference to, the notion of powerlessness that is inherent or situational (including pathogenic). The discussion begins by unpacking the treaty bodies' characterisation of vulnerability as group-based, and then proceeds to examining jurisprudence that recognises vulnerability on a more context-specific basis.

[223] Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' (n 158) 152.
[224] ibid citing *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23 para 51.
[225] ibid citing *MC v Bulgaria* (2005) 40 EHRR 20 paras 183 and 58; *Juppala v Finland* (2010) 51 EHRR 4 paras 41–42; *MB v Romania*, App no 43982/06 (ECtHR, 3 November 2011) para 52; *Keenan v United Kingdom* (2001) 33 EHRR 38 para 111.

i. *Detainees*

The treaty bodies' understanding of vulnerability as situational powerlessness is most clearly demonstrated in their recognition of detainees' vulnerability.[226] Making this connection, Nowak explains that 'it is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure'.[227] The most recent report of the Special Rapporteur on torture acknowledges the long-standing association of deprivation of liberty with powerlessness under the anti-torture norm.[228]

The notion of detainees' powerlessness can be dismantled to reveal the specific forms of situational vulnerability that are recognised within the group-based classification of detainees as 'vulnerable'. In *Bouyid v Belgium*, the ECtHR explained the vulnerability of individuals in police custody to arise from their being 'under the control' of state authorities.[229] In '*Juvenile Reeducation Institute*' *v Paraguay*, meanwhile, the IACtHR described the forms of powerlessness which are in turn generated by prison authorities' 'heavy control or command over the persons in their custody'.[230] The Court noted that 'typically the State can be rigorous in regulating what the prisoner's rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity'.[231]

ii. *Children*

Children are frequently referred to as vulnerable by the ECtHR, the IACtHR and numerous other human rights actors. The treaty bodies' language often suggests that they view children's vulnerability as inherent, whether they use this terminology explicitly or imply this viewpoint by referring to the vulnerability of children in general, as a group. In *Bouyid v Belgium*, for example, the ECtHR referred to the 'vulnerability inherent in their young age'.[232] In *Juvenile*

[226] See (n 140) in Chapter 1.
[227] Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (n 45) 678.
[228] UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer: Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' (20 July 2017) UN Doc A/72/178, para 35.
[229] *Bouyid v Belgium* (n 57) para 107.
[230] IACtHR, '*Juvenile Reeducation Institute*' *v Paraguay* (n 157) para 152.
[231] ibid.
[232] ibid para 110.

Reeducation Institute v Paraguay, the IACtHR referred to children generally as 'vulnerable',[233] and in *Z and others v United Kingdom*, the ECtHR held that States have a positive obligation to 'provide effective protection, in particular, of *children and other vulnerable persons* and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'[234] (emphasis added). To the extent that the treaty bodies and other human rights actors view children's vulnerability as inherent, they seem to do so on the grounds that children are inherently dependent upon others for their care and development, and that children are inherently fragile, or, susceptible to psychological harm.[235] These traits can be understood as forms of powerlessness: powerlessness to meet one's own needs, or dependency; and powerlessness to prevent the psychological impact of mistreatment.

However, in addition to the treaty bodies' overt recognition of children's inherent vulnerability, many of their judgments in the anti-torture context also reveal the treaty bodies' understanding of children's vulnerability to arise from their situational powerlessness. In *O'Keeffe v Ireland*, the ECtHR referred to children as a category of 'vulnerable persons';[236] however, the Court also noted the especial vulnerability of young children in the primary education context, who 'are under the exclusive control of [the school] authorities'.[237] *Rahimi v Greece* is a further example of the ECtHR's equation of vulnerability with situational powerlessness. Here, the Court held that a 15 year-old boy in immigration detention 'because of his age *and personal circumstances*, was in a situation of extreme vulnerability' (emphasis added).[238] The Court explained that he was in the category of 'the most vulnerable people in society' on account of,

[233] ibid para 212.
[234] *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73, citing *Osman v United Kingdom* (2000) 29 EHRR 245 para 116.
[235] In *Bouyid v Belgium* (n 57), the ECtHR acknowledged the additional vulnerability 'inherent' in young age (para 110). The Court gleaned its understanding of why children are vulnerable from, among other sources, a Council of Europe Committee of Ministers Recommendation noting children's 'fragility… and dependence on adults for their growth and development' (para 53, citing Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures and Recommendation CM/Rec(2009)10 on integrated national strategies for the protection of children from violence, adopted by the Committee of Ministers of the Council of Europe on 5 November 2008 and 18 November 2008 respectively). In UNGA 'Interim report of the Special Rapporteur of the Human Rights Council on torture' (n 109), at para 64, the Special Rapporteur on Torture described the 'dual vulnerability' of child detainees: 'firstly, owing to their detention and like all other detainees, they depend on the State for care; secondly, owing to their age, their psychological stage of development and their physical fragility, what is at stake is not only the well-being of the child at the moment of deprivation of liberty but also his or her further development. From a developmental and psychological perspective, children are in their "formative years", making their time in detention particularly influential on the rest of their lives.'
[236] *O'Keeffe v Ireland* (2014) 59 EHRR 15 para 144.
[237] ibid para 145.
[238] *Rahimi v Greece* (n 65) para 86.

not only his young age, but also his lack of legal protection, lack of familiarity with his surroundings and lack of any family support.[239]

The ECtHR's judgment in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*[240] is another example of the Court's recognition of the situational vulnerabilities of a child, whom it also understood to be inherently vulnerable. As discussed in Chapter 1, this case concerned the immigration detention of an unaccompanied five-year-old girl. The ECtHR held her to be 'in an extremely vulnerable situation', not only on account of 'her very young age', but also because of 'the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices'.[241] Although the Court did not explicitly connect its recognition of the girl's vulnerability with the following factors, arguably it could have found the girl to be, additionally, pathogenically vulnerable. The Court recognised that 'she was detained in a centre that had initially been designed for adults…No measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel [and] the place of detention was not adapted to her needs'.[242]

Several judgments of the IACtHR have recognised the vulnerability of children in situations of powerlessness caused by the State's conduct; in other words, the IACtHR has recognised what Mackenzie, Rogers and Dodds term pathogenic vulnerability. In *Juvenile Reeducation Institute v Paraguay*, having first referred to children generally as 'vulnerable',[243] the IACtHR found a violation of Article 5(5) ACHR on the basis that the children in question were put in a situation of vulnerability by their placement in adult prisons. The Court noted that such placements 'exposed the children to conditions highly prejudicial to their development and made them vulnerable to others who, as adults, could prey upon them'.[244] In *'Street Children' (Villagran Morales et al) vs. Guatemala*,[245] the IACtHR acknowledged the vulnerability of 'street children', which the IACmHR contended arose from their defencelessness to their systematic persecution due to the State's failure to ensure accountability. The IACmHR argued that 'the State agents who were responsible were rarely investigated or convicted, and this gave rise to

[239] ibid para 87.
[240] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (n 224).
[241] ibid para 55.
[242] ibid para 50.
[243] IACtHR, *'Juvenile Reeducation Institute' v Paraguay* (n 157) para 212.
[244] ibid para 175.
[245] IACtHR *'Street Children'* (n 155).

the de facto impunity that allowed, and even encouraged, the continuation of these violations against the "street children", increasing their vulnerability'.[246] The jointly concurring judgment in the *'Street Children'* decision also connected the children's vulnerability with their situational powerlessness: 'The duty of the State to provide positive measures is stressed precisely in relation to the protection of life of vulnerable and defenceless persons, in situation of risk, such as the children in the streets.'[247]

In a similar vein to the IACtHR's judgments mentioned above, the ECtHR's judgment in *Z and others v United Kingdom*[248] could be understood to recognise, implicitly, the pathogenic vulnerability of children arising from the state's failure to intervene to protect them from abuse of which it had knowledge. In *Z and others,* the ECtHR explained its understanding of the children's vulnerability only by reference to the fact that children are 'vulnerable persons'.[249] However, the Court's judgment hinged on the state's positive obligation to protect, in particular, 'children and other vulnerable persons', and the Court's explanation of why it found the state to have violated this obligation seems also to indicate why it found the children to have been vulnerable. In concluding that there had been a violation of Article 3 ECHR, the Court found that the state authorities had failed to intervene in the care of the children for a period of four and half years, despite being made aware of their abuse, and that '[o]ver the intervening period…they had been subject in their home to what the child consultant psychiatrist who examined them referred to as horrific experiences'.[250]

iii. *People with mental illnesses*

The ECtHR has repeatedly made generalised statements about the vulnerability of 'mentally ill persons' and, as Timmer notes, therefore appears at first glance to view their vulnerability primarily as inherent.[251] In *Slawomir Musial v Poland*, the Court reiterated its settled position regarding people with mental illness who are detained: 'the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in

[246] ibid para 139.
[247] ibid, Joint Concurring opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli para 4.
[248] *Z and Others v United Kingdom* (n 234).
[249] ibid para 73.
[250] ibid para 74.
[251] Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' (n 158) 152.

some cases, to complain coherently or at all about how they are being affected by any particular treatment'.[252]

Although to a certain extent mental illness may give rise to inherent vulnerabilities, what the above statement does not on its face reflect are the many forms of situational vulnerability which people with mental illness experience. These include the situational and pathogenic factors which may render people powerless to obtain treatment, and/or cause their complaints to be ineffective, and/ or give rise to their illnesses in the first place or cause their illnesses to be more acute. In substance, however, the jurisprudence of the ECtHR, IACtHR and other human rights actors does recognise many of these situational vulnerabilities, or, forms of powerlessness.

In *MS v United Kingdom*, which concerned the state authorities' failure to provide timely psychiatric treatment to a person detained at a police station, the ECtHR held that 'the applicant was in a state of great vulnerability throughout the entire time at the police station…He was in dire need of appropriate psychiatric treatment, as each of the medical professionals who examined him indicated'.[253] The Court noted in the same paragraph that '[t]hroughout the relevant time, the applicant was entirely under the authority and control of the state'.[254] The form of vulnerability which the Court recognised in *MS v United Kingdom* may thus be described as situational. Because he was detained, the applicant was powerless to obtain psychiatric treatment on his own behalf and therefore was dependent on the state authorities to obtain appropriate psychiatric treatment for him. It may also be described as pathogenic; the applicant was in dire need of appropriate psychiatric treatment throughout his detention because he had not been provided with such treatment by the state authorities.

Slawomir Musial v Poland[255] is another example of an ECtHR judgment which suggests that the Court understands vulnerability to mean situational powerlessness. Here, the Court acknowledged that a person with 'chronic and severe mental disorders including schizophrenia', who was detained in prison, was 'in need of constant and specialised medical

[252] *Slawomir Musial v Poland*, App no 28300/06 (ECtHR, 20 January 2009) para 87 citing *Herczegfalvy v Austria* (1993) 15 EHRR 437 para 82; *Aerts v Belgium* (2000) 29 EHRR 50 para 66. See also *Keenan v United Kingdom* (n 147) para 110.
[253] *MS v United Kingdom* (2012) 55 EHRR 23 para 44.
[254] ibid.
[255] *Slawomir Musial v Poland*, App no 28300/06 (ECtHR, 20 January 2009).

supervision, in the absence of which he face[d] major health risks'.[256] The Court found that 'the very nature of the applicant's psychological condition made him more vulnerable than the average detainee' and linked this with the fact that, '[u]ndeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness'.[257] In other words, the Court linked the applicant's vulnerability not only to his inherent need for medical treatment, but—perhaps more importantly—to his powerlessness to obtain such treatment himself due to his situation of detention and his consequent dependence on the prison authorities to do so for him.

In *Ximenes Lopes v Brazil*, which concerned the death of a person in a mental health institution, the IACtHR held for the first time that States are obliged to provide 'special protection' to people with mental disabilities, 'for they are particularly vulnerable'.[258] The IACtHR was explicit that its recognition of the vulnerability of people with mental disabilities was based on the situational vulnerabilities which they frequently experience. In explaining what 'special protection' entails, the Court held that states' positive measures are 'determined according to the specific needs of protection of the legal person, either because of his personal condition *or the specific situation he is in, such as his disabilities*'[259] (emphasis added). The Court proceeded to note that mental disabilities are more likely to be experienced by 'groups of persons who live in adverse conditions and have few resources' and that '[t]he link between the disability, on the one hand, and poverty and social exclusion, on the other, is direct and significant'.[260] The Court noted, further, that '[p]ersons with disabilities are often discriminated by reason of their condition',[261] and that, in psychiatric institutions, '[t]he vulnerability inherent to people with mental disabilities is compounded by the high degree of intimacy which is typical of the treatment of psychiatric illnesses, which makes these persons more susceptible to mistreatment when they are hospitalized'.[262] The IACtHR expressly recognised the powerlessness that people with disabilities in psychiatric institutions frequently experience, noting that 'the staff in charge of the care of patients exercise a strong control or dominance

[256] *ibid* para 92.
[257] ibid para 96.
[258] IACtHR *Case of Ximenes Lopes v Brazil* (n 148) paras 101–03.
[259] ibid para 103 citing IACtHR, *Baldeón-García v Peru*, Judmgent of 6 April 2006 (Merits, Reparations and Costs) Series C No 147 para 81; IACtHR, *Comunidad Indígena Sawhoyamaxa v Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs) Series C No 146 para 154; IACtHR, *Pueblo Bello Massacre v Colombia*, Judgment of 31 January 2006 (Merits, Reparations and Costs) Series C No 140 para 111.
[260] IACtHR, *Ximenes Lopes v Brazil*, ibid para 104.
[261] ibid para 105.
[262] ibid para 106.

over the persons who are under their custody' and that '[t]his intrinsic imbalance in power between hospitalized patients and the persons having authority over them is usually greater in psychiatric institutions'.[263]

The former United Nations Special Rapporteur on torture, Manfred Nowak, has also highlighted the situational powerlessness often experienced by people with disabilities. In a 2008 report, the Special Rapporteur noted that '[t]orture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person'.[264] He stated that '[p]ersons with disabilities often find themselves in such situations, for instance when they are deprived of their liberty in prisons or other places, or when they are under the control of their caregivers or legal guardians'.[265] The situational powerlessness which the Special Rapporteur highlighted was not just that arising from bodily control, or dependence, however. In addition, he argued that 'it is often circumstances external to the individual that render them "powerless", such as when one's exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others'.[266]

The Special Rapporteur's recognition of the powerlessness which a person with a mental disability may experience by virtue of their denial of legal capacity or of de facto decision-making authority casts an important light on the ECtHR's assertion that people with mental illnesses or disabilities are vulnerable because of their 'inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment'.[267] So too does the IACtHR's recognition in *Ximenes Lopes v Brazil* of the power imbalance inherent in the doctor-patient relationship.[268] A situational perspective on this 'inability to complain' is essential in order to avoid the presumption that this is solely an inherent vulnerability. It is striking that, in the ECtHR cases of *Keenan v United Kingdom*[269] and *Renolde v France*[270] (where the Court repeated its position that the minimum threshold of severity assessment has

[263] ibid para 107.
[264] UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (28 July 2008) UN Doc A/63/175 para 50.
[265] UNGA, 'Interim report of the Special Rapporteur on torture', ibid.
[266] ibid.
[267] See, for example, *Dybeku v Albania*, App no 41153/06 (ECtHR, 18 December 2007) para 41; *Herczegfalvy v* Austria (n 252) para 82; *Aerts v Belgium* (n 252) para 66.
[268] IACtHR, *Ximenes Lopes v Brazil* (n 148) para 107.
[269] *Keenan v UK* (n 146).
[270] *Renolde v France* (n145).

to consider the 'inability, in some cases', of mentally ill persons 'to complain coherently or at all about how they are being affected by any particular treatment'[271]), the men at the centre of the cases had complained *repeatedly* about their psychiatric conditions. The ineffectiveness of their complaints was not due to their inherent vulnerability but instead attributable to the prison authorities' failure to respond appropriately and the men's powerlessness to force the authorities to behave any differently.

iv. *Other situational vulnerabilities*

The ECtHR, IACtHR and other human rights actors have recognised the vulnerability of individuals arising from numerous other forms of situational powerlessness.

The former Special Rapporteur on torture, Juan E Méndez, has noted that individuals in health-care settings are 'disproportionately vulnerable to having informed consent compromised'.[272] The denial of legal capacity, and the de-facto denial of decision-making ability, has been recognised as a form of powerlessness, or, situational vulnerability, in the mental health context, as discussed above. Méndez's report, and a report of the Special Rapporteur on the right to health to which Méndez refers, draw attention to the fact that this situational vulnerability is experienced by many other individuals in the healthcare context.[273]

The reasons for the denial of decision-making capacity in the healthcare context have, further, been recognised as forms of vulnerability, or, situational powerlessness. In the Article 3 ECHR case of *VC v Slovakia*, the ECtHR found that 'widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population' had made a woman vulnerable to a forced sterilisation.[274] The Court found that there was 'a certain

[271] *Keenan v UK* (n146) para 110; *Renolde v France* (n 145) para 114.

[272] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 para 29, referring to UNGA, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on informed consent' (10 August 2009) UN Doc A/64/272 para 44.

[273] See UNGA, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 272) para 46:

> Certain groups deserve special consideration regarding the protection of informed consent as a result of vulnerabilities stemming from economic, social and cultural circumstances.' The Special Rapporteur goes on to discuss in his report the situation of lesbian, bisexual, transgender and intersex persons; children; elderly persons; women; ethnic minorities; indigenous peoples; persons with disabilities; persons living with HIV/AIDS; persons deprived of liberty; sex workers and persons who use drugs.

[274] *VC v Slovakia* (n 125) para 146.

mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed'.[275] This had resulted in hospital staff acting in a 'paternalistic' way, not offering the women 'any option but to agree to the procedure which the doctors considered appropriate in view of her situation'.[276] The Special Rapporteur on the right to health, similarly, has noted that 'structural inequalities can result in the voluntary or informed nature of consent being significantly compromised',[277] and the Special Rapporteur on torture has added that such structural inequalities can be 'exacerbated by stigma and discrimination'.[278] The Special Rapporteur on the right to health has further highlighted that informed consent can be impeded by the 'imbalance of power, experience and trust inherently present in the doctor-patient relationship'.[279] This echoes the IACtHR's recognition in *Ximenes Lopes v Brazil* that the vulnerability of people with mental disabilities is caused, in part, by the 'imbalance in power' and 'high degree of intimacy' inherent in mental health treatment.[280]

Dependence on medical professionals for health-related information, and their failure to provide such information to a person depending on it, were both recognised as giving rise to a 'situation of great vulnerability' in *RR v Poland*,[281] where the ECtHR found a violation of Article 3 ECHR in respect of a woman who was denied timely information regarding the health of her foetus. The woman's situational powerlessness features heavily in the Court's description of her vulnerability. The Court noted that 'the applicant was in a situation of great vulnerability…she was deeply distressed by information that the foetus could be affected with some malformation…she wanted to obtain as much information as possible…She also wanted to find out about the options available to her'.[282] The Court continued: 'Her concerns were not properly acknowledged and addressed…No regard was had to the temporal aspect of the applicant's predicament. She obtained the results of the tests when it was already too late for her to make an informed decision'.[283] That the woman's vulnerability, or, powerlessness, was caused by the doctors' actions is made particularly clear by the ECtHR's highlighting of the

[275] ibid para 151.
[276] ibid para 114.
[277] UNGA, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 272) para 45.
[278] UNHRC, 'Report of the Special Rapporteur on torture' (n 272) para 29.
[279] ibid para 45.
[280] IACtHR, *Ximenes Lopes v Brazil* (n 148) para 107.
[281] *RR v Poland* (2015) 53 EHRR 31.
[282] ibid para 159.
[283] ibid.

fact that 'the diagnostic services which she had requested early on were at all times available and…she was entitled as a matter of domestic law to avail herself of them'.[284]

In *Grimailovs v Latvia*, the ECtHR recognised that a person's dependence on prison authorities for mobility assistance due to the combination of their physical disability and lack of alternative support made a person a 'more vulnerable detainee'.[285]

In *MSS v Belgium and Greece*, meanwhile, the ECtHR recognised the vulnerability of an asylum seeker on the grounds of his situation of powerlessness, deriving from his complete lack of resources.[286] Although, at one point in its judgment, the Court acknowledged the applicant's vulnerability on the basis that asylum seekers 'as such' are 'a particularly underprivileged and vulnerable population group in need of special protection',[287] in fact the judgment—at least in respect of the applicant's treatment in Greece—turned on his particular circumstances of vulnerability. In concluding that the applicant's lack of socio-economic support from the Greek authorities had violated Article 3 ECHR, the ECtHR held that 'the Greek authorities have not had due regard to the applicant's vulnerability'.[288] The Court immediately went on to describe the applicant's position of powerlessness, apparently explaining its understanding of why the applicant was vulnerable. The Court noted that, for several months, the applicant had been 'living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs'.[289]

Impunity regarding the previous mistreatment of a person or others in a similar situation has been recognised as causing vulnerability, because it makes the person defenceless in the face of such treatment. The IACtHR recognised this form of situational vulnerability, or,

[284] ibid para 106.
[285] *Grimailovs v Latvia*, Application no 6087/03 (ECtHR, 25 June 2013) para 79. Here, the ECtHR acknowledged the applicant to be a 'more vulnerable detainee', having referred to a statement by the Special Rapporteur on Torture, Manfred Nowak, that persons with disabilities often find themselves powerless because 'the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse': UNGA, 'Interim report of the Special Rapporteur on torture' (n 264) para 50. See also para 162 of the ECtHR's judgment: 'The Court has already stressed its disapproval of a situation in which the staff of a prison feel relieved of their duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or, if necessary, with first aid' (citing *Kaprykowski v Poland*, App no 23052/05 (ECtHR, 3 February 2009) para 74).
[286] *MSS v Belgium and Greece* (n 62).
[287] ibid paras 232, 251.
[288] ibid para 263.
[289] ibid.

powerlessness, in *'Street Children' (Villagran Morales et al) vs. Guatemala*,[290] as discussed above in part ii of Section C. Similarly, in *Rosendo Cantu v Mexico*, the IACtHR found indigenous women to be in a situation of vulnerability where numerous complaints of rape of indigenous women by members of the Army had gone unpunished and women were subject to 'a patriarchal structure that is blind to gender equity'.[291] In *Opuz v Turkey*, the ECtHR recognised that a woman who had been subjected to domestic violence was vulnerable because of 'the violence suffered by the applicant in the past, the threats issued by HO following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey'.[292] The Court's reference to the 'vulnerable situation of women in south-east Turkey' was in response to the submission of evidence by several non-governmental organisations showing that women were often unable to obtain judicial protection orders;[293] that the majority of women contacting a local emergency helpline among other things were illiterate or had a low level of education, and had no independent source of income;[294] that attitudes in the community were 'tolerant of violence against women and [were] frequently shared by judges, senior government officials and opinion leaders in society';[295] and that 'at every level of the criminal justice system the authorities fail[ed] to respond promptly or rigorously to women's complaints of rape, sexual assault or other violence within the family'.[296] All of these circumstances caused the powerlessness of women who experienced domestic violence.

Related to impunity, the IACtHR has found that barriers to accessing justice cause vulnerability, or, powerlessness. In *Rosendo Cantu v Mexico*, the Court held that the state had 'not consider[ed] Ms Rosendo Cantu's situation of vulnerability based on her language and ethnicity' due to its failure to provide a translator when she was receiving medical care and filing a complaint, and its failure to provide information in her language about subsequent steps regarding her complaint.[297] The Court further held that

[290] IACtHR, *'Street Children'* (n 155).
[291] IACtHR, *Rosendo Cantu v Mexico* (n 133) para 71.
[292] *Opuz v Turkey* (n 158) para 160.
[293] ibid paras 94–97.
[294] ibid para 98.
[295] ibid para 100.
[296] ibid para 101.
[297] IACtHR, *Rosendo Cantu v Mexico* (n 133) para 185.

> in general, the indigenous population is in a situation of vulnerability…because they do not speak Spanish and do not have interpreters, because of the absence of financial resources to hire a lawyer, to travel to health care centers or to the organs of justice, and also because they are often victims of abuse practices or practices that violate due process.[298]

The final example of situational vulnerability which this chapter highlights as having been recognised by the treaty bodies and other human rights actors, is an individual's experience of discrimination. In *Dzemajl et al v Yugoslavia*, the CAT factored the 'particular vulnerability' of a Romani community into its assessment that the police authorities' acquiescence in the burning down of their settlement by a racist mob violated Article 16(1) of the Convention.[299] The CAT did not explain why it understood members of the Roma minority to be particularly vulnerable. However, the previously discussed judgments in *VC v Slovakia*[300] (concerning discriminatory views towards Roma women), and *Opuz v Turkey*[301] and *Rosendo Cantu v Mexico*[302] (concerning discrimination against women through tolerance of violence against them) demonstrate that discriminatory or stereotypical attitudes towards particular individuals may operate to deny those individuals recognition of their experiences and/or to make them powerless to obtain the same protection and respect given to others in society.

In a 2009 report, the Special Rapporteur on torture, Manfred Nowak, emphasised the situational vulnerability of detainees who fell into categories of persons traditionally subordinated. He stated: 'most of the victims of arbitrary detention, torture and inhuman conditions of detention are usually ordinary people who belong to the poorest and most disadvantaged sectors of society'.[303] The Special Rapporteur listed, for example, 'those belonging to the lowest classes, children, persons with disabilities and diseases, gays, lesbians, bisexuals, transgender persons, drug addicts, aliens and members of ethnic and religious minorities or indigenous communities'.[304] One specific example which the Special Rapporteur provided of these individuals' powerlessness in the prison context was that '[i]f they dare to complain to

[298] ibid para 70.
[299] CAT, *Hajrizi Dzemajl et al v Yugoslavia*, Communication No 161/00 (21 November 2002) UN Doc CAT/C/29/D/161/2000 para 9.2.
[300] *VC v Slovakia* (n 125).
[301] *Opuz v Turkey* (n 158).
[302] IACtHR, *Rosendo Cantu v Mexico* (n 133).
[303] UNGA, 'Interim report of the Special Rapporteur of the Human Rights Council on torture' (n 109) para 40.
[304] ibid.

prosecutors or prison authorities about torture practices, their complaints are not taken seriously and are not properly investigated'.[305]

This section has shown that despite the treaty bodies' ostensible reliance on group characteristics to identify vulnerability, their use of the concept in fact corresponds to (and demonstrates the potential for further conceptualisation in accordance with) the idea of vulnerability as inherent, situational or pathogenic powerlessness. For example, the above-discussed jurisprudence recognises as vulnerability the inherent powerlessness of children who depend on others for care and who are less able to recover from psychological injury due to their stage of human development. The jurisprudence also recognises as vulnerability numerous forms of situational powerlessness, including being under the physical control of others, being prevented from satisfying one's basic needs and being dependent on others to do so due to one's environment (for example, detention) or lack of resources, having one's legal rights lawfully curtailed (for example, in detention), lacking family support, lacking familiarity with one's surroundings, and being in a relationship of dependence upon medical professionals. The jurisprudence further recognises as vulnerability various forms of pathogenic powerlessness, including being denied legal protection, being unable to access justice for violations of one's rights, being denied care when in a situation of dependence on the state, being denied de facto decision-making capacity and/or legal capacity, being denied medical information by those upon whom one is dependent for such information, and being subjected to discriminatory attitudes and practices.

In light of the above, it is possible to understand the discussion of deprivation of liberty and other forms of vulnerability in Chapter 1 as demonstrating the anti-torture norm's capacity to respond to inherent, situational and pathogenic vulnerabilities. Chapter 1 discussed the treaty bodies' practice of applying heightened scrutiny to the minimum threshold of severity assessment following their recognition of, for example, the inherent vulnerability of children,[306] the situational vulnerability of detainees[307] and the pathogenic vulnerability of individuals who have been denied the resources necessary to meet their basic needs when dependent on the state.[308] Chapter 1 further outlined the treaty bodies' practice of specifying

[305] ibid para 41.
[306] See, for example, IACtHR, *Juvenile Reeducation Institute v Paraguay (n 157)* paras 163, 212; *Bouyid v Belgium* (n 57) paras 109–110.
[307] See Chapter 1, Part II, Section A(i).
[308] See, for example, *MSS v Belgium and Greece* (n 62) para 263.

positive obligations that respond to inherent vulnerability (for example, the requirement to provide reception conditions tailored to child asylum seekers' particular needs,[309] and the requirement to provide healthcare to detainees[310]), situational vulnerability (for example, the requirement to establish detection and reporting mechanisms to guard against sexual abuse in schools,[311] and the obligation to regulate and supervise psychiatric institutions[312]) and pathogenic vulnerability (for example, the requirement to take specific measures to guarantee access to justice to those who have been denied it[313]).

Conclusion

This chapter has argued that dignity has an established capacity to facilitate shifts in human rights doctrine and to expand the reach of human rights norms. The chapter has argued, further, that dignity has a particularly strong connection with the rule against torture and ill-treatment, which enhances its ability to ground the interpretation of this particular norm and the adaptation of its legal framework. Having acknowledged the need for the treaty bodies and other human rights actors to develop a substantive conception of dignity in order to use the concept effectively, the chapter has proposed that such a conception is discernible from existing anti-torture jurisprudence, illuminated by Luban's theoretical work.

The chapter proposes that the following conception of a dignity violation sufficient, in principle, to constitute torture or ill-treatment could assist in the interpretation of the anti-torture norm to respond to the mistreatment of older people: an interference with a core aspect of the personality, in respect of which the person is powerless. The chapter further proposes that the concept of vulnerability under the anti-torture norm should be understood to constitute the powerlessness aspect of a dignity violation and further conceptualised as inherent, situational or pathogenic powerlessness, including dependency.

The first aspect of the proposed conception of a dignity violation—an interference with a core aspect of the personality—has the capacity to cast a crucial spotlight on the immediate (and possibly ongoing) impact of harmful conduct on the older person themselves. This first aspect

[309] For example, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (n 224).
[310] See Chapter 1, Part II, Section A(i).
[311] For example, *O'Keeffe v Ireland* (n 236)
[312] For example, IACtHR, *Ximenes Lopes v Brazil* (n 148)
[313] See, for example, IACtHR, *Rosendo Cantu v Mexico* (n 133) paras 29, 34, 39.

requires consideration of the many facets of the older person's experience that affect their personality. The remaining chapters in the thesis demonstrate how this aspect of the conception has a powerful ability to pierce through the range of social and legal structures that tend to obscure older people's experiences of rights violations, revealing more clearly whether a particular experience meets the minimum threshold of severity under the anti-torture norm.

The powerlessness aspect of the proposed conception of a dignity violation under the anti-torture norm is crucial to the treaty bodies' and other actors' ability to distinguish conduct that meets the minimum threshold of severity for torture or ill-treatment from interferences with the personality that may violate other human rights norms but not the anti-torture norm. Chapters 3 and 4 of the thesis demonstrate the need for this ability in the context of care of older people, in particular, given that the characterisation of treatment as 'care' appears to militate against its inclusion within the remit of the anti-torture norm.

Furthermore, the 'vulnerability as powerlessness' aspect of the proposed conception provides the space in which the treaty bodies and other human rights actors can identify and respond to the structural causes of torture and ill-treatment. To explain: conceptualising vulnerability as situational and pathogenic powerlessness (in addition to inherent powerlessness) demands identification of the ways in which the state and other actors cause torture and ill-treatment, thus revealing the structures that need to be addressed by the anti-torture norm's positive obligations. Further, in the proposed conceptualisation of a dignity violation under the anti-torture norm, powerlessness (or, vulnerability) does not constitute torture or ill-treatment in itself. It is only one half of the violation; a dignity violation will only arise where a person who suffers an interference with her personality is powerless to prevent it, and vice versa. Therefore, while identifying the forms of powerlessness that contribute to a dignity violation under the anti-torture norm allows for vindication of rights in individual cases of past torture or ill-treatment, the identification of these forms of powerlessness is also critical to prevention of torture and ill-treatment. Again, the powerlessness element of the proposed dignity violation operates to reveal the ways in which positive obligations under the norm could mitigate the potential for torture or ill-treatment to occur. The remaining chapters in the thesis use the proposed conception of a dignity violation to expose specific positive obligations that, the thesis argues, may help to prevent torture or ill-treatment of older people in the contexts of deprivation of liberty and care, access to adequate care, and prolonged impunity for torture or ill-treatment.

This chapter envisages vulnerability as being most effectively conceptualised and used in practice under the anti-torture norm within the frame of a dignity analysis. Although vulnerability operates in some similar ways as dignity in the existing anti-torture jurisprudence (i.e. by sensitising the minimum threshold of severity assessment and identifying heightened or specific positive obligations), this chapter has demonstrated that dignity is the driving force behind the rule against torture. Thus, vulnerability's functions have the potential to be strengthened by the harnessing of vulnerability to dignity under the anti-torture norm, and the conceptualisation of vulnerability as an 'alert' (to use Mackenzie, Rogers and Dodds' description)[314] to the potential or actual existence of a violation of the underpinning purpose of the norm.

The operation of vulnerability under the anti-torture norm stands to be strengthened by its conceptualisation as part of a (potential) dignity violation under the anti-torture norm for a further reason. That is, a dignity frame offers a way of combating the ever-present danger that the identification of vulnerability, per se (i.e. even if not based explicitly on group membership), will invite paternalistic and discriminatory responses from states and others.[315] Philosophically speaking, Mackenzie's response to the danger of paternalistic responses to vulnerability is to argue that the vulnerable subject should also be understood as an autonomous subject, and that responses to vulnerability must be 'guided wherever possible by the overall aim of fostering autonomy and promoting capabilities'.[316] Mackenzie argues that 'interventions must aim to restore, wherever possible, the vulnerable person's sense of herself as an autonomous agent, with significant options open to her, and the capacity (with social support) to act to realize her choices'.[317] Mackenzie's understanding of autonomy is not that of Fineman's 'mythical' and objectionable 'liberal subject', independent of and impervious to the social and institutional structures surrounding her. Rather, Mackenzie understands autonomy from a relational perspective, which coheres with her understanding of vulnerability. Relational theorists, according to Mackenzie, propose that the development and exercise of self-determination 'requires extensive and ongoing interpersonal, social and institutional

[314] Mackenzie, Rogers and Dodds, 'Introduction' (n 140)12.
[315] See Kate Brown, 'Vulnerability: Handle With Care' (2011) 5(3) Ethics and Social Welfare 313; Kate Brown, 'Re-moralising "Vulnerability"' (2012) 6(1) People, Place and Policy Online 41.
[316] Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' (n 195) 41.
[317] ibid 46.

scaffolding and can be thwarted by social domination, oppression, and disadvantage'.[318] Believing that 'the capacity to exercise some degree of self-determination is crucial for leading a flourishing life',[319] relational theorists argue that '[a] socially just state therefore has an obligation to develop social, political, and legal institutions that foster citizen autonomy'.[320]

Mackenzie, Rogers and Dodds note that Miller makes a similar argument; they explain that Miller's 'rich Kantian interpretation of the ethics of care' recognises both that '[w]e have needs because we are vulnerable biological and social beings' and that 'what makes our lives characteristically human is the capacity for self-determined (rational, emotional, and relational) agency'.[321] As discussed above in Section B of Part II, Miller argues that '[t]he duty to care does more than obligate agents to respond to others' needs; it requires that the nature of their response be both respectful and caring'.[322] Miller states that the care demanded by a person's needs has to be 'dignifying care'.[323] Arguably, the conception of a dignity violation proposed in this chapter could provide the treaty bodies and other human rights actors with the tool necessary to interpret the anti-torture norm as requiring the response to vulnerability that Mackenzie and Miller envisage. Once vulnerability alerts to the potential or actual existence of a dignity violation sufficient to constitute torture or ill-treatment, the response must be to avoid an interference with a core aspect of the personality and/or to ameliorate the person's powerlessness to the extent necessary to avoid a violation. Both of these responses are tied to the aim of promoting autonomy, choice and self-determination, while recognising the necessity of relationships and resources to achieving these states.

[318] ibid 42.
[319] ibid.
[320] ibid 44.
[321] Mackenzie, Rogers and Dodds, 'Introduction' (n 140) 12–13.
[322] Sarah Clark Miller, *The Ethics of Need: Agency, Dignity and Obligation* (Routledge, 2012) 5.
[323] ibid.

CHAPTER 3: DEPRIVATION OF LIBERTY IN THE CARE CONTEXT

Introduction

This chapter examines whether the rule against torture and ill-treatment could be interpreted to provide more effective protection to older people who are deprived of their liberty in care contexts.

As discussed in Chapters 1 and 2, the anti-torture framework evinces an intention on the part of the international community and the human rights treaty bodies to provide heightened protection to individuals who are deprived of their liberty, in recognition of their vulnerability. Article 10 of the International Covenant on Civil and Political Rights (ICCPR)[1] and its equivalents in universal and regional human rights law place a positive obligation on states to ensure that those who are deprived of their liberty are treated humanely and with respect for their dignity.[2] This obligation intensifies the treaty bodies' scrutiny of whether conduct has reached the minimum threshold of severity required for a finding of torture or ill-treatment.[3] Recognition of detainees' vulnerability has also led treaty bodies to specify a range of heightened, tailored positive obligations under the overarching positive obligation on states to prevent and protect from torture and ill-treatment.[4] The anti-torture norm provides further protection to individuals who are deprived of their liberty through the operation of preventive mechanisms under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[5] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[6]

This chapter maintains that the anti-torture norm's heightened protection of those who are deprived of their liberty is currently circumscribed by the treaty bodies' and other human rights actors' definition of 'deprivation of liberty'. It is argued that many of the contexts in which older people receive care are excluded from recognition as places where deprivations of liberty

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10.
[2] See Chapter 1, Part II Section A (i).
[3] ibid.
[4] See Chapter 1, Part II Section A (ii).
[5] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT).
[6] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1 February 1989) ETS 126 (ECPT).

can occur due to the paradigmatic conception of deprivation of liberty as state custody. The chapter further contends that, even if they fall within the current paradigm, older people's experiences of deprivation of liberty may be obscured by discriminatory structures and ageist attitudes that are prevalent in the care context.

Notwithstanding the anti-torture framework's current limitations, the chapter claims that the framework could adapt to recognise and respond to older people's experiences of deprivation of liberty in care contexts through a focus on their experiences of powerlessness. It is argued that, in order to effectively protect older people from dignity violations, the treaty bodies' conceptualisation of deprivation of liberty under the anti-torture norm (among other norms) needs to take account of not just physical confinement but also the powerlessness arising from dependency and denial of capacity.

Part I of the chapter summarises existing evidence of the confinement and restraint of older people in care contexts. Part II then argues that there is a prima facie protection gap in relation to these experiences under the anti-torture norm, among other human rights norms. Part II bases this argument on the treaty bodies' failure to explicitly recognise older people's care contexts as places of deprivation of liberty, the limiting deprivation of liberty paradigm, and the refusal by the European Court of Human Rights (ECtHR) to recognise the existence of a deprivation of liberty in two cases of court-ordered detention in older people's care homes. Part III proposes that the treaty bodies could interpret the anti-torture norm to provide more effective protection to older people by conceptualising deprivation of liberty in a manner that recognises not just physical confinement but also dependency and denial of capacity (together) as sources of powerlessness that may give rise to a deprivation of liberty. The focus on powerlessness in Part III of the chapter demonstrates the capacity of the dignity and vulnerability reasoning developed in Chapter 2 to bring attention to older people's lived experiences and to ground the expansion, or re-construction, of doctrinal and conceptual paradigms that have previously limited the anti-torture norm's application to older people. The chapter concludes by suggesting specific positive obligations that should be derived from the overarching positive obligation under the norm, and ways in which the preventive mechanisms might adapt their practice in order to provide better protection from torture and ill-treatment to older people deprived of their liberty in care contexts.

I. Older People's Experiences

As noted in the Introduction to the thesis, the United Nations (UN) High Commissioner for Human Rights (OHCHR) and the UN Independent Expert on the enjoyment of all human rights by older persons (Independent Expert on older persons' human rights) have both expressed concern at the involuntary confinement of older people in long-term care settings and older people's lack of access to appropriate care services in their homes and communities.[7] This section summarises some of the available evidence of older people's experiences of confinement and restraint in care contexts. Many of these experiences appear to derive from lack of access to alternative forms of care.[8]

A. *Confinement in premises*

As demand for formal care services for older people grows worldwide, long-term residential care institutions are rapidly increasing in number in many countries.[9] Several commentators warn that this is frequently happening in the absence of adequate state regulation.[10] Living in a residential care setting may be the free and informed choice of an older person. However, the Independent Expert on older persons' human rights notes that institutional care 'can often take the form of forced institutionalization and compulsory placements, especially when no other

[7] See Introduction, Part III Section C.
[8] For further discussion on this point, see the introduction to Chapter 4.
[9] See UN Office of the High Commissioner for Human Rights (OHCHR), 'Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper' (2012) 26; citing United Nations Division for the Advancement of Women, 'Gender Dimensions of Ageing' (2000) 5, Nélida Redondo and Peter Lloyd-Sherlock, 'Institutional care for older people in developing countries: Repressing rights or promoting autonomy? The case of Buenos Aires, Argentina' (Working Paper 13, DEV Working Paper Series, School of International Development, University of East Anglia 2009). See also Redondo and Lloyd-Sherlock, ibid, 5; Michelle H Y Shum and others, 'Protecting the rights of Chinese older persons in need of residential care: the social justice and health equity dilemma in the People's Republic of China' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016) 68.
[10] See OHCHR, 'Normative standards in international human rights law' (n 9) 26; UN Human Rights Council (UNHRC), 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (4 July 2011) UN Doc A/HRC/18/37 para 48; Isabella Aborderin and others, 'Human Rights and residential care for older adults in sub-Saharan Africa, Case study of Kenya' in Meenan, Rees and Doron, *Towards Human Rights in Residential Care for Older Persons*, ibid 17–18; Shum and others, 'Protecting the rights of Chinese older persons in need of residential care' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016) 69.

forms of care are available for the individual or when relatives are unable or unwilling to provide care'.[11]

There is evidence to suggest that, once in residential care institutions, older people are commonly prevented from leaving. They may face physical barriers to exit, such as locked doors, a perimeter fence with a locked gate, a keypad entry system which they cannot unlock, or assistive technology such as sensors or surveillance.[12] Barriers may also take the form of legal and/or institutional procedures, such as the requirement of a third party's permission for an older person to leave,[13] a care plan providing that a person will only access the community with an escort, or restricted access to finances or travel documents.[14] Psychological coercion, or a failure to inform a person of their rights, may also prevent an older person from leaving an institution. In the English High Court case of *JE v DE*, for example, an older man in a care home was consistently told by staff that the police would be called to prevent him from leaving, even though there was no legal basis for this.[15]

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[11] UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 para 74, citing UN Economic and Social Council (ECOSOC), 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (20 April 2012) UN Doc E/2012/51 para 25. See also a 2012 study of 1,300 nursing home staff in Ireland (one of the largest study undertaken internationally) that found that 73.4% of staff had been involved in arguments with residents about leaving the institutional setting: Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) x.

[12] See The Law Society of England and Wales, *Identifying a Deprivation of Liberty: A Practical Guide* (London, 2015) 73, 103–04; Northern Ireland Human Rights Commission (NIHRC), *In Defence of Dignity: The Human Rights of Older People in Nursing Homes* (Belfast, 2012) 62. See also Sage Support and Advocacy Service, 'Human Rights: Vulnerable Adults and Older People in Ireland: Submission to the United Nations Committee Against Torture on the Second Periodic Report of Ireland' (2017) para 55 <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27965_E.pdf> accessed 31 August 2017:

> [I]n many residential care settings for older people…buildings are commonly secured by key code locks as a safety mechanism, requiring residents to ask permission to leave the premises. In Sage's experience, the de facto detention can extend as far as limiting people's access to recreational grounds outside of the building, justified by an assessment that the resident is a "fall risk" or likely to "escape". While explanations for policies may point to efforts to introduce safety measures to protect some of the people in a residential care centre, the impact of such measures can be the de facto detention of all the people who reside within that centre.

[13] See Michelle H Y Shum and others, 'Protecting the rights of Chinese older persons in need of residential care: the social justice and health equity dilemma in the People's Republic of China' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016) 79.

[14] See Law Society, *Identifying a deprivation of liberty* (n 12) 53, 56, 81.

[15] *JE v DE* (2006) EWHC 3459 (Fam); [2007] 2 FLR 1150 para 124.

A 2016 report by White for the New Zealand Human Rights Commission notes that, in addition to older people being detained in 'locked aged care facilities' in New Zealand,[16] older people are often not free to leave supposedly non-secure facilities, such as dementia units and community-based homes and residences for disabled persons.[17] White states that 'approximately 70% of people living in non-secure aged facilities are experiencing dementia' and that 'the physical design features of such places, such as coded locks, heavy doors and the location of exits can prove problematic for those suffering from even mild dementia, resulting in them effectively living in a locked/closed environment'.[18]

The Law Commission of England and Wales has also reported that, in addition to confinement in institutions, older people who are living in community-based settings may be prevented from leaving the premises. The Commission reported in its Consultation Paper on mental capacity and deprivation of liberty on its visits to a range of housing schemes, all of which had the purpose of 'promoting independent living for a wide range of older and disabled people, including those with high levels of need'.[19] The Commission found that in some settings, 'independent living was achieved through the use of a variety of alarm or monitoring systems, and other assistive technologies, including wireless door sensors and GPS-based tracking devices'.[20] The Commission noted that '[t]here was also a range of diversionary techniques aimed at ensuring that certain residents did not leave the property or grounds unaccompanied'.[21]

B. *Restraint*

It appears that methods of restraint are commonly applied to older people in care contexts, with the result that they are not able to leave care settings and are further restricted in their movement within those settings.

[16] Michael J V White, *A Pathway Forward: The Scope and Role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged Care and Disability Residences and Facilities* (New Zealand Human Rights Commission 2016) 22.
[17] ibid 2.
[18] ibid 22.
[19] Law Commission of England and Wales (Law Commission), *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Law Comm No 372, 2015) para 2.27.
[20] ibid para 2.27.
[21] ibid.

Regarding older people's nursing homes, Drennan et al note that '[t]he excessive use of restraints to control residents has been reported as the most frequently-occurring type of physical abuse in a number of studies undertaken in the US and Europe'.[22] In 2009, using a measurement common to 20 countries, Feng et al found the prevalence of physical restraint use in nursing homes to vary from 6% of residents in Switzerland, to 20% in Hong Kong, to over 31% in Canada.[23]

Examples of the physical restraint of older people that various studies have highlighted include the use of straps on chairs, bedrails, reclining chairs, or obstructions such as tables or chairs, to prevent older persons moving about; restricted space; 'wandering' technology such as 'tag' monitors or alarm mats; the laying of hands to prevent movement; and the inability to access various parts of the premises or outdoor areas, for example, because of locked doors.[24] In 2003, the Mental Disability Advocacy Center reported the routine use of cage beds to restrain older people with dementia in Hungary, the Czech Republic, Slovakia and Slovenia.[25] Psychological restraint, in the form of repeated verbal or non-verbal cues to tell a person to stay in one place, has also been highlighted.[26]

Measures of physical restraint may be applied to older people in hospital, too. In a 2011 report on hospital care of older adults in English and Welsh hospitals, Tadd et al stated that 'throughout our observations on the acute wards…concerns for patient safety, particularly for confused patients or those with dementia, mean that staff spend a great deal of time preventing patients from moving out of their chairs'.[27] The report stated, further, that '[d]ue to concerns of potential risks to the system, of falls and other untoward incidents, the culture of acute care

[22] Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) 73, citing K Pillemer and D W Moore, 'Abuse of patients in nursing homes: Findings from a survey of staff' (1989) 29(3) The Gerontologist 314; Thomas Goergen, 'A multi-method study on elder abuse and neglect in nursing homes' (2004) 6(3) Journal of Adult Protection 15; Radka Bužgová and Katerina Ivanová, 'Elder abuse and mistreatment in residential settings' (2009) 16(1) Nursing Ethics 110.
[23] Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross-national study' (2009) 24 International Journal of Geriatric Psychiatry 1110, 1113.
[24] See, for example, NIHRC, *In Defence of Dignity* (n 12) 30, 62–64; OHCHR, 'Normative standards in international human rights law' (n 9); Drennan and others, *Older People in Residential Care Settings* (n 22) viii; World Health Organization (WHO), *World Report on Ageing and Health* (2015) 133; Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes' (n 23); White, *A Pathway Forward* (n 16) 22.
[25] Mental Disability Advocacy Center (MDAC), 'Cage beds: Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries' (Budapest, 2003).
[26] NIHRC, *In Defence of Dignity* (n 12) 62.
[27] Win Tadd and others, *Dignity in Practice: An exploration of the care of older adults in acute NHS Trusts* (Cardiff University, University of Kent, 2011) 90–91.

practice encourages patients to remain in their chairs and use bedpans or commodes rather than being helped to a toilet'[28] and that '[s]taff are also more likely to adopt habits of using bed rails when perhaps they are not necessary'.[29] The failure to assist an older person, where necessary, to use the toilet is examined in detail in Chapter 4, as a case study through which to examine the potential impact of dignity reasoning on the minimum threshold of severity assessment and the specification of positive obligations under the anti-torture norm in the care context.

Older people with dementia are frequently chemically restrained in care contexts.[30] Chemical restraint is generally understood to involve the use of medication (usually anti-psychotic medication) as sedation or otherwise to control a person's behaviour.[31] According to Feng et al, the prevalence of anti-psychotic medication use to control the behaviour of older persons in nursing homes ranged, in 2009, from 38% of nursing home residents in Finland, to 34% in Switzerland, to 27% in the United States to 11% in Hong Kong.[32] Banerjee estimated in 2009 that between 30% and 50% of English residential and nursing home residents with dementia may have been receiving antipsychotic medication.[33] Banerjee notes that older people in England are also frequently chemically restrained in hospital[34] and by doctors in the community.[35]

Several authors and institutions have raised concerns that sedating medication is commonly administered to older people unnecessarily and without adequate oversight or accountability. Banerjee notes that anti-psychotic medication is prescribed mostly unlicensed (or 'off-label') to older people with dementia,[36] and he has estimated that at least 80% of people with dementia who are treated with anti-psychotic medication in England do not derive any benefit from it.[37] Banerjee also highlights substantial evidence that the use of such medication significantly

[28] ibid.
[29] ibid.
[30] See Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 5–6. See also UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (8 July 2016) UN Doc A/HRC/33/44 para 48.
[31] See Banerjee, *The use of antipsychotic medication for people with dementia*, ibid; Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes' (n 23) 1113.
[32] Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes' (n 23) 1113.
[33] Banerjee, *The use of antipsychotic medication for people with dementia* (n 30) 19, cited in Rosie Harding and Elizabeth Peel, '"He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 Medical Law Review 243.
[34] Banerjee, *The use of antipsychotic medication for people with dementia* (n 30) 35.
[35] ibid 30, 31, 35.
[36] ibid 18.
[37] ibid 6.

increases the incidence of death and stroke.[38] The Czech national preventive mechanism (NPM)[39] has found that prescriptions for the use of sedatives in older people's care homes are often 'so vague, that it in practice it is not a physician who decides on the administration of a sedative, but an employee of the facility (in some cases not even a medical officer)'.[40] The Austrian NPM has reported cases in older people's nursing homes 'where drugs were prescribed in the case of "restlessness" without a traceable diagnosis'.[41] Harding and Peel note that British Psychological Society advocates caution and strict safeguards if anti-psychotic medication is to be prescribed (allowable for severe symptoms only),[42] in stark contrast to the United Kingdom's (UK) Royal College of Psychiatrists' permissive approach to the use of anti-psychotic medication to treat even mild or moderate symptoms of dementia.[43]

Harding and Peel, Banerjee and the Austrian NPM report that sedating medication is routinely administered to older people with dementia without their consent and often without providing information to relatives, representatives or carers.[44] Banerjee and the Austrian NPM note that prescribing physicians frequently fail to demonstrate that they have considered alternatives to

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[38] ibid 25–28. See also Harding and Peel, '"He was like a zombie"' (n 33) 245, citing Lon S Schneider and others, 'Risk of Death with Atypical Anti-psychotic Drug Treatment for Dementia: Meta-analysis of Randomized Placebo-controlled Trials' (2005) 294 Journal of the American Medical Association 1934.

[39] under OPCAT (n 5).

[40] See Czech Republic, Public Defender of Rights (Ombudsman), 'Annual Report on the Activities of the Public Defender of Rights' (2013) 88.

[41] Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 84.

[42] National Collaborating Centre for Mental Health, 'Dementia: a NICE-SCIE Guideline on supporting people with dementia and their carers in health and social care. National Clinical Practice Guideline no 42' (British Psychological Society, Leicester 2011), cited in Harding and Peel, '"He was like a zombie"' (n 33) 271.

[43] Royal College of Psychiatrists Faculty for the Psychiatry of Old Age, 'Atypical antipsychotics and behavioural and psychological symptoms of dementia: Prescribing update for old age psychiatrists' (2004) (RCPsych 2004), cited in Harding and Peel, '"He was like a zombie"' (n 33) 271.

[44] See Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 84: 'The commissions have uncovered cases where drugs were prescribed in the case of "restlessness" without a traceable diagnosis. In almost all of the incidents monitored in detail, the documentation in the nursing homes did not contain any indication whatsoever of a medical briefing or explanation or the patient's consent. In many cases, the staff did not even realise that giving sedatives with the purpose of tranquilising or immobilizing the person affected could be a measure depriving them of their liberty, that there were drugs with fewer side effects, etc. Accordingly, there were also no reports made to the residents' representatives.' See also Banerjee, *The Use of Antipsychotic Medication for People with Dementia* (n 30) 30; Harding and Peel, '"He was like a zombie"' (n 33) 265: 'In summary, the qualitative findings from these research projects highlight that carers overwhelmingly report negative experiences of the prescription of antipsychotic medication to people with dementia. In contrast to the severe adverse effects (e.g., stroke, death) of these drugs highlighted in clinical research, carers described a range of other harms experienced by the person with dementia that they care for. They described sedative effects of antipsychotics, leaving people with dementia like 'zombies' or 'catatonic'. Informal carers, including those with power of attorney, reported not being consulted prior to the use of antipsychotic medication nor given any information about the risk/benefit profile of the drugs prescribed. Several carers reported removing people with dementia from formal care settings because of failures of care associated with the prescription of antipsychotics' (citations omitted).

anti-psychotic medication or that they have planned for reduction and cessation of the use of such medication on their patients.[45] Feng et al argue that '[t]he persistent use of physical restraints and antipsychotics warrants additional monitoring and research' and that '[a] number of studies have demonstrated that a substantial reduction in restraint use, combined with meaningful alternatives, could result in no adverse outcomes or even in positive benefits'.[46]

II. Gaps in Recognition of Older People's Experiences

This part of the chapter contends that there is, prima facie, a doctrinal gap in the protection afforded by the anti-torture norm to older people who are deprived of their liberty. In addition to providing evidence of the apparent doctrinal gap, this part examines why the gap exists. This examination sets up the analysis in Part III of how the anti-torture norm could be interpreted to provide more effective protection to older people. Part III adds to this part's argument that there is a protection gap in the anti-torture norm as it is currently understood. Part III argues that the treaty bodies and other human rights actors concerned with the interpretation and application of the rule against torture and ill-treatment should focus on the powerlessness of older people who are involuntarily confined and restrained in care contexts. As Part III develops this argument, it becomes clear that the experiences outlined above in Part I *can* be conceptualised as deprivations of liberty and thus that the apparent gap is a real one.

Section A of this part argues that the lack of attention to older people's experiences of deprivation of liberty in the human rights treaty bodies' jurisprudence, when compared with the recognition given by other human rights and legal actors, evidences a prima facie doctrinal gap in the anti-torture norm's protection of older people who are deprived of their liberty.

Section B recognises that the inclusion, or otherwise, of various deprivation of liberty contexts in the work of the universal and regional preventive mechanisms and other treaty bodies under

[45] Banerjee, *The use of antipsychotic medication for people with dementia* (n 30) 35; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83.
[46] Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes' (n 23) 1117, citing Elizabeth Capezuti and others, 'The Relationship Between Physical Restraint Removal and Falls and Injuries Among Nursing Home Residents (1998) 53(1) Journal of Gerontology Series A Biological Sciences and Medical Sciences M47; Richard R Neufeld and others, 'Restraint Reduction Reduces Serious Injuries Among Nursing Home Residents' (1999) 47(10) Journal of the American Geriatrics Society 1202; Laura Palmer and others, 'Reducing Inappropriate Restraint Use in Colorado's Long-term Care Facilities' (1999) 25(2) Jount Commission Journal on Quality and Patient Safety 78; Anna R Huizing and others, 'Short-term Effects of an Educational Intervention on Physical Restraint Use: A Cluster Randomized Trial' (2006) 6(17) BMC Geriatrics <https://bmcgeriatr.biomedcentral.com/articles/10.1186/1471-2318-6-17> accessed 26 September 2017.

the anti-torture norm depends on how these actors conceptualise deprivation of liberty.[47] Section B argues that the paradigmatic conceptualisation of deprivation of liberty under the anti-torture norm, as state custody, contributes to the invisibility of many care contexts in which older people, in particular, may experience deprivations of liberty. This section notes that several commentators and treaty bodies have highlighted the gaps in human rights protection that are caused by the existing paradigm's limitations.

Section C argues that the ECtHR's decisions in *HM v Switzerland*[48] and *Haidn v Germany*[49] demonstrate that, even when older people are detained in a manner that fits the paradigm of deprivation of liberty, there are structural barriers to the recognition of older people's human rights in care settings that are liable to obscure their experiences of deprivation of liberty. Section C contends that older people's deprivations of liberty may not be recognised because older people are routinely denied legal capacity in care contexts, rendering the question of whether they consent to institutionalisation or to measures of restraint irrelevant to those in authority. It is further contended that older people may be denied de facto decision-making capacity due to the (lack of) definition of informed consent including the process required to obtain it. Section C argues that the denial of both legal capacity and de facto decision-making ability are not just lived experiences for older people but are also doctrinal and conceptual problems within the international human rights framework. This section argues that ageist attitudes seem to be further to blame for the treaty bodies' failure to recognise and respond to older people's experiences of deprivation of liberty.

A. *The prima facie gap in recognition*

There is a dearth of treaty body jurisprudence under both the anti-torture norm and the right to liberty regarding older people who are deprived of their liberty outside of the prison context.[50] As Section C of this part discusses in detail, the European Court of Human Rights (ECtHR)

[47] See Rachel Murray and others, *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press 2011) 69: 'How one defines these terms ['detention' and 'deprivation of liberty'] is not just an academic discussion. It has implications for what should fall within an NPM's jurisdiction at the national level and the SPT's internationally, particularly when one considers the areas which are often seen as less obvious, such as those relating to secure accommodation for the young or social care institutions.'
[48] *HM v Switzerland* (2004) 38 EHRR 17.
[49] *Haidn v Germany*, App no 6587/04 (ECtHR, 13 January 2011).
[50] See generally Claudia Martin, Diego Rodriguez-Pinzon and Bethany Brown, *Human Rights of Older People: Universal and Regional Legal Perspectives* (Springer 2015).

has adjudicated two complaints under Article 5 of the European Convention on Human Rights (ECHR)[51] alleging arbitrary detention in older people's nursing homes.[52] In both of these cases, the ECtHR found no deprivation of liberty to exist despite the applicants being forcibly placed in the institutions and prevented from leaving by an administrative and/or court order.

To date, the annual reports of the Subcommittee for Prevention of Torture (SPT) have not reported any visits to older people's care settings, nor has the SPT issued any guidance on states' obligations in the context of care of older people.[53] Older people's care settings are not mentioned in the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Standards) either,[54] although some of the CPT's country visit reports mention nursing homes.[55]

The contrasting approach of several NPMs and other human rights and legal actors suggests that the treaty bodies' general lack of attention to older people's care contexts within their work on deprivation of liberty constitutes a gap in older people's protection under the anti-torture norm.

A small number of NPMs recognise older people's care homes as places of detention that require monitoring pursuant to OPCAT. The Austrian Ombudsman Board routinely inspects retirement and nursing homes and has made detailed recommendations in response to those

[51] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 United Nations Treaty Series 222
(ECHR) art 5.
[52] *HM v Switzerland* (2004) 38 EHRR 17; *Haidn v Germany*, App no 6587/04 (ECtHR, 13 January 2011).
[53] See Subcommittee on Prevention of Torture (SPT), Annual Reports <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27> accessed 25 September 2017; SPT, SPT Documents <www.ohchr.org/EN/HRBodies/OPCAT/Pages/Documents.aspx> accessed 25 September 2017. See also Murray and others, *The Optional Protocol to the UN Convention Against Torture* (n 47) 73–77, discussing the places of detention that the SPT generally includes in its visits.
[54] See Council of Europe (CofE), CPT Standards (compiled from the annual reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment <www.coe.int/en/web/cpt/standards> accessed 25 September 2017.
[55] See, for example, CofE, 'Council of Europe Anti-Torture Committee visits Liechtenstein' Press Release (14 February 2007) <www.cpt.coe.int/documents/lie/2007-02-14-eng.htm> accessed 31 August 2017; CofE, 'Council of Europe anti-torture Committee visits Armenia' Press Release (27 May 2010) <www.cpt.coe.int/documents/arm/2010-05-27-eng.htm> accessed 31 August 2017.

visits.[56] The Dutch,[57] Kyrgyz,[58] Serbian,[59] Czech Republic[60] and Slovenian[61] NPMs have also carried out visits to institutions providing care to older persons. The Czech Republic's NPM has reported 'typical' practices of clients being prevented from leaving the facility or their room, the use of restraints, identity cards and insurance cards being taken away, and a requirement that clients give all of their income to the facility.[62] The Slovenian NPM, which has prioritised visits to retirement homes with 'secure' wards, has cited the use of electronic locks on wards, locks on corridors, rules that residents may only leave the premises if escorted, and the use of restraints.[63] Meanwhile the German National Agency for the Prevention of Torture states that it considers residential care homes and nursing homes for older people to meet the definition of 'places of detention' under Article 4 OPCAT, but that its financial capacities are insufficient to allow it to visit these institutions.[64] The New Zealand NPMs have highlighted the need for community-based care settings to be recognised as loci of deprivations of liberty because older people may be prevented from leaving these premises.[65]

The IACmHR's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognise that individuals 'under the custody and supervision' of 'institutions for the elderly' fall under the definition of deprivation of liberty.[66] In 2015, the UN Working Group on Arbitrary Detention highlighted in its report on New Zealand that it had met 'older persons, some of them suffering from dementia, who were deprived of their liberty in rest

[56] See, for example, Austrian Ombudsman Board, 'Annual Report' (2014) (n 45) 27.
[57] See, for example, The Netherlands, National Preventive Mechanisms, 'Second Annual Report: Monitoring Places of Detention' (2002) 17.
[58] See, for example, Kyrgyz Republic, National Centre of the Kyrgyz Republic on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, '2014 Annual Report' (Bishkek, 2015) 5, 14, 17.
[59] See, for example, Republic of Serbia, National Mechanism for Prevention of Torture, 'Annual Report' (Belgrade, 2016) 22, 23.
[60] See, for example, Czech Republic, Public Defender of Rights (Ombudsman), *Protection against ill-treatment: Report on the Activities of the Public Defender of Rights as the National Preventive Mechanism in 2014* (Brno, 2015) 17.
[61] See, for example, Republic of Slovenia, Human Rights Ombudsman of the Republic of Slovenia, 'Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2014' (Ljubljana, May 2015) 95–109.
[62] Czech Republic, *Protection against ill-treatment* (n 60).
[63] Republic of Slovenia, 'Report of the Human Rights Ombudsman' (n 61).
[64] Germany, National Agency for the Prevention of Torture, *Annual Report of the Federal Agency and the Joint Commission, 2013* (2014) 15; Germany, National Agency for the Prevention of Torture, *Annual Report 2014* (2015) 10.
[65] New Zealand Human Rights Commission (NZHRC), *Monitoring Places of Detention, Annual Report of activities under the Optional Protocol to the Convention against Torture (OPCAT), 1 July 2013 to 30 June 2014* (December 2014) 29.
[66] Inter-American Commission on Human Rights (IACmHR), Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (13 March 2008) IACmHR Res 1/08, OEA/Ser/L/V/II.131 doc 26, 3.

homes and secure facilities'.[67] The Working Group called for a legal framework to protect older people from arbitrary detention in care settings.[68]

The Law Commission of England and Wales, in its recent Consultation on Mental Capacity and Deprivation of Liberty, recognised that older people may experience deprivations of liberty in 'supported living' arrangements in the community,[69] as well as in care homes. In the case of *Cheshire West*,[70] the Supreme Court of the United Kingdom considered whether a deprivation of liberty could occur where an individual was being looked after by carers in a home-like environment in the community, in the absence of ECtHR jurisprudence on the point. The Supreme Court found that deprivations of liberty had occurred in both an individual foster home and in an assisted-living bungalow housing three residents, applying the ECtHR deprivation of liberty test.[71]

On its face, the lack of attention to older people's care contexts in the work of the SPT, CPT and many NPMs, and the inevitable knock-on effect on the recognition of older people's deprivations of liberty in the anti-torture jurisprudence more generally, deny effective protection from torture and ill-treatment to many older people. As discussed in Chapter 1, the preventive mechanisms jurisprudentially develop, and pursue the practical implementation of, states' heightened positive obligations under the anti-torture norm towards individuals who are deprived of their liberty. If the preventive mechanisms do not recognise older people's

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[67] UNHRC, 'Report of the Working Group on Arbitrary Detention, Addendum, Mission to New Zealand' (6 July 2015) UN Doc A/HRC/30/36/Add.2 para 87. See also White, *A Pathway Forward* (n 16) 23:

> The United Nations Working Group on Arbitrary Detention noted, following its visit to New Zealand, that '…despite the increasing phenomenon of older people staying in residential care, there is very little protection available to ensure that they are not arbitrarily deprived of their liberty'. The Working Group recommended that the Government develop a comprehensive human rights-based legal framework to govern the provision of services to older persons' (citing Working Group on Arbitrary Detention, 'Statement at the conclusion of its visit to New Zealand' (24 March–7 April 2014) <www.ohchr.org/en/NewsEvents/Pages/ DisplayNews.aspx?NewsID=14563&LangID=E> accessed 31 August 2017).

[68] ibid.

[69] Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (n 19) paras 2.25-2.28.

[70] *P v Cheshire West and Chester Council and P v Surrey County Council* [2014] UKSC 19; [2014] AC 896.

[71] ibid. Hale LJ applied what she saw as the ECtHR test for deprivation of liberty—'whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives'—and relied, in respect of the woman in a foster home, on the fact that she 'would not be allowed out without supervision, or to see anyone whom they did not wish her to see, or to do things which they did not wish her to do' (para 52). Regarding the man living in the bungalow, Hale LJ viewed as determinative the trial judge's finding that he 'cannot go anywhere or do anything without … support and assistance' and that his behavior necessitated 'at time physical restraint, and, when necessary, the intrusive procedure of inserting fingers into his mouth whilst he is being restrained' (para 51). The question of consent did not trouble Hale LJ; she concluded that it was 'probably the case' that the woman in foster care fell into the category of people whom the 'Strasbourg court accepts… are not capable of expressing a view either way' (para 55).

experiences of deprivation of liberty, this precludes the operation of the aspects of the anti-torture normative framework intended to prevent and protect from dignity violations in situations where people are powerless.

B. *A problematic paradigm*

This section argues that the apparent gap in the anti-torture norm's protection of older people who are deprived of their liberty in care contexts is at least partly explained by the current conceptualisation of deprivation of liberty under the anti-torture norm. Part (i) of this section discusses the paradigmatic conceptualisation of deprivation of liberty under the anti-torture norm as police or prison custody, and contends that the conception of deprivation of liberty under the OPCAT and the ECPT (institutional detention that is effectuated or authorised by the state) is related to that paradigm. Part (ii) highlights the views of several human rights actors and commentators that these conceptions exclude many individuals from effective human rights protection.

(i) *Current conceptions of deprivation of liberty*

It is widely recognised that state custody in the form of arrest or detention by police, military or prison authorities is the paradigmatic conception of deprivation of liberty in international human rights law in general and under the anti-torture norm in particular.[72] The ECtHR has referred in its Article 5 ECHR judgments to 'classic detention in prison'[73] and 'the paradigm of confinement in a cell'.[74] Murray et al acknowledge that '[d]etention in prisons, police cells, and other pre-trial facilities is what many imagine as the focus of OPCAT's attention'.[75] They note that this paradigm is reflected in the SPT's visits, stating that 'although [the SPT] has visited other places of detention, such as children's homes, drug rehabilitation centres, and psychiatric hospitals, the focus of its attention has been police stations and prisons'.[76] Murray

[72] See, for example, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel 1993) 135; *Austin v United Kingdom* (2012) 55 EHRR 14 para 59; *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69 para 83; Murray and others, *The Optional Protocol to the UN Convention Against Torture* (n 47) 68, 73; IACmHR, Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (n 66) 12, 13.
[73] *Guzzardi v Italy* (1981) 3 EHRR 333 para 95.
[74] *Austin v United Kingdom* (2012) 55 EHRR 14 para 59.
[75] Murray and others, *The Optional Protocol to the UN Convention Against Torture* (n 47) 73.
[76] ibid.

et al discern a similar pattern in the NPMs' visits and recommendations to governments. They contend that 'despite the breadth of places that could be visited under OPCAT, there is still the tendency to equate what is required with coverage, principally, of prisons and police cells'.[77] They note that 'while the NPM may be visiting other places of detention such as psychiatric hospitals or migrant detention facilities, the latter may not be as frequent as OPCAT requires'.[78] These authors argue that the NPMs' focus on the paradigmatic contexts of deprivation of liberty often stems from the fact that the domestic institutions designated as the NPM 'have frequently had as their primary (and often sole) focus criminal detention facilities' and 'there has been a trend by governments to fail to provide the necessary resources to institutions once they are designated as NPMs'.[79]

Beyond the paradigm of criminal justice detention, a broader conception of deprivation of liberty operates in the mandates and work of the preventive mechanisms under the OPCAT and the ECPT: detention in an institution, which is effectuated or authorised by the state. This conception is related to the paradigm of deprivation of liberty, in that deprivation of liberty remains understood as a 'public' or state-related affair.

The official documentation and visiting practices of both the SPT and CPT suggest that both preventive mechanisms are solely concerned with institutional settings.[80] The SPT has visited institutions such as police stations, prisons, pre-trial facilities, drug rehabilitation centres, psychiatric hospitals and children's detention centres,[81] while the CPT Standards cover police custody, prison, immigration detention centres, psychiatric and social care institutions, and juvenile detention centres.[82]

Furthermore, the definitions of deprivation of liberty under the ECPT and OPCAT appear to require that the deprivation of liberty is either caused by the state or is authorised by the state through a process provided for in legislation.

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[77] ibid 82.
[78] ibid.
[79] ibid.
[80] See OHCHR, 'The SPT in Brief' <www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx> accessed 1 September 2017. See also Murray and others, *The Optional Protocol to the UN Convention Against Torture* (n 47)
[81] Murray and others, *The Optional Protocol to the UN Convention Against Torture* (n 47) 73–76.
[82] See CofE, CPT Standards (n 54).

Article 2 ECPT provides that states must allow the CPT to visit 'any place within [the state's] jurisdiction where persons are deprived of their liberty by a public authority'.[83] According to the Explanatory Report to the ECPT, 'the notion of "deprivation of liberty" for the purposes of the present Convention is to be understood within the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the [ECHR]'.[84] However, the requirement that a person be 'deprived of their liberty by a public authority' creates a narrower category of contexts than are, today, covered by Article 5 ECHR (as discussed further in part (ii) of this section). Morgan and Evans have acknowledged that '[t]he notion of being deprived of liberty by a public authority in ECPT Article 2 is not necessarily co-terminus with that of "deprivation of liberty" for the purposes of Article 5(1) of the European Convention on Human Rights'.[85]

According to the Explanatory Report, Article 2 ECPT requires that the 'deprivation of liberty is the result of action by a public authority'.[86] The Explanatory Report states further that as long as a public authority has been involved in the deprivation of liberty, it does not matter if the deprivation of liberty is not based on a 'formal decision',[87] and that it is immaterial whether the person is confined in a public or private institution as the CPT can visit both types of institution.[88] The Explanatory Report gives examples of the contexts to which the CPT's mandate extends: 'places where persons are held in custody, are imprisoned as a result of conviction for an offence, are held in administrative detention, are interned for medical reasons or where minors are detained by a public authority'.[89] The Northern Ireland Human Rights Commission has noted that 'the CPT has not been explicit on how it would assess the conditions in a home in which residents are not, and are not likely to be, detained under the provisions of domestic law'.[90]

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[83] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1 February 1989) ETS 126 (ECPT) art 2:

> Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.

[84] CofE, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), Text of the Convention and Explanatory Report, European Treaty Series-No. 126, Text amended according to the provisions of Protocols No. 1 (ETS No 151) and No 2 (ETS No 152) which entered into force on 1 March 2002, para 24.

[85] Rod Morgan and Malcolm Evans, *Combating torture in Europe: the work and standards of the European Committee for the Prevention of Torture (CPT)* (Council of Europe Publishing 2001) 28.

[86] CofE, ECPT, Text of the Convention and Explanatory Report (n 84) para 32.

[87] ibid para 28.

[88] ibid para 32.

[89] ibid para 30.

[90] NIHRC, *In Defence of Dignity* (n 12) 18.

On its face, Article 4 OPCAT similarly requires that the deprivation of liberty is either directly effectuated by the state, or sanctioned by the state.[91] Guidance provided by the SPT to the New Zealand Human Rights Commission explains that Article 4 OPCAT requires states to allow visits to 'any public or private custodial setting under the jurisdiction and control of the State party, where persons may be deprived of their liberty and are not permitted to leave, either by an order given by any judicial, administrative or other authority, or at its instigation, or with its consent or acquiescence'.[92]

Interpreting Article 4 OPCAT, the Austrian NPM states that 'custodial measures in care and nursing homes…are always directly attributable to the State' because '[i]n Austria it has…been specifically established by law which persons/professional groups are explicitly authorized to instruct the use of measures that restrict liberty in social institutions'.[93]

The HRC's General Comment on Article 10 ICCPR chimes with the wording of Article 4 OPCAT. The HRC states that Article 10 applies 'to any one deprived of liberty *under the laws and authority of the State* who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere'[94] (emphasis added).

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[91] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT) art 4:

> *Article 4*
>
> 1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
>
> 2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

[92] SPT 'Response to the Human Rights Commission's request for interpretative guidance on Article 4.2 of the OPCAT' (2015) cited in White, *A Pathway Forward* (n 16) 19.

[93] Austrian Ombudsman Board, 'Monitoring of nursing and residential homes – determining factors to decide if they are places of deprivation of liberty or not' (2015) 2 <http://volksanwaltschaft.gv.at/downloads/9n6pb/Monitoring%20Elderly%20Homes_EN.pdf> accessed 1 September 2017.

[94] HRC General comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' (10 April 1992) UN Doc HRI/GEN/1/Rev 9 (Vol 1) para 2.

(ii) *The paradigm's limitations*

The above discussion demonstrates that, to the extent that the preventive mechanisms' remits include older people's care contexts even in principle, they only include settings that are institutional and that care for people on the instructions of the state, and/or with the support of the state, and/or under a licence from the state. The conception of deprivation of liberty under the OPCAT and ECPT therefore excludes older people's experiences of deprivation of liberty in the 'private' sphere—in other words in homes and other non-institutional settings (even if the state is involved), and in institutions that the state does not regulate.

In the UK Supreme Court case of *Cheshire West*,[95] Hale LJ highlighted the importance of recognising deprivations of liberty in non-institutional settings (in this case in an individual foster home and an assisted-living house for three people) in order for the basic human rights of those who are detained to be equally protected. Hale LJ acknowledged the likely resistance by health and social care authorities to categorising arrangements for the care of people with disabilities in a home-like environment as a deprivation of liberty. She noted that 'they may worry that it carries a stigma…Legal formalities may be seen as the antithesis of the normalisation which it is the object of both the Mental Health and the Mental Capacity Acts to achieve'.[96] Nonetheless, Hale LJ stated: 'It is no criticism of them if the safeguards are required. It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else'.[97]

Other courts, treaty bodies and commentators have recognised the gaps in protection that arise from conceptualising deprivation of liberty in a way that requires state involvement.

Writing in 1989 just after the ECPT's adoption, Cassese highlighted that the CPT's mandate appeared not to extend to deprivations of liberty that were not authorised or effectuated by the state. Cassese noted that '[o]n its face, the Convention therefore seems not to cover, among other things, the "voluntary" committal of a person to a psychiatric hospital carried out at the request of the family, without the intervention of a public authority and without the consent of

[95] *P v Cheshire West and Chester Council and P v Surrey County Council* (n 70).
[96] ibid (Hale LJ) para 10.
[97] ibid para 1.

the person concerned'.[98] Cassese's concern is particularly relevant to older people's experiences of care. Professional care is frequently provided to older people by the private sector and many countries do not regulate several of the forms of professional care that older people receive.[99] Furthermore, many (if not most) countries do not regulate deprivation of liberty in care settings other than psychiatric hospitals.[100] This means that older people are frequently confined and restrained in the absence of legal authorisation and without any other form of state involvement. White contends that, while the OPCAT's definition of deprivation of liberty makes sense 'for traditional places of detention', it is 'more problematic for "non-traditional places of detention" where people may be held on a "voluntary" basis, or with their family's consent, without any official or public intervention'.[101]

The ECtHR's Article 5 ECHR jurisprudence has recognised that people in private psychiatric institutions may be deprived of their liberty without any state involvement. Acknowledging the vulnerability of individuals who are deprived of their liberty in private psychiatric institutions, the ECtHR has held that states have a positive obligation to supervise deprivations of liberty in these settings, and that the state will be responsible for an arbitrary deprivation of liberty if it has violated its positive obligation to supervise. In *Storck v Germany*, where the applicant was detained without any official authorisation in a private psychiatric clinic, the ECtHR held that the State is 'obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty, of which the authorities have or ought to have knowledge'.[102] Without such a positive obligation, the Court contended, there would be 'a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society'.[103] Specifically regarding private psychiatric institutions, which were the subject of *Storck*, the ECtHR held that '[t]hese institutions, in particular those where persons are held without a court order, need

[98] Antonio Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture' in Antonio Cassese, Paola Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) 350.
[99] See (n 10). See further White, *A Pathway Forward* (n 16) 19; Sage Support and Advocacy Service, 'Human Rights: Vulnerable Adults and Older People in Ireland: Submission to the United Nations Committee Against Torture on the Second Periodic Report of Ireland' (2017).
[100] Ibid. See further UNHRC 'Report of the Working Group on Arbitrary Detention, Addendum, Mission to New Zealand' (6 July 2015) UN Doc A/HRC/30/36/Add.2 para 87.
[101] White, *A Pathway Forward* (n 16) 19.
[102] *Storck v Germany* (n 187) para 102.
[103] ibid.

not only a licence, but a competent supervision on a regular basis of the justification of the confinement and medical treatment'.[104]

The Inter-American Commission on Human Rights' (IACmHR) Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas state that the concept of deprivation of liberty encompasses 'any form of detention… of a person in a public or private institution which that person is not permitted to leave at will'.[105] As discussed in Chapters 1 and 2, the IACtHR has held that the vulnerability of patients in psychiatric institutions requires 'the strict supervision of such institutions', both public and private.[106]

The CAT's General Comment No 2, meanwhile, provides that:

> each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions *as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm* (emphasis added).[107]

It appears from a recent interaction between the SPT and the New Zealand Human Rights Commission that the SPT may in fact be open to interpreting Article 4 OPCAT more broadly than its wording suggests, in a way that echoes other treaty bodies' recognition of states' positive obligation under the right to liberty to monitor private places of detention.

White states that, in response to a request for guidance from the New Zealand Human Rights Commission, the SPT informed the Commission that 'the preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM'.[108] The SPT continued:

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[104] ibid.
[105] IACmHR, Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (n 66) 3.
[106] IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006, Series C No 149 para 108. See Chapter 1, Part II Section B (ii) and Chapter 2, Part II Section C (iii).
[107] CAT General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007) UN Doc CAT/C/GC/2 para 15.
[108] SPT 'Response to the Human Rights Commission's request for interpretative guidance on Article 4.2 of the OPCAT' (2015), cited in White, *A Pathway Forward* (n 16) 19–20.

> The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of its visiting mandate and, in consequence, under the visiting mandate of an NPM if it relates to a situation in which the State either exercises, *or might be expected to exercise a regulatory function*. As a tool of prevention, the NPM ought therefore to be able to access as broad a range of potential places of deprivation of liberty as possible in order to determine whether the State ought to be exercising such a regulatory function, as well as to examine the manner in which existing detention powers and regulatory functions are being exercised[109] (emphasis added).

Part III of the chapter proposes a method by which the treaty bodies and other human rights actors could see more clearly situations of older people's deprivation of liberty that states 'might be expected to' regulate, even if they do not at present.

C. *Structural barriers to recognition of rights in the care context*

The above section has demonstrated that the preventive mechanisms' current conceptualisation of deprivation of liberty excludes non-institutional care settings and private forms of care from consideration as contexts of potential deprivation of liberty. This section contends that there are additional structural barriers to the recognition of older people's rights and experiences of rights violations in the care context, which may serve to further obscure older people's deprivations of liberty in care settings (even if they ostensibly fall within the established conception discussed above). These structural barriers are not just societal but also take the form of legal doctrines and judicial attitudes towards older people in need of care.

This section discusses two judgments under Article 5 ECHR: *HM v Switzerland*[110] and *Haidn v Germany.*[111] In each of these cases, the ECtHR refused to recognise detention in an older people's nursing home under a court and/or administrative order as a deprivation of liberty. The section focuses mainly on the decision in *HM v Switzerland* since it appears to be the most

[109] SPT, 'Response to the Human Rights Commission's request' ibid.
[110] *HM v Switzerland* (n 52).
[111] *Haidn v Germany* (n 52).

detailed assessment by a human rights treaty body of a claim of arbitrary detention in an older people's long-term care institution. It is worth noting briefly, however, the facts of *Haidn v Germany* and its outcome.

In *Haidn v Germany*,[112] the applicant challenged the compatibility with Article 5 ECHR of his continued 'preventive detention' in a series of institutions following completion of his prison sentence. The ECtHR was satisfied that the applicant's detention in prison and subsequently in a psychiatric hospital amounted to deprivation of liberty. However, the Court left open the question of whether the applicant had been deprived of his liberty for three months where he was 'instructed by the Bayreuth Regional Court to reside in an old people's home, which he was not to leave without his custodian's permission'.[113] The Court stated that it had 'serious doubts whether the restrictions on the applicant's liberty of movement during that period amounted to a deprivation of liberty within the meaning of Article 5 § 1, as opposed to a mere restriction on his freedom of movement.'[114] The ECtHR's judgment in *Haidn* did not explain the reasons for the Court's 'serious doubts' about the existence of a deprivation of liberty.

This section now turns to *HM v Switzerland*.[115] Part (i) discusses the facts of the case and outlines the ECtHR's decision. The remaining parts argue that the decision displays the following structural barriers to recognition of older people's experiences of deprivation of liberty in care contexts: denial of legal capacity through paternalism, de facto denial of capacity through the definition of consent, and discriminatory attitudes. It is argued that these structural barriers may be understood to be forms of situational powerlessness in that they render older people unable to claim their rights and to have their experiences acknowledged.

(i) *Overview of HM v Switzerland*

The applicant in *HM v Switzerland* was a woman in her mid-80s who had been living at home with her adult son. In December 1996, a District Government Office ordered the applicant's placement in an older people's 'foster home' on the basis of serious neglect, in spite of her stating that she did not wish to go there. The placement order referred (in the ECtHR's words)

[112] *Haidn v Germany* (n 52).
[113] ibid para 82.
[114] ibid.
[115] *HM v Switzerland* (n 52).

to the applicant's need for 'permanent treatment' of leg sores and an eye cataract. The order also stated that 'it was not certain that she had enough to eat', and that she had experienced 'untenable conditions of hygiene in [an] unheated flat', which were unlikely to change. The applicant was taken to the foster home by the police.[116]

The applicant and her son appealed the placement order but it was upheld by an Appeals Commission on the basis that Swiss law allowed for deprivation of liberty on the ground of welfare assistance, and the applicant fell within the legislative provision, first due to neglect, and second due to the Appeals Commission's view that the applicant was experiencing 'senile dementia'.[117] The order was upheld on further appeal by the Federal Court which found that the placement was a proportionate 'deprivation of liberty' because the applicant was 'no longer capable of looking after and caring for herself, of nourishing herself or even dressing herself… there is nobody else who is in a position to care for her [and] placement in the S Worben foster home has been considered to be the only means of preventing neglect'.[118] The Federal Court found it unnecessary to examine whether the applicant was experiencing 'mental weakness which would also justify a deprivation of liberty in itself'.[119]

In January 1998, over a year after the applicant's placement, the administrative order was lifted given that (as the ECtHR noted) the applicant 'had agreed to reside in the foster home of her own free will.'[120]

When the case came before the ECtHR, a majority of the Court held that the applicant had not experienced a deprivation of liberty within the meaning of Article 5(1) ECHR. The Court justified its decision primarily on the basis that 'the Cantonal Appeals Commission placed the applicant in the foster home in her own interests in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene'.[121] The ECtHR found that the placement 'did not amount to a deprivation of liberty within the meaning of Art.5(1) but was a responsible measure taken by the competent authorities in the applicant's interests'.[122] The Court further drew attention to the fact that the applicant had freedom of movement within

[116] ibid para 18.
[117] ibid para 23.
[118] ibid para 26.
[119] Ibid.
[120] ibid para 27.
[121] ibid para 48.
[122] ibid.

the home and 'was able to entertain social contacts with the outside world'.[123] The Court also noted that the applicant had been 'undecided' about whether she wished to stay at the time of the first appeal hearing and had eventually agreed to stay.[124]

In a forceful dissent, Judge Loukis Loucaides argued that he could not see 'how her situation could be anything else than a deprivation of liberty'.[125] Judge Loucaides highlighted that 'the applicant's placement in the foster home was against her will. It was implemented by the national police under an order explicitly defined by the national law itself and referred to by the national authorities as a measure of deprivation of liberty'.[126] He noted further that the applicant 'was not permitted to leave the foster home'.[127] Concurring Judge Gaukur Jörundsson also concluded that the applicant had been deprived of her liberty (although, unlike Judge Loucaides, he decided that it was justified under Article 5(1)(e)). Judge Jörundsson acknowledged that the domestic authorities had referred to the measure as a 'deprivation of liberty' and that the Appeals Commission had 'considered that such a measure had become necessary as the applicant had not accepted placement in the foster home of her own free will'.[128] He further noted that 'it is undisputed that the police were employed to implement the measure, which was of unlimited duration and served the purpose of ensuring that the applicant did not leave the foster home'.[129]

The following parts explore how discrete aspects of the Court's decision made the applicant's experience of deprivation of liberty invisible.

[123] ibid para 45.
[124] ibid paras 46–47. At para 21, the Court noted that:

> On 21 On January 16, 1997 the Appeals Commission conducted a hearing at which the applicant, her son HeM, their lawyer, as well as a member of the Guardianship Commission and a representative of the S home were present. According to the minutes of the hearing, the applicant explained, on the one hand, that she had no reason to be unhappy with the foster home; that as she could no longer walk, it would be better for her to stay there, and that she did not see how matters would get better for her. On the other hand, she stated that '(she) wanted to get out of the S'.

[125] *HM v Switzerland* (n 52), Dissenting Opinion of Judge Loucaides para O-II3.
[126] ibid para O-II3.
[127] ibid.
[128] ibid paras O-I3–O-I4.
[129] ibid para O-I5.

(ii) *Denial of legal capacity through paternalism*

The ECtHR's primary reason for finding that *HM* had not been subjected to a deprivation of liberty was that her placement was 'a responsible measure taken by the competent authorities in the applicant's interests'.[130] In reaching this conclusion, the Court explicitly drew a link between *HM*'s situation and 'the comparable circumstances of the case of *Nielsen v Denmark*',[131] which concerned a 12 year-old child's placement in a locked ward in hospital at the request of his mother. The Court in *Nielsen* based its decision on the fact that the child's mother held parental responsibility; it held that 'the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5, but was a responsible exercise by his mother of her custodial rights in the interest of the child'.[132]

The ECtHR's judgment demonstrates clear paternalism whereby the Court considered that, similarly to a parent exercising custodial rights in the interests of her child, the state authorities were entitled to make a decision for *HM* according to their view of what her best interests required. The Ontario Law Commission has explained that paternalism arises where older people are 'assumed to be less capable of exercising their autonomy, and in greater need of protection', and that 'paternalism may often manifest in the removal of decision-making opportunities for older persons under the guise of protecting their "best interests"'.[133]

The judgment in *HM* demonstrates how denial of legal capacity through the process of 'best interests' decision-making can lead to a person's non-recognition as someone who is entitled to the protection of human rights norms. The Committee on the Rights of Persons with Disabilities highlighted this possibility in its first General Comment, stating that '[t]he denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including…the right to liberty'.[134] The ECtHR's decision in effect denied *HM* legal capacity and, with it, recognition of her right to the protection of Article 5 ECHR. The Court did not view *HM* as someone with the right to decide whether or not she should live in an institution. Therefore, it did not see the fact that she was coercively confined

[130] *HM v Switzerland* (n 52) para 48.
[131] *Nielsen v Denmark* (1989) 11 EHRR 175.
[132] ibid para 73.
[133] Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto, April 2012) 77.
[134] Committee on the Rights of Persons with Disabilities (CtteeRPD) General Comment No 1, 'Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1 para 8.

by the state, on the basis of court and administrative orders, as relevant to her claim under Article 5. Because it did not recognise any deprivation of liberty, the ECtHR also did not require the State to demonstrate that its confinement of *HM* was in accordance with law and justified under one of the grounds provided for in Article 5(1).[135]

In his dissenting judgment, Judge Loucaides emphasised the danger of establishing 'categories of "deprivation of liberty" in respect of which the prohibition of Art.5 would be inapplicable, either because the compulsory restriction of a person's freedom is a "responsible measure" for his own good (as in the present case) or for any other "useful" purpose'.[136] Judge Loucaides contended that 'this would render the prohibition in question meaningless and would amount to a mockery of its objectives. What is even worse, it would open the door to uncontrolled arbitrariness and real and unwarranted dangers to the freedom of the individual which the Convention aims to avert'.[137]

The majority's decision in *HM* demonstrates the validity of Judge Loucaides' concern that arbitrary detention could be perpetuated by the existence of 'exceptions' to the definition of deprivation of liberty. In *HM*, the ECtHR acknowledged that the applicant was placed in the foster home 'in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene'.[138] Because the Court failed to recognise the existence of a deprivation of liberty, it did not deal with the fact that there is no provision in Article 5(1) ECHR for deprivation of liberty on the ground of physical health needs.[139] The ECtHR suggested in *Stanev v Bulgaria* that a person's welfare needs may partially justify a deprivation of liberty,[140] but the Court's dicta were confined to people deemed to be of 'unsound mind'

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[135] See, for example, *Stanev v Bulgaria* (2012) 55 EHRR 22 paras 143–47. The grounds provided for by the ECHR art 5(1) concern detention for criminal or civil justice purposes, detention of minors for educational supervision, immigration detention, detention for the prevention of infectious disease transmission, and detention of 'persons of unsound mind, alcoholics or drug addicts or vagrants'.

[136] *HM v Switzerland* (n 52), Dissenting Opinion of Judge Loucaides para O-II12.

[137] *HM v Switzerland*, ibid.

[138] ibid para 48.

[139] Judge Loucaides highlighted this in his dissent. See *HM v Switzerland* (n 52), Dissenting Opinion of Judge Loucaides para O-II2.

[140] *Stanev v Bulgaria* (n 135) para 153:

> The Court notes that the applicant was eligible for social assistance as he had no accommodation and was unable to work as a result of his illness. It takes the view that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give

under Article 5(1)(e) and the Court clarified that 'the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty.'[141] There appears to be no allowance under Article 9 ICCPR either for deprivation of liberty on the basis of physical ill-health, frailty or welfare needs.[142]

(iii) *De facto denial of capacity through the definition of consent*

In *HM v Switzerland*, while endorsing substitute decision-making as described above, the ECtHR also appeared to recognise the applicant's legal capacity to some degree. The Court mentioned as an additional justification for its finding that *HM* was not deprived of her liberty, that at the time of the Appeals Commission hearing she 'was undecided as to which solution she in fact preferred'.[143] The Court added that, after more than a year in the foster home under a placement order, 'she agreed to stay there'.[144]

The remaining paragraphs in this part argue that *HM v Switzerland* and subsequent ECtHR decisions regarding institutionalisation in care settings demonstrate that even if an older person's legal capacity appears to be recognised, the manner in which informed consent is in fact defined (including the process required to obtain it) affects whether the person's legal capacity is recognised in reality.

The applicant's 'undecided' state of mind was not the primary focus of the ECtHR's decision in *HM*. However, subsequent ECtHR decisions have characterised the judgment as relying primarily on the applicant's consent to her institutionalisation.[145] *HM v Switzerland* is the foundation for the ECtHR's current definition of deprivation of liberty in care settings—that a

rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.

[141] Ibid.

[142] HRC General Comment No 35 (n 178) discusses the grounds on which a person may be deprived of their liberty. The HRC notes that 'Article 9 expressly recognizes that individuals may be detained on criminal charges, and article 11 expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation' (para 14). The HRC then discusses 'security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge' (para 15), 'Detention in the course of proceedings for the control of immigration' (para 18), mental health detention (para 19) and—at para 40—mentions detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests.

[143] ibid para 46.

[144] ibid para 47.

[145] See, for example, *DD v Lithuania* (n 181) para 145; *Shtukaturov v Russia* (2012) 54 EHRR 27 para 106.

deprivation of liberty comprises both an 'objective element' and a 'subjective element'.[146] The Court now states that 'the notion of deprivation of liberty within the meaning of art.5(1) does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time'.[147] The Court adds: 'A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question'.[148]

This conception of a deprivation of liberty, stemming from *HM v Switzerland*, is highly troubling. In proposing that a person in a care setting can validly 'consent' to being prevented from leaving the premises, the ECtHR has changed the meaning of consent, or voluntariness, in the care context. In his dissenting judgment in *HM v Switzerland*, Judge Loucaides highlighted the notion's incompatibility with the ECtHR's oft-repeated statement in *De Wilde, Ooms and Versyp v Belgium*, that 'the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention'.[149]

The ECtHR's decision in *HM v Switzerland*, as it has been characterised in subsequent cases, means that freedom to leave a place at will is no longer a requirement of the Court's definition of consent in the care context. In other words, 'consent' to institutionalisation can in fact mean involuntary, or coercive, confinement. This is contrary to the SPT's most recent set of standards regarding institutional care settings, which sets out the dual requirement of (a) informed consent and (b) retention of the ability to exit the institution or facility in order for a patient's placement to be classified as 'voluntary'.[150] The ECtHR's position is also contrary to the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental

[146] See *Shtukaturov v Russia* (n 145) referring to *HM v Switzerland* (n 52) para 46. See also *DD v Lithuania*, ibid para 145; *Stanev v Bulgaria* (n 135) para 117; *Kedzior v Poland* App no 45026/07 (ECtHR, 16 October 2012) para 55; *Storck v Germany* (n 187) para 74.
This approach was taken clearly in the more recent case of *M v Ukraine*, App no 2452/04 (ECtHR, 19 April 2012) paras 71–79, where the Court, having found that the applicant was clearly not free to leave, still went on to assess whether she had consented to her confinement.
[147] See, for example, See *Shtukaturov v Russia* (n 145) para 106, referring to *HM v Switzerland* (n 52) para 46. See also *DD v Lithuania* (n 181) para 145.
[148] ibid.
[149] *De Wilde, Ooms and Versyp v Belgium*, App nos 2832/66, 2835/66 and 2899/66 (ECtHR, 18 June 1971) para 75. See *Stanev v Bulgaria* (n 135) para 199 and *HL v United Kingdom* (n 194) paras 89–94, citing this judgment.
[150] SPT, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (26 January 2016) UN Doc CAT/OP/27/2, para 6.

Health Care, which state that '[e]very patient not admitted involuntarily shall have the right to leave the mental health facility at any time… and he or she shall be informed of that right'.[151]

The ECtHR is also at odds with the HRC. The HRC's notion of 'voluntary' or consensual institutionalisation is not just that a person has initially consented to their placement but also that the person retains the right to leave the premises at any time and is aware of this right—and therefore can be deemed to be consenting on an informed and continuing basis to their situation. For example, in *Jessop v New Zealand*[152] the HRC rejected an Article 9 ICCPR complaint because the applicant had gone voluntarily to a police station and participated in an interview and identification parade without being arrested or detained for the purpose. In deciding that the applicant had not been deprived of her liberty, the HRC placed great emphasis on the fact that the applicant had been informed several times of her right to leave the police station at any time.[153]

In addition to changing the substantive meaning of informed consent in the care context, the ECtHR's approach to consent in *HM v Switzerland* and subsequent cases under Article 5 ECHR is problematic for another reason: that is, the Court has largely failed to apply any particular test or require any procedure to be followed to ascertain the presence of informed consent.

Generally, if the ECtHR finds that a person was 'legally incapable of consenting to, or disagreeing with, the proposed action' or lacked capacity to consent or object to treatment, the Court will reject the possibility that the person 'validly consented' to their institutionalisation (often citing the above-mentioned statement in *De Wilde, Ooms and Versyp v Belgium*).[154] In these instances, the ECtHR relies solely on an 'objective' test for deprivation of liberty; in *HL v United Kingdom*, for example, the ECtHR found a deprivation of liberty to exist where 'the applicant was under continuous supervision and control and was not free to leave'.[155]

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[151] UN Principles for the Protection of People with Mental Illness and the Improvement of Health Care, UNGA Res 46/119 (17 December 1991) UN Doc A/RES/46/119, Principle 15:

> …3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient, as set forth in principle 16 below, apply, and he or she shall be informed of that right.

[152] HRC, *Jessop v New Zealand*, Communication No 1758/2008 (29 March 2011) UN Doc CCPR/C/101/D/1758/2008 paras 7.9–7.10.

[153] ibid para 7.9.

[154] See, for example, *HL v United Kingdom* (n 194) para 90, citing *De Wilde, Ooms and Versyp v Belgium* (n 149) para 65.

[155] *HL v United Kingdom* (n 194) para 91.

However, when it comes to individuals who are *not* deemed incapable of consenting or objecting to placement in a care setting, the ECtHR has paid little attention to whether a person has positively consented, on an informed and ongoing basis, to their institutionalisation or confinement. This is particularly problematic in light of Article 12 CRPD, which requires that everyone's legal capacity must be recognised.[156] As part of this requirement, states are obliged to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' and 'ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'.[157]

Decisions of the ECtHR subsequent to *HM v Switzerland* have characterised the applicant in *HM* as having given 'valid consent' to institutional care. In *HM*, the applicant's 'valid consent' arose from her being 'undecided' as to whether or not she wished to stay in the older persons' care home while being subject to an administrative order for her placement there. In the subsequent case of *Storck v Germany*, the ECtHR found the applicant to have consented to her detention where 'on the very day of her admission to the clinic, the applicant had been unable to speak and had shown signs of autism'[158] but she had then not attempted to flee and had 'conceded in [later] proceedings before the Bremen Court of Appeal that she had "to a certain extent voluntarily" consented to her stay'.[159] In *Mihailovs v Latvia*, the ECtHR held (seemingly contradicting its earlier jurisprudence regarding the inability of person lacking legal capacity to consent) that 'the fact that the applicant lacked de jure legal capacity to decide matters for himself does not necessarily mean that he was de facto unable to understand his situation'[160] and rejected a deprivation of liberty complaint on the basis that the applicant had 'tacitly agreed to stay'.[161] The ECtHR did not refer to the need for informed consent or supported decision-making where appropriate in any of these decisions.

[156] Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 (CRPD) art 12.
[157] ibid.
[158] *Storck v Germany* (n 187) para 127.
[159] ibid.
[160] *Mihailovs v Latvia* (n 184) para 134, citing *Shtukaturov v Russia* (n 145) para 108.
[161] *Mihailovs v Latvia* (n 184) para 139.

More recently, in *M v Ukraine*,[162] the ECtHR espoused a more detailed concept of 'valid consent',[163] referring to the standards regarding consent to mental health treatment in the UN Principles for the Protection of Persons with Mental Illness[164] and the CPT Standards.[165] The ECtHR held that consent to admission to a mental health facility for in-patient treatment would only be valid 'where there is sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him'.[166] This is an improvement on the nebulous conception of consent applied in the above-mentioned cases. However, as discussed in Chapter 1, the ECtHR (among other treaty bodies) needs to revise its informed consent definition to allow for and require supported decision-making where a person needs assistance to exercise their legal capacity. A further glaring omission in the conception of valid consent in *M v Ukraine* was the absence of a clear requirement that the person be free to leave the institution at any time and be informed of that right.[167]

(iv) *Discriminatory Attitudes*

It is worth examining whether discriminatory attitudes towards *HM* as an older person in need of care accompanied, and perhaps drove, the ECtHR's denial of her capacity.

The decision in *HM v Switzerland* appears to evidence a discriminatory attitude towards older people in need of care that older people's advocates and disability advocates have repeatedly

[162] *M v Ukraine*, App no 2452/04 (ECtHR, 19 April 2012).
[163] In *M v Ukraine*, ibid (at para 77) the ECtHR interpreted the 'subjective element' of the deprivation of liberty test as follows:

> a person's consent to admission to a mental health facility for in-patient treatment can be regarded as valid for the purpose of the Convention only where there is sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him.

[164] UN Principles for the Protection of People with Mental Illness (n 151), cited by the ECtHR in *M v Ukraine*, (n 163) para 37.
[165] CofE CPT standards 2006, cited by the ECtHR in *M v Ukraine* (n 163) para 39.
[166] *M v Ukraine*, ibid para 77.
[167] In *M v Ukraine*, ibid, although the ECtHR referred directly to this requirement in the UN Principles (para 71), the Court went on to apply the test for deprivation of liberty containing both an objective and subjective element. Despite finding that 'there is no indication that after being admitted the applicant was free to leave the hospital', and that the applicant 'was confined in the hospital in quite strict conditions, even as to freedom of movement within the premises of the hospital, let alone freedom to leave the hospital' (para 72), the ECtHR went on to apply the second, subjective test in order to determine whether a deprivation of liberty had occurred (on the facts, the Court found that there was no valid consent) (paras 75–79).

drawn attention to: that care is a benefit rather than a right, and that older people are beneficiaries rather than rights holders when it comes to how the state chooses to provide physical care for them, if at all.[168]

The decision in *HM v Switzerland* also appears to support an observation of the former Special Rapporteur on the right to health, Anand Grover, in a 2011 report on the right to health of older people. The Special Rapporteur expressed the view that older people are 'often perceived as a "lapsed" segment of society'.[169] As mentioned above, one of the bases for the ECtHR's conclusion that there was no deprivation of liberty was that the applicant 'was not placed in the closed ward of the foster home…Rather, she had freedom of movement and was able to entertain social contacts with the outside world'.[170] Concurring Judge Jörundsson explained this to mean that 'she was able to have personal contacts, to write letters and to telephone the outside world' but 'it is clear that she was not permitted to leave the institution and go home; and that if she did, she would have been brought back to the foster home'[171] (on this basis, Judge Jörundsson found her to have been deprived of her liberty). Judge Loucaides argued that the majority had applied a different standard to *HM* than to prisoners, who are deemed to be deprived of their liberty even though they 'may be allowed to move freely within defined areas and have social contacts with the outside world through telephone calls, correspondence and visits, for example, let alone conditional leave'.[172]

The decision in *HM* arguably displays a discriminatory understanding of what liberty means for older people in that it suggests that older people's horizons and expectations of their lives should be confined to the four walls of an institution. The view that older people will not be deprived of their liberty if they are able to move around inside an institution which they are nonetheless not free to leave was echoed in the ECtHR's judgment in *Haidn v Germany*.[173] As noted above, the Court stated in *Haidn* that it had 'serious doubts whether the restrictions on

[168] See for example, Gerard Quinn and others, 'The current and future potential of United Nations human rights instruments in the context of disability' (OHCHR, 2002) < http://repository.un.org/handle/11176/378203> accessed 1 September 2017 1; see also Ireland, Houses of the Oireachtas, Seanad Public Consultation Committee, *Report on the Rights of Older People* (Dublin, March 2012), report of remarks of Professor Gerard Quinn, 11.
[169] UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 10) para 11.
[170] *HM v Switzerland* (n 52) para 45.
[171] *HM v Switzerland*, ibid, Concurring Opinion of Judge Gakur Jörundsson para O-I6.
[172] ibid para O-II5.
[173] *Haidn v Germany* (n 52).

the applicant's liberty of movement during that period amounted to a deprivation of liberty within the meaning of Article 5 § 1, as opposed to a mere restriction on his freedom of movement'.[174]

III. Potential for Adaptation

This part of the chapter argues that the human rights treaty bodies and others could interpret the anti-torture norm to respond to the deprivation of liberty of older people in care contexts by acknowledging the centrality of powerlessness to the concept of deprivation of liberty and by focusing on the powerlessness of older people in the situations described above. This proposed approach coheres with the dignity analysis advocated in Chapter 2, firstly because it focuses on the impact of treatment on the person, and secondly because it connects the concept of vulnerability with the human experience of powerlessness, broadening the understanding of vulnerability beyond group characteristics and beyond the paradigm of detention in a cell. This part argues that deprivation of liberty should be conceptualised to take account not only of physical confinement of older people but also of the powerlessness experienced by older people who are dependent on others for care and are denied the right to give or withhold (or withdraw) consent to isolating or restrictive forms of care that their dependency prevents them from escaping.

Section A claims that the most clearly established conception of deprivation of liberty under Article 9 ICCPR[175] and related guarantees in universal and regional law, is physical confinement, or lack of physical freedom to leave a place at will. It is submitted that many of the experiences described in Part I fall within this conception. Section B claims that the ECtHR's Article 5 ECHR jurisprudence demonstrates a further conceptualisation of deprivation of liberty, as coercion. It is argued that this conceptualisation provides the space for the treaty bodies and other actors to recognise deprivations of older people's liberty arising from the denial of legal or de facto decision-making capacity where older people are dependent

[174] ibid para 82.

[175] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9:

> Article 9
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> …

on others for care. Together, Sections A and B propose an approach to conceptualising deprivation of liberty in older people's care contexts in a manner that coheres with the CAT's statement in General Comment No 2 that 'each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of *custody or control*'[176] (emphasis added).

A. *Physical confinement*

In some Article 5 ECHR jurisprudence, the ECtHR defines deprivation of liberty as 'confinement in a particular restricted space for a length of time which is more than negligible'.[177] The HRC's definition under Article 9 ICCPR is similar: 'more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12'.[178] A related, common definition of deprivation of liberty under international human rights law is lack of freedom to leave a place at will. Article 4(2) OPCAT defines deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.[179] According to the IACmHR, 'the concept of "deprivation of liberty" encompasses: [a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will'.[180] The ECtHR finds the objective aspect of a deprivation of liberty to exist where a person is 'under continuous supervision and control and not free to leave'.[181] The HRC, meanwhile, has held that a person will not be deprived of their liberty if they 'know that they are free to leave at any time'.[182]

The examples in Part I of physical barriers to older people's exit from premises appear to fall within the conception of deprivation of liberty as physical confinement or lack of freedom to

[176] CAT General Comment No 2 (n 107) para 15.
[177] See, for example, *Kędzior v Poland*, App no 45026/07 (ECtHR, 16 January 2013) para 55.
[178] See HRC General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 5 citing HRC, *González del Río v Peru*, Communication No 263/1987 (28 October 1992) UN Doc CCPR/C/46/D/263/1987 para 5.1; HRC, *Karker v France*, Communication No 833/1998 (26 October 2000) UN Doc CCPR/C/70/D/833/1998 para 8.5.
[179] OPCAT (n 5) art 4(2).
[180] IACmHR, Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (n 66) para 38.
[181] See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146. The subjective aspect of the ECtHR's test, regarding consent, is discussed below.
[182] See HRC General Comment No 35 (n 178) para 6.

leave a place. The physical barriers described in Part I included locked doors, fences and keypad entry systems, among other aspects of the physical design of care settings.

Measures of restraint also appear to fall within the above-described conception of deprivation of liberty to the extent that they physically prevent a person from moving about within, and therefore from leaving, premises. The SPT issued a report in 2016 stating that '[r]estraints, physical or pharmacological, are forms of deprivation of liberty', which have 'an inherently high potential for abuse [and] must be applied, if at all, within a strict framework'.[183] The ECtHR's Article 5 ECHR jurisprudence supports this view: although the ECtHR has held that a deprivation of liberty should be 'sufficiently lengthy for [the person] to have felt the full adverse effects of the restrictions imposed',[184] if coercion is involved, the Court's jurisprudence suggests that the duration may be short.[185]

The HRC explains that '[l]iberty of person concerns freedom from confinement of the body'.[186] Measures of restraint involve the direct application of liberty-restricting measures to one's person. Therefore, they could be seen as an even more immediate, intimate and intense deprivation of liberty than the existence of locks on a door in the person's vicinity.

Harris, O'Boyle and Warbrick note that the ECtHR has held resulting social isolation to be a key factor in determining the existence of a deprivation of liberty.[187] Arguably, where restraint isolates or segregates a person from others in the care setting, or prevents them from determining how and where they will spend their day, or prevents them from maintaining contact with the outside world as they choose, it should be scrutinised as a potential deprivation of liberty. A clear example of social isolation deriving from restraint, which surely evidences deprivation of liberty, comes from Harding and Peel's qualitative study of informal carers' experiences of the administration of anti-psychotic medication to their older relatives with dementia. Several carers described the medication as leaving their relative like a 'zombie' or 'catatonic'.[188]

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[183] SPT, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (n 150) para 9.
[184] *Stanev v Bulgaria* (n 135) para 129; *Mihailovs v Latvia*, App no 35939/10 (ECtHR, 22 January 2013) para 133.
[185] i.e. less than 30 minutes, or less than an hour. see (n 190).
[186] HRC General Comment No 35 (n 178) para 3.
[187] See Harris and others, *Law of the European Convention on Human Rights*, ibid 290–91, citing *Guzzardi v Italy* (n 73); *HM v Switzerland* (n 52) para 45; *Storck v Germany* (2006) 43 EHRR 6 para 73.
[188] Harding and Peel, '"He was like a zombie"' (n 33) 265.

B. *Coercion*

In the English High Court case of *Rochdale Metropolitan Borough Council v KW*, Mostyn J opined that if a person were unable to physically remove themselves from a care setting they could not be considered to be deprived of their liberty.[189] Arguably, such a conception of deprivation of liberty does not adequately protect from dignity violations that may arise where older people who are dependent on others for care are subjected to isolating or restrictive forms of care that they do not want but cannot avoid due to their dependency.

Contrary to the suggestion in *Rochdale*, physical confinement or lack of physical freedom to leave a place at will appears not to be the only established conception of deprivation of liberty in international human rights law. The ECtHR has held that an 'element of coercion' is indicative of a deprivation of liberty.[190] The Court rejects the notion that deprivation of liberty must take any particular form.[191] It holds that what matters is the 'degree or intensity' of the restriction on movement[192] and the 'concrete situation' of the person concerned having regard to the 'type, duration, effects and manner of implementation of the measure in question', among other factors.[193]

While 'coercion' may be physical, it is contended that it can take other forms as well. The ECtHR's deprivation of liberty case law recognises coercion in a variety of forms, including psychological, legal and financial. The ECtHR has found deprivations of liberty to exist in the mental health care context even where premises are unlocked[194] and where a person has previously gone on outings or visits away from the institution.[195] Individuals have been found

[189] *Rochdale Metropolitan Borough Council v KW* [2014] EWCOP 45; [2015] 2 FCR 244 para 22.
[190] See, for example, *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105. Although the Court did not ultimately make a finding in relation to Article 5 in this case, it stated at para 57 that being stopped and searched for 30 minutes was 'indicative of a deprivation of liberty'. In *Novotka v Slovakia*, App no 47244/99 (ECtHR, 4 November 2004), the ECtHR found a deprivation of liberty where a person was 'brought to a police station against his will and was held there in a cell' for less than an hour (p7). See also *DD v Lithuania* (n 181) para 149; *Krupko and Others v Russia*, App no 26587/07 (ECtHR, 26 June 2014) para 36; *Foka v Turkey*, App no 28940/95 (ECtHR, 24 June 2008) para 78.
[191] See *Guzzardi v Italy* (n 73) para 93.
[192] See *Guzzardi v Italy*, ibid; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 314; *Stanev v Bulgaria* (n 135) para 115.
[193] See *Guzzardi v Italy* (n 73) para 92; *Medvedyev and Others v France*, App no 3394/03 (ECtHR, 29 March 2010) para 73; *Creangă v Romania* (2013) 56 EHRR 11 para 91.
[194] *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.
[195] *Stanev v Bulgaria* (n 135).

to be 'not free to leave' where permission to leave the premises is required,[196] where a person's guardian is required to consent to the person leaving,[197] where there are restrictions as to the length of time and destination to which a person may go,[198] where an institution restricts access to a person's identity documents or finances, which would enable them to travel,[199] where a person is returned—for example, by the police—when they leave,[200] or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.[201]

It is argued that the denial of legal capacity, or of de facto decision-making capacity, to an older person who is dependent for care should be conceptualised as 'coercion' indicative of a deprivation of liberty where an isolating or restrictive form of care is imposed on them. Indeed, this is the conception of deprivation of liberty in the Austrian Nursing and Residential Homes Residence Act, according to the Austrian NPM.[202] The Austrian NPM states that under Article 3(1) of the Act, 'a deprivation of liberty occurs when a change in the location of a supervised or cared for person is effectuated against or without their will and with the use of physical means'.[203]

As mentioned in Part I and in the Introduction to the thesis, many older people live in institutional care settings against their will, not necessarily because they are prevented by the institution from leaving but because they have no other choice. Older people may, for example, be placed in a residential care setting without their consent by relatives upon whom they are dependent for care.[204] Or, the state authorities upon whom older people depend for care may not give them a choice about the care that they receive.[205] A 2016 study by Donnelly et al regarding care for older people in Ireland found that the government's neglect of home care services means that older people who require assistance with basic needs are frequently forced to enter long-term residential care settings unnecessarily and prematurely.[206] One of the social

[196] ibid paras 124- 126.
[197] *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (n 135) para 128.
[198] *Stanev v Bulgaria* (n 135) para 124.
[199] ibid para 125–26.
[200] ibid para 127; *DD v Lithuania* (n 181) para 146.
[201] *HL v United Kingdom* (n 194).
[202] Austrian Ombudsman Board, 'Monitoring of nursing and residential homes – determining factors to decide if they are places of deprivation of liberty or not' (n 93) 2.
[203] ibid.
[204] Sarah Donnelly and others, *'"I'd Prefer to Stay at Home but I Don't Have a Choice" Meeting Older People's Preference for Care: Policy, but what about practice?'* (University College Dublin 2016) 6.
[205] ibid 4.
[206] ibid 5.

workers interviewed by Donnelly et al is reported as stating: 'I could count on one hand the number of people who want to be in the facility. Many people eventually accept their situation—they see it as having no other choice'.[207]

While older people faced with limited options to meet their care needs may indeed choose to receive institutional or other restrictive care, there is a need for the anti-torture norm among other human rights norms to recognise and respond to the risk of arbitrary detention (and with it the heightened risk of torture or ill-treatment) that dependence creates. An older person's inability to obtain alternative care or to remove themselves from a situation of care creates the potential for a dignity violation to occur through an interference with their personality (i.e. the imposition of a form of care that they do not wish to receive), which they are powerless to reject, escape or avoid. The way in which people who are in need of care maintain their autonomy is through the right to informed consent.[208] Therefore, it is argued, informed consent makes the difference between voluntarily institutionalisation or medical treatment on the one hand, and deprivations of liberty on the other, in care settings.

Conclusion

This chapter has argued that conceptual and doctrinal shifts are needed in how the treaty bodies, including the SPT and CPT, define deprivation of liberty so that older people can benefit from the heightened protection that the anti-torture norm provides, in principle, to individuals who are deprived of their liberty. The chapter has proposed that focusing on older people's experiences of powerlessness, both inherent and situational, could ground a conception of deprivation of liberty that goes beyond the current paradigm and responds to the ways in which various forms of care, dependency and denial of capacity can give rise to the involuntary confinement and restraint of older people.

The chapter does not argue that the care of an older person in an institution or the administration of anti-psychotic medication to an older person with dementia, for example, always constitutes a deprivation of liberty. Nor does the chapter argue that care-related deprivation of liberty is

[207] ibid 17.
[208] See Chapter 1, Part II Section D.

invariably a violation of the right to liberty and/or to freedom from torture and ill-treatment. However, the chapter argues that the anti-torture framework needs to acknowledge that both deprivation of liberty and torture or ill-treatment (including arbitrary detention) *can*, and frequently do, occur in care contexts and in the form of established professional care practices.

The lack of an automatic connection between care and deprivation of liberty (such as there is between prison and deprivation of liberty, for example) raises a challenge for the doctrinal and underlying conceptual development of the anti-torture norm. There is a need for the treaty bodies to consider and formulate positive obligations setting out how states should monitor care settings and practices in general, in order to ensure that some older people receiving care are not arbitrarily detained or subjected to torture or ill-treatment when deprived of their liberty.

The chapter's analysis of older people's experiences of powerlessness in care settings provides a blueprint for the specification of positive obligations under the anti-torture norm that address the structural causes of dignity violations in this context. Among other potential positive obligations deriving from the overarching preventive obligation under the anti-torture norm, the chapter demonstrates that states should be required to monitor places and forms of care of older people in order to prevent arbitrary detention. This arguably requires legislation setting out the circumstances in which deprivation of liberty is permitted, or not, in the care context (as recommended by the Working Group on Arbitrary Detention in respect of New Zealand[209]). The chapter also demonstrates that states should be required to ensure (e.g. through legislation and monitoring) that every person's right to legal capacity, including the right to free and informed consent, is respected in all care contexts and with regard to all forms of care that impact on core aspects of the personality. States should also be required to monitor care settings and care practices in general, in order to effectively prevent torture or ill-treatment of older people who are deprived of their liberty in them. Chapter 4 discusses some of the more specific positive obligations that the anti-torture norm could, and should, impose on states in the context of care of older people.

Similarly, the preventive mechanisms under the OPCAT and ECPT need to consider how they could extend their mandates to older people's care settings and practices generally. This chapter

[209] UNHRC, 'Report of the Working Group on Arbitrary Detention' (n 67) para 87. See also White, *A Pathway Forward* (n 16) 23.

has demonstrated that there is a need for preventive monitoring not just of older people's care institutions that are state-regulated or state-managed but also of non-institutional settings (perhaps through a focus on care providers rather than settings) and 'private' contexts that the state ought to monitor.

Crucially, in specifying positive obligations on states under the anti-torture norm to protect older people who are deprived of their liberty in care contexts, the treaty bodies need to consider the requirements of the CRPD and adapt their conceptions of informed consent and arbitrary detention accordingly. The ECtHR's judgment in *HM v Switzerland* and the concerns outlined in the Introduction regarding the widespread denial of older people's capacity demonstrate that older people in care settings need the protection of Article 12 CRPD. Furthermore, the denial of *HM*'s capacity and the ensuing invisibility of her deprivation of liberty on the basis that she needed physical care demonstrates that older people in care settings also need the protection of Article 14 CRPD.[210]

Similar to the uncertainty discussed in Chapter 1 regarding the permissibility of non-consensual medical treatment under the anti-torture norm, there is a lack of clarity in the international human rights framework at present regarding the circumstances (if any) in which a person with a disability may be deprived of their liberty for the purpose of care.[211] This chapter shows that

[210] CRPD (n 156) art 14:

> Article 14 – Liberty and security of the person
> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
> (a) Enjoy the right to liberty and security of person;
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
> 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

[211] Prior to 2014, the HRC accepted 'mental disorder' as a justification for deprivation of liberty (HRC, *A (name withheld) v New Zealand*, Communication No. 754/1997 (3 August 1999) UN Doc CCPR/C/66/D/754/1997). Article 5(1)(e) ECHR, meanwhile, expressly permits deprivation of liberty on the ground of 'unsound mind' (*Varbanov v Bulgaria*, App no 31365/96 (ECtHR, 5 October 2000) para 47; *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 66; *Shtukaturov v Russia* (2012) 54 EHRR 27 para 115). However, as a result of Article 14 CRPD, the HRC's General Comment No 35 calls on States to 'revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention' (HRC General Comment No 35 (n 178) para 19). Now, according to the HRC, '[t]he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others' (HRC General Comment No 35, ibid). The Special Rapporteur on torture echoes this formulation, adding that deprivation of liberty must be 'for a limited time and with limited means, strictly sufficient only to prevent the risk of major harm' (Juan E Méndez, 'Introduction', in American University, Washington College of Law, Center for Human Rights and Humanitarian Law, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington,

the debate being prompted by Article 14 CRPD needs to consider the routine deprivation of liberty of older people for physical care purposes as well as in relation to mental disability.[212] In *HM v Switzerland*, as noted above, the ECtHR did not engage at all with the fact that there is no provision in Article 5(1) ECHR for deprivation of liberty on the basis of physical frailty or physical care needs. Likewise, the Explanatory Memorandum to the Council of Europe's 2004 Recommendation of the Committee of Ministers on the protection of the human rights and dignity of persons with mental disorder[213] does not offer any guidance on the lawfulness of what it recognises as 'placements on grounds other than that of mental disorder, for example when a person with dementia is placed in a care home so that the person's needs for personal care (for example a need for assistance with dressing, washing and bathing) can be met'.[214]

Chapter 4 focuses on the positive obligations that dignity and vulnerability reasoning reveal to be required in the context of care for older people. Chapter 4 continues this chapter's argument the anti-torture norm should and could be interpreted to meet the requirements of the CRPD, and that meeting its requirements would provide an opportunity to re-imagine the anti-torture norm's positive obligations regarding contexts of older people's care more broadly.

February 2014) explaining his approach in UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 para 69). The Office of the High Commissioner for Human Rights (OHCHR) explains of the requirements of Article 14 CRPD that 'the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis' (UNHRC, 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities' (29 January 2009) UN Doc A/HRC/10/48 para 49). The HRC's position is not yet generally accepted. Fennell and Khaliq argue that, while Council of Europe Member States entered no reservations to the CRPD regarding Article 14 CRPD, it is 'not politically realistic to expect the United Kingdom, or any of the other Council of Europe Member States to repeal specialist mental health legislation authorising detention on grounds of unsoundness of mind' ((Philip Fennell and Urfan Khaliq, 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law' (2011) 6 EHRLR 662, 670–74).

[212] Minkowitz agrees: see Tina Minkowitz, 'A Response to the Report by Juan E Mendez, Special Rapporteur on Torture, Dealing with Torture in the Context of Healthcare, as it Pertains to Nonconsensual Psychiatric Interventions' in American University, Washington College of Law, Center for Human Rights and Humanitarian Law, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington, February 2014) 241–43.

[213] CofE, 'Recommendation (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder and Explanatory memorandum' (22 September 2014).

[214] ibid para 15. The Explanatory Memorandum states simply that the Recommendation does not deal with such placements.

CHAPTER 4: ACCESS TO ADEQUATE CARE

Introduction

This chapter examines whether the anti-torture norm is capable of being interpreted to provide more effective protection to older people who experience suffering due to inadequate care.

As discussed in the Introduction, older people (and older women to a greater extent) are particularly affected by poverty. Financial hardship, often coupled with other factors such as illness, can mean that older people are not able to access formal care services where necessary to assist them with personal care and the tasks of everyday living.[1] In addition, even when older people have access to care services, they may experience neglectful or inadequate care due to institutional practices and/or the actions of individual medical professionals or carers. It has been noted that 'neglect is consistently the most prevalent type of care deficit reported in the nursing home sector and far supersedes reports of physical or psychological abuse'.[2] There is also a connection between the deprivations of liberty discussed in the preceding chapter and lack of access to care services. Frequently, older people are forced to enter long-term care institutions because they cannot access the care services they need in the community or in their own homes.[3] In addition, older people are often restrained in care settings due to staff

[1] See, for example, United Nations (UN) Human Rights Council (UNHRC), 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (4 July 2011) UN Doc A/HRC/18/37 para 40; UNHRC, 'Report of the 2014 Social Forum (Geneva, 1–3 April 2014)' (14 May 2014) UN Doc A/HRC/26/46 para 69.

[2] Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin 2012) 24, citing Arja Isola and others, 'Quality of institutional care of older people as evaluated by nursing staff' (2008) 17(18) Journal of Clinical Nursing 2480 and Connie Page and others, 'The effect of care setting on elder abuse: Results from a Michigan survey' (2009) 21 (3) Journal of Elder Abuse and Neglect 239.

[3] See, for example, Nélida Redondo and Peter Lloyd-Sherlock, 'Institutional care for older people in developing countries: Repressing rights or promoting autonomy? The case of Buenos Aires, Argentina' (Working Paper 13, DEV Working Paper Series, School of International Development, University of East Anglia 2009) 15; Joan Harbison and others, 'Understanding "Elder Abuse and Neglect": A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People' (2012) 24(2) Journal of Elder Abuse and Neglect 88, 99; Sarah Donnelly and others, *'"I'd Prefer to Stay at Home but I Don't Have a Choice" Meeting Older People's Preference for Care: Policy, but what about practice?'* (University College Dublin 2016) 33, 35, 43.

shortages,[4] and because they cannot access non-pharmacological approaches to managing the behavioural and psychological symptoms of dementia.[5]

Some of the discussions in the previous chapters have indicated the challenges that face any attempt to harness the rule against torture and ill-treatment to protect older people from suffering due to socio-economic deprivation. First, Chapter 3 demonstrated that older people deprived of their liberty in care settings are not generally recognised as falling within the remit of the established positive obligation on states to ensure the humane treatment of persons deprived of their liberty. Second, as discussed in Chapter 1, there does not appear to be consensus that states are responsible under the anti-torture norm for omissions to provide socio-economic resources beyond the detention context. The European Court of Human Rights (ECtHR) has imposed a positive obligation on the state to prevent suffering due to a lack of socio-economic resources in some instances where the state has already legislated to put such an obligation on itself, and/or where the state's positive actions have contributed or threaten to contribute to a person's suffering. Where this is not the case, however, the ECtHR has not yet held that states have a positive obligation to prevent suffering due to a lack of socio-economic resources. Third, the discussion in Chapters 1 and 3 of the 'medical necessity' doctrine and paternalism in care contexts suggests that the treaty bodies and other human rights actors may apply a lower level of scrutiny under the anti-torture norm to the treatment of older people in care settings. Chapter 1 argued that the 'nature and context' factors that feed into the minimum threshold of severity assessment may facilitate this lower level of scrutiny where care is concerned.

[4] See Drennan and others, *Older People in Residential Care Settings* (n 2) 17, citing Roisin Gallinagh and others, 'Perceptions of older people who have experienced physical restraint' (2001) 10(13) British Journal of Nursing 852.

[5] See Rosie Harding and Elizabeth Peel, '"He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 Medical Law Review 243, 263 citing Amy Wood-Mitchell and others, 'Factors Influencing the Prescribing of Medications by Old Age Psychiatrists for Behavioural and Psychological Symptoms of Dementia: A Qualitative Study' (2008) 37(5) Age and Ageing 547. Banerjee estimates that two-thirds of current prescriptions in England would be unnecessary if appropriate supports for older people with dementia were available: Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom _(UK) Department of Health, 2009) 6. Banerjee and the Austrian Ombudsman Board have recommended non-drug approaches, the training of professionals and care home staff in non-drug treatments, and research into other pharmacological approaches as alternatives to anti-psychotic medication: Banerjee, *The Use of Antipsychotic Medication for People with Dementia*, ibid, 8, 31–33; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83–84.

This chapter explores whether dignity reasoning has the potential to increase the treaty bodies' and other human rights actors' sensitivity to the human experience of suffering which arises from a lack of access to adequate care, and thus to facilitate the interpretation of the anti-torture norm to respond to such suffering in a manner that accords with the norm's underlying purpose. Older people's experiences of suffering due to inadequate continence care are used as a case study through which to undertake this examination.

Part I of the chapter outlines existing empirical evidence of the suffering caused to many older people by their lack of access to adequate continence care, both within formal care contexts and when they are not in receipt of any formal care. The chapter then contends in Part II that, frequently in the care context, the impact of treatment on the person is not the paramount concern of either care providers or courts adjudicating claims of rights violations. It is argued that this demonstrates the need for a dignity-focused approach to preventing and responding to mistreatment in the care context, in particular. Part III of the chapter uses the conception of a dignity violation proposed in Chapter 2 to analyse older people's experiences of inadequate continence care. It is contended that this analysis demonstrates the capacity of dignity and vulnerability reasoning to both cast a spotlight on older people's experiences of suffering in the care context and reveal the structures that perpetuate and obfuscate such suffering. The chapter concludes that a dignity analysis demonstrates the need and provides the basis for the anti-torture framework to move beyond the doctrinal limitations that limit state responsibility for suffering according to the degree of direct state involvement in it. The chapter further concludes that the forms of powerlessness identified in the dignity analysis offer the blueprint for the specification of positive obligations under the anti-torture norm to prevent and protect from suffering due to inadequate continence care.

I. Inadequate Continence Care

The first section of this part discusses the inability of many older people to access the assistance they need to use the toilet and maintain continence, while the second section discusses many older people's lack of access to the assistance necessary to keep clean of their own waste.

A. *Lack of assistance to use the toilet*

One of the most common problems for older people regarding their personal hygiene is that, if they have limited mobility, they may not receive the physical assistance necessary to help them to use the toilet, thus rendering them unable to control where and when they urinate and defecate. This can affect older people in hospitals and care homes, as well as those living in their own homes.

In a rare quantitative study in 2009, Zisberg found that, of 465 patients aged 70 or older admitted to an Israeli teaching hospital with no prior incontinence, where all reported being able to control their bladder during the first 48 hours of hospitalisation, 14% were provided with incontinence briefs during most of their stay.[6] Her results showed that the leading factor for whether or not an older person was given incontinence pads was their level of mobility and not, as previous studies which relied on nurses' reports suggested, poor cognitive and functional status, complex health conditions or remote or crowded toilets.[7] Women were approximately twice as likely to be given incontinence pads, which Zisberg suggested may have been due to the fact that 'the use of urinals in men is simpler than the use of commodes in women'.[8]

There are widespread reports of older hospital patients and nursing home residents not receiving physical assistance to go to the toilet when they request it.[9] A study of 1,316 nursing home care staff in Ireland in 2012—one of the largest studies internationally—found that in the previous 12 months 40% of staff had witnessed another staff member fail to bring a resident to the toilet when they asked, and 52% had witnessed a staff member ignore a resident when they called.[10] Carers may not approach those who need to be asked whether they would like

[6] Anna Zisberg, 'Incontinence brief use in acute hospitalised patients with no prior incontinence' (2011) 38(5) Journal of Wound, Ostomy and Continence Nursing 559, 563.
[7] ibid 563.
[8] ibid.
[9] See, for example, Parliament of the United Kingdom, *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust, January 2005–March 2009, Chaired by Robert Francis QC, Volume I* (HC375-I, London, 2010) (Francis Independent Inquiry Report) 10, 52; Northern Ireland Human Rights Commission (NIHRC), *In Defence of Dignity: The Human Rights of Older People in Nursing Homes* (Belfast, 2012) 36–37; Parliament of the United Kingdom, *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Volume 1: Analysis of evidence and lessons learned (part 1)* (HC 898-I, London, 2013) (Francis Public Inquiry Report) 19, 125; Lorna Siggins, 'Hospitals breaching human rights of the elderly, GP says' *The Irish Times* (26 February 2015).
[10] Drennan and others, *Older People in Residential Care Settings* (n 2) 44.

help to use the toilet, either regularly or at all.[11] In the absence of assistance to use the toilet, some older people are given incontinence pads,[12] some are told to soil themselves,[13] and all end up being unable to avoid soiling themselves.[14]

Regarding older people living at home, evidence was given in the United Kingdom (UK) Supreme Court case of *R (McDonald) v RBKC*[15] (which led to the ECtHR's judgment in *McDonald v United Kingdom*[16]) that 'the use of incontinence pads for patients who are not clinically incontinent is both widespread and accepted practice in the provision of social services'.[17] Meanwhile, the problems of neglect, and 'self-neglect', of older people living in their own homes are gaining increasing attention and are commonly understood to include situations where an older person is denied, or cannot access, the assistance required for important activities of daily living, including toileting.[18]

The authors of several investigations into the issue conclude that being forced to soil oneself instead of being helped to use the toilet when the need arises can be greatly distressing to older people.[19] The immediate frustration that can be caused by the lack of assistance is demonstrated

[11] See, for example, Francis Independent Inquiry Report (n 9) 52.
[12] See, for example, Anita De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (2010) 35(1) Contemporary Nurse 100, 103; Siggins, 'Hospitals breaching human rights of the elderly, GP says' (n 9); NIHRC, *In Defence of Dignity* (n 9) 36–37; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 85.
[13] See, for example, Win Tadd and others, *Dignity in Practice: An exploration of the care of older adults in acute NHS Trusts* (Cardiff University, University of Kent, 2011) 209.
[14] See, for example, Francis Independent Inquiry Report (n 9) 52; Francis Public Inquiry Report (n 9) 1.
[15] *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33; [2011] 4 All ER 881.
[16] *McDonald v United Kingdom* (2015) 60 EHRR 1.
[17] See *R (McDonald) v RBKC* (n 15) para 30, where Walker LJ quotes from the second witness statement of the Head of Assessment at the Royal Borough of Kensington and Chelsea's Adult Social Care Department: 'The court should be aware that the solution of incontinence pads in a case of this nature is not exclusive to RBKC…In my experience the use of incontinence pads for patients who are not clinically incontinent is both widespread and accepted practice in the provision of social services'. See further para 31, where Walker LJ quotes from the third witness statement of the Head of Assessment: 'It is my experience based on 16 years in social care (most of them working with older people) and another four years working in a large general hospital that, in medical and residential care settings, it is general practice in the management of functional incontinence to use night-time incontinence pads or absorbent sheets as a means of ensuring safety in patients/residents with severely compromised mobility….The management plan would remain the same if the claimant needs to pass faeces at night'.
[18] See, for example, Drennan and others, *Older People in Residential Care Settings* (n 2) 31; Aanand D Naik and others, 'Assessing capacity in suspected cases of self-neglect' (2008) 63(2) Geriatrics 24. See also, for example, Ireland, Health Service Executive (HSE), *Open Your Eyes, Report on Elder Abuse* (2013) 4, stating: 'self-neglect has been the second most reported reason for referral to the HSE elder abuse services since 2008, accounting for approximately 20% of all referrals. Research indicates that self-neglect is medically significant, resulting in higher morbidity and mortality'.
[19] See, for example, NIHRC, *In Defence of Dignity* (n 9) 36; Francis Independent Inquiry Report (n 9) 10.

by reports of individuals 'hammering' out for help,[20] calling out repeatedly and crying.[21] Sage, the national advocacy service for older people in Ireland, has reported the use of sedating medication to encourage an older woman in hospital to 'adapt' to incontinence pads.[22] In a recent study of the views of 180 seriously ill hospitalised patients aged 60 or older, the majority (68.9%) considered bowel and bladder incontinence to be a health state 'the same or worse than death'.[23] Although the authors of the study acknowledge that individuals may 'underestimate their abilities to adapt to certain health states',[24] they argue that the fact that so many patients 'so often viewed commonly encountered health states as worse than death' is a challenge to those concerned with 'patient-centred outcomes'.[25]

The reported physical effects of prolonged use of incontinence pads include dermatitis[26] and continuous breakdown of skin integrity, pressure ulcers, urinary tract infections and, indeed, the development of lasting incontinence.[27] Zisberg notes that 'there is evidence suggesting that even among continent patients, diaper use may be "addictive"…suggesting that new diaper use within hospital settings may make it difficult for the older person to regain continence once back home'.[28] This conclusion is supported elsewhere.[29]

Long-term incontinence has been found to affect 'multiple dimensions of psychological well-being, self-esteem, and psychological distress'.[30] A UK national audit of continence care in

[20] See NIHRC, *In Defence of Dignity* (n 9) 36-37.
[21] ibid.
[22] See Sage Support and Advocacy Service, 'Older people being sedated for "convenience", senior consultant warns', Press Statement (28 July 2016) <www.thirdageireland.ie/sage/latest-news/press-releases/older-people-being-sedated-for-convenience-senior-consultant-warns> accessed 1 September 2017.
[23] Emily B Rubin, Anna E Buehler and Scott D Halpern, 'States Worse Than Death Among Hospitalized Patients With Serious Illnesses' (2016) 176(10) JAMA Internal Medicine 1557, 1557–59.
[24] Rubin and others, 'States Worse Than Death', ibid, citing P A Ubel and others, 'Misimagining the unimaginable: the disability paradox and health care decision making' (2005) 24(4) Health Psychology S57.
[25] Rubin and others, 'States Worse Than Death' (n 24).
[26] See Zisberg, 'Incontinence brief use in acute hospitalised patients with no prior incontinence' (n 6) 559 (citations omitted).
[27] Zisberg, 'Incontinence brief use in acute hospitalised patients with no prior incontinence' (n 6) 559 (citations omitted); De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 105.
[28] ibid.
[29] See, for example, Siggins, 'Hospitals breaching human rights of the elderly, GP says' (n 9):

> Dr Mary Rogan, who runs a large practice in Annaghdown, Co Galway, said that she was aware of many cases where elderly people sent to hospital for treatment were fitted with nappies because there were insufficient nursing staff or carers to escort them to the toilet. 'This results in these patients developing incontinence, because of this practice', Dr Rogan said. 'Incontinence is a feature of getting old, but many people who have successfully maintained continence find themselves being fitted with nappies after they are admitted and given a chair or trolley in an emergency department. Overdependence on nappies then results in them losing the ability to keep control'.

[30] See Susan M Heidrich and Thelma J Wells, 'Effects of Urinary Incontinence: Psychological Well-Being and Distress in Older Community-Dwelling Women' (2004) 30(5) Journal of Gerontological Nursing 47, 52.

2010 associated incontinence with depression.[31] A six-year longitudinal study of older women living at home in the United States found that 'over time, older women with urinary incontinence report more symptom distress and functional impairments, more psychological distress, and lower psychological well-being than women without urinary incontinence'.[32]

B. *Lack of assistance to keep clean*

Whether they are biologically incontinent or have been forced to soil themselves through lack of assistance to reach the toilet, many older people, additionally, experience insufficient assistance to change continence pads or clothes in order to keep clean. Inquiries in the UK have revealed many instances of older people being left in 'sheets soiled with urine and faeces for considerable periods of time'[33] and 'people being left in their own waste'.[34] Other studies have noted care or nursing staff dealing with toileting in a standardised, regimented manner,[35] and only at 'set "toileting" times'.[36] The 2012 survey of Irish nursing home staff mentioned above found that 22% of staff had witnessed another staff member 'not change a resident each time they were wet or soiled after an episode of incontinence' in the previous 12 months.[37]

An empirical study by Harding, which investigated the complaints of informal carers for people with dementia regarding their professional care, found that '[a] major theme within these complaints was concerned with problems with continence care' in hospitals[38], and in residential care homes, day care centres and by home carers.[39] Harding quotes a carer reporting, for example, that 'they left my aunt in bed without changing her even though she was incontinent…They did not help her get up so she stayed in bed all day'.[40] Harding quotes another carer stating: 'my dad is doubly incontinent, even though this was documented on all

[31] Royal College of Physicians, *National Audit of Continence Care 2010* (London, 2010) 8, cited by NIHRC, *In Defence of Dignity* (n 9) 36–37.
[32] Heidrich and Wells, 'Effects of Urinary Incontinence' (n 30) 53.
[33] See Francis Independent Inquiry Report (n 9) 10.
[34] See United Kingdom House of Lords and House of Commons (UK Parliament) Joint Committee on Human Rights, *Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare* (London, August 2007) 11.
[35] De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 105.
[36] NIHRC, *In Defence of Dignity* (n 9) 36.
[37] Drennan and others, *Older People in Residential Care Settings* (n 2) 44.
[38] Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (Cambridge University Press 2017) 148.
[39] ibid 147–50.
[40] ibid 148.

paperwork he was left without a pad on…they thought by sitting him next to the wide open window in January the smell would go away'.[41]

Again, the absence of assistance to keep clean has been noted to cause distress,[42] embarrassment,[43] humiliation and shame.[44] Particular distress has been reported where individuals are suffering from hospital-acquired illnesses such as *Clostridium difficile*.[45]

II. The Need for a Dignity Approach

The concept of dignity is fundamentally concerned with what it means to be human, and with each individual's human experience, as Chapter 2 explained. This part of the chapter argues that the impact of treatment on the person is not always the paramount concern of either care practitioners or courts adjudicating the compliance of care practices or states' care-related conduct with human rights norms. This demonstrates a gap in the understanding of poor or unavailable continence care both in practice and in law, which the chapter argues could be addressed to some extent by dignity reasoning under the anti-torture norm.

Arguably the clearest articulation of the need for a dignity analysis of older people's experiences of inadequate care are the conclusions of Sir Robert Francis QC, following a Public Inquiry in 2013 into 'conditions of appalling care' in the Mid Staffordshire General Hospital in the UK.[46] Francis concluded the inquiry by criticising a 'culture which too often did not consider properly the impact on patients of actions being taken'.[47] He recommended 'a refocusing and recommitment of all who work in the NHS—from top to bottom of the system—on putting the patient first'.[48] Francis' primary recommendation following the earlier Independent Inquiry was that 'people must always come before numbers…it is the individual experiences that lie behind statistics and benchmarks and action plans that really matter'.[49] In

[41] ibid.
[42] See UK Parliament, *The Human Rights of Older People in Healthcare* (n 34) 11; Francis Independent Inquiry Report (n 9) 10.
[43] See Francis Independent Inquiry Report (n 9) 10.
[44] See Tadd and others, *Dignity in Practice* (n 13) 157.
[45] Francis Independent Inquiry Report (n 9) 10.
[46] Francis Public Inquiry Report (n 9) 3.
[47] ibid 2.
[48] ibid 3.
[49] Francis Independent Inquiry Report (n 9) 4. See, in a similar vein, United Kingdom Parliamentary and Health Service Ombudsman, *Care and Compassion? Report of the Health Service Ombudsman on Ten Investigations in NHS Care of Older People* (London, 2011), 8–10. The Ombudsman concluded her investigation into failings in

a similar vein, Tadd et al concluded a study of poor care in four NHS hospitals in the UK by recommending that staff 'be reminded of the importance of seeing patients as persons' and as 'individuals in their own right'.[50]

Francis' and Tadd et al's conclusions call to mind the controversy discussed in Chapter 1 regarding the question of state responsibility under the anti-torture norm for omissions to provide socio-economic resources to people who are suffering from deprivation. Arguably, like the professional approaches to care criticised by Francis and Tadd et al, the ECtHR's approach to specifying states' positive obligations to provide resources under the anti-torture norm does not always treat the person's experience of suffering as the paramount, or overriding, concern.

The English High Court case of *R(Bernard) v LB Enfield*[51] provides a continence care-focused example of the delineation of state responsibility under the anti-torture norm for omissions to provide socio-economic resources according to the degree of state involvement in the person's suffering. In *R(Bernard)*, a local authority failed to comply with its statutory duty to provide housing suitable for a wheelchair user to a woman and her family. As a result, for over two years the woman was confined to one room, unable to reach the bathroom without the assistance of her husband and constantly forced to urinate and defecate in incontinence pads and in her clothes. Sullivan J found a violation of Article 8 of the European Convention of Human Rights (ECHR) but found no violation of Article 3 ECHR. The judge drew a distinction between prison conditions cases, where '[i]t is understandable that the protection afforded by Article 3 should be rigorously applied…even if there is no intention to humiliate or debase',[52] and the case before him, where 'the claimants' suffering was due to the defendant's corporate neglect and not to a positive decision by the defendant that they should be subjected to such conditions'.[53] Sullivan J further referred to the 'unique' vulnerability of a prisoner. The judge stated that the woman who was 'living (in admittedly deplorable conditions) in her own home, surrounded by her family'[54] was not in a comparable situation to a prisoner who is 'in a

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the care of older people in 2011 by noting that 'the actions of individual staff…add up to an ignominious failure to look beyond a patient's clinical condition and respond to the social and emotional needs of the individual and their family' (8). She argued that 'listening to older people [and] taking account of feedback from families' was necessary to achieve change (10).

[50] Tadd and others, *Dignity in Practice* (n 13) 209.

[51] *R (Bernard) v LB Enfield* [2002] EWHC 2282 (Admin); [2003] Human Rights Law Review (HRLR) 4.

[52] ibid para 28.

[53] ibid para 29.

[54] ibid.

uniquely vulnerable position: detained against his will, he is literally at the mercy of the prison authorities'.[55]

It appears that under the international human rights framework, a person's experience of suffering may be further obscured in the care context by deference to professional decision-making, or, paternalism. The discussion of the doctrine of 'medical necessity' in Chapter 1 and of the ECtHR's *HM v Switzerland* judgment in Chapter 3 demonstrates this. Indeed, the former Special Rapporteur on torture, Juan E Méndez, has highlighted the potential for obfuscation of individuals' experiences of ill-treatment in the care context. The Special Rapporteur warned in a 2013 report on abuses in health-care settings that there are 'unique challenges' to stopping ill-treatment in healthcare settings, one of which is 'a perception that, while never justified, certain practices in health-care may be defended by the authorities on grounds of administrative efficiency…or medical necessity'.[56]

The ECtHR case of *McDonald v United Kingdom*[57] provides an example of the lower standard of scrutiny which may be applied under international human rights law to the treatment of people in care settings, compared to those detained in prison. Here, an older woman who had limited mobility relied on state-funded home care assistants to help her reach the toilet. The state decided to withdraw her night-time home care service and replace it with incontinence pads and plastic bed sheeting, although she was not incontinent. The case was decided under Article 8 ECHR. Despite finding that 'considerations of human dignity were engaged when someone who could control her bodily functions was obliged to behave as if she could not',[58] the ECtHR held that the withdrawal of night-time home care and its replacement with incontinence pads and plastic sheeting did not violate the right to respect for the applicant's private life.[59] The Court held that the interference 'pursued a legitimate aim, namely the

[55] ibid para 28.
[56] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 para 13.
[57] *McDonald v United Kingdom* (n 16).
[58] ibid para 47, referring to the dissenting opinion of Hale LJ in *R (McDonald) v RBKC* (n 15).
[59] Regarding the period where the local authority's assessment of the applicant's need was that she required assistance to use a commode, the European Court of Human Rights (ECtHR) found a violation of Article 8 as the interference with the applicant's private life was not 'in accordance with law': *McDonald v United Kingdom* (n 15) para 51. However, from the time that the local authority had changed its assessment of the applicant's need to 'a need to be kept safe from falling and injuring herself' (see *R (McDonald) v RBKC* (n 15) para 11), the ECtHR found that it did not violate Article 8 of the European Convention on Human Rights (ECHR): *McDonald v United Kingdom* (n 16) paras 53–58.

economic well-being of the state and the interests of the other care-users',[60] and that 'states are afforded a wide margin of appreciation in issues of general policy, and that margin is particularly wide when the issues involve an assessment of the priorities in the context of the allocation of limited state resources'.[61]

Referring to the UK Supreme Court's decision in *McDonald* and several ECtHR judgments, Clements argues that 'the courts have grave difficulties in identifying atypical human rights abuses experienced by disabled people' who are not in prison.[62] He states that Article 5 ECHR is a 'cliff edge right' in the sense that '[o]nce secured, the "detainee" gains all manner of rights (not only procedural, but also health and social care supports, flush toilets and glasses). However, if they are fractionally the wrong side of detained, then they fail and the court is powerless to intervene'.[63] Clements contends that, while the English courts and the ECtHR may refer to dignity in cases concerning the treatment of individuals outside of the detention context, they 'appear to comprehend dignity on an objective intellectual plane but are unable to express (or perhaps "experience") what it is to suffer indignity. In effect…"dignity" becomes something defined by a process and perforce "indignity" in terms of a flawed process—and not as an issue of substance'.[64] Clements asks: '[i]s there really a qualitative difference between a state's international human rights obligations to detained disabled people than to those who it has not "deprived of their liberty"?[65] His question echoes O'Cinneide's comment, cited in Chapter 1, that suffering of an intensity sufficient to reach the minimum threshold of severity required for a finding of ill-treatment 'cannot be intelligibly differentiated' by its source.[66]

The following analysis of inadequate continence care by reference to the conception of a dignity violation developed in Chapter 2 attempts to respond to Clements' and O'Cinneide's arguments and to the ECtHR's suggestion in its dicta in *Budina v Russia* that dignity should guide the development of positive obligations to provide socio-economic resources under the anti-torture norm.[67] The analysis is also an attempt to explore Cassese's argument, made in

[60] *Mc Donald v United Kingdom* (n 16) para 53.
[61] ibid para 55.
[62] Luke Clements, 'Disability, Dignity and Cri de Coeur' (2011) European Human Rights Law Review (EHRLR) 675, 676.
[63] ibid 679.
[64] ibid.
[65] ibid 675.
[66] Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 EHRLR 583, 588.
[67] *Budina v Russia* (Admissibility), App no 45603/05 (ECtHR, 18 June 2009) 6.

1991, that Article 3 ECHR 'could constitute an appropriate means for the Commission and the Court to make, if only in extreme cases, the protection of economic and social rights more incisive'.[68] Cassese based this argument on the notion of dignity: 'Plainly, the concept of human dignity underpinning Article 3 and the prohibition of any treatment or punishment contrary to humanitarian principles embrace any measure or action by a public authority, whatever the specific field to which this measure or action appertains'.[69]

III. A Dignity Analysis

It is notable that numerous investigations into poor continence care—both legal and non-legal—have characterised older people's experiences of being prevented from retaining continence and from keeping clean as interfering with their dignity.[70] The testimony of family members who have witnessed poor continence care of their older relatives, when it is included in investigative reports and empirical studies, also frequently describes what they have seen as a denial of dignity.[71]

Regarding the connection between dignity, inadequate continence care and the anti-torture norm specifically, Mégret,[72] the Northern Ireland Human Rights Commission (NIHRC)[73] and Mr Justice Munby (as he then was) of the English High Court[74] have suggested that the rule against torture and ill-treatment may be violated through an interference with dignity in the form of poor continence care. In addition, several human rights treaty bodies have found

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[68] Antonio Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2 European Journal of International Law 141, 143.
[69] ibid.
[70] See, for example, UK Parliament, *The Human Rights of Older People in Healthcare* (n 34) 14–15; Tadd and others, *Dignity in Practice* (n 13) 10, 90, 205, 209; Francis Independent Inquiry Report (n 9) 10–11, 13; UK Parliamentary and Health Service Ombudsman, *Care and Compassion?* (n 49) 10; NIHRC, *In Defence of Dignity* (n 9) 36–37. See also British Geriatrics Society, 'Dignity Behind Closed Doors' campaign, August 2006, <www.bgs.org.uk/campaigns/dignity.htm#aims> accessed 1 September 2017:

> The aim of the campaign is to raise awareness that people, whatever their age and physical ability, should be able to choose to use the toilet in private in all care settings. 'Toilet Access and Use' has been chosen as a marker of Human Rights and Dignity…Giving people back control over their most private of functions will enhance their independence and rehabilitation, reduce lengths of stay and promote continence.

[71] See, for example, Francis Public Inquiry Report (n 9) 535–37; Francis Independent Inquiry Report (n 9) 110; Harding, *Duties to Care* (n 38) 148.
[72] Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) Human Rights Law Review 37, 55.
[73] NIHRC, *In Defence of Dignity* (n 9) 36–37.
[74] *R (on the application of A) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCL Rep 194 (Munby J) para 87, 114.

interferences with dignity sufficient to meet the minimum threshold of severity for a finding of torture or ill-treatment to arise in circumstances concerning toileting or personal hygiene in the prison context.[75]

In one of the ECtHR's first decisions, *Ireland v United Kingdom*, Judge Sir Gerald Fitzmaurice connected diminishment of dignity with being 'smeared with filth' or other experiences that made a person unclean.[76] Ready access to hygienic sanitary facilities is a basic requirement of humane treatment in detention, according to the array of legal standards that exist explicitly to protect the dignity of those deprived of their liberty.[77] In a 2013 judgment concerning prison conditions, *Grimailovs v Latvia*, the ECtHR made an explicit finding that 'placing the applicant, who is confined to a wheelchair, in facilities where he cannot properly wash and use the toilet, even if only for a limited period of time, could be hardly considered compatible with respect for his human dignity'.[78] The Court stated that 'the accessibility of the sanitation facilities raises a particular concern under Article 3 of the Convention'.[79] In 1999, in *Hamilton v Jamaica*, the Human Rights Committee (HRC) found that a failure by prison authorities to assist a man who was paralysed in both legs to move from his cell, meaning that he had to pay his fellow inmates to remove his slop bucket from his cell and had to rely on them for help to move, violated 'the author's right to be treated with humanity and with respect for the inherent dignity of the human person'.[80]

Despite the above, the reasons for the connection between dignity and hygiene have not been made explicit. The following discussion uses the conception of a dignity violation developed in Chapter 2—an interference with a core aspect of the personality in respect of which a person

[75] See, for example, Inter-American Court of Human Rights (IACtHR), *Miguel Castro Prison v Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs) Series C No 160, cited in Viviana Bohorquez Monsalve and Javier Aguirre Roman, 'Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law (2009) 6(11) Sur – International Journal on Human Rights 39, 53; *Peers v Greece* (2001) 33 EHRR 51; *MSS v Belgium and Greece* (2011) 53 EHRR 2 para 263. See further below.
[76] *Ireland v United Kingdom* (1979–80) 2 EHRR 25, Separate Opinion of Judge Sir Gerald Fitzmaurice para 27.
[77] See, for example, Counsel of Europe (CofE), Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies (European Prison Rules) Rule 19.3; UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UN General Assembly (UNGA) Res 70/175 (17 December 2015) UN Doc A/RES/65/230, Rule 15; Inter-American Commission on Human Rights (IACmHR), Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (13 March 2008) IACmHR Res 1/08, OEA/Ser/L/V/II.131 doc 26, Principle XII (2).
[78] *Grimailovs v Latvia* App no 6087/03 (ECtHR, 25 June 2013) para 159.
[79] ibid para 158, citing *DG v Poland*, App no 45705/07 (ECtHR, 12 February 2013) paras 147 and 150.
[80] UN Human Rights Committee (HRC), *Zephiniah Hamilton (represented by counsel of the London law firm Macfarlanes) v Jamaica*, Communication No 616/1995 (28 July 1999) UN Doc CCPR/C/66/D/616/1995 para 8.2.

is powerless—to analyse whether, and in what circumstances, inadequate continence care might be said to meet the minimum threshold of severity required for a finding of ill-treatment.

A. *An interference with a core aspect of the personality*

Along with the needs to breathe, drink and eat, it is hard to conceive of a more basic element of our embodied humanity than the need to empty our bladder and bowels. Because it is a constantly recurring need, its potential to impact on our relationship with ourselves and others is similarly constant.

The inability to keep clean of one's own waste has been acknowledged to affect individuals' sense of self. Tadd et al reflect on the situation of an older woman in hospital whose plea to use the toilet is ignored by staff. They note that 'Dorothy is extremely concerned about being able to maintain her self-respect by avoiding the situation she finds herself in', and conclude that the failure to provide help 'takes away her control, disconnecting Dorothy from her own body, something that can leave people feeling violated as the boundaries to the self are unable to be preserved'.[81] In respect of another older woman who is scolded for repeatedly ringing a bell for help to use the toilet, Tadd et al suggest that '[o]ne can only imagine the humiliation and shame that this woman must feel, being reduced both in her eyes and those of others, because not only has she soiled her bed but she is then left to lie in it and is also reprimanded'.[82] In *Napier v Scottish Ministers*, Lord Bonomy noted evidence that made clear how greatly averse prisoners in HM Prison, Barlinnie, Glasgow had been, for a long time, to living in the presence of their own waste.[83] The Court paid particular attention to the applicant's testimony that the prospect of being forced to use a chamber pot in his cell made him 'feel like you don't exist …and I was not prepared to do that myself'.[84] Sir Robert Francis QC, in his Independent Inquiry report, stated that '[f]ailure to ensure a proper level of personal cleanliness and hygiene degrades patients, aggravating their feelings of illness [and] disability'.[85] The ECtHR noted in *McDonald v United Kingdom*, meanwhile, that as a result of the State's decision to refuse Ms

[81] Tadd and others, *Dignity in Practice* (n 13) 92, citing Dennis D Waskul and Pamela van der Riet, 'The Abject Embodiment of Cancer Patients: Dignity, Selfhood and the Grotesque Body' (2002) 25(4) Symbolic Interaction 487.
[82] Tadd and others, *Dignity in Practice*, ibid 157.
[83] *Napier v Scottish Ministers,* Court of Session (Outer House) 2005 1 SC 229 para 76.
[84] ibid para 76.
[85] Francis Independent Inquiry Report (n 9) 12.

McDonald assistance to use the toilet, she was 'faced with the possibility of living in a manner which "conflicted with [her] strongly held ideas of self and personal identity"'.[86]

The ability to keep clean of one's own waste is also fundamental to relating to others, including to how one wishes to present to the world. As mentioned in Chapter 2, the ECtHR's judgment in *Bouyid v Belgium* emphasised the impact on dignity of a slap to the face, noting that the face 'manifests [a person's] social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others'.[87] In *Svinarenko and Slyadnev v Russia*, the ECtHR held that confining accused persons in a cage during a criminal trial denied respect for human dignity and amounted to degrading treatment on the basis that such treatment would communicate a certain message to others about the applicants.[88] In *Polay Campos v Peru*, the HRC found that displaying a detainee to the press in a cage violated Articles 7 and 10 ICCPR, since it was degrading and 'failed to respect Mr Polay Campos' inherent and individual human dignity'.[89] In a similar vein, Judge Sir Gerald Fitzmaurice in a separate opinion in *Ireland v United Kingdom* suggested that a person's dignity would be diminished under Article 3 ECHR by being forced to dress up in a way 'calculated to provoke ridicule or contempt'.[90] Francis' conclusion that older people in hospital were caused embarrassment by an inability to use the toilet and by being left in soiled sheets for considerable periods of time, and Tadd et al's suggestion that poor continence care can result in individuals feeling reduced in others' eyes, point to the cultural importance that is attached to keeping clean of one's own waste and the actual or perceived reality that others' opinions are affected by how a person presents in that regard.

Luban notes that a 'phenomenon systematically connected with degrading practices of confinement, and torture as well' is that 'degradation induces behaviour by prisoners that

[86] *McDonald v United Kingdom* (n 16) para 47, citing *Pretty v United Kingdom* (2002) 35 EHRR 1 para 65.
[87] *Bouyid v Belgium* (2016) 62 EHRR 32 para 104.
[88] See *Svinarenko and Slyadnev v Russia*, App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014). Here, the applicants complained that, 'like "monkeys in a zoo', [they] had been exposed in a cage to the general public, including the large number of candidate jurors and witnesses from the same settlement, and the applicants' family members and acquaintances who had attended the hearings' (para 108). Finding the measure unnecessary, the ECtHR recognised the excessive anxiety and distress which arose from the applicants' 'objectively justified fears' that their confinement in a cage in the courtroom during their trial 'would convey to their judges, who were to take decisions on the issues concerning their criminal liability and liberty, a negative image of them as being dangerous to the point of requiring such an extreme physical restraint' (para 133).
[89] HRC, *Víctor Alfredo Polay Campos v Peru*, Communication No 577/1994 (6 November 1997) UN Doc CCPR/C/61/D/577/1994 para 8.5.
[90] *Ireland v United Kingdom* (n 76), Separate Opinion of Judge Sir Gerald Fitzmaurice para 27.

makes them contemptible in their guards' eyes, and their contemptible condition seemingly justifies the abuse'.[91] He argues that '[t]he victims themselves provide the evidence that they deserve their treatment'.[92] It is possible that leaving a person to lie in their own waste rather than assisting them to keep clean may result in the person being seen by others as someone for whom keeping clean is not important or, indeed, possible.

B. *Powerlessness*

As discussed in Chapter 2, the powerlessness element of the thesis' proposed conception of a dignity interference sufficient, in principle, to violate the rule against torture and ill-treatment relates to inequality of status. In other words, an interference with a core aspect of the personality may amount to torture or ill-treatment if it causes the person to feel, or objectively demonstrates whatever the subjective impact,[93] that the person occupies an unequal position in relation to others due to their being powerless or helpless to avoid the experience.

The subjective feelings of powerlessness and inequality that a lack of access to adequate sanitary conditions may cause were demonstrated in *Napier v Scottish Ministers*,[94] where the Scottish Court of Session explicitly found a violation of dignity sufficient to breach Article 3 ECHR. The Court focused heavily on the petitioner's feelings of inferiority, inequality and powerlessness, which resulted from his lack of control over where and when he relieved himself. The Court quoted the petitioner's testimony that '[i]t makes you feel like you don't exist because you are forced to use that toilet… you shouldn't need to do that… it just makes you feel low all the time… They shouldn't make you do the toilet in a pot. There should be toilets there for you, even though you are a prisoner'.[95]

It is surely the case that older people in care settings, or in their own homes, who fail to receive the necessary assistance to use the toilet or change soiled incontinence pads or clothes experience powerlessness and helplessness which may cause them to feel inferior, or unequal in worth, to others. In *R (Bernard) v LB Enfield*, the husband of a woman who had no access

[91] David Luban, 'Treatment of Prisoners and Torture' in Marcus Duwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 449.
[92] ibid.
[93] See *Bouyid v Belgium* (n 87) (2016) para 101.
[94] *Napier v Scottish Ministers* (n 83).
[95] ibid para 76.

to a wheelchair or wheelchair-accessible toilet at home and was therefore forced to use incontinence pads and was unable to prevent herself from soiling her clothes and carpets, gave testimony that she found the situation 'depressing *and demeaning'* (emphasis added).[96]

Regarding objective powerlessness or subordination, it is worth recalling the argument in Chapter 2 that the vulnerability element of a dignity interference sufficient to violate the rule against torture and ill-treatment may constitute a combination of several forms of powerlessness. Chapter 2 contended that in order to effectively protect older people from mistreatment under the anti-torture norm, the treaty bodies and other human rights actors should seek to discern all of the situational forms of powerlessness that contribute to dignity violations, in addition to any inherent powerlessness. Identifying situational forms of powerlessness reveals ways in which the state may in fact be contributing to dignity violations, countering the notion that suffering in the care context is solely a matter of inherent vulnerability or 'pure suffering'.[97] At the same time, discerning these situational vulnerabilities sheds light on structural, or systemic, causes of dignity violations that may be addressed through the specification of positive obligations. The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on health), Anand Grover, made a similar argument in a 2011 report on the right to health of older people. The Special Rapporteur's report stated that '[i]t is essential that the actual vulnerabilities of older persons are recognized, and prejudicial perceptions and attitudes are addressed, so that goods and services are designed in such a manner to overcome actual, rather than perceived, barriers in accessing healthcare'.[98]

With this in mind, the following analysis attempts to identify various sources of powerlessness that prevent older people from avoiding interferences with their personality through a lack of access to adequate continence care.

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[96] *R (Bernard) v LB Enfield* (n 51) para 20.

[97] See Natasa Mavronicola, 'Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights' (DPhil thesis, University of Cambridge 2014). Mavronicola uses this term to refer to suffering 'which no particular human agency can be said to be the direct cause of' (at 165). As discussed in Chapter 1, Part II Section C, Mavronicola argues that the ECtHR has not imposed positive obligations on the state to prevent or protect from such suffering; she contends that positive obligations to respond with socio-economic resources to suffering have only arisen under Article 3 ECHR to date where there exists a responsibility on the state under domestic law to act, or the state has acted so as to 'restrict or control the individual or the frame of action of the individual and the individual's ability to provide for and protect himself or herself' (at 170).

[98] UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 1) para 39.

(i) *Dependency*

The need for physical assistance to either use the toilet or keep clean is a classic instance of dependency, as Dodds and other vulnerability theorists referred to in Chapter 2 understand this form of vulnerability. Dependency may be inherent or situational, or a combination of both. It is possible that an older person who seems inherently dependent on carers to assist them to use the toilet or to keep clean may in fact be situationally dependent because their environment is structured in a way that disables them from doing these tasks for themselves. Hospital settings and other institutional care contexts where the environment is structured and care is administered in ways over which older people do not have control may give rise to situational dependency. It is also possible, perhaps, to view the lack of access to formal care services of an older person living at home without the support that they need as a situational vulnerability. In any event, the treaty bodies have recognised both situational and inherent dependency as forms of vulnerability, or powerlessness, giving rise to dignity violations where individuals with disabilities in prison are unable to access adequate sanitary facilities.[99] The existence of a disability (inherent) and the lack of mobility assistance (situational) have both been factored into the treaty bodies' decisions.

For example, in *DG v Poland*, the ECtHR made a finding of degrading treatment where prison authorities had failed to provide sufficient incontinence pads and had given no physical assistance to reach the toilet or the shower to a prisoner who was 'confined to a wheelchair and suffer[ed] from serious malfunctions of the urethral and anal sphincters'.[100] Although the Court did not refer explicitly to dignity, its analysis of the effects of the applicant's powerlessness to keep clean of his own waste is instructive for a dignity analysis. The Court found that the lack of assistance from the prison authorities placed the applicant 'in a position of absolute dependence on his fellow inmates'.[101] The applicant's fellow inmates 'did not provide him with suitable and sufficient assistance',[102] and the Court found that this concurrent dependence and lack of assistance 'must have given rise to considerable anxiety on the applicant's part and placed him in a position of inferiority vis-à-vis the other prisoners'.[103] Similarly, in *Grimailovs*

[99] See, for example, *Grimailovs v Latvia* (n 78); *Hamilton v Jamaica* (n 80).
[100] *DG v Poland* (n 79) para 143.
[101] ibid para 145.
[102] ibid para 147.
[103] ibid para 147, citing *Farbtuhs v Latvia,* App no 4672/02 (ECtHR, 2 December 2004) para 60.

v Latvia,[104] the ECtHR made a finding of degrading treatment, using a dignity analysis, where the applicant was detained in a prison which was not adapted for wheelchair use and was unable to wash or use the toilet without the help of his fellow inmates. The Court approved the judgment in *DG v Poland*, holding that 'in particular, [the applicant's] inability to have access to various prison facilities independently, including the sanitation facilities, and in such a situation the lack of any organised assistance with his mobility…reached the threshold of severity required to constitute degrading treatment'.[105] The facts in the HRC case of *Hamilton v Jamaica*[106] were similar, although the HRC did not elaborate its reasoning beyond what is cited from the judgment above.

The following paragraphs discuss the causes of many older people's situational dependency—in other words, the causes of many older people's inability to access the assistance necessary to meet their continence and hygiene needs and thus to avoid interferences with their personality. These causes may be conceptualised as further situational vulnerabilities. Some of the situational vulnerabilities identified below appear to relate only to contexts where older people are already receiving some form of care, rather than to the situation of older people who cannot access any care services at all. However, it is possible that, in fact, all of the vulnerabilities discussed below have an influence on government policy-making in the field of older people's healthcare more broadly and therefore could be said to constitute situational vulnerabilities (to some extent) even in respect of older people who have no access to care services at all.

(ii) *Barriers to complaints*

In Chapter 2, it was noted that the ECtHR has recognised the inability of people with mental illnesses to complain about their treatment to be a source of vulnerability under the anti-torture norm. The ECtHR has also recognised, albeit obiter in a case concerning Article 10 ECHR, the vulnerability of older people in residential care who are unable to complain of their treatment. In *Heinisch v Germany*, where a former staff member in an older people's residential home was fired for complaining about the treatment of residents, the ECtHR recognised 'the particular vulnerability of the patients concerned, who often may not be in a position to draw

[104] *Grimailovs v Latvia* (n 78).
[105] ibid para 162.
[106] *Hamilton v Jamaica* (n 80).

attention to shortcomings in the provision of care on their own initiative'.[107]

It was also argued in Chapter 2, however, that vulnerability arising from an inability to complain should be viewed from a situational, rather than inherent, perspective.

Some authors and human rights actors have highlighted that the unequal relationship between older people who are receiving care and professional care providers can create a barrier to older people's ability or willingness to complain about their treatment. Chapter 2 noted that the Inter-American Court of Human Rights (IACtHR) has, similarly, recognised the 'intrinsic imbalance in power between hospitalized patients and the persons having authority over them' as a source of vulnerability.[108] White states that 'residents in aged care facilities remain vulnerable' because the 'inherent power imbalance in such a care environment may mean that residents (and their families) are reluctant to voice their concerns and raise complaints'.[109] White contends that '[m]any older people in such environments are reluctant to complain for a variety of reasons including fear of being penalised'.[110] Others, too, point specifically to the relationship of dependency as the basis for older people's, and their families', reluctance to complain of poor treatment. Charpentier and Soulières have found that official mechanisms for the protection of older people living in institutional settings are under-used, and they state that older people and family members are often discouraged from speaking out because of 'above all, fear or retaliation and of being labelled as a disruptive elderly person or family'.[111] The British Institute for Human Rights (BIHR), similarly, contends that older people may not complain about their treatment in care settings because they feel they are 'just making a fuss' or fear eviction if they complain.[112] The United Nations High Commissioner for Human Rights (OHCHR) also highlights that older people who suffer mistreatment often fear to report

[107] *Heinisch v Germany* (2014) 58 EHRR 31 para 71.
[108] IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006 (Merits, Reparations and Costs) Series C No 149 para 107.
[109] Michael J V White, *A Pathway Forward: The Scope and Role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged Care and Disability Residences and Facilities* (New Zealand Human Rights Commission, 2016) 23. This is one of the reasons White puts forward in support of his argument that preventive monitoring under OPCAT should extend to older people's care contexts.
[110] ibid 23.
[111] Michèle Charpentier and Maryse Soulières 'Elder Abuse and Neglect in Institutional Settings: The Resident's Perspective' (2013) 25(4) Journal of Elder Abuse and Neglect 339, 352.
[112] British Institute for Human Rights (BIHR) and Age UK, *Older People and Human Rights: A Guide for Professionals Working with Older People* (2nd ed, March 2011) 7, cited in Beverley Clough and Margaret Brazier, 'Never too old for health and human rights?' (2014) 14(3) Medical Law International 133, 144.

'because of their dependency on the abuser [and] concern for repercussions'.[113]

The absence of measures to support older people who need assistance to complain has also been cited as a reason for older people's frequent inability to complain about their experiences of mistreatment. Charpentier and Soulières note that older people in institutional care settings and their family members often have 'poor knowledge of recourse mechanisms'.[114] The BIHR concurs, that older people may not complain because they lack information about how to complain.[115] The OHCHR contends that older people who suffer mistreatment may feel 'anxiety over a lack of support or lack of familiarity or the accessibility of reliable mechanisms'.[116] Drennan et al, meanwhile, note that 'many older people in receipt of residential care have enhanced…cognitive disabilities and reduced social networks',[117] and several authors point to the fact that older people are often prevented from complaining by a lack of support where they experience communication or cognitive difficulties.[118] As noted in Chapter 2, the IACtHR has found in its anti-torture jurisprudence that the state's failure to ensure access to complaints mechanisms for those who face communication or information barriers to complaining may be a cause of vulnerability, or, powerlessness.[119]

(iii) *Paternalism*

Older people's experiences of suffering may be ignored, both in practice in care settings and under the anti-torture framework, because of a culture of deference to professional decision-making about what type of care is in an older person's 'best interests'. Paternalism towards older people is a widespread problem, particularly in the care context,[120] and previous chapters

[113] OHCHR, 'Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper' (2012) 31.
[114] Charpentier and Soulières, 'Elder Abuse and Neglect in Institutional Settings: The Resident's Perspective' (n 111) 352.
[115] BIHR and Age UK, *Older People and Human Rights* (n 112) 7.
[116] UN Office of the High Commissioner for Human Rights (OHCHR), 'Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper' (n 10) 31.
[117] Drennan and others, *Older People in Residential Care Settings* (n 2) vii.
[118] See, for example, BIHR and Age UK, *Older People and Human Rights* (n 112) 7; White, *A Pathway Forward* (n 109) 16, 23.
[119] IACtHR, *Rosendo Cantu et al v Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 216 para 185.
[120] See, for example, UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 1) para 51 and generally; Martha A Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(1) Elder Law Journal 71, 85; Law Commission of Ontario,

have discussed the susceptibility of some human rights treaty bodies to such thinking. As argued in Chapter 3, paternalism persuaded the ECtHR in *HM v Switzerland*[121] to ignore the fact that an older woman was confined in a nursing home and not free to leave by virtue of administrative and court orders. In *McDonald v United Kingdom*,[122] the ECtHR saw no compelling reason to disturb a proportionality assessment by the UK Supreme Court which accepted the local authority's view that the provision of incontinence pads would provide Mrs McDonald with 'greater privacy and independence'. This view was reached by the local authority, and accepted by both the UK Supreme Court and ECtHR, despite the fact that Mrs McDonald's own view of what her privacy and independence required was diametrically opposed.[123]

A study by Donnelly et al of the experiences of 38 social workers supporting 788 older people in Ireland in 2015[124] reported that 'many older people with a mental health issue and/or cognitive impairment/dementia were excluded from the decision-making process [about their care] regardless of their level of functional capacity'.[125] The social workers reported that older people with dementia were particularly likely to be excluded due to '[a] status approach to dementia, where people were deemed to lack capacity', because their 'family didn't want them involved', because they had 'communication difficulties which impacted on their involvement' and/or because they had 'no opportunity to be involved'.[126] Chapter 2 noted that both the denial of legal capacity and the de-facto denial of decision-making capacity have been recognised as forms of vulnerability under the anti-torture norm.[127]

(iv) *Institutional and professional risk aversion*

A related problem, which compounds the above, is that professional decision-making regarding older people's continence care may not actually be focused on the older person or on the

A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice (Toronto, April 2012).

[121] *HM v Switzerland* (2004) 38 EHRR 17.

[122] *McDonald v United Kingdom* (n 16).

[123] ibid para 56.

[124] Sarah Donnelly and others, *'"I'd Prefer to Stay at Home but I Don't Have a Choice" Meeting Older People's Preference for Care: Policy, but what about practice?'* (University College Dublin 2016) 8.

[125] ibid 6.

[126] ibid.

[127] See, for example, *VC v Slovakia* (2014) 5 9EHRR 29 para 151; UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (28 July 2008) UN Doc A/63/175 para 50.

entirety of their experience. The Explanatory Memorandum to Article 7 of the Council of Europe Committee of Minsters' Recommendation on the protection of the human rights and dignity of persons with mental disorder acknowledges this possibility, particularly with respect to nursing homes.[128] The Explanatory Memorandum contends that people being cared for in nursing homes may be subject to 'institutional vulnerability', finding themselves 'subject to the authority of persons or bodies who could have their own, and possibly conflicting, interests'.[129]

The overall conclusion of Robert Francis QC following the Public Inquiry into systemic failings in care in Mid Staffordshire was that the failings resulted from 'an institutional culture in which the business of the system was put ahead of the priority that should have been given to the protection of patients'.[130] Tadd et al argue regarding hospital care in England that '[t]he response to the need for further regulation of clinical practice has resulted in the management of risk being subjected to audit and transparent practice',[131] and that, as a result, 'the risk of harm to patients has become part of the regulatory regime of healthcare and therefore a matter for healthcare organisations rather than clinicians'.[132] They contend that 'this approach to the regulation of risk…alters the ways in which staff approach care delivery and subsequently poses a threat to older people's dignity'.[133]

Tadd et al argue that hospital practice tends to be more concerned with 'safeguarding the system itself' from risks such as litigation and failure to meet targets[134] than with the particular risks that individual patients face. These authors argue that a desire to protect the hospital system from risk encourages the blanket application of policies designed to avoid falls, for example, or to control infection or reduce waiting times.[135] Their study of 16 wards in four NHS hospitals found that a desire to avoid 'falls and other untoward incidents' had resulted in patients being nursed in bed, movement being restricted, people being encouraged to remain

[128] CofE, 'Recommendation (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder and Explanatory memorandum' (22 September 2014) para 55.
[129] ibid.
[130] Francis Public Inquiry Report (n 9) 2.
[131] Tadd and others, *Dignity in Practice* (n 13) 89.
[132] ibid 90.
[133] ibid 89.
[134] ibid 90.
[135] ibid.

in their chairs, and visiting being limited.[136] All of these practices, the authors argue, have an especially negative impact on older people with dementia, and on continence care for older people.[137] Tadd et al recommend that '[p]atients' experience' should be considered in the formulation of risk management strategies, and that professional staff 'must be reassured that they will be supported and enabled to decide when risks are worth taking to promote patient dignity'.[138]

Donnelly et al's study of social workers' views in 2015 reported that '[r]isk was found to regularly influence the decisions of professionals and family members' and that 'professional practice is defensive, often to the detriment of the older person who wanted to live in a manner deemed "risky" by others'.[139] Social workers reported that health and social care professionals 'are often concerned about the impact of perceived risky decisions on themselves as professionals'[140] and are afraid of being blamed 'if something goes wrong'.[141] As a result, Donnelly et al noted, 'the rights of the older person were often ignored and pressure brought to bear on the older person to for example, move into long-term care where it was viewed they would be "safer"'.[142]

The case of *McDonald v United Kingdom*[143] demonstrates that care professionals may refuse mobility assistance to older people who are continent but frail, and insist on their use of incontinence pads, on the basis that the person needs to be kept safe from falls even if the older person does not share this view. What is more, courts adjudicating human rights claims may approve of this approach. In *McDonald*, the ECtHR and the UK Supreme Court accepted the local authority's view that incontinence pads would afford the applicant the 'maximum protection from injury', even though this assessment only considered the risk of falls and failed to acknowledge any risk to other aspects of the applicant's wellbeing.[144] Notably, the Austrian national preventive mechanism has highlighted that '[s]tudy results indicate that residents are not kept safe from falling by means of measures that restrict freedom' and that restricting freedom of movement 'initiates an insidious cycle [as] due to the forced immobilisation, the

[136] ibid89, 205.
[137] ibid 205.
[138] ibid 216.
[139] Donnelly and others, *'I'd Prefer to Stay at Home but I Don't Have a Choice'* (n 124) 5.
[140] ibid 21.
[141] ibid.
[142] ibid 5.
[143] *McDonald v United Kingdom* (n 16).
[144] such as her mental wellbeing, or health-related consequences of prolonged incontinence pad use.

body loses more and more muscle strength and balance, which ultimately increases the danger of falling even further'.[145]

(v) *Discriminatory attitudes*

In *VC v Slovakia*, the ECtHR recognised as a source of vulnerability the discriminatory attitudes held by medical professionals towards Roma women, which led to the de facto denial of the applicant's decision-making capacity.[146] In the context of older people's access to continence care, professional decision-making regarding older people's continence care may also be influenced by harmful stereotypes and discriminatory views. Ageist attitudes may obscure older people's experiences of suffering, and the contributions of others to that suffering.[147]

As noted in Chapter 3, the former Special Rapporteur on health, Anand Grover, has argued that older people are 'often perceived as a "lapsed" segment of society'.[148] He contends that '[t]here is a pernicious and deeply ingrained notion that once a person ages, he/she becomes incapable of contributing to society, chronically ill and/or frail' and that '[s]uch prejudices often lead to a conclusion that not much can be done to help them'.[149] Arguably, these attitudes are evident in the belief of some care professionals (reported in several studies[150]) that incontinence is inevitable for older people. In *R(McDonald) v RBKC*, the local authority's Head of Assessment in the Adult Social Care Department explained in his witness statement that, while the local authority accepted that Ms McDonald was 'not clinically incontinent of urine', her impaired

[145] Austrian Ombudsman Board (AOB), *Annual Report 2015 on the activities of the Austrian National Preventive Mechanism (NPM), International Version* (Vienna, June 2006) 36. The AOB recommends interventions such as 'hip protectors, training of staff and call systems to summon nursing staff that can be easily reached' (at 37).
[146] *VC v Slovakia* (2014) 5 9EHRR 29 paras 146, 151.
[147] See the discussion in Chapter 2, Part II of the recognition of vulnerability in the form of discrimination in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *Hajrizi Dzemajl et al v Yugoslavia*, Communication No 161/00 (21 November 2002) UN Doc CAT/C/29/D/161/2000; *Opuz v Turkey* (2010) 50 EHRR 28; IACtHR, *Rosendo Cantu v Mexico* (n 119); UN General Assembly (UNGA), 'Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (3 August 2009) UN Doc A/64/215 para 40.
[148] UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 1) para 11.
[149] ibid para 38.
[150] See, for example, Joanne Mangnall and others, 'Continence problems in care homes: auditing assessment and treatment', (2013) 18(2) Nursing Older People 20, 20, citing Linda Nazarko, 'A new perspective on an old problem' (2001) 97(3) Nursing Times 52 and Mary H Palmer, Pearl S German and Joseph G Ouslander, 'Risk factors for urinary incontinence one year after nursing home admission' (1991) 14(6) Research in Nursing and Health 405.

mobility gave rise to a 'condition' often described as 'functional incontinence'.[151] This seems a discriminatory diagnosis; it justifies ignoring—and, in fact, harming—an older person's retained ability to carry out one of their most important physical functions on the basis that they are experiencing another form of disability. It attaches no importance to an older person's ability to maintain their continence when other aspects of their health are impaired. The diagnosis of 'functional incontinence' treats an older person as suffering from greater disability than they actually are, demonstrating a view of older people as individuals on an unstoppable trajectory of illness and decline.

(vi) *Education and training*

The attitudinal problems discussed above are also a problem of insufficient education and training. A lack of knowledge of,[152] and training in,[153] continence care has been explicitly acknowledged as a source of poor practices. More generally, the Independent Expert on the enjoyment of all human rights by older persons (Independent Expert) has highlighted the 'shortage of social and health-care professionals with formal education in geriatrics and gerontology, and with gender and disability-based expertise',[154] meaning that 'health-care professionals are not fully trained to help and understand older persons'.[155] The Special Rapporteur on health contends that 'States should allocate more resources for the provision of geriatric healthcare'[156] and that all healthcare workers, irrespective of specialty or profession, should be 'trained on the right to health so that they interact with elderly patients in an appropriate, considerate and non-discriminatory manner'.[157]

[151] See *R (McDonald) v RBKC* (n 15) para 30.
[152] See, for example, De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 105.
[153] See, for example, Francis Independent Inquiry Report (n 9) 22; Mangnall and others, 'Continence problems in care homes' (n 150) 21: 'Rates of incontinence among residents in the homes in our audit ranged from 60 to 100 per cent….However, many staff had not attended any training regarding continence care in the past 12 months. A significant number had never attended any continence care training. These findings are not unusual; a survey of nurses working in care homes in Scotland found that only 29 per cent of staff (who completed the survey) had attended continence care training in the previous year' (citing Royal College of Nursing, *Voices from the Independent Sector – Nurses Working in Care Homes in Scotland* (Edinburgh, 2005)).
[154] UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 para 76.
[155] ibid para 77.
[156] UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 1) para 18.
[157] ibid.

(vii) *Resources*

There is considerable evidence that inadequate staffing—both in terms of staff expertise and the number of staff available to provide care—is a key cause of inadequate continence care for older people.[158] Several commentators agree that continence care is routinely delegated to the 'least qualified staff who have the lowest status in the hierarchy',[159] are time poor[160] and have a limited knowledge base.[161] Tadd et al characterise this as a 'development exacerbated by policies to reduce labour costs whilst achieving higher quality'.[162] De Bellis contends that the Australian government 'has ignored the need for qualified nurses' in the residential aged care system and has 'allowed the industry to hire inadequately skilled staff by designating elements of core nursing care for those with high dependencies as "health and personal care"'.[163]

The Independent Expert argues that the devaluing of care work, and its under-resourcing, harms carers at the same time as it harms older people. She notes that care workers 'tend to be undervalued, underpaid and undertrained'[164] and that their work is 'often characterized by a

[158] See De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 108:
Studies identify a direct correlation between staffing levels and the quality of care provided, and between staffing levels and the optimal care able to be provided (citing Mary Courtney and Lyndall Spencer, 'Clinical Indicators of Quality in Residential Aged Care Facilities' (2000) 7(2) Collegian 14; Susan Irvin, 'The experiences of the registered nurse caring for the person dying of cancer in a nursing home' (2000) 7(4) Collegian 30; Lorraine Venturato, Ursula Kellett and Carol Windsor, 'Nurses' experiences of practice and political reform in long-term aged care in Australia: Implications for the retention of nursing personnel' (2007) 15(1) Journal of Nursing Management 4). Limited human resources in aged care facilities contributes to a rushed and hurried provision of nursing care in Australia to the detriment of nursing and resident outcomes (citing, inter alia, Commonwealth of Australia (CofA), *National review of nursing education, Australian aged care nursing: A critical review of education, training, recruitment and retention in residential and community settings* (Department of Education, Science and Training, Canberra, 2002); Susan Irvin, ibid; Wendy Moyle and others, 'Validation of nurse caring behaviours in residential aged care' (2005) 23(1) Geriaction 13; 2000; Patricia Parmelee, 'Quality improvement in nursing homes: the elephants in the room' (2004) 52(12) Journal of the American Geriatrics Society 2138; Sue Richardson and Bill Martin, *The Care of Older Australians—A Picture of the Residential Aged Care Workforce* (National Institute of Labour Studies, Flinders University 2004)).
[159] See, for example, Tadd and others, *Dignity in Practice* (n 13) 105; the authors note that this is also identified within the literature, citing Jenny Firth-Cozens and Jocelyn Cornwell, *The Point of Care: Enabling Compassionate Care in Acute Hospital Settings* (The King's Fund 2009) <www.kingsfund.org.uk/sites/default/files/field/field_publication_file/poc-enabling-compassionate-care-hospital-settings-apr09.pdf> accessed 3 September 2017. See also De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 101.
[160] See, for example, De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 103.
[161] ibid.
[162] Tadd and others, *Dignity in Practice* (n 13) 105, citing Davina Allen, 'The nursing-medical boundary: a negotiated order?' (1997) 19(4) Sociology of Health and Illness 498.
[163] De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 101.
[164] UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (n 154) para 80.

heavy workload, long working hours and emotional exhaustion'.[165] The Independent Expert notes 'evidence that the satisfaction of persons receiving care correlates with the well-being of their care workers'.[166]

Resource constraints and a desire to reduce costs may be masked by rhetoric about providing or improving care.[167] This is potentially doubly problematic for the application of the anti-torture norm because it may invite deference to professional decision-making in addition to reluctance to engage with questions of resource allocation. In the *McDonald* case, the decision to withdraw home carers and replace their assistance with incontinence pads was described by the local authority in its care plan at the time as being intended to keep Ms McDonald safe from falls and to afford her 'a degree of privacy and independence'.[168] However, the subsequent litigation made clear that costs savings were also at its heart. In 2006, an audit of primary care trusts in the UK revealed that many had started providing incontinence pads to care homes (ostensibly an increase in resources), but they had done so in the 'absence of any increase in resources for clinical assessment and treatment therapies'.[169] As a result, according to Mangnall et al, many older people in care homes were being given incontinence pads without any assessment of their needs or the potential benefits of other strategies.[170]

Donnelly et al suggest that older people's lack of access to the care that they need may not be due simply to a lack of resources in the government budget for older people's care. Instead, governments may have made decisions to prioritise certain, even more expensive, forms of care for older people over others based on policies that do not adequately consider older people's preferences and experiences. For example, Donnelly et al argue that '[c]are at home is cheaper than care that is provided in institutions such as hospitals and nursing homes',[171] and

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[165] ibid.
[166] ibid.
[167] See, for example, UK Parliament, *The Human Rights of Older People in Healthcare* (n 34) 10: 'The Department of Health, in its written evidence to our inquiry, does not explicitly acknowledge any of the problems identified by other witnesses, but instead focuses rather defensively on the financial investment made into the NHS and the many initiatives launched by government in relation to older people'. See also, for example, De Bellis, 'Australian Residential Aged Care and the Quality of Nursing Provision' (n 12) 101: 'The government rhetoric claims the residential aged care system is a 'best' model, however, there is a failure to recognise the need for qualified nurses'.
[168] *R (McDonald) v RBKC* (n 15) para 11.
[169] See Mangnall and others, 'Continence problems in care homes' (n 150) 20.
[170] ibid.
[171] Donnelly and others, *'"I'd Prefer to Stay at Home but I Don't Have a Choice"* (n 124) 15, citing Social Care Institute for Excellence, 'Commissioning Home Care for Older People' (2014) <www.scie.org.uk/publications/guides/guide54/files/guide54.pdf> accessed 29 September 2017.

that '[r]esearch indicates that most older people would prefer to live in their own homes and to have support services provided to enable them to do so for as long as possible'.[172] However, the authors note that legislation in Ireland provides statutory entitlements only in respect of long-term residential care for older people and hospital care, rather than care in the community, and funding is therefore diverted away from care services that older people themselves would prefer to receive.[173]

Conclusion

This chapter has demonstrated that older people's lack of access to adequate continence care could be understood as a dignity interference sufficient to violate the rule against torture and ill-treatment if analysed according to the conception of a dignity violation proposed in Chapter 2. Given the range of systemic causes of inadequate continence care discussed above, it seems appropriate to classify the problem as one of potential ill-treatment, rather than torture (although this is not to say that it is impossible for the intent and purpose required to meet the definition of torture to exist in older people's care contexts).

In principle, the severity of the experiences described in Part I of this chapter could be evaluated without explicit recourse to dignity, and instead by reference to factors ordinarily considered in the minimum threshold of severity assessment: for example, one's older age, state of health, physical suffering, humiliation, and situation of dependency. However, this chapter has demonstrated that such factors, and their cumulative impact on the older person experiencing a lack of access to adequate continence care, have been obscured by a range of formalistic doctrinal and conceptual constructs in law and discriminatory attitudes and care practices in society. Part II of this chapter argued that there is a need for dignity to re-focus attention on older people's human experiences of suffering in the care context, in order to ensure more effective protection from mistreatment. Chapter 2 highlighted McCrudden's argument that dignity often operates in judicial reasoning to 'tip the scales' of a balancing exercise or impose 'strict scrutiny' in a proportionality assessment.[174] In a similar vein, it is argued, dignity

[172] Donnelly and others, *'"I'd Prefer to Stay at Home but I Don't Have a Choice"* (n 124) 10, citing Ursula Barry, 'Elderly Care in Ireland - Provisions and Providers', UCD School of Social Justice Working Papers: 10c(1):1-34 (University College Dublin 2010).
[173] See ibid 4, 5, 10, 13, 14.
[174] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655, 717.

reasoning has the potential to ensure that the minimum threshold of severity assessment under the anti-torture norm treats the human experience as its paramount and over-riding concern. Indeed, it is contended that dignity's position as the core value underpinning the rule against torture and ill-treatment demands this approach.

As explained in Chapter 1, the existence of ill-treatment (or, more realistically, its recognition by human rights actors) causes the negative and positive obligations under the anti-torture norm to come into operation. This chapter's analysis demonstrates that the thesis' conception of a dignity violation not only assists in specifying torture or ill-treatment but also—in the process of identifying the powerlessness that gives rise to torture or ill-treatment—reveals the structural causes of dignity violations that should be targets for states' positive obligations. The chapter identifies numerous sources of powerlessness that contribute to older people's experiences of dignity violations in the continence care context. It is argued that existing anti-torture jurisprudence demonstrates the framework's ability, in principle, to adapt to respond to these sources of powerlessness.

For example, Part III recognised that some older people suffer from a lack of adequate continence care because they are dependent on an unresponsive state for such care. Dependence on the state, as O'Cinneide recognises,[175] has already been recognised by the ECtHR to be the basis for positive obligations under the anti-torture norm to provide resources. Albeit in contexts of state control or direct state action towards the person (as discussed in Chapter 2), the ECtHR has specified an obligation to provide 'organised assistance' with continence care in prison,[176] an obligation to provide alternative care for children suffering abuse in the home,[177] and an obligation to provide resources to asylum seekers who have no other way of meeting their basic needs.[178] These obligations are additional to the generally recognised positive obligations on states to provide the resources necessary to ensure respect for the dignity of individuals who are deprived of their liberty.

[175] Colm O'Cinneide, 'A modest proposal: destitution, state responsibility and the European Convention on Human Rights' (2008) 5 European Human Rights Law Review 583, 585. See further Chapter 1, Part II Section C.
[176] *Grimailovs v Latvia*, ibid para 162.
[177] *Z and Others v United Kingdom* (2002) 34 EHRR 3.
[178] For example, *MSS v Belgium and Greece* (2011) 53 EHRR 2; *Tarakhel v Switzerland* (2015) 60 EHRR 28.

The chapter has demonstrated that resources are not the only answer to inadequate continence care, however. The discussion in Part III showed that in contexts where formal care services are being provided (either by state actors or non-state actors), older people may suffer from poor continence care practices on account of their powerlessness to have their preferences sought out and acted upon, their powerlessness to have their experiences of suffering recognised, and a related lack of staff expertise. It is argued that these sources of powerlessness demand the specification of a number of positive obligations pursuant to the overarching preventive and protective obligation under the anti-torture norm.

The chapter's analysis reveals that the anti-torture norm should require states to ensure that older people's legal capacity and de facto decision-making capacity (including the right to free and informed consent to medical interventions that interfere with the personality) is respected in care settings generally. States should further be required to ensure the availability of effective mechanisms for redress in the care context, including effective complaints and accountability mechanisms.

Not only does the CRPD demand that supported decision-making processes are a core requirement of these potential positive obligations, but the adaptation of the anti-torture framework to meet the CRPD's requirements could also provide the opportunity to specify positive obligations that respond more broadly to older people's experiences in care contexts. Arguably, the specification of a positive obligation on states to ensure the availability of advocacy support to all individuals in care settings could enable more effective protection of older people, whether or not they experience a disability, from dignity violations sufficient to violate the rule against torture or ill-treatment. Harding argues that formal complaints mechanisms in older people's care settings have proven ineffective because they do not take into account the relationality of care experiences.[179] She explains that they do not respond, for example, to informal carers' inability to pursue complaints at the same time as caring for a relative, or older people's worries about retribution by those upon whom they are dependent.[180] In this vein, Charpentier and Soulières argue that, instead of formal and impersonal complaints systems, monitoring needs to be based on 'meaningful social relationships that exist in a

[179] Harding, *Duties to Care* (n 38) 167–69.
[180] ibid.

context of proximity'.[181] Meanwhile, the former Special Rapportuer on health, Anand Grover, has stated that ensuring that older people's right to informed consent requires a 'customized, individualized' approach, that could be assisted 'possibly through peer networks'.[182]

There are already some positive obligations under the anti-torture norm that bear relation to the obligations advocated in the above paragraph and that therefore demonstrate the norm's potential to be interpreted in the way that the chapter proposes. Several treaty bodies have specified obligations to supervise institutional settings other than places of deprivation of liberty.[183] In addition, the treaty bodies have specified obligations to ensure access to complaints mechanisms for those who tend to face barriers, including communication and information barriers.[184] Education (of state officials) is also a well-established positive obligation under the norm.[185] It is also important to note that, as per the previous chapter's analysis, many older people are in fact deprived of their liberty in care contexts, which introduces an additional existing source of heightened scrutiny and positive obligations into the equation. The challenge, which this thesis argues may be met through a focus on dignity and vulnerability, is for the treaty bodies and other relevant actors to recognise the relevance and potential for existing aspects of the norm to embrace the experiences of individuals not adequately considered previously.

[181] Michèle Charpentier and Maryse Soulières, 'Elder Abuse and Neglect in Institutional Settings: The Resident's Perspective' (n 111) 351.

[182] UNHRC, 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (n 1) para 63.

[183] See the discussion in Chapter 1 Part II Section B(ii) of IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006 (Merits, Reparations and Costs) Series C No 149 and *O'Keeffe v Ireland* (2014) 59 EHRR 15.

[184] See, for example, *O'Keeffe v Ireland* (2014) 59 EHRR 15 para 148; IACtHR, *Valentina Rosendo Cantu et al v Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 216 paras 184, 229; CAT General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3 para 23.

[185] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 10.

CHAPTER 5: REDRESS FOR 'HISTORIC' TORTURE OR ILL-TREATMENT

Introduction

This chapter examines whether dignity and vulnerability reasoning could enable the interpretation of the anti-torture norm to provide more effective protection of older people's right to redress for so-called 'historic' torture or ill-treatment. Specifically, the chapter explores whether the right to redress under the norm could be recognised to exist (a) with respect to torture or ill-treatment perpetrated prior to a state's ratification of the relevant instrument enshrining the norm,[1] and (b) indefinitely (i.e. without expiring over time).

Around the world, the efforts of many groups of older people to obtain truth and justice regarding so-called 'historic' abuses demonstrate that the human impact of such abuses does not necessarily subside over time.[2] The Committee Against Torture's (CAT) General Comment No 3 acknowledges that the effects of torture or ill-treatment may intensify, rather than dissipating, in the absence of redress.[3] Notwithstanding the potential for the impact of torture or ill-treatment to increase the longer impunity lasts, survivors of so-called 'historic' torture or ill-treatment routinely face bureaucratic and procedural barriers to obtaining redress through domestic mechanisms.[4] Shelton maintains that many high profile 'historical injustices' involve

[1] The chapter refers to 'ratification' as shorthand for a treaty's entry into force in respect of a state, or the date of the state's recognition of the treaty body's jurisdiction if later.

[2] See, for example, the discussion in Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013) 115 of the 'long and tangled history of silence, denial, evasion, and compromised reparations attempts in the case of women sexually enslaved in military brothels run by the Japanese Army in World War II' and the 'continuing pursuit by African Americans of redress for slavery or for Jim Crow legal discrimination and segregation'. See also, for example, the discussion in Dinah Shelton, 'The World of Atonement' (n 5) 292 of claims brought against Germany by victims of World War II injuries and 'recent or current claims includ[ing] those of Native Americans in the United States and Canada, aboriginal peoples in Australia and New Zealand, diamond miners and other victims of apartheid in South Africa, and the families of disappeared persons in Latin America and North Africa'.

[3] United Nations (UN) Committee Against Torture (CAT) General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3 para 40: 'For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress.'

[4] State authorities may refuse to acknowledge complaints for reasons such as the absence of domestic legislation explicitly outlawing the abuse at the time that it occurred, the fact that the conduct was supported or sanctioned by the state in the past, or the notion that the conduct falls to be judged by the standards of a 'different time'. Investigations may be refused on the basis of the anticipated or presumed difficulties of investigating 'historic' events. Criminal prosecutions may be precluded by the statutory limitation of criminal liability or defendants' arguments that they cannot be guaranteed a fair trial due to the passage of time. Survivors may not be able to access the civil courts due to statutory limitation periods and rules against 'delay', and governments may in turn use the absence of court judgments as a reason to avoid acknowledging any wrongdoing. See for example Justice for Magdalenes Research (JFMR), 'NGO Submission to the UN Committee Against Torture in respect of Ireland

systematic abuses which do not fit 'the remedial paradigm of individual perpetrator, individual victim and proven quantifiable losses'.[5] She argues that the nature of such abuses may 'pose formidable obstacles to reparations, especially when coupled with procedural barriers like statutes of limitations and the principle against non-retroactivity of law'.[6] Where redress is unavailable through ordinary domestic legal procedures, survivors must rely on the political will of governments to address their claims on an ad hoc basis. McAlinden and Shelton acknowledge that state responses to 'historic' abuses have varied widely.[7]

Shelton contends that there is no clear legal basis for claims for reparation for 'historical injustice'.[8] She states that 'public interest in human rights, the rule of law, and legal certainty suggests the need to develop a framework to determine the legitimacy and modality of responding to reparations claims for historical injustice.'[9] This chapter attempts to respond to the challenge that Shelton presents at least with respect to torture and ill-treatment. The chapter contends that dignity and vulnerability reasoning could enable the treaty bodies and other human rights actors to conceptualise both torture and ill-treatment as being capable of constituting a 'continuing situation'. It is argued that understanding torture and ill-treatment in this way would provide the basis for the development of a right to redress for torture and ill-treatment regardless of when in the past the conduct occurred.

Part I of the chapter explores the current doctrinal approach to the right to redress for torture and ill-treatment perpetrated in past decades. It highlights that the CAT, having developed a 'comprehensive reparative concept' that could in principle respond to the systematic 'historic' torture or ill-treatment of the kind Shelton refers to,[10] appears to recognise a right to redress for torture and ill-treatment regardless of when the conduct occurred. Part I argues, however, that the reasoning behind the CAT's approach is incompatible with the international law doctrine of non-retroactivity of treaty obligations and inconsistent with the other treaty bodies'

(for the session)' (July 2017) <http://jfmresearch.com/wp-content/uploads/2017/07/JFMR-report-to-CAT-for-the-session-2017-Main-Report.pdf> accessed 5 October 2017 and the discussion in Part III regarding the obstacles facing survivors of Ireland's Magdalene Laundries.

[5] Dinah Shelton, 'The World of Atonement: Reparations for Historical Injustices' (2003) 50(3) Netherlands International Law Review 289, 291.

[6] ibid.

[7] Anne-Marie McAlinden, 'An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland', (2013) 33(2) Legal Studies 189; Shelton, 'The World of Atonement' (n 5) 297–302.

[8] Shelton, 'The World of Atonement' (n 5) 292.

[9] ibid.

[10] CAT General Comment No 3 (n 3) para 2.

jurisprudence. In response to this incoherence, Part I contends that instead of focusing on the 'continuing effects' of torture and ill-treatment, the CAT and other treaty bodies could base a right to redress for pre-ratification torture or ill-treatment and indefinitely on a conception of torture or ill-treatment as a 'continuing situation' for as long as redress is denied.

Part II of the chapter applies a dignity and vulnerability analysis to victims' experiences of impunity for torture or ill-treatment in order to demonstrate the potential for such experiences to be characterised as 'continuing situations' of torture or ill-treatment. This part of the chapter draws heavily on Walker's theory that redress is fundamentally concerned with 'reciprocal accountability relations'—in other words, with individuals' moral standing in relation to each other.[11] It is argued that state actions that render a victim of torture or ill-treatment powerless to obtain redress may interfere with dignity sufficiently to constitute torture or ill-treatment, and that the continuum of powerlessness experienced and the concrete impact of impunity on the personality may demonstrate the existence of a 'continuing situation'. Part II undertakes its analysis according to a framework of criteria for a 'continuing situation' gleaned from the human rights treaty bodies' recognition of enforced disappearance as the prototypical continuing act.

Part III applies the theoretical argument developed in Part II to a concrete case study: that of the continuing impunity for Ireland's Magdalene Laundries abuse. As the chapter explains in Part I, the CAT has found that survivors of the Magdalene Laundries are entitled to comprehensive redress under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), notwithstanding that Ireland ratified the Convention after all of the institutions had ceased operating. Given the doctrinal and conceptual uncertainty underlying the CAT's apparent recognition of a right to redress for torture or ill-treatment regardless of when it occurred, the facts of the Magdalene Laundries abuse and survivors' ongoing inability to obtain redress offer a fertile landscape with which to analyse the potential for more effective protection of the right.

[11] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2).

I. Current Approach to Redress for 'Historic' Torture or Ill-treatment

This part of the chapter begins by summarising the CAT's current understanding of the temporality and longevity of the right to redress under the anti-torture norm. It proceeds to examine the compatibility of the CAT's approach with the international law doctrine of non-retroactivity of treaty obligations and the jurisprudence of the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR) and Human Rights Committee (HRC). This part concludes by arguing that there is a need for a conceptual shift in the understanding of torture and ill-treatment, away from the presumption that these violations are invariably 'instantaneous' and instead to a conceptualisation of both torture and ill-treatment as capable of amounting to a 'continuing situation'.

A. *The CAT's approach*

The CAT's General Comment No 3 declares that 'States parties shall ensure that all victims of torture or ill-treatment, *regardless of when the violation occurred* or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress' (emphasis added).[12] According to this statement, the CAT understands the right to redress for torture or ill-treatment to exist from the date that torture or ill-treatment is initially perpetrated until the date that redress is afforded, without exception.

The CAT's judgment in *Gerasimov v Kazakhstan*[13] in 2012 appears to confirm that this is the Committee's understanding of the right to redress even with regard to torture or ill-treatment initially perpetrated prior to a state's ratification of the UNCAT. In *Gerasimov*, the CAT found violations of Article 1 in conjunction with Article 2 UNCAT, and Articles 12, 13 and 14 UNCAT, notwithstanding that the torture complained of occurred prior to Kazakhstan's declaration of the Committee's competence under Article 22 of the Convention. On the preliminary question of temporality, the CAT held that it 'can examine alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under article 22 if the effects of these violations continued after the declaration, and if the effects constitute in themselves a violation of the Convention'.[14] The Committee

[12] ibid para 40.
[13] CAT, *Gerasimov v Kazakhstan*, Communication No 433/2010 (24 May 2012) UN Doc CAT/C/48/D/433/2010.
[14] ibid, para 11.2.

found that, due to the state authorities' decision following the Article 22 declaration not to open a criminal investigation, 'the State party's failure to fulfil its obligations to investigate the complainant's allegations and to provide him with redress continued after the State party recognized the Committee's competence'.[15] Therefore, it was held, the CAT had jurisdiction over the entire complaint.

Gerasimov v Kazakhstan is one of only three published decisions of the CAT on the issue of temporal jurisdiction, and it is the only one of those in which the Committee exercised jurisdiction to decide whether pre-declaration treatment amounted to torture or ill-treatment and whether the right to redress had been violated.[16] It is thus fair to say that the CAT's recognition of a right to redress for pre-ratification torture or ill-treatment is still at a fledgling stage. However, the CAT's Concluding Observations on Ireland's periodic reports in 2011 and 2017, explained in the below paragraph, demonstrate that even if the Committee's approach to the right to redress is at an early stage, it is being steadily applied in practice.

In both 2011 and 2017, the CAT made numerous recommendations to Ireland regarding its history of systemic, church-related institutional abuses during the twentieth century.[17] The Committee paid particular attention to the incarceration and forced labour of thousands of girls

[15] ibid.

[16] The first of the CAT's decisions concerning temporality, *AA v Azerbaijan*, Communication No 247/2004 (25 November 2005) UN Doc CAT/C/35/D/247/2004 rejected the complaint as inadmissible on the grounds that it had been litigated before the ECtHR. In its most recent decision regarding temporality, *NZ v Kazakhstan*, Communication No 495/2012 (28 November 2014) UN Doc CAT/C/35/D/495/2012, the CAT decided the issue of whether or not the State's investigation of pre-declaration allegations of torture in police custody had violated articles 12 and 13 of the Convention (it found no violation). However, the CAT held that it lacked temporal jurisdiction to decide whether or not the alleged pre-declaration conditions of pre-trial detention amounted to ill-treatment in violation of the Convention. The CAT's reasoning for declining jurisdiction was that 'the allegations relate to events that took place before the State party made a declaration under article 22 of the Convention and do not appear to have been raised at any point before the domestic authorities' (para 12.2). *NZ* appears to undermine the CAT's previous decision in *Gerasimov* that it had jurisdiction to assess whether pre-declaration conduct contributed to, or amounted to, a substantive violation of the anti-torture norm. *NZ* is perhaps distinguishable because the substantive complaint had not been raised at the domestic level and was therefore inadmissible for a reason other than lack of temporal jurisdiction. An additional difference between the substantive complaints in *Gerasimov* and *NZ* is that, in *Gerasimov*, the State did not contest the medical evidence of the complainant's injuries ((n 13) para 12.2). However, the contradiction between *NZ* and *Gerasimov* may also signal a lack of clarity, and, perhaps, of confidence, in the CAT's justification for the position indicated in General Comment No 3 and *Gerasimov* that the right to redress applies regardless of when in the past torture or ill-treatment occurred.

[17] CAT, 'Concluding Observations on the initial report of Ireland' (17 June 2011) UN Doc CAT/C/IRL/CO/1 paras 20–21, concerning reformatory and industrial schools and Magdalene Laundries; CAT, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2 paras 23–30, concerning reformatory and industrial schools, Magdalene Laundries, Mother and Baby Homes, forced and illegal adoptions and symphysiotomy (surgical division of a pelvic joint during or in advance of childbirth).

and women in Magdalene Laundries between 1922 and 1996,[18] and included its recommendations on this topic in the periodic reporting 'follow-up' procedure on both occasions.[19] The CAT recommended that the State establish thorough and impartial investigations into all alleged abuses in the Magdalene Laundries, prosecute perpetrators where appropriate, and ensure that survivors obtain redress, including an enforceable right to compensation and as full rehabilitation as possible.[20] Notably, Ireland ratified the UNCAT on 11 April 2002, years after the last Magdalene Laundry in Ireland closed and decades after the closure of the majority of the institutions.[21]

The CAT has not provided particularly detailed reasoning to justify its recognition of a right to redress for torture or ill-treatment that occurred prior to ratification of the UNCAT and indefinitely. To the extent that General Comment No 3 provides a rationale for the CAT's approach, it is that victims or survivors of torture or ill-treatment continue to suffer 'harm' and that the 'effects' of their treatment are continuous.[22] General Comment No 3 acknowledges that '[f]or many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress'.[23] The General Comment also refers to 'the continuous nature of the effects of torture'.[24] The CAT's decision in *Gerasimov*, meanwhile, focuses on the continuing 'effects' of torture or ill-treatment, as noted above.

The next two sections of this part explore the compatibility of the CAT's approach with the international law doctrine of non-retroactivity of treaty obligations and with the jurisprudence of the HRC, IACtHR and ECtHR. It is contended that the reasoning behind the CAT's recognition of a right to redress for pre-ratification torture or ill-treatment is incompatible with

[18] CAT, 'Concluding Observations on the initial report of Ireland', (n 17) para 21; CAT, Concluding Observations on the second periodic report of Ireland', (n 17) paras 25–26.
[19] CAT, 'Concluding Observations on the initial report of Ireland' (n 17) para 33; CAT, Concluding Observations on the second periodic report of Ireland' (n 17) para 37.
[20] CAT, 'Concluding Observations on the initial report of Ireland' (n 17) para 21; CAT, Concluding Observations on the second periodic Report of Ireland' (n 17) paras 25–26.
[21] Ireland, 'Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries' (2013), Chapter 3 < www.justice.ie/en/JELR/Pages/MagdalenRpt2013> accessed 5 September 2017.
[22] CAT General Comment No 3 (n 3) para 40.
[23] ibid.
[24] ibid.

the non-retroactivity doctrine. It is also explained that the CAT's approach is inconsistent with other human rights treaty bodies' jurisprudence.

B. *Non-retroactivity of treaty obligations*

In international treaty law, as far as temporal jurisdiction is concerned, there is a significant difference between a 'continuing situation' of a treaty violation and the 'continuing effects' of a treaty violation. This is true even though, somewhat confusingly, the human rights treaty bodies have found that either can amount to a 'continuing violation'.[25]

Article 28 of the Vienna Convention on the Law of Treaties (VCLT) provides that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions *do not bind a party in relation to any act or fact which took place or any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party' (emphasis added).[26] The International Law Commission's (ILC) Articles on State responsibility for internationally wrongful acts explain that Article 28 VCLT imposes state responsibility for treaty violations that form a 'continuing act' even if the act began prior to the treaty's entry into force, while precluding state responsibility for violations prior to the treaty's entry into force that produced only 'continuing effects'. The ILC Articles on State responsibility provide that: 'The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.'[27] The ILC Articles provide further: 'The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.'[28]

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[25] As discussed in parts (i) and (ii) of this section.

[26] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 28. According to Buyse, '[a]lthough ratification of this Convention is not universal, part of its contents are considered to reflect international customary law. The same goes for the specific principle of non-retroactivity: the customary rule of intertemporal law (a fact has to be examined according to the rules existing at the time it occurred) logically entails this': Antoine Buyse, 'A Lifeline in Time–Non-retroactivity and Continuing Violations under the ECHR' (2006) Nordic Journal of International Law 63, 65 fn 7 citing Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 429 and Donald W Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law, London, 2001).

[27] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Annual Report of the ILC on its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) A/56/10 ch IV, endorsed by UNGA Res 56/83 (12 December 2001) UN Doc A/RES/58/63, Article 14 (Extension in time of the breach of an international obligation), para 1.

[28] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, ibid Article 14, para 2.

Whether or not a state is responsible under Article 28 VCLT for a treaty violation is inextricably linked to the right to redress. Several of the human rights treaty bodies have confirmed the perhaps self-evident principle that the right to redress depends upon the existence of a treaty violation.[29] Therefore, in order for the CAT to recognise the right to redress for pre-ratification torture or ill-treatment, it must have the jurisdiction to find that torture or ill-treatment occurred.

As explained above, Article 28 VCLT and the ILC Articles on State responsibility provide that treaty bodies will only have jurisdiction to adjudicate substantive allegations of pre-ratification torture or ill-treatment if the conduct complained of formed part of a 'continuing act' or 'continuing situation' that persisted past the date of the state's ratification of the relevant instrument. This means that the CAT's specific reliance on the 'continuing effects' of pre-ratification violations of the UNCAT is insufficient to ground its exercise of jurisdiction over substantive allegations of pre-ratification torture or ill-treatment and thus its recognition of a right to redress for pre-ratification torture or ill-treatment. The international law doctrine discussed above makes clear that, in order to have the jurisdiction to recognise a right to redress for pre-ratification torture or ill-treatment, the CAT would need to identify such violations as giving rise to a 'continuing situation' or 'continuing act' that persisted past the date of the state's ratification of the UNCAT.

C. *Other treaty bodies' approaches*

The temporality-focused jurisprudence of the IACtHR, HRC and ECtHR bears out the distinction between 'continuing effects' of a pre-ratification violation that has ceased, on the one hand, and a 'continuing act' or 'continuing situation' of a treaty violation that includes pre-ratification elements, on the other.

The following paragraphs discuss the jurisprudence of the IACtHR, HRC and ECtHR concerning temporal jurisdiction in respect of enforced disappearance and torture or ill-

[29] In *SE v Argentina*, the Human Rights Committee stated that 'under article 2 [ICCPR] the right to a remedy arises only after a violation of a Covenant right has been established': HRC, *SE v Argentina*, Communication No 275/1988 (26 March 1990) UN Doc CCPR/C/38/D/275/1988 para 5.3. In *Janowiec v Russia*, the ECtHR held that 'the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date': *Janowiec v Russia* (2014) 58 EHRR 30 para 130, citing *Kopecky v Slovakia* (2005) 41 EHRR 43 para 38.

treatment. The discussion shows that when the IACtHR and HRC recognise a 'continuing situation' or 'permanent act' of a substantive treaty violation ranging from before until after ratification, the treaty bodies adjudicate the entirety of the substantive violation (including its pre-ratification elements) and all obligations arising from it, including redress. The discussion also shows that when the IACtHR, HRC and ECtHR recognise only 'continuing effects' of a pre-ratification substantive violation that does not itself continue, the treaty bodies adjudicate only the effects (if they amount in themselves to post-ratification treaty violations) and not the substantive pre-ratification violation.

(i) *Enforced disappearance jurisprudence*

The IACtHR, ECtHR and HRC have all recognised enforced disappearance to constitute a 'continuing situation'.[30] These treaty bodies' recognition of enforced disappearance as a 'continuing situation' echoes the 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearance.[31] The Declaration provides that '[a]cts constituting enforced disappearance shall be considered a continuing offence as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared'.[32]

In its 2011 General Comment, the Working Group on Enforced or Involuntary Disappearances stated that 'an enforced disappearance is a unique and consolidated act, and not a combination of acts', and as a result its adjudication 'should not be fragmented'.[33] Referring to enforced disappearances that began before entry into force of the relevant treaty obligations, the

[30] See IACtHR, *Case of Gomez Lund et al ("Guerrilha do Araguaia") v Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 219 para 17; *Varnava and others v Turkey*, App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 148; HRC, *S Jegatheeswara Sarma v Sri Lanka*, Communication No. 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000 para 6.2; also para 9.1 onwards. See also IACtHR, *Case of Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988 (Merits) Series C No 4 (1988); (1989) 28 ILM 291 para 155; IACtHR, *Case of Chitay Nech et al v Guatemala*, Judgment of 25 May 2010 (Preliminary Objections, Merits, Reparations, and Costs) Series C No 212 paras 81, 87; IACtHR, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Judgment of 1 September 2010 (Merits, Reparations and Costs) Series C No 217 paras 59–60). See further Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' in UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc A/HRC/16/48,
preamble.

[31] UN Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Res 47/133 (1 December 1992) UN Doc A/RES/47/133.

[32] UN Declaration on the Protection of All Persons from Enforced Disappearances, ibid Article 17(1).

[33] Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' in UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc A/HRC/16/48
para 3.

Working Group explained that 'the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole'.[34] While the ECtHR has a more limited understanding of its temporal jurisdiction than the Working Group,[35] the IACtHR and HRC have both followed the Working Group's approach to exercising jurisdiction over enforced disappearances that began prior to ratification. These treaty bodies have found substantive treaty violations, including of the rule against torture and ill-treatment, on the basis of conduct pre-dating ratification that initiated or perpetuated an enforced disappearance.[36]

(ii) *Torture or ill-treatment jurisprudence*

The approach of the IACtHR, HRC and ECtHR to temporal jurisdiction regarding torture and ill-treatment is different. In contrast to enforced disappearance, the IACtHR, HRC and ECtHR all appear to agree that torture and ill-treatment are, by definition, 'instantaneous' acts. In *Alfonso Martin del Campo-Dodd v United Mexican States*, the IACtHR held that '[e]ach act of torture is consummated or terminated within itself, the perpetration thereof not extending over time'.[37] The case law of the ECtHR and HRC conveys the same understanding.[38] Therefore, these treaty bodies understand torture and ill-treatment to be incapable of constituting a

[34] ibid.

[35] See, for example, *Varnava and others v Turkey*, App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009). Although in *Varnava*, the ECtHR found that a disappearance gave rise to a 'continuing situation', the Court nonetheless refused to adjudicate on aspects of the continuing situation which took place prior to Turkey's recognition of the right of individual petition to the Court in January 1987; it held that 'any complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1974 are outside the Court's temporal jurisdiction' (para 134). In effect, dividing up the 'continuing situation', the ECtHR in *Varnava* made findings only in relation to the continuing procedural violations of Articles 2 and 5 ECHR that had occurred since January 1987, namely the 'failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974' (paras 194, 208).

[36] See, for example, HRC, *Jegatheeswara Sarma v Sri Lanka*, Communication No 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000 para 9.4; IACtHR, *Case of Gomez Lund et al ("Guerrilha do Araguaia") v Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 219 paras 121, 125, 155.

[37] IACtHR, *Alfonso Martín del Campo-Dodd v United Mexican States*, Judgment of 3 September 2004 (Preliminary Objections) Series C No 113 para 78. See also IACtHR, *Rio Negro Massacres v Guatemala* Judgment of 4 September 2012 (Preliminary objection, Merits, Reparations and Costs) Series C No 250 para 39; IACtHR, *Moiwana Community v Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) Series C No 145 para 92.

[38] See, for example, *Mocanu v Romania* (2015) 60 EHRR 19 paras 205–06; HRC, *Singarasa v Sri Lanka*, Communication No 1033/2001 (21 July 2004) UN Doc CCPR/C/81/D/1033/2001 (2004) paras 3.5 and 6.5; HRC, *Kouidis v Greece*, Communication No 1070/2002 (28 March 2006) UN Doc CCPR/C/86/D/1070/2002 para 6.4.

'continuing situation' and they refuse to exercise jurisdiction over substantive allegations of pre-ratification torture or ill-treatment.[39]

Nonetheless, these treaty bodies recognise that procedural violations relating to alleged pre-ratification torture or ill-treatment may continue past ratification and amount to 'continuing violations' of the relevant treaty.[40] So, for example, the IACtHR has repeatedly held that it has jurisdiction to adjudicate states' post-ratification compliance with their procedural obligations to investigate and to provide access to justice regarding alleged pre-ratification torture or ill-treatment or extrajudicial killing.[41] The IACtHR views the investigative obligation as having arisen at the time of the pre-ratification acts and remained 'pending' at the date of ratification.[42] The Court has held that violations of Articles 8 and 25 of the American Convention on Human Rights (ACHR)[43] can arise from 'acts or omissions characterized as autonomous facts that occurred when the Court acquired temporal competence'[44] and 'can constitute specific and autonomous violations concerning denial of justice occurring after the recognition of the Court's jurisdiction'.[45]

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[39] See, for example, IACtHR, *Garcia Lucero et al v Chile*, Judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No 267 para 37; IACtHR, *Alfonso Martín del Campo-Dodd v United Mexican States*, Judgment of 3 September 2004 (Preliminary Objections) Series C No 113 para 78; IACtHR, *Rio Negro Massacres v Guatemala*, Judgment of 4 September 2012 (Preliminary objection, Merits, Reparations and Costs) Series C No 250 para 39; *Mocanu v Romania* (2015) 60 EHRR 19 paras 205–06; HRC, *Singarasa v Sri Lanka*, Communication No 1033/2001 (21 July 2004) UN Doc CCPR/C/81/D/1033/2001 (2004) paras 3.5 and 6.5; HRC, *Kouidis v Greece*, Communication No 1070/2002 (28 March 2006) UN Doc CCPR/C/86/D/1070/2002 para 6.4

[40] The HRC appears not yet to have explicitly considered the question of whether there is a continuing procedural obligation to investigate alleged or suspected pre-ratification torture or ill-treatment, which may be adjudicated upon post-ratification. However, in *Sankara v Burkina Faso*, Communication No 1159/2003 (28 March 2006) UN Doc CCPR/C/86/D/1159/2003, the HRC implied that there is such a continuing procedural obligation in respect of pre-ratification extrajudicial killing by holding (at para 12.2) that the State's failure to investigate amounted to inhuman treatment of the deceased's family.

[41] IACtHR, *Moiwana Community v Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) Series C No 145 para 43; IACtHR, *Rio Negro Massacres v Guatemala*, Judgment of 4 September 2012 (Preliminary objection, Merits, Reparations and Costs) Series C No 250 para 235; IACtHR, *Garcia Lucero et al v Chile*, Judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No 267 para 39; IACtHR, *Serrano-Cruz Sisters v El Salvador*, Judgment of 23 November 2004 (Preliminary Objections) Series C No 118 para 84.

[42] IACtHR, *Moiwana Community v Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) Series C No 145 para 43; IACtHR, *Rio Negro Massacres v Guatemala* Judgment of 4 September 2012 (Preliminary objection, Merits, Reparations and Costs) Series C No 250 para 235.

[43] American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (ACHR) arts 8 (right to a fair trial), 25 (right to judicial protection).

[44] IACtHR, *Garcia Lucero v Chile*, Judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No 267 para 39.

[45] IACtHR, *Serrano-Cruz Sisters v El Salvador*, Judgment of 23 November 2004 (Preliminary Objections) Series C No 118 para 84.

In a set of recent judgments, the ECtHR also accepted that it has some jurisdiction regarding states' post-ratification compliance with their procedural obligations under Articles 2 and 3 of the European Convention on Human Rights (ECHR) to investigate 'instantaneous' pre-ratification substantive violations of the Convention.[46] In *Silih v Slovenia*, concerning a pre-ratification death, the Court held that 'the procedural obligation to carry out an effective investigation under art.2 has evolved into a separate and autonomous duty' and 'it can be considered to be a detachable obligation arising out of art.2 capable of binding the state even when the death took place before the critical date'.[47] The Court based its characterisation of the procedural obligation as 'autonomous' and 'detachable' on the fact that the investigative obligation arises whether or not the state is found responsible for a substantive violation.[48] The Court further held that the investigative obligation generally 'binds the state throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it'.[49]

The willingness of the ECtHR to recognise procedural 'continuing violations' regarding pre-ratification 'instantaneous' substantive violations is more circumscribed than that of the IACtHR, however. In *Silih v Slovenia*, the ECtHR espoused a 'genuine connection' test[50] that limits the Court's jurisdiction over procedural obligations concerning pre-ratification substantive violations to cases where (a) the alleged pre-ratification substantive violation occurred not more than 10 years prior to ratification,[51] and (b) 'much of the investigation… took place or ought to have taken place in the period following the entry into force of the Convention'.[52] If these two criteria are not met, in exceptional circumstances the 'genuine connection' test may be satisfied by the 'need to ensure the real and effective protection of the guarantees and the underlying values of the Convention'.[53] The 'genuine connection' test was heavily criticised by a group of partly dissenting judges in the case of *Janowiec v Russia*, because it prevented the ECtHR from exercising jurisdiction over Russia's alleged failure

[46] *Silih v Slovenia* (2009) 49 EHRR 37; *Janowiec v Russia* (2014) 58 EHRR 30; *Mocanu v Romania* (2015) 60 EHRR 19.
[47] *Silih v Slovenia*, ibid para 159.
[48] ibid para 156.
[49] ibid para 157, citing *Brecknell v United Kingdom* (2008) 46 EHRR 42 paras 66–72 and *Hackett v United Kingdom*, App no 34698/04 (ECtHR, 10 May 2005).
[50] *Silih v Slovenia* (n 46) paras 161–63. See also *Mocanu v Romania* (n 46) paras 208–09.
[51] *Janowiec v Russia* (n 46) para 146.
[52] ibid para 147.
[53] ibid para 149.

following ratification of the Convention in 1998 to properly investigate the 1940 massacre of thousands of Polish prisoners of war.[54]

(iii) *Redress for pre-ratification torture or ill-treatment*

Contrary to the CAT's approach, therefore, the other treaty bodies do not recognise a right to redress for torture or ill-treatment that happened prior to the relevant treaty's entry into force. The other treaty bodies recognise rights to an effective remedy and redress for the procedural 'continuing violations'.[55] In fact, they have each also recognised that a failure to investigate pre-ratification substantive violations may, in certain circumstances, amount to ill-treatment in itself.[56] However, it is argued that redress for post-ratification procedural violations relating to pre-ratification torture or ill-treatment is not equivalent to the 'comprehensive reparative concept' envisaged in the CAT's General Comment No 3,[57] because such redress does not respond specifically to the torture or ill-treatment that originally occurred.

To illustrate: in *Garcia Lucero v Chile*,[58] the IACtHR held that it lacked jurisdiction to adjudicate substantive allegations of political imprisonment, torture and exile before Chile's ratification of the ACHR (although the Court was content to assess whether Chile had violated its procedural obligations to investigate and ensure access to justice following ratification). As a result, the IACtHR held that it could 'not rule on…the damage derived from the "political imprisonment," torture, and exile of Mr Garcia Lucero, in relation to either Mr Garcia Lucero himself or to his family members, or the measures of reparation that might be satisfactory based

[54] *Janowiec v Russia* (n 46), Concurring Opinion of Judge Zagrebelsky joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajo. The majority of the ECtHR held that 58 years between the 'triggering' event and ratification was 'too long in absolute terms for a genuine connection to be established' (para 157); that no real investigative steps had taken place since 1998, nor had any additional relevant evidence come to light since 1998 (para 159); and that the exception to the usual 'genuine connection' test, focusing on the need to uphold Convention values, 'cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950' (paras 151, 160).

[55] *Mocanu v Romania* (n 46) paras 371–75; IACtHR, *Garcia Lucero v Chile* (n 44) para 230.

[56] IACtHR, *Rio Negro Massacres v Guatemala* (n 42) paras 238–44; IACtHR, *Moiwana Community v Suriname* (n 42) paras 87–103; HRC, *Sankara v Burkina Faso*, Communication No 1159/2003 (28 March 2006) UN Doc CCPR/C/86/D/1159/2003 para 12.2. The ECtHR has not followed the IACtHR and HRC in finding that the failure to investigate, or account for, an alleged pre-ratification 'instantaneous' violation may amount to ill-treatment in itself: *Janowiec v Russia* (n 46) paras 178–86. However, in several other cases of 'continuing situations' of forced disappearance, the ECtHR has found that family members have been subjected to ill-treatment on account of the authorities' refusal to provide information about the fate of the disappeared person: *Cyprus v Turkey* (2002) 35 EHRR 30 para 156; *Varnava v Turkey* (2010) 50 EHRR 21 para 138; *Kurt v Turkey* (1999) 27 EHRR 373; *Bazorkina v Russia* (2008) 46 EHRR 15.

[57] CAT General Comment No 3 (n 3) para 2.

[58] IACtHR, *Garcia Lucero et al v Chile* (n 44).

on these facts'.[59] The Court also held that it could not order measures of rehabilitation, because rehabilitation 'could be related to facts that fall outside the temporal competence of the Court and, therefore, regarding which the Court has not ruled'.[60] The Court did not order any measures to guarantee non-repetition either, contrary to its usual practice in cases of torture or ill-treatment.[61]

D. *Time limits for complaints*

Questions of temporality aside, the distinction between a 'continuing situation' of a treaty violation and an 'instantaneous' treaty violation is also relevant to the longevity of the right to redress for torture and ill-treatment.

In *Mocanu v Romania*,[62] the ECtHR set out its position regarding the time limit for complaints in respect of a 'continuing situation' of a Convention violation such as enforced disappearance. The Court stated that that '[i]n cases of a continuing situation, the period starts to run afresh each day and it is in general only when that situation ends that the six-month period actually starts to run'.[63] In other words, according to the ECtHR, a 'continuing situation' of a treaty violation carries with it an indefinite right to redress. By contrast, apart from the CAT, none of the treaty bodies appears to have stated that there is an indefinite right to redress for torture or ill-treatment. The ECtHR, Inter-American Commission on Human Rights (IACmHR) and HRC all apply time limits to complaints under the anti-torture norm.[64]

It is worth noting, however, that in some cases the IACmHR and ECtHR have extended the time limit for complaints regarding torture or ill-treatment on the basis of the violation's effects on the victim. In *Garcia Lucero v Chile*,[65] for example, notwithstanding that 29 years had elapsed since the torture complained of, the IACmHR held that the petition had been presented

[59] ibid para 37.
[60] ibid para 230.
[61] IACtHR, *'Cotton Field'* (n 20) paras 502–543.
[62] *Mocanu v Romania* (n 46).
[63] Ibid para 261.
[64] HRC, Rules of Procedure (11 January 2012) UN Doc CCPR/C/3/Rev.10, Rule 96; ACHR (n 43) art 46(1); IACmHR, Rules of Procedure (entered into force 1 August 2013) art 32; IACmHR, *Community of Rio Negro of the Maya Indigenous People and its Members v Guatemala*, Report No 13/08, Case 844-05 (Admissibility) (5 March 2008) para 88; *Mocanu v Romania* (n 46) paras 262, 264.
[65] IACmHR, *Leopoldo Garcia Lucero v Chile*, Report No 58/05, Petition 350/02 (Admissibility) (12 October 2005).

within a reasonable time. The Commission found that 'Mr Garcia was so severely tortured that he was physically and psychologically incapacitated for work, he was unable to learn English despite living in Great Britain for nearly 30 years, and his persistent efforts to secure compensation reveal his financial situation.'[66] The Commission concluded that 'it is not reasonable to require a person under such circumstances to travel from United Kingdom to Chile and initiate a legal action for reparations, when no person in the same situation as Mr Garcia has been compensated as the result of a judicial decision'.[67]

In *Mocanu v Romania*,[68] the ECtHR cited *Garcia Lucero v Chile*,[69] *Rio Negro Massacres v Guatemala*[70] and the CAT's General Comment No 3 in support of its finding that a complaint was admissible under Article 3 ECHR 18 years after the alleged ill-treatment, and despite the applicant waiting 11 years before lodging a criminal complaint. The ECtHR acknowledged that the duty of diligence depends on the 'circumstances of the case'[71] and held that

> delay in lodging a complaint is not decisive where the authorities ought to have been aware that an individual could have been subjected to ill-treatment—particularly in the case of assault which occurs in the presence of police officers—as the authorities' duty to investigate arises even in the absence of an express complaint.[72]

In *Mocanu*, the ECtHR concluded that 'the applicant's vulnerability and his feeling of powerlessness, which he shared with numerous other victims who, like him, waited for many years before lodging a complaint, amount to a plausible and acceptable explanation for his inactivity from 1990 to 2001'.[73] The Court accepted the applicant's explanation that his 'vulnerability' stemmed from 'the deterioration in his health following the ill-treatment allegedly sustained' and 'the feeling of powerlessness which he experienced on account of the large number of victims of the repression conducted by the security forces and the judicial authorities' failure to react in a prompt manner, capable of reassuring him and encouraging him to come forward'.[74]

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[66] ibid para 48.
[67] ibid.
[68] *Mocanu v Romania* (n 46).
[69] IACtHR, *García Lucero v Chile* (n 44).
[70] IACtHR, *Rio Negro Massacres v Guatemala* (n 42).
[71] *Mocanu v Romania* (n 46) paras 265–66.
[72] ibid para 265.
[73] ibid para 275.
[74] ibid para 273.

E. *The need for a new approach*

The discussion in the immediately preceding section demonstrates the treaty bodies' recognition that the impact of torture or ill-treatment may not subside, even over numerous decades, until redress is afforded. However, the current doctrinal position of several of the treaty bodies regarding the right to redress for torture and ill-treatment does not adequately reflect this recognition. The refusal of the treaty bodies other than the CAT to recognise a right to redress for torture or ill-treatment regardless of when in the past it occurred fails to effectively respond to the experiences of people who have suffered torture or ill-treatment in past decades. As explained above, the CAT's position is also not as effective as it could be, given the incompatibility of the reasoning behind it with the international law doctrine of non-retroactivity of treaty obligations.

The above discussion makes clear that the formalistic approach of the ECtHR and IACtHR to the temporality of the right to redress for torture and ill-treatment is driven by a conceptualisation of torture and ill-treatment as 'instantaneous' by nature. Arguably, the rationale for the treaty bodies' recognition of continuing procedural obligations arising from pre-ratification torture or ill-treatment—i.e. that the procedural obligations are 'autonomous', and 'detachable' from the question of whether torture or ill-treatment occurred—solidifies the presumption that torture and ill-treatment are 'instantaneous', and vice versa. The notion that both torture and ill-treatment are 'instantaneous' violations provides no 'continuing situation' to which the procedural obligations can attach, while the idea that the procedural obligations are 'autonomous' makes irrelevant the question of whether a person has, in fact, experienced torture or ill-treatment and what its impact has been.

The treaty bodies' reliance on these two legal constructs (the instantaneity of torture and ill-treatment, and the detachability of the procedural obligations under the anti-torture norm) appears to have taken their focus away from, and prevented them from attaching proper legal significance to, what they have at times in fact acknowledged in their jurisprudence. That is, that torture and ill-treatment may continue to impact survivors after its physical perpetration has ceased, that survivors of so-called 'historic' torture or ill-treatment may continue to require

both procedural and substantive redress decades after the initial violations, and that survivors may be rendered powerless by the absence of redress.

Notwithstanding the current position, according to the doctrine of 'continuing violations' a right to redress for pre-ratification torture or ill-treatment could be developed on the basis of a conceptualisation of both torture and ill-treatment as capable of giving rise to a 'continuing situation'. Furthermore, the ECtHR's position that time limits for complaints do not run while a 'continuing situation' exists suggests that a conceptualisation of torture or ill-treatment as a 'continuing situation' would enable the recognition of an indefinite right to redress.

The next part of the chapter explores whether dignity and vulnerability reasoning could provide the perspective and basis necessary to recognise torture and ill-treatment as potential 'continuing situations'.

II. Torture or Ill-treatment as a 'Continuing Situation'

This part of the chapter argues that dignity reasoning could enable the human rights treaty bodies and other actors to understand an experience of torture or ill-treatment that is followed by prolonged impunity as a 'continuing situation' of torture or ill-treatment.

Prior to embarking on a dignity and vulnerability analysis of prolonged impunity for torture or ill-treatment, however, it is worth scrutinising the notion that torture and ill-treatment are both invariably 'instantaneous' by reference to existing anti-torture jurisprudence. The label 'instantaneous' suggests a conception of torture and ill-treatment as acts of immediate force (such as beatings, electric shocks or other forceful punishments), which are defined by the way in which they are administered rather than how they are received or perceived, and not as the cumulative product of various forms of conduct, or conditions, experienced over time. When unpacked in this way, the 'instantaneous' label appears at odds with much of the treaty bodies' jurisprudence regarding the types of conduct or 'acts' that are capable of meeting the minimum threshold of severity under the anti-torture norm.

In some cases, the treaty bodies have factored the prolonged suffering experienced by a person in the aftermath of particular conduct (and, indeed, the person's projected further suffering)

into the decision regarding the nature of the conduct. For example, in *Aydin v Turkey*, the ECtHR held that a rape constituted torture, not just because of the circumstances of the rape and the pain of forced penetration at the time of its occurrence, but also because 'rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence'.[75] Indeed, the treaty bodies' classic formulation of the factors which influence the relative threshold of severity in any given case include the 'effects' of the treatment.[76]

Furthermore, the treaty bodies have frequently recognised ill-treatment to arise from an accumulation of conditions (including actions and omissions) over time, without pin-pointing the 'instant' at which the conditions crystallised into an act of ill-treatment. Prison conditions cases provide examples of this approach,[77] as do the treaty bodies' recognition of the ill-treatment caused to family members by enforced disappearances.[78] The ECtHR's finding of degrading treatment arising from the State's failure to provide for the basic needs of an asylum seeker in *MSS v Belgium and Greece*[79] is a further example. The existing jurisprudence, therefore, undermines the presumption in the temporality jurisprudence of the ECtHR and IACtHR that torture and ill-treatment are 'instantaneous' acts. The treaty bodies have, in fact, recognised that torture or ill-treatment may constitute a coalescing of various forms of conduct, several aspects of which could reach one or other minimum threshold of severity, or which together have an impact on the person that reaches the relevant minimum threshold of severity.

The dignity and vulnerability analysis in this part needs to be further prefaced, and indeed framed, by a brief discussion of the nature of enforced disappearance. Enforced disappearances are described by the Working Group on Enforced or Involuntary Disappearances as 'prototypical continuous acts'.[80] On this basis, this chapter's argument that torture or ill-treatment could be conceptualised as a 'continuing situation' ought to consider whether and how torture or ill-treatment could fit the mould that gives enforced disappearance its continuing character.

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[75] *Aydin v Turkey* (1998) 25 EHRR 251 para 83.
[76] See Chapter 2, Part I Section C (ii).
[77] ibid.
[78] See (n 108), (n 109) and (n 110) in Chapter 1.
[79] *MSS v Belgium and Greece* (2011) 53 EHRR 2.
[80] Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' (n 33) para 1.

When explaining what gives rise to a 'continuing situation' of enforced disappearance, the treaty bodies place a particular focus on the lack of accountability for the state's initiating violation(s).[81] Arguably, however, it is possible to discern not one but three key features of an enforced disappearance as a 'continuing situation'. One feature is, as mentioned, that what perpetuates the 'continuing situation'—its agreed-upon sine qua non—is the State's ongoing refusal or failure to account for the whereabouts or fate of the 'disappeared' person. A second feature is that, as noted by the Working Group on Enforced or Involuntary Disappearances, the 'continuing situation' is made up of several human rights violations, which coalesce into one 'act' or 'situation'.[82] A third clear feature is that the 'continuing situation' is manifested concretely by the ongoing physical 'disappearance' of the person.

The below sections develop the argument that a dignity and vulnerability analysis could enable treaty bodies and other human rights actors to view torture or ill-treatment as a 'continuing situation' in the absence of redress. The three features of a 'continuing situation' of enforced disappearance mentioned above form the framework of the argument, as three key claims are made.

First, Section A argues that the provision or otherwise of redress for torture or ill-treatment is a question of accountability, and as such it has a fundamental impact on human dignity and the personality because the absence of accountability interferes with a victim's moral status in relation to others. Framing redress for torture or ill-treatment in terms of accountability reveals

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[81] See *Case of Gomez Lund et al ("Guerrilha do Araguaia") v Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs) Series C No 219 para 17: 'the act of disappearance and execution commence with the deprivation of liberty of the person and the subsequent lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are made known and the facts are ascertained.' See also *Varnava and others v Turkey*, App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 148: 'A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred.' See further HRC, *S Jegatheeswara Sarma v Sri Lanka*, Communication No. 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000, where the HRC viewed a disappearance as continuing on account of the State's ongoing refusal to provide information regarding the victim's fate (para 6.2, para 9.1–9.5).

[82] See Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' (n 33) para 2:

> Even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.

a major connection with the 'continuing situation' of enforced disappearance (the overall defining feature of an enforced disappearance being an ongoing failure of accountability). Viewing redress from an accountability perspective also brings into focus the treaty bodies' existing jurisprudence that recognises impunity for gross human rights violations as a form of ill-treatment.

Second, Section B argues that a continuum of dignity violations sufficient to reach the minimum threshold of severity occurs where redress is denied to survivors of torture or ill-treatment in the sense that they are rendered powerless to obtain it. The focus on powerlessness draws attention to the state's conduct in denying redress and also to the continuous context of powerlessness from the point of the initial torture or ill-treatment until redress is ensured. Thus, an analogy may be drawn from the coalescing of multiple violations into one 'continuous act' in a case of enforced disappearance, to the continuum or 'continuing situation' of dignity violations where torture or ill-treatment is followed by the denial of redress.

Third, Section C argues that the absence of redress for torture or ill-treatment may cause continuing concrete interferences with core aspects of victims' personalities, analogously to the continuing concrete manifestation of a 'continuing situation' of enforced disappearance.

A. *Dignity and accountability*

This section argues that redress is a matter of accountability and that Walker's philosophical work demonstrates that accountability is fundamentally concerned with human dignity. On this basis, it is contended, the absence of redress for torture or ill-treatment interferes with a core aspect of the personality—which is the first aspect of the thesis' proposed conception of a dignity violation sufficient to constitute torture or ill-treatment.

All five elements of redress elaborated in the CAT's General Comment No 3 can be understood as forms of accountability for torture or ill-treatment. The Preamble to the United Nations (UN) Basic Principles and Guidelines,[83] which are reflected in General Comment No 3, recognises that 'in honouring the victims' right to benefit from remedies and reparation, the international

[83] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law'.[84] Academic commentators, too, have characterised measures of redress such as truth commissions, rehabilitation, compensation and reparations as measures of accountability.[85] Walker's philosophical theory of 'reciprocal accountability relations', as the process through which individuals' equal moral standing in relation to each other is confirmed, further supports the notion that both procedural and substantive redress measures are methods of accountability for wrongs inflicted on a person.[86] The redress measures set out in the CAT's General Comment No 3 all communicate to, and in respect of, the person who has been wronged that they are someone who is entitled to make demands of others.

Walker argues that because the purpose of redress is to restore reciprocal accountability relations, redress must directly acknowledge 'the reality and the nature of the wrongs, the insult and the harm suffered by the victim in wrongful treatment, the victim's deservingness of repair as a matter of justice, and the responsibility of those offering reparations to take up the demand of reparative justice'.[87] This vision coheres with the CAT's demand for comprehensive redress. It corresponds with the Committee's statements in General Comment No 3 that financial compensation is inadequate on its own,[88] that collective and administration programmes may not bar individual access to a remedy and redress,[89] and that '[f]ull redress cannot not be obtained if the obligations under articles 12 and 13 are not guaranteed'.[90]

Regarding the relationship between redress and dignity specifically, Walker posits that the recent shift in international human rights law towards comprehensive redress and reparation demonstrates a concern that redress and reparation should address the 'moral relationship' between victims and their community and the 'dignitary wounds' inflicted by such violations.[91] Walker contends that 'what is at stake in whether (adequate) reparations are offered is the

[84] ibid, preamble.
[85] Tricia D Olsen, Leigh A Payne & Andrew G Reiter, 'Conclusion: Amnesty in the Age of Accountability' in Francesca Lessa and Leigh A Payne (Eds), *Amnesty in the Age of Human Rights Accountability* (Cambridge University Press 2012) 342–43, 351.
[86] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2). Walker's theory is discussed in the following paragraphs of the chapter.
[87] ibid 117.
[88] CAT General Comment No 3 (n 3) para 9.
[89] ibid para 20.
[90] ibid para 23.
[91] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2).

recognition of a certain kind of relationship and its implications'.[92] She explains that redress and reparation are fundamentally concerned with 'reciprocal accountability relations', which are core to 'moral dignity'.[93] Reciprocal accountability connects individuals to each other by upholding standards of mutually acceptable conduct; 'it consists in suffering the demands of others on us to render accounts of our conduct and, where our conduct is unexcused, accepting responsibility and in turn enjoying the standing to make similar claims upon others'.[94] Walker argues that enjoying the standing to hold others to account, while being held to account oneself, demonstrates a person's position as a 'participant with others under shared moral standards'.[95]

Although Walker's analysis does not single out torture or ill-treatment as a human rights violation in respect of which the obligation to ensure accountability through redress attracts particular dignitary force, arguably her notion of reciprocal accountability is particularly relevant to the *jus cogens* norms of international human rights law. Walker's theory of reciprocal accountability relations is based on the idea that there are some shared norms, which individuals expect to prompt an accounting and acknowledgement of wrongdoing to the victim when they are breached.[96] The application of this idea to the anti-torture norm is clear. As discussed in Chapter 1, the rule against torture and ill-treatment is a particularly strong 'norm for acceptable conduct'.[97] What is more, the right to redress for torture or ill-treatment is a particularly well-established 'norm for acceptable response to unacceptable conduct—conduct that has failed to observe mutually recognized norms'.[98]

The human rights treaty bodies have drawn an explicit connection between accountability for torture or ill-treatment and the existence of the universal right to freedom from torture or ill-treatment, which (as discussed in Chapter 2) is rooted in the concept of human dignity. The ECtHR first identified the investigative obligation under Article 3 ECHR in *Assenov v Bulgaria*[99] and stated that, without the investigative obligation 'the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents

[92] ibid 116.
[93] ibid.
[94] ibid 118.
[95] ibid 123.
[96] ibid 121.
[97] ibid 117.
[98] ibid.
[99] *Assenov and Others v Bulgaria* (1999) 28 EHRR 652.

of the State to abuse the rights of those within their control with virtual impunity'.[100] This rationale is echoed in the jurisprudence of the IACtHR.[101] It recognises that the right to freedom from torture and ill-treatment is dependent upon accountability for violations of the right, and that if accountability is denied to some individuals, then the right does not exist in practice for them.

Understanding redress in terms of accountability, and also in dignitary terms, calls to mind the existing jurisprudence characterising states' failures to investigate or to ensure access to justice in respect of gross human rights violations as ill-treatment.[102] This jurisprudence lends further support to the idea that the denial of redress could be characterised as a dignity violation. At the same time, an understanding of accountability as fundamental to human dignity calls into question the coherence of the treaty bodies' recognition of procedural obligations (but not substantive redress obligations) regarding pre-ratification torture or ill-treatment because, they argue, it is irrelevant to the existence of the procedural obligations whether or not torture or ill-treatment has actually occurred.

B. *Impunity and powerlessness*

On the basis that redress for torture or ill-treatment is fundamental to respecting dignity, this section argues that a dignity violation sufficient to reach the minimum threshold of severity for a finding of torture or ill-treatment may arise where the state renders a survivor of torture or ill-treatment powerless to obtain redress.

Walker's notion of 'moral vulnerability' refers to the potential powerlessness of a survivor of torture or ill-treatment to obtain an accounting for their experience. 'Moral vulnerability', according to Walker, is 'the potential for being exposed to the insult and additional injury, when we perceive ourselves wronged, of having our standing to call others to account denied, dismissed, or ignored in ways that call our very status as full participants into question'.[103]

[100] ibid para 102. See also, for example, *Cestaro v Italy*, App no 6884/11 (ECtHR, 7 April 2015) para 204.
[101] See, for example, IACtHR, *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988 (Merits) Series C No 4 (1988); para 166; IACtHR, *Rio Negro Massacres v Guatemala* (n 42) para 261.
[102] See (n 56).
[103] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) ibid 124.

Walker explains that when accountability is denied, 'the potential for moral diminishment, erasure, exclusion, or abandonment by whatever community the victim appeals to for validation is realized' as the denial communicates to the victim: 'You are in no position to make demands on us'.[104] Walker recalls Strawson's notion that, where individuals who see themselves as full participants in accountability relations do not see others as 'eligible and competent participants',[105] they are viewing these others with an 'objective attitude'.[106] In other words, Walker explains, they are viewing the other as 'an object to be controlled or managed, not a participant in reciprocal accounting'.[107]

That a victim's powerlessness to obtain accountability demonstrates their inequality was acknowledged by the IACtHR in *Moiwana Community v Suriname*,[108] where the Court found impunity to constitute a violation of the right to humane treatment under Article 5 ACHR. The Court acknowledged that the 'long-standing absence of effective remedies…has even convinced the community members that the State actively discriminates against them'.[109] The Court further cited the evidence of victims who stated that 'compared to others in the country…we do not have the same rights in Suriname', and that there was 'insufficient support of the idea…that the Maroons deserve the same type of legal protection in the country'.[110]

Walker suggests that the wronged person may be denied an accounting and thus subjected to a further 'moral wound' because others 'might not see what the victim has suffered as wrong because they blame the victim or do not believe him'.[111] Alternatively, others 'might not recognize that the victim is entitled to call the offender to account, perhaps because the victim is negligible or despised or the offender is powerful or esteemed', or they 'might think that this is, after all, the lot of a woman, a servant, or a person of lower caste'.[112] In a similar way to the idea of situational vulnerabilities, Walker's conceptualisation of 'moral vulnerability' invites consideration of the many different, and multi-layered, reasons why survivors of torture or ill-treatment may be rendered powerless to obtain redress. This exercise reveals the ways in which

[104] ibid.
[105] ibid 118.
[106] ibid, citing Peter Frederick Strawson, 'Freedom and resentment' in Peter Frederick Strawson (ed), *Studies in the Philosophy of Thought and Action* (Oxford University Press 1968).
[107] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 118.
[108] IACtHR, *Moiwana Community v Suriname* (n 42).
[109] ibid para 94.
[110] ibid.
[111] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 121
[112] ibid.

the state acts to make survivors powerless and fails to act to ameliorate the powerlessness of survivors. As discussed in Part I, Section C above, the treaty bodies have acknowledged many forms of powerlessness that can prevent a survivor of torture or ill-treatment from obtaining redress. The challenge, and opportunity, presented by dignity and vulnerability reasoning is to recognise how this powerlessness is imposed upon survivors by the ongoing acts and omissions of the state, rather than constituting simply the leftover effects on the person of a previous, 'instantaneous', act of torture or ill-treatment.

In *Garcia Lucero v Chile*, the IACtHR acknowledged that the author's physical and psychological ill-health and state of poverty, resulting from his torture, prevented him for decades from initiating legal action to claim reparations.[113] The CAT, in General Comment No 3, has also noted that 'the associated stigma, and the physical, psychological and other related effects of torture or ill-treatment' can act as obstacles to survivors' ability to obtain redress.[114] If one questions what situational vulnerabilities might be at play in these situations, and if one considers how Walker's notion of accountability relations might feature, it appears that the survivor's state of health and/or poverty, or sense of stigmatisation, has not been caused solely by the initial act(s) of torture or ill-treatment and is not the only reason for their powerlessness. Rather, the state's failure to provide redress (perhaps as a result of its decision to provide redress to survivors of torture or ill-treatment only through judicial proceedings, which may in turn be inaccessible to survivors for the very reason that they have not been afforded redress) emerges as a cause of the person's powerlessness.

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[113] See text to (n 66) and (n 67).

[114] CAT General Comment No 3 (n 3) para 38. See further Nora Sveaass, 'Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation' (2013) 4 European Journal of Psychotraumatology 1, 8–9:

> …alternative ways of obtaining redress are very important, because after all, how many victims of torture will ever make it to court…Standing up for your rights, and presenting complaints and stories about torture to the authorities in the country where torture has taken place is not only often dangerous, but something most people will have serious difficulties in doing so. For the many who have worked clinically with torture survivors, this is quite evident. Torture will very often reduce the capacity and the energy to deal with this part of the trauma, and most people will need a good psychosocial support system and one that they can be confident of, to want to raise such cases in the first place…
>
> Persons subjected to serious human rights violations have many reasons not to believe in the legal system in the state where the violations have taken place in addition to the lack of money, support, or self-confidence needed to raise one's own rights in a judicial setting. Legal aid is more often than not unavailable or often involves a very lengthy and complicated procedure. The wheels of justice turn slowly, with a high risk of retraumatization and lack of significant outcomes. Redress should not be dependent on the victim taking his or her case to court. The lack of available effective legal mechanisms, or the person's own choice *not* to pursue legal justice, should not prevent anyone from being able to access their right to redress through other means.

In *Mocanu v Romania*,[115] the ECtHR explicitly recognised the State's behaviour as the cause of the applicant's powerlessness to seek any form of redress for over a decade. In *Janowiec v Russia*, the partly dissenting judges pressed the point that for over 40 years the relatives of those massacred had been prevented from seeking redress because of the State's denial of responsibility, blocking of any procedural steps, and maintaining of secrecy over its records.[116] The dissenting judges lamented the majority's decision to allow the time limit established as part of the *Silih* 'genuine connection' test to run in such circumstances. Gallen has noted, in relation to 'historical abuse', that victims 'may not have pursued litigation…in the reasonable belief that the conduct under which they were abused was legal and endorsed by the State'.[117] The CAT's General Comment No 3 lists a range of further conduct by the State which can prevent survivors of torture or ill-treatment from obtaining redress.[118]

The above discussion of the situational powerlessness experienced by torture or ill-treatment survivors who cannot obtain redress allows several arguments to be made in favour of conceptualising torture or ill-treatment as a 'continuing situation' in the absence of redress.

First, it is clear that the state has the power, and chooses whether or not to exercise its power, to afford redress to survivors of torture or ill-treatment. Second, where a person has experienced torture or ill-treatment, the dignity analysis developed in the preceding chapters demonstrates that, by definition, they have been placed in a position of powerlessness by the state's conduct. This context heightens the risk of a further dignity interference, and—as Walker argues—establishes a need for redress to restore 'reciprocal accountability relations'.[119] Arguably, it requires the treaty bodies and courts to be particularly sensitive to

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[115] *Mocanu v Romania* (n 46).

[116] *Janowiec v Russia* (n 46), Joint partly dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller para OIV-28.

[117] James Gallen, 'Historical Abuse and the Statute of Limitations' (2016) Statute Law Review <https://doi-org.ezproxyd.bham.ac.uk/10.1093/slr/hmw045> accessed 5 September 2017, 7.

[118] CAT General Comment No 3 (n 3) para 38:

> Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: inadequate national legislation, discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures for securing the custody of alleged perpetrators, State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; [and] the failure to provide sufficient legal aid and protection measures for victims and witnesses.

[119] See Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 123–24: 'It is because the victim's standing to require accountability can be in question that acknowledgement of wrong and responsibility is crucial in constituting reparations. It is the clarity and adequacy of that acknowledgment that resolves the question in favour of the victim's standing as a full participant with others under shared moral standards and one whose sound claims concerning wrong and redress require respectful attention.'

whether the State's exercise of its power following the initial torture or ill-treatment is causing further powerlessness or is ameliorating powerlessness.

These two arguments support a third: that domestic laws and international procedural rules that assume the need for time limits and rules against 'delay' in the bringing of complaints in order to avoid 'stale claims', and to guarantee 'legal certainty' for alleged perpetrators,[120] fail to reflect that the time it takes to complain may be—and appears to be often—due to the continued exercise of power by the state over the torture or ill-treatment survivor, rendering them powerless to obtain redress.

Turning to the enforced disappearance analogy, a fourth argument is made. The state's denial of redress for torture or ill-treatment can be recognised as conduct that from a dignity perspective has a similar character to the initial torture or ill-treatment in its interference with a core aspect of the personality and its exploitation and engendering of powerlessness.[121] Therefore, analogously to enforced disappearance, torture or ill-treatment and the subsequent denial of redress could be understood in the words of the Working Group on Enforced or Involuntary Disappearances as 'a unique and consolidated act, and not a combination of acts[,] [e]ven if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument'.[122]

C. *Concrete manifestation of the 'continuing situation'*

In cases of enforced disappearance, the 'continuing situation' manifests concretely in the continued 'disappearance' of the person as the denial of accountability prevents them from

[120] In *Stubbings v United Kingdom* (1997) 23 EHRR 213 the ECtHR stated at para 51:

> It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.'

[121] Walker highlights that '[i]n cases where reparations are at issue, victims of grave and usually massive wrongs have typically suffered persistent denial and exclusion from relations of reciprocal accountability, both *in the event of the wrongdoing and often in its genesis* and aftermath' (emphasis added): Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 112.

[122] Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' (n 33) para 2.

being traced. It is argued that impunity for torture or ill-treatment may also cause victims to continue to have concrete experiences of many of the core aspects of the initial violation(s).

When viewed from the victim's perspective (rather than from the perspective of the actor responsible for inflicting torture or ill-treatment), the concrete harms of torture or ill-treatment, and even the actual experience of torture or ill-treatment, appear capable of persisting and increasing in intensity while redress is denied. As mentioned at the outset of the chapter, the CAT recognises this fact in its General Comment No 3.

Patel explains that '[t]he impact of torture can be devastating, and its psychological health consequences can be severe, complex and enduring in the long term, in some cases for many years after the torture'.[123] She contends, further, that the physical and psychological health consequences 'must be understood in the context of other dimensions of health (such as existential, spiritual and interpersonal aspects), all of which often overlap and manifest in complex and diverse ways'.[124] Sveaass argues that '[m]any victims of torture may in fact be

[123] Nimisha Patel, Amicus Curiae brief presented to the Inter-American Court of Human Rights in the case of Mr Leopoldo García Lucero et al v Chile (Case No 12.519) on 26th March 2013, 4 <www.redress.org/downloads/nimisha-patel-amicus-for-case-12-519-iacthr-26-3-13-english-final-1.pdf> accessed 5 September 2017. Patel states, at 5:

> Physical health problems related to torture have been widely documented and can include health problems affecting various systems, including neurological, cardiovascular, musculoskeletal, digestive, genitourinary and gastrointestinal systems, in addition to chronic pain…
> Psychological health problems include pain; hyperarousal (manifesting in irritability, disturbed sleep, difficulty concentrating, hypersensitivity to noise, exaggerated startle response, and hypervigilance); suspicion and intense fear and mistrust of others; hearing voices; anger and irritability; anxiety and panic; sleeping difficulties (including nightmares, insomnia, and early morning and frequent wakening); intrusive phenomena (including nightmares related to torture experiences, vivid memories, and intrusive thoughts and images related to the torture experiences); helplessness, hopelessness and despair; profound guilt, grief and shame and feelings of humiliation; loss of interest in life and the future; loss of pleasure in previously enjoyable activities; depressed mood; numbing or restricted range of affect or emotional ability; passivity and learned helplessness; fatigue and loss of energy; disturbance of appetite; poor concentration; memory impairment; dissociation and detachment from others and withdrawal from other people (which can often lead to intense isolation and exacerbation of psychological health difficulties); avoidance of thoughts, people or situations which remind the person of their torture experiences; avoidance of crowds, enclosed spaces and public transport; sexual difficulties; relationship difficulties (in existing relationships or in forming new relationships which can also compound isolation, psychological health difficulties and the ability to care for oneself in the absence of social support); suicidal ideation and intent; self-neglect or poor self-care; obsessive thoughts and compulsive behaviours related to bodily functions and safety (e.g. in the person's home); substance misuse (such as of alcohol or illegal drugs which can further compound the psychological health difficulties noted above); difficulties in everyday functioning; and existential crises.3 Impaired functioning can also impact on the individual's livelihood, their autonomy, self-esteem, their relationships with others and their general well-being.

[124] Patel, Amicus Curiae brief, ibid 5.

considered as persons with disabilities, given the serious psychological and physical problems they encounter'.[125]

Patel explains how the manner and harms of torture may translate directly into the survivor's psychological experiences in its aftermath. Patel contends, for example, that the 'feeling of powerlessness [experienced during torture and prolonged detention] increases the sense of personal vulnerability, shattering any belief in one's capacity to protect oneself, or beliefs in a safe and predictable world'.[126] Having suffered torture, Patel explains, '[v]ictims often feel they have completely lost any hope or belief in their ability to have any control in their lives, or the lives of family members, including the ability to protect themselves and loved ones from harm'.[127] The 'systematic attack on the psyche and the body' that Patel argues occurs during torture may follow victims in the aftermath, causing 'what many victims describe as a sense of total disintegration (at the bodily, emotional, interpersonal and existential levels), and feeling that they lost all sense of coherence and of who they are and what their struggles and their lives are worth'.[128]

Psychologists have argued that it is not just the absence of individual clinical therapeutic interventions that perpetuates the harm initiated by torture or ill-treatment but also the absence of 'justice', characterised by psychologists in ways that align with the legal concepts of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Sveaass and Lavik state that 'when truth and justice do not exist in a society', this 'increases the risk of psychological distortion such as misinterpretation of reality, denial, suspiciousness, frustration, aggressive acts, depression, anxiety, guilt feelings, and apathy'.[129] They explain, for example, that when 'lies and denials are institutionalised' and there is 'no disclosure of those behind the atrocities', this creates a situation where 'the reality experienced is denied…and psychological reactions such as feelings of worthlessness and disempowerment, as well as even cognitive distortions, may follow'.[130] They explain, further, for example, that '[w]hen the past is covered up or 'reinvented', the prospect of a clear future is endangered' and that 'the feeling of constant

[125] Nora Sveaass, 'Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation' (2013) 4 European Journal of Psychotraumatology 1, 5.
[126] Patel, Amicus Curiae brief (n 123) 6.
[127] ibid.
[128] ibid.
[129] Nora Sveaass and Nils Johan Lavik, 'Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation' (2000) 69(1) Nordic Journal of International Law 35, 47.
[130] ibid 43.

fright and lack of security continues…There may be strong feelings of vulnerability. There is no place to turn for protection'.[131] Sveaass and Lavik contend that the following 'justice and reconciliation' measures are crucial for the psychological rehabilitation of survivors of gross human rights violations: truth disclosure, sanctions against perpetrators, compensation, and the 'reinterpretation of history'.[132]

Patel, too, opines that '[i]mpunity may intensify the torture victim's powerlessness, guilt and shame, further silencing them, leaving some in a state of psychological wounded paralysis'.[133] She maintains that '[i]mpunity also perpetuates the stigma in society against victims of torture and their families, further marginalising them, creating a context lacking in safety, where victims and their families are afraid to speak out and are silenced'.[134] In a similar vein to Patel's assessment, the IACtHR in *Rio Negro Massacres v Guatemala* recognised that '[t]he denial of justice to victims of grave and massive human rights violations… gives rise to numerous adverse effects not only in the individual sphere of the victim, but also in their collective sphere'.[135] The Court noted that 'the victims of prolonged impunity will suffer different effects not only of a pecuniary nature owing to the search for justice, but also other sufferings and harm of a psychological and physical nature and on their life project, as well as other possible changes in their social relationships and in their family and community dynamics'.[136]

III. Case study: redress for survivors of Ireland's Magdalene Laundries

This part of the chapter takes the dignity analysis developed in Part II and applies it to a concrete example of impunity for 'historic' torture or ill-treatment. It is argued that the analysis in this part supports the theoretical argument pursued above that the thesis' conception of a dignity violation could assist the treaty bodies to recognise the existence of 'continuing situations' of torture or ill-treatment, and thus to extend the right to redress backwards to pre-ratification violations and forwards indefinitely.

[131] ibid.
[132] ibid.
[133] Patel, Amicus Curiae brief (n 123) 15.
[134] ibid.
[135] IACtHR, *Rio Negro Massacres v Guatemala* (n 42) para 272.
[136] ibid, citing IACtHR, *Ituango Massacres v Colombia,* Judgment of 1 July 2006 (Preliminary Objection, Merits, Reparations and Costs) Series C No 148 para 396; IACtHR, *Dos Erres Massacre v Guatemala*, Judgment of 24 November 2009 (Preliminary Objection, Merits, Reparations and Costs) Series C No 211 para 226.

A brief description of the Magdalene Laundries is warranted at this point. Magdalene Laundries, or Magdalene 'Asylums' or 'Refuges' as they were variously called, were commercial laundry operations housed in Catholic convents in towns and cities around Ireland. Between 1922 and 1996, well over 10,000 girls and women were incarcerated in the institutions in an unregulated manner and mostly without any statutory basis, and forced to work unpaid for periods ranging from weeks to whole lifetimes.[137] The public knew the Magdalene Laundries as places of punishment for so-called 'fallen' women, and those forced to live and work in the institutions were frequently referred to as 'penitents'.[138] Inside Magdalene Laundries, girls and women were routinely stripped of their identities including through the imposition of 'house' names and numbers, uniforms and haircuts.[139] They were prohibited from communicating with the outside world and with each other, and they were denied information regarding the reasons for and potential duration of their incarceration.[140] In addition to being forced to work constantly at laundry and other chores and handcrafts, the girls and women were subjected to constant surveillance, physical and psychological violence, solitary confinement, and physical, emotional and medical neglect.[141] Many girls and women died while incarcerated in Magdalene Laundries, and the nuns buried a significant number of those who died in unmarked graves and/or without registering their deaths.[142]

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[137] See Ireland, 'Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries' (2013) < www.justice.ie/en/JELR/Pages/MagdalenRpt2013> accessed 5 September 2017. See also Justice for Magdalenes (JFM), 'Submission to the United Nations Committee Against Torture' (May 2011) <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_NGO_IRL_46_9041_E.pdf> accessed 5 September 2017; JFM, 'Follow-up Report to the Committee Against Torture' (May 2012) <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_NGS_IRL_12078_E.pdf> accessed 5 September 2017; JFM, Principal submissions to the Inter-departmental Committee to establish the facts of State involvement with the Magdalene Laundries (18 September 2012) <www.magdalenelaundries.com/State_Involvement_in_the_Magdalene_Laundries_public.pdf> accessed 5 September 2017; Maeve O'Rourke and James M Smith, 'Ireland's Magdalene Laundries: Confronting a History Not Yet in the Past' in Alan Hayes and Maire Meagher (eds), *A Century of Progress? Irish Women Reflect* (Arlen House 2016); Maeve O'Rourke, 'The Justice for Magdalenes Campaign' in Suzanne Egan (ed), *Implementing International Human Rights: Perspectives from Ireland* (Bloomsbury 2016); Justice for Magdalenes Research (JFMR), 'NGO Submission to the UN Committee Against Torture in respect of Ireland (for the session)' (July 2017) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fIRL%2f27974&Lang=en> accessed 5 September 2017.

[138] See Maeve O'Rourke and James M Smith, 'Ireland's Magdalene Laundries: Confronting a History Not Yet in the Past' in Alan Hayes and Maire Meagher (eds), *A Century of Progress? Irish Women Reflect* (Arlen House 2016).

[139] See (n 137). See also Evelyn Glynn, 'Breaking the Rule of Silence' <www.magdalenelaundrylimerick.com> accessed 5 September 2017; Katherine O'Donnell, Sinead Pembroke and Claire McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (University College Dublin) <www.magdaleneoralhistory.com> accessed 5 September 2017.

[140] ibid.

[141] ibid.

[142] Justice for Magdalenes Research (JFMR), 'NGO Submission to the UN Committee Against Torture in respect of Ireland (for the session)' (July 2017) <http://jfmresearch.com/wp-content/uploads/2017/07/JFMR-report-to-

A government inter-departmental committee (IDC) reported in 2013 that there was 'significant State involvement with the Magdalen Laundries'.[143] The State placed girls and women in the institutions, funded placements, awarded state laundry contracts to the institutions, conferred charitable status and tax exemptions on the institutions, and provided in legislation for the non-payment of wages to the girls and women working in the Magdalene Laundries.[144] All the while, the State failed to regulate or inspect the institutions beyond treating them as ordinary factory premises.[145]

The Irish Human Rights Commission has concluded that 'from the testimonies of survivors it appears that a certain level of ill-treatment occurred'[146] in Magdalene Laundries. The CAT's recommendations to Ireland in 2011 and 2017 show that the CAT also understands the available evidence of abuse in the Magdalene Laundries to indicate ill-treatment.[147]

Ireland's Magdalene Laundries abuse is a particularly useful case study for this chapter to use for two reasons. First, the CAT has found that survivors of the Magdalene Laundries have a continuing right to redress for the systematic ill-treatment alleged to have occurred, even though Ireland ratified the UNCAT six years after the last Magdalene institution closed and decades after several of the institutions ceased operating.[148] The experiences of Magdalene Laundries survivors therefore provide a rich landscape from which to glean a conceptual basis

CAT-for-the-session-2017-Main-Report.pdf> accessed 5 October 2017. See also Claire McGettrick and others, 'Death, Institutionalisation & Duration of Stay: A critique of Chapter 16 of the Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries and related issues' (19 February 2015) <www.magdalenelaundries.com/JFMR_Critique_190215.pdf> accessed 5 September 2017.

[143] Ireland, 'Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries' (n 137), Introduction, para 29.

[144] JFMR, 'NGO Submission to the UN Committee Against Torture' (n 142) paras 2.8–2.9.

[145] ibid.

[146] Irish Human Rights Commission, *Follow Up Report on State Involvement with Magdalen Laundries* (June 2013) <www.ihrec.ie/documents/ihrc-follow-upreport-on-state-involvement-with-magdalen-laundries-june-2013/> accessed 3 October 2017, para 237.

[147] CAT, 'Concluding Observations on the initial report of Ireland' (17 June 2011) UN Doc CAT/C/IRL/CO/1 para 21; CAT, Concluding Observations on the second periodic Report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2 paras 25–26.

[148] Ireland, 'Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries' (2013) < www.justice.ie/en/JELR/Pages/MagdalenRpt2013> accessed 5 September 2017. Chapter 3 of the report notes that the Magdalene Laundries closed in the following years: Sean McDermott Street in 1996; Donnybrook in 1992; High Park in 1991; Galway in 1984; Good Shepherd, Limerick in 1982; Good Shepherd, Waterford in 1982; Good Shepherd in Sunday's Well, Cork in 1977; Good Shepherd, New Ross in 1967; Dun Laoghaire in 1963; Peacock Lane, unclear.

for the development of a right to redress for torture or ill-treatment regardless of when it occurred that can ground the CAT's current position.

Second, the Irish State's interactions with the CAT (among other universal human rights treaty bodies[149]), and the State's actions in relation to the Magdalene Laundries since the CAT's recommendations in 2011, have cast a spotlight on a range of forms of power that the State continues to exercise over survivors of the Magdalene Laundries. The ongoing efforts by Magdalene survivors and survivor advocates to obtain redress and reparation, and the reactions from the State that such efforts are (and are not) garnering, offer a detailed insight into the human experience of impunity for torture or ill-treatment perpetrated in past decades. In other words, the active nature of the issue provides considerable concrete detail with which to test the chapter's argument that prolonged impunity for torture or ill-treatment could be conceptualised as a 'continuing situation'.

The below sections argue that the experiences of Magdalene Laundries survivors can be understood as a 'continuing situation' of a dignity violation sufficient to constitute ill-treatment (at least). This argument is made by reference to the thesis' conception of a dignity violation and according to the three-pronged framework of the 'prototypical' 'continuing situation' identified above. Section A explains that Magdalene survivors, state representatives and numerous universal human rights treaty bodies have all recognised that in order for redress for the Magdalene Laundries abuse to be effective, it must be fundamentally concerned with accountability and with 'moral validation' (as Walker puts it). Section B explains how the State's exercise of power over Magdalene survivors is causing the ongoing absence of accountability for the abuse. This section argues that the survivors' powerlessness demonstrates their inequality and violates their dignity. Section B also maintains that the powerlessness that Magdalene survivors are currently experiencing at the hands of the State is to a large extent the same form of state-imposed powerlessness that they experienced in the Magdalene Laundries. Section C concludes Part III of the chapter by describing the continuing impact of prolonged impunity for the abuse on survivors' personalities.

[149] including the Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR) and Committee on the Elimination of Discrimination against Women (CEDAW): HRC, 'Concluding Observations on the Fourth Periodic Report of Ireland' (19 August 2014) UN Doc CCPR/C/IRL/CO/4 paras 10, 25; CESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (19 June 2015) UN Doc E/C.12/IRL/CO/3 para 18; CEDAW, 'Concluding observations on the combined sixth and seventh periodic reports of Ireland' (3 March 2017) UN Doc CEDAW/C/IRL/CO/6-7 paras 14–15.

A. *Dignity and accountability*

Irish state representatives have acknowledged that accountability is key to the effectiveness of redress for the Magdalene Laundries abuse. Their parliamentary speeches have recognised that the purpose of redress is, as Walker argues, to restore relations of reciprocal accountability by acknowledging the truth and the wrongfulness of, and the responsibility of the perpetrator(s) for, the treatment to which individuals were subjected.[150]

In February 2013, following a public advocacy campaign that made use of domestic and UN human rights mechanisms including the CAT periodic review process[151] the Irish Taoiseach (Prime Minister) issued a State apology to the survivors of the Magdalene Laundries.[152] During the apology, the Taoiseach emphasised the importance of acknowledging the women's experiences. He noted that in the preceding week he 'had the chance to do the most important thing of all, which was to meet personally with the Magdalen women and to sit down with them face to face to listen to their stories'.[153] The Taoiseach stated that Magdalene survivors 'took this country's terrible secret and made it their own, burying it and carrying it in their hearts here at home or with them to England, Canada, America and Australia on behalf of Ireland and the Irish people'.[154] He promised that the apology would ensure that 'they need carry it no more, because today we take it back. Today, we acknowledge the role of the State in their ordeal'.[155] The Taoiseach's speech also recognised the importance of permanent official acknowledgement of the wrongfulness of the Magdalene Laundries abuse; he noted that 'many of the women I met last week want to see a permanent memorial established to remind us all of this dark part of our history'.[156] The Minister for Justice, in his address

[150] See Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 122:

> Most simply, moral validation, from the perpetrator of a wrong or from others, consists in those others' affirmation with the victim that the wrong is real and its wrongfulness is clear, that someone else bears responsibility, and that others owe an accounting and may be liable to sanction or for redress. At its most effective, moral validation is a social process in which convergent judgments about grave wrongs within a community or society assure the victims of wrong (and anyone else who may be uncertain or resistant) that norms are shared and that the victims are recognized and valued members of a community prepared to respond to the mistreatment the victim has suffered with appropriate and justified demands for accountability on those who have done wrong.

[151] See O'Rourke, 'The Justice for Magdalenes Campaign' (n 138).

[152] Dáil Éireann, Magdalen Laundries Report: Statements (19 February 2013) <www.kildarestreet.com/debates/?id=2013-02-19a.387> accessed 5 September 2017.

[153] ibid.

[154] ibid.

[155] ibid.

[156] ibid.

following the Taoiseach's apology, similarly recognised the importance of acknowledging the truth of the women's experiences. He stated that, beyond the government's proposed material supports, 'the greatest respect we can pay to their stories of the laundries is to say that those stories and the lessons from them will never be forgotten and are truly believed'.[157]

In the days and weeks following the state apology in 2013, some Magdalene survivors made clear in interviews for the University College Dublin (UCD) Magdalene Oral History project[158] that they too understood redress to be fundamentally about accountability in the sense of what Walker terms 'moral validation'.[159]

Walker states that '[t]hose who experience what they take to be gross injustice yearn for, and where possible seek, some validation from others that their sense of their experience is true'.[160] One Magdalene survivor said days later: '…it was so emotional and you were thinking, "yeah, that really happened". And to get an apology, and for all the people that condemned us, disowned us or whatever, we got an apology and we felt better'.[161] Another woman, two weeks after the apology, recalled, '…for the first time then, the child wasn't wrong, the child didn't do anything wrong… the system did it, the system failed us… And I needed to know I wasn't wrong. Now I know… I've no shame! The shame is on you! …that's what Enda Kenny did for me that day'.[162]

The views of Magdalene survivors in interview following the state apology support the idea that accountability for torture or ill-treatment requires comprehensive redress, as envisaged in the CAT's General Comment 3. Several women stated in interview that the Taoiseach's apology was inadequate on its own to remedy the abuse. According to the woman quoted first above, '[t]he apology from him was great, but it's not enough for Ireland… I don't think the people that looked down on us will change their views…'.[163] The woman quoted second focused on the lack of an investigation into physical and sexual abuse (which she had

[157] ibid, Statement by Alan Shatter, TD, Minister for Justice, Equality and Defence.
[158] Katherine O'Donnell, Sinead Pembroke and Claire McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (University College Dublin) <www.magdaleneoralhistory.com> accessed 5 September 2017.
[159] Walker, 'Moral Vulnerability and the Task of Reparations' (n 2) 122–23.
[160] ibid 122.
[161] O'Donnell, Pembroke and McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (n 158) MAGOHP/13/ANON (23 February 2013).
[162] ibid, MAGOHP/48/ANON (28 February 2013).
[163] ibid, MAGOHP/13/ANON (23 February 2013).

experienced and witnessed others experiencing), the need for the nuns to be held to account, and the need for the truth of the Magdalene Laundries abuse to be historically recorded. She stated: 'I'll give him his due, great apology, but he's missing what really happened in those laundries and this is what I want investigated…because this needs to be recognised, that this was part of the history too, the physical and sexual abuse that went on in there by the nuns… The nuns need to be answerable. Why?' She continued: 'the Irish people in general…A lot of them are still ignorant to it…they're not believing what they're hearing…I feel that the quicker it goes out there in the history books, the quicker they have to look back. Because I mean, what history is [there] for young people to come along in 20 years' time and say, "Jesus, did this really happen?"'.[164]

The recommendations and reactions of numerous universal human rights treaty bodies to the Irish State's recent actions regarding the Magdalene Laundries confirm that accountability is the core, and the sine qua non, of effective reparation for the abuse.

Regrettably, the state apology in 2013 appears to have been an outlier in terms of the government's willingness to acknowledge the reality and wrongfulness of the Magdalene Laundries abuse and the State's responsibility for it. The apology aside, the State has refused to accept responsibility for abuse in the Magdalene Laundries and its payments to the women are characterised as strictly 'ex gratia'.[165] The State has not initiated any independent investigation into the systematic abuse.[166] Since 2013, the government has stated to UN treaty bodies and publicly that the Magdalene Laundries 'were private institutions under the sole ownership and control of the religious congregations concerned'[167] and that it knows of '[n]o factual evidence to support allegations of systematic torture or ill treatment of a criminal nature in these institutions'.[168]

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[164] ibid, MAGOHP/48/ANON (28 February 2013).
[165] Ireland, *Report of Mr Justice John Quirke/ Report of the Magdalen Commission Report on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries, May 2013*, (Magdalen Commission Report) 1 <www.justice.ie/en/JELR/Pages/PB13000255> accessed 5 September 2017.
[166] JFMR, 'NGO Submission to the UN Committee Against Torture' (n 142) Section 2.
[167] Ireland, 'Replies to List of issues prior to submissions of the second periodic report of Ireland to the Committee Against Torture' (20 January 2016) UN Doc CAT/C/IRL/2 para 237 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2f2&Lang=en> accessed 5 September 2017.
[168] Ireland, 'Combined sixth and seventh periodic reports to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women' (16 September 2016) UN Doc CEDAW/C/IRL/6-7, 8 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2f

The CAT and other treaty bodies have refused to accept the state apology and 'ex gratia' redress scheme as sufficient to comply with the State's obligation to ensure redress for the Magdalene Laundries abuse.[169] In July 2014, then Chairperson of the HRC, Sir Prof Nigel Rodley, criticised the complete absence of accountability in the State's responses to various forms of 'historic' institutional abuse, including the Magdalene Laundries. He stated:

> The state's response has been one of seeking to find material responses to the needs of the victims, and I don't want to pour cold water on that. However, there remains the problem of accountability—the accountability for assault and worse. In all of these cases, the issue that remains for the state party is to consider what it is going to do about accountability. Accountability for its own responsibilities, accountability for its failures to monitor what others have been doing, and the accountability of others for committing abuses that the State might well be able to think of as crimes. The accountability that I mention is missing in everything that we've heard so far.[170]

B. *Impunity and powerlessness*

This section argues that the lack of accountability for the Magdalene Laundries abuse is due to the State's continuing exercise of power over Magdalene survivors. On the basis that impunity interferes with Magdalene survivors' dignity through its denial of moral validation and equal moral status, it is contended that the powerlessness of survivors to change the situation of impunity for their systematic ill-treatment gives rise to a dignity violation sufficient to meet the minimum threshold of severity under the anti-torture norm. It is also maintained that the State's actions in denying accountability reveal a continuum of powerlessness that links the initiating dignity violation with the ongoing dignity violations, creating a 'continuing situation' of dignity violations under the anti-torture norm.

The Irish government has argued that it has no obligations towards Magdalene survivors because they have not successfully sued the State or the religious congregations that managed

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6-7&Lang=en> accessed 5 September 2017; Ireland, 'Replies to List of issues prior to submissions of the second periodic report of Ireland to the Committee Against Torture' (n 167) para 241.

[169] See (n 18) and (n 149).

[170] HRC, Examination of the fourth periodic report of Ireland (14 and 15 July 2014), Statement by Sir Nigel Rodley, 0.00–1.08; 4.33–5.55 mins <www.youtube.com/watch?v=v0NCIB3uHns> accessed 5 September 2017.

the institutions in court, thereby establishing responsibility for unlawful conduct. In 2011, the Department of Justice resisted a recommendation by the Irish Human Rights Commission IHRC for an immediate statutory investigation into human rights violations in the Magdalene Laundries,[171] arguing that it was 'not aware of any finding by a court or other similar body that any offences or torts [had] been committed by those operating Magdalen laundries'.[172] In August 2016, the Department of Justice refused a recommendation by the Ombudsman to allow a number of applications to the 'ex gratia' scheme from women who had worked in Magdalene Laundries as children, stating:

> There has been no court ruling that the State had any liability for women who entered such institutions, nor have we ever seen any legal advice or factual evidence that would give rise to the belief that the State has any legal liability. We are also not aware of any successful legal action taken against the religious orders concerned.[173]

The analysis in this section refutes the idea that the lack of court action by Magdalene survivors is evidence of the absence of abuse. The following discussion demonstrates that the State's actions have made the Irish criminal and civil justice systems unavailable to Magdalene survivors, perpetuating the women's powerlessness in the aftermath of their incarceration in the institutions.

It is argued that aspects of the Magdalene Laundries abuse combined with the State's failure to initiate any measures of accountability over decades rendered survivors powerless to obtain redress.

First, the involvement and acquiescence of state authorities including the police in the Magdalene Laundries system,[174] combined with the State's failure to establish any

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[171] Irish Human Rights Commission (IHRC), *Assessment of the Human Rights Issues Arising in relation to the 'Magdalen Laundries'* (November 2010).
[172] Ireland, Department of Justice, Draft Memorandum for the Government, Magdalen Laundries (March 2011) in O'Fatharta, 'Government "conscious of redress" for Magdalene survivors' *Irish Examiner* (18 November 2014).
[173] Letter from the Assistant Secretary to the Minister for Justice and Equality to the Office of the Ombudsman dated 3 August 2016, filed with the High Court in the case of *MKL v Minister for Justice and Equality, DC v Minister for Justice and Equality* [2017] IEHC 389 See further Conall Ó Fatharta, 'Verdict in Magdalene case may be farreaching' *Irish Examiner* (1 June 2017) <www.irishexaminer.com/viewpoints/analysis/verdict-in-magdalenecase-may-be-far-reaching-451342.html> accessed 3 October 2017.
[174] JFMR, 'NGO Submission to the UN Committee Against Torture' (n 142) para 2.7 and fn 93.

investigation or other measures of accountability, may be understood to have caused survivors' powerlessness. As noted above, the ECtHR in *Mocanu v Romania* recognised the powerlessness caused to a victim of police violence by 'the authorities' failure to react in a prompt manner, capable of reassuring him and encouraging him to come forward'.[175] Magdalene survivors have described how they remained fearful for their fate after their release or escape. One woman stated: 'You never knew what was going to happen to you, the day after, the day after'.[176] Another woman explained: 'I was going to write to the nun when I left Limerick—to the head nun and ask her why I didn't get paid for working in the laundry. And I thought, "if I do you know they'll try and bring me back again." I just got that feeling'.[177] The IDC report states that, having been released, 'many [women] were fearful that, for some unknown reason, they might be brought back there again. Some of the women told the Committee that they felt free of this fear only after they left Ireland to live abroad".[178]

Second, the Magdalene Laundries imposed a sense of stigma and shame on those incarcerated that was so great it prevented women from speaking of their treatment for decades afterwards, and the State took no action until the apology in 2013 to relieve the women of this experience. The Magdalene Laundries were a product of what Fischer describes as the 'politics of shame in early twentieth-century Ireland', which 'functioned through the construction of deviant others who were presented as threats to a new national identity of purity and moral virtue'.[179] The Taoiseach explicitly characterised the state apology as an attempt to lift the shame and stigma imposed on the women not just during their incarceration but also throughout their lives afterwards.[180] A Magdalene survivor in interview for the UCD Magdalene Oral History project explained: 'you had to go through life knowing you had all of that - you couldn't tell anybody about it because nobody really wanted to know. And so therefore you were left with the whole thing yourself'.[181] Another woman stated: 'I feel if I start talking to somebody that I'm going

[175] *Mocanu v Romania* ((n 46) para 273.
[176] JFM, 'Submission to the United Nations Committee Against Torture' (May 2011) 33 <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_NGO_IRL_46_9041_E.pdf> accessed 5 September 2017.
[177] ibid 42.
[178] Ireland, 'Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries' (n 137), Ch 19 para 28.
[179] Clara Fischer, 'Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalization of Feminine Transgression in Modern Ireland' (2016) 41(4) Signs: Journal of Women in Culture and Society 821, 833.
[180] Dáil Éireann, Magdalen Laundries Report: Statements (n 152).
[181] O'Donnell, Pembroke and McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (n 158), MAGOHP/04/ANON (5 January 2013).

to tell them and I don't want to tell them because when you tell people how you are or what you're feeling and what you've been through they actually don't want to know you anymore. They have this kind of like..oh...the...it's kind of like they stand back from you as if you were kind of a leper or...'.[182]

Third and related to the above aspects, the fact that the Magdalene Laundries abuse happened in plain view and with the involvement of the State and society in general, coupled with the State's failure to initiate any measures of accountability can be understood to have prevented Magdalene survivors from complaining and obtaining redress. Gallen has argued that Magdalene survivors may not have been aware, following their escape or release, that their treatment was unlawful due to the fact that it was perpetrated with the direct involvement and consent of the State.[183] In fact, the open and widespread nature of the Magdalene Laundries abuse was recently found by the Irish High Court, Court of Appeal and Supreme Court to prevent the operation of the 'concealed fraud' exception to the ordinary limitation period for personal injury claims in the Irish civil courts.[184]

Fourth, the Magdalene Laundries abuse has had a profoundly damaging impact on survivors' health throughout their lives, as discussed in Section C below. The physical, psychological and other impacts of the abuse may be understood to have further impeded women's ability to pursue complaints.[185] As noted above, the ECtHR, IACtHR and CAT have all recognised this possibility.[186] The State provided no measures of rehabilitation to the women until it established the 'ex gratia' scheme in 2013. Although the 'ex gratia' scheme ostensibly provides

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[182] ibid, MAGOHP/07/ANON (23 March 2013):

[183] Gallen, 'Historical Abuse and the Statute of Limitations' (n 117) 4.

[184] *O'Dwyer v The Daughters of Charity of St Vincent de Paul & Ors* [2015] IECA 226 (Court of Appeal) para 45. See also *EAO v Daughters of Charity of St Vincent de Paul & ors* [2015] IEHC 68 (High Court); *Elizabeth Anne O'Dwyer v The Daughters of Charity of St Vincent de Paul, the Sisters of Our Lady of Charity of Refuge, and the Health Service Executive* [2016] IESCDET 12 (unreported), January 22, 2016 (Supreme Court).

[185] See Nora Sveaass, 'Gross human rights violations and reparation under international law' (n 125) 8–9:

> alternative ways of obtaining redress are very important, because after all, how many victims of torture will ever make it to court…Standing up for your rights, and presenting complaints and stories about torture to the authorities in the country where torture has taken place is not only often dangerous, but something most people will have serious difficulties in doing so. For the many who have worked clinically with torture survivors, this is quite evident. Torture will very often reduce the capacity and the energy to deal with this part of the trauma, and most people will need a good psychosocial support system and one that they can be confident of, to want to raise such cases in the first place. The most valuable evaluation of good health and psychosocial support for survivors of torture may well be readiness to go to court when the treatment is over. Psychosocial and medical care is possibly a prerequisite for complaints and redress rather than as a result of it.

[186] IACmHR, *Leopoldo Garcia Lucero v Chile* (n 65) para 48; *Mocanu v Romania* (n 46) paras 273–75; CAT General Comment No 3 (n 3) para 38.

for some rehabilitation, in fact it does not give Magdalene survivors any health services over and above those ordinarily available to holders of a means-tested public health services card.[187]

It is further argued that the State has rendered the women powerless to obtain redress by taking a number of actions in the legal sphere.[188]

First, the government has required Magdalene survivors to sign a legal waiver, abandoning all rights of action against the State or any State agency regarding their experiences in Magdalene Laundries, in order to obtain financial payments from the so-called 'ex gratia' scheme.[189]

Second, the Irish Statute of Limitations presents an almost total bar to litigation of 'historic' claims against either the State or non-State actors.[190] There is no provision for the exercise of judicial discretion to extend the two-year limitation period for an action claiming damages in tort in the interests of justice, and the few existing exceptions to the limitation period are extremely narrow.[191]

Third, the State refuses to allow public access to its archive of state records concerning the Magdalene Laundries.[192] In addition, the IDC inquiry into state involvement with the institutions mentioned above (which investigated operational aspects of the institutions only and not allegations of abuse) destroyed its copies of archival evidence received from the relevant religious congregations and returned all original evidence to the them at the conclusion of its work in 2013.[193] Through these actions and its continuing refusal to legislate for an

[187] JFMR, 'NGO Submission to the UN Committee Against Torture' (n 166) paras 4.7–4.11.
[188] See CAT General Comment No 3 (n 3) para 38 for a discussion of '[s]pecific obstacles that impede the enjoyment of the right to redress', including 'State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress [and] statutes of limitations'.
[189] Ireland, Department of Justice, 'Terms of the ex gratia scheme', Appendix 2, 'Template – Acceptance Form and Statutory Declaration', on file with author. Survivors must agree to 'waive any right of action against the State or any public or statutory body or agency arising out of [their] admission to and work in' a Magdalene Laundry and to 'discontinue any proceedings instituted by [them] against the State or any public or statutory body or agency arising out of the circumstances of [their] application.'
[190] Gallen, 'Historical Abuse and the Statute of Limitations' (n 117) 12.
[191] ibid 15. The 'disability' exception to the running of the limitation period applies only if (a) the person is 'of unsound mind', in the sense that she is 'incapable of conducting her ordinary affairs in a general way',[191] or (b) the person's court action is based on sexual abuse suffered in childhood, which caused a 'psychological injury' of 'such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action [was] substantially impaired': Statute of Limitations Act 1957 (as amended by Statute of Limitations (Amendment) Act 2000), s 48A.
[192] JFMR, 'NGO Submission to the UN Committee Against Torture' (n 142) paras 3.3–3.4.
[193] See Ireland, Inter-departmental Committee to establish the facts of State involvement with the Magdalen Laundries, Interim Progress Report (20 October 2011) para 35

inquiry or truth-telling process, the State continues to exercise absolute power over Magdalene survivors given that it occupies the exclusive position of being able to produce and force the religious congregations' production of archival evidence concerning the Magdalene Laundries system.

Fourth, the *O'Keeffe v Ireland*[194] case demonstrates the Irish State's practice of pursuing litigants for its costs of defending test cases concerning constitutional rights claims and does not provide legal aid for constitutional claims involving personal injuries. It is worth recalling in this respect the IACtHR's finding in *Garcia Lucero v Chile* that it was 'not reasonable' to expect the applicant to initiate a claim against the State while suffering the health and financial effects of torture and where 'no person in the same situation…ha[d] been compensated'.[195] When the applicant in *O'Keeffe* lost her claim against the State (concerning its failure to protect her from child sexual abuse at school several decades previously) at first instance, the High Court awarded the State approximately €500,000 in costs, to be paid by Ms O'Keeffe.[196] In the ECtHR's judgment finding a substantive violation of Article 3 ECHR due to the State's failure to protect children in church-run schools from sexual abuse, the Court noted that although Ms O'Keeffe had legal representation throughout the proceedings, she had not had legal aid.[197]

It is argued that the State's continuing exercise of its power to deny Magdalene survivors redress demonstrates the women's unequal standing in moral terms to others. The State's actions communicate that the women's experiences do not qualify for the response that might be expected if, for example, they had been subjected to the abuse in recent years; or were male; or had been arbitrarily detained and forced into unpaid labour in a context to which a deeply ingrained gendered stigma was not attached. In a public interview, one Magdalene survivor has explained her feeling of inequality, which stems from her powerlessness in the face of the government's denial of redress. She states: 'For me, they're saying again that I don't matter.

<www.justice.ie/en/JELR/Appendix%201.pdf/Files/Appendix%201.pdf> accessed 5 September 2017. See also Written reply by Frances Fitzgerald, TD, Minister for Justice and Equality, to Maureen O'Sullivan, TD (23 February 2017) <www.kildarestreet.com/wrans/?id=2017-02-23a.218> accessed 3 October 2017.

[194] *O'Keeffe v Ireland* (2014) 59 EHRR 15.

[195] IACmHR, *Leopoldo Garcia Lucero v Chile* (n 65) para 48. See also CAT General Comment No 3 (n 3) para 38, recognizing 'the failure to provide sufficient legal aid and protection measures for victims and witnesses' to be one of the '[s]pecific obstacles that impeded the enjoyment of the right to redress and prevent effective implementation of article 14'.

[196] Mary Carolan, 'State awarded costs in school abuse case' *Irish Times* (24 March 2006); *O'Keeffe v Ireland* (n 194) paras 27, 47.

[197] *O'Keeffe v Ireland* (n 194) para 48.

Again they're ignoring my basic human rights. I bet you all those people in Government are getting their full pension and expenses, yet the Irish women are still being deprived of their entitlements'.[198] Demonstrating further her feelings of belittlement, she continues: 'I was taken up with the moment of the idea of an apology. On reflection it couldn't be genuine because they've reneged on Judge Quirke's recommendations. I really believed it… but now I feel that it was all a drama. He has let us down very badly.'[199]

It is contended that the powerlessness that Magdalene survivors are experiencing at present through the State's denial of redress is of substantially the same character as the powerlessness they experienced at the hands of the State while incarcerated in Magdalene Laundries. The women's inability to call the State and other perpetrators to account for the wrongfulness of their experiences demonstrates, as did their abuse in the institutions, that they do not enjoy the right to freedom from torture and ill-treatment (among other basic rights) or the standing to claim those rights. The women's powerlessness continues to communicate that incarcerating them with no legal basis, reasons, set duration or possibility of review was not wrong; that denying them education, their identities and the ability to communicate with others was acceptable; and that forcing them to work constantly while unpaid and under threat of punishment was not abusive. In short, the State's actions continue to deny the women's status as human beings with the same rights as others.

C. *Concrete manifestation of the 'continuing situation'*

There is significant evidence that the denial of redress for the Magdalene Laundries abuse has continued the concrete interference with core aspects of the women's personalities that began in the institutions, in many of the ways that Patel describes.

Magdalene survivors have spoken about continuing to relive their experiences in the institutions. One woman states: 'I never, never forget – I'm 67 now and it looks like it was only yesterday. It feels so vivid in my memory… The nightmares still haunt me'.[200] Another woman explains, 'I wish I could of unburden all this but no matter who I talk to, no matter how many counsellors I talk to it's… the pain is still there. It's never going to go. It's always going to be

[198] Sorcha Pollak, 'Magdalene survivor: "They're ignoring my basic human rights" *Irish Times* (19 January 2015).
[199] ibid.
[200] JFM, 'Submission to the United Nations Committee Against Torture' (May 2011) (n 176) 33.

there. And people will say to you, 'ah…f…it's in the past, forget about it', like you know, but you can't because it's…it's in your brain, it's in your head'.[201] Another woman finds that 'the whole thing has been a really bad nightmare in my life…and it's difficult really talking about it'.[202]

Some survivors have explained how their experiences have interfered with their sense of self. One woman explains: 'I had tried to commit suicide many times in the past. I never found happiness. I felt like broken pieces, and I never felt in one piece, together, solid'.[203] Another woman says that 'It's like I want to sleep my life away'.[204]

It is clear from several women's testimonies that their treatment in Magdalene Laundries continues to impinge on their ability to communicate and build relationships with others. As one woman describes: 'I've always felt an outsider, looking in always…Whatever walk you take in life, you always felt an outsider. You never seemed to fit in. It was very hard to hold relationships, I think. Because you were always felt nervous, frightened, scared'.[205] Another woman says that 'you found it really hard to trust anybody, because you were such a giving…you were a very giving person and trusting everybody and then, you know, you found that you had been taken in'.[206] Another woman explains, 'I was afraid to go out like, you were always exp…looking behind your back…you were always expecting the same thing [to] happen. I didn't trust anyone in the town'.[207]

The continuing interference with the survivors' personalities that impunity for the Magdalene Laundries has caused is further evidenced in the report of the Commission that was instructed by government in 2013 to devise proposals for an 'ex gratia' scheme in consultation with the women.[208] The Commission's report noted that 90% of 231 survivors with whom the Commission had spoken had only primary level education, that '[s]ome stated that they

[201] O'Donnell, Pembroke and McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (n 158), MAGOHP/07/ANON (23 March 2013).
[202] ibid, MAGOHP/04/ANON (5 January 2013).
[203] JFM, 'Submission to the United Nations Committee Against Torture' (May 2011) (n 176) 34.
[204] O'Donnell, Pembroke and McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (n 158), MAGOHP/07/ANON (23 March 2013).
[205] JFM, 'Submission to the United Nations Committee Against Torture' (May 2011) (n 176) 33.
[206] O'Donnell, Pembroke and McGettrick, 'Magdalene Institutions: Recording an Archival and Oral History' (n 158), MAGOHP/04/ANON (5 January 2013).
[207] ibid, MAGOHP/48/ANON (28 February 2013).
[208] Ireland, Magdalen Commission Report (n 165).

believed that their right to an education had been "taken away" from them; some could not read or write and some had taught themselves to read and write', and that '[s]ome described how they had often wished to return to education but that they believed that it was now "too late"'.[209] The report demonstrated the women's generally low income level, noting that 91% of 231 women were in possession of a state medical card or GP visit card[210] and recording that '[s]ome women spoke of how they worried about being unable to afford medical care as they became older or as their illness deteriorated'.[211] In terms of the women's physical and mental health, and sense of self, Mr Justice Quirke's report stated that 66% of 288 women were experiencing "serious health issues",[212] and that '[a] very large number of the women described the traumatic, ongoing effects which incarceration within the laundries has had upon their security, their confidence and their self-esteem'.[213]

It is argued that the continuing concrete effects add support to the argument that the impunity has given rise to a continuum of torture or ill-treatment.

Conclusion

This chapter has argued that there is the potential for the right to redress to be interpreted to apply to torture and ill-treatment regardless of when in the past the conduct occurred, through a dignity and vulnerability analysis of the impact of prolonged impunity on survivors. The chapter has contended that conceptualising torture or ill-treatment that is followed by impunity as a 'continuing situation' of torture or ill-treatment would provide a sound doctrinal basis for recognition of a right to redress regardless of when in the past torture or ill-treatment was perpetrated. Bearing in mind that enforced disappearance is acknowledged to be the paradigmatic instance of a 'continuing situation', the chapter has demonstrated the capacity of dignity and vulnerability reasoning to shed light on how torture or ill-treatment followed by impunity may meet the general criteria of the conception of enforced disappearance as a 'continuing situation'.

[209] ibid 37.
[210] ibid 34.
[211] ibid 33.
[212] ibid 34.
[213] ibid para 5.13. See further JFM, 'Submission to the United Nations Committee Against Torture' (May 2011) (n 176), Appendix IV, describing the lifelong psychological effects endured by many women, including nightmares, depression and despair; feeling ashamed, stigmatised, worthless, nervous and frightened; and finding it difficult to integrate in society and to maintain relationships.

The analysis in this chapter is an attempt to respond (albeit to a limited degree) to Shelton's call for the development of 'a framework to determine the legitimacy and modality of responding to reparations claims for historical injustice'.[214] The chapter also responds to Shelton's particular concern that many 'historical injustices' involve systematic abuses that 'pose formidable obstacles to reparation'.[215] The right to redress as understood by the CAT and in the jurisprudence of the IACtHR—as outlined in Chapter 1—already demonstrates the potential to respond to systematic abuses.[216] Many aspects of these treaty bodies' conceptions of redress respond to the particular forms of powerlessness that Parts II and III of this chapter argue older people experience in contexts of prolonged impunity. The challenge for the treaty bodies and other actors responsible for the implementation of the anti-torture norm is to anchor the existing (and constantly developing) 'comprehensive reparative concept' in a legal claim that older people who have experienced a prolonged inability to obtain redress can effectively assert. The chapter contends that dignity and vulnerability reasoning can help to meet that challenge.

[214] Shelton, 'The World of Atonement' (n 5) 292.
[215] ibid 291.
[216] The 'comprehensive reparative concept' espoused in CAT General Comment No 3 (n 3) and the IACtHR's approach to reparation in *González et al ('Cotton Field') v Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs) Series C No 205 are expansive. For insight into the potential for these conceptualisations of the right to redress to address systematic abuses, see for example Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression' in Rubio-Marín R (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009); Ruth Rubio-Marín, 'Introduction: A Gender and Reparations Taxonomy' in Rubio-Marín R (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009); Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment' (2011) 33(4) Human Rights Quarterly 1062 and UNHRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, on reparations to women who have been subjected to violence in contexts of both peace and post-conflict' (23 April 2010) UN Doc A/HRC/14/22.

CONCLUSION

This thesis has argued that the rule against torture and ill-treatment has significant potential to more effectively protect older people from mistreatment in the following contexts: deprivation of liberty for care purposes, lack of access to adequate care, and impunity for 'historic' torture or ill-treatment. The thesis contends that the concepts of dignity and vulnerability could act as lenses enabling the treaty bodies and other human rights actors to see more clearly when older people's experiences fall within the remit of the norm, and as levers to facilitate the necessary adaptations to states' obligations under the norm, in order to respond to those experiences.

Summary of Key Findings

The thesis' first step in establishing the anti-torture norm's capacity to provide more effective protection to older people was to identify the ways in which the anti-torture framework in international human rights law currently fails to respond to older people's experiences of mistreatment in the contexts selected for examination.

Chapter 3 of the thesis argued that the anti-torture framework as currently understood fails to recognise the involuntary confinement and restraint of older people in care contexts as deprivation of liberty, thus preventing older people from benefitting from the heightened protection intended to be provided by the norm to individuals who are deprived of their liberty. Chapters 1 and 3 contended that a related doctrinal gap is the tendency within the frameworks of both the anti-torture norm and the right to liberty for older people's right to respect for their legal capacity to be denied through the treaty bodies' approval of substitute decision-making and failure to define informed consent in a manner compatible with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Chapters 1 and 4 of the thesis highlighted the reticence of treaty bodies and courts to impose state responsibility under the anti-torture norm for suffering arising from socio-economic deprivation, meaning that older people's experiences of inadequate care are not embraced by the norm at present. Meanwhile, Chapter 5 argued that the right to redress for torture and ill-treatment is not generally understood to apply to torture or ill-treatment perpetrated prior to the relevant treaty's entry into force or to extend indefinitely into the future.

The thesis then attempted to ascertain the reasons for these current doctrinal constraints. They were argued to stem from a combination of conceptions (and conceptual paradigms) that exclude older people's experiences, and discriminatory structures and attitudes that camouflage the mistreatment of older people.

Chapter 3 highlighted that the current failure of the anti-torture framework to recognise the deprivation of liberty of older people in care contexts derives from a conception of deprivation of liberty as state custody, excluding state responsibility for 'private' contexts. Related to this, Chapters 1 and 4 noted that the limitation of states' obligations under the norm in the socio-economic context is based on the idea that the anti-torture norm relates only to suffering that can be attributed directly to the state. The chapters on deprivation of liberty and lack of access to adequate care argued that paternalism towards older people, while a widespread societal problem, has also seeped into the frameworks of the anti-torture norm and right to liberty. Linked to paternalism, these chapters maintained that the anti-torture framework also displays deference to professional decision-making and a failure to interrogate the discriminatory attitudes that often influence professional care practices concerning older people and make older people's experiences of mistreatment invisible. With regard to the inapplicability of the right to redress to many instances of 'historic' torture or ill-treatment, Chapter 5 argued that the limitation is based on a conception of torture and ill-treatment as 'instantaneous' in its impact on the person.

The core of the thesis is the argument that dignity could act as a lens through which older people's experiences of mistreatment could be more effectively recognised under the norm, and as a lever by which the anti-torture framework could adapt in response to that recognition. Chapter 2 of the thesis examined the role of dignity in relation to the international human rights framework as a whole and with respect to the rule against torture in particular. The chapter argued that, despite the fluid meaning of dignity within the overall human rights framework, the concept is accepted as having a particularly strong connection with the anti-torture norm; indeed, respect for dignity is generally understood to be the underpinning purpose of the anti-torture norm. As a result, the thesis argues, dignity has powerful potential to cast a spotlight on older people's lived experiences of mistreatment, piercing through the concepts, structures and attitudes that currently serve to obscure the nature of those experiences and their relationship to the anti-torture norm. The thesis also argues that once mistreatment or suffering of older people is recognised as a dignity violation sufficient to reach the minimum threshold of

severity, dignity's nature as the norm's foundational value means that the obligations necessary to address such mistreatment or suffering under the norm must flow.

Chapter 2 recognised the widespread concern among academic commentators that dignity requires substantive conceptualisation in order to maintain its role as a powerful interpretive and adaptive tool in legal reasoning. Therefore, drawing on the work of Luban[1] and existing anti-torture jurisprudence, Chapter 2 developed a conception of a dignity violation sufficient in principle to constitute torture or ill-treatment: an interference with a core aspect of the personality, in respect of which the person is powerless. The powerlessness aspect of the conception prompted an exploration in Chapter 2 of the relevance of vulnerability to dignity reasoning under the anti-torture norm—bearing in mind the increasing use of vulnerability within the anti-torture normative framework as an interpretive and adaptive tool. Following an analysis of a number of philosophical theories of vulnerability,[2] which shed light on latent aspects of the human rights treaty bodies' conceptualisation of vulnerability in the anti-torture context, Chapter 2 argued that vulnerability should be understood as the powerlessness aspect of the proposed conception of a dignity violation under the norm. More specifically, the chapter contended, vulnerability should be conceptualised as inherent, situational or pathogenic powerlessness—drawing on Mackenzie, Rogers and Dodds' taxonomy of vulnerability.[3] Chapter 2 argued that such conceptualisation of vulnerability, detached from group membership and understood as an indicator of a potential dignity violation, would encourage responses to vulnerability that are dignity enhancing.[4] Furthermore, the chapter contended, recognising the potential of various forms of powerlessness to contribute to dignity violations under the norm would enable the treaty bodies and other actors to identify the structural causes of dignity violations and therefore the positive obligations required to prevent and protect from them.

In Chapters 3, 4 and 5, the thesis put the conception of a dignity violation developed in Chapter 2 to use, analysing the extent to which dignity and vulnerability reasoning could enable the

[1] David Luban, 'Treatment of Prisoners and Torture', in Duwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014).
[2] including those of Martha Fineman, Catriona Mackenzie, Wendy Rogers, Susan Dodds and Sarah Clark Miller.
[3] Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013).
[4] The thesis engaged with Sarah Clark Miller's notion of 'dignifying care': Sarah Clark Miller, *The Ethics of Need: Agency, Dignity and Obligation* (Routledge, 2012).

treaty bodies and other human rights actors to interpret the rule against torture to better protect older people in the contexts selected for examination.

Chapter 3 demonstrated that a focus on both inherent and situational forms of powerlessness experienced by older people who are involuntarily confined and restrained in care contexts could enable the recognition of such forms of treatment as deprivations of liberty. Chapter 3 argued that deprivation of liberty should be re-conceptualised under the anti-torture norm to recognise not just physical confinement of older people but also the non-consensual imposition of isolating or restricting forms of care on an older person who is dependent for care and therefore unable to physically avoid such an imposition. Flowing from this argument, the chapter contended that the preventive mechanisms' mandates should be extended and adapted to monitor care contexts in general. The chapter also highlighted the need for consideration of the impact of Articles 12 and 14 CRPD on how deprivation of liberty and arbitrary detention are defined under the anti-torture norm.

Chapter 4 showed the capacity of dignity reasoning to pierce through the doctrinal separation of forms of suffering under the anti-torture norm depending on the degree of state involvement in them, and through a variety of discriminatory structures and attitudes related to care of older people, shining a light on the human impact of inadequate continence care. The vulnerability analysis in the chapter revealed a range of practices that warrant the specification of positive obligations under the existing overarching preventive and protective obligation under the norm, with a view to tackling the structural causes of inadequate continence care. These include obligations to provide care to older people who are dependent upon the state, to monitor contexts of care in order to ensure respect for older people's legal capacity and the provision of support where necessary to enable decision-making, to ensure training of care professionals and to ensure access to advocacy for individuals in care settings.

Chapter 5 demonstrated that viewing prolonged impunity for torture or ill-treatment from a dignity and vulnerability perspective could enable the treaty bodies to recognise the existence of a 'continuing situation' of torture or ill-treatment in the absence of redress, thus grounding a right to redress regardless of when in the past torture or ill-treatment occurred. Using

Walker's theory of 'moral vulnerability',[5] the chapter argued that redress for torture or ill-treatment is fundamentally concerned with restoring relations of reciprocal accountability, whereby the victims of torture or ill-treatment are recognised as having the standing to call to account those who have perpetrated such violations. The chapter maintained that impunity results from acts of power by the state, and as such causes victims to experience powerlessness in the face of interferences with core aspects of their personality, continuing the dignity violation initially experienced through the perpetration of torture or ill-treatment. Chapter 5 noted that the 'comprehensive reparative concept' developed by the CAT in its General Comment No 3 and echoed in the IACtHR's jurisprudence is capable in principle of responding to 'historic', systematic torture or ill-treatment and that dignity and vulnerability reasoning can assist in providing older people with an effective right to such redress.

As acknowledged in the Introduction, the present inquiry was prompted by the current debate at the United Nations regarding the need or otherwise for a dedicated instrument on the rights of older people. The thesis does not argue for or against the prospect of a convention on the rights of older people. There are many reasons why a dedicated instrument may or may not be necessary beyond the question of so-called 'normative gaps', which the thesis has not explored. However, the thesis' findings have some relevance to the ongoing discussions at the Open-ended Working Group on Ageing. First, the thesis demonstrates that there are significant doctrinal and conceptual shortcomings, or 'gaps', in the existing anti-torture framework in international human rights law as it relates to older people. This finding suggests that ameliorating the 'implementation gaps' in the universal human rights framework is not simply a question of the treaty bodies and other human rights actors explicitly considering older people as they go about their work. It is also a matter of states, treaty bodies and other actors actively seeking to adapt and broaden legal concepts and doctrines under the rule against torture and ill-treatment in order to ensure that the existing norm responds effectively to older people's experiences, including by dismantling the discriminatory structures and attitudes that have rendered them invisible in the past. Second, the thesis demonstrates that there is potential for the existing anti-torture framework to adapt to address the gaps identified and thereby to provide more effective protection to older people. This finding, combined with the finding above, shows that even as debate continues over the question of a dedicated instrument, more

[5] Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013) .

progress can and should be made on strengthening the capacity of the existing international human rights framework to protect the rights of older people. Third, the thesis provides detailed insight into a number of legal problems relating to the mistreatment of older people that a dedicated instrument might seek to address.

Limitations

A significant limitation of the thesis' inquiry is that it investigated the adequacy of only one norm within the existing international human rights framework, notwithstanding the widespread concern that older people's human rights are being routinely violated in most, if not all, areas. The Introduction set out the rationale for the thesis' approach. It was explained that the choice of the rule against torture and ill-treatment was due to its relative strength as a vehicle for ensuring the enjoyment of human rights, its history of progressively expansive interpretation in response to developing consciousness of the experiences of individuals previously ignored, and the nature of the rights violations affecting older people that are most frequently discussed. Given the paucity of literature and jurisprudence regarding older people's human rights that this examination has encountered, it is suggested that there is an urgent need for further inquiries into all aspects of older people's enjoyment of their human rights.

A further limitation of the thesis' investigation is that it did not engage with some key forms of mistreatment of older people that ostensibly deserve consideration under the anti-torture norm. For example, the thesis did not focus on the widely acknowledged problem of abuse of older people in their homes by family members and others.[6] Nor did the thesis examine the issue of denial of palliative care medication, which the former Special Rapporteur on torture, Juan E Méndez, has argued ought to be recognised as a violation of the norm.[7] The norm's application to these issues requires research, and it is hoped that the analytical framework developed in this thesis might assist with such inquiries.

A third significant limitation of the research is that it did not explore in depth the relationship between mistreatment of older people in care contexts, the rule against torture and ill-treatment

[6] United Nations Human Rights Council (UNHRC), 'Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' UN Doc A/HRC/18/37 (4 July 2011) paras 51–53.
[7] UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 paras 51–56.

and the requirements of the CRPD. Chapters 1, 3 and 4 refer to areas where further analysis is required. The thesis points generally to the need for developments and debates surrounding the CRPD to consider the treatment of older people with disabilities and who are perceived to have disabilities.

Future Directions

In addition to the above mentioned areas, the thesis' findings and analysis suggest that further research is required in a range of areas in order to understand more clearly how the protection of older people's human rights could be improved. These include:

- The impact of gender-based discrimination on older women's enjoyment of their human rights and the ways in which the anti-torture norm needs to adapt to address this specific problem.
- The feasibility of broadening the preventive mechanisms' mandates to include all forms of deprivation of liberty of older people, and the normative content of a supervisory framework for care contexts and professional care practices that may deprive older people of their liberty.
- How to define informed consent under the anti-torture norm in order to comply with the CRPD, and the positive obligations that should be specified under the norm in order to protect the right to free and informed consent in the care context generally.
- The circumstances in which non-consensual medical treatment or other non-consensual interferences with core aspects of the personality in the care context may be permitted under the anti-torture norm, and the normative adaptations required to comply with the CRPD in this respect.
- The potential for the positive obligations under the anti-torture norm to respond to the treatment of formal and informal carers of older people.
- The interaction between a positive obligation on states to provide socio-economic resources in order to prevent dignity-related violations of the anti-torture norm and existing approaches to socio-economic rights adjudication.
- The relevance of the dignity and vulnerability analysis developed in the thesis to the protection of older people's rights under other normative frameworks.

- The potential for the concepts of redress and transitional justice to respond to older people's experiences in particular.

In sum, this thesis represents a small but detailed investigation into a broad area that urgently requires further research and, indeed, advocacy. It is hoped that the thesis will contribute to these future efforts.

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