

Good Intentions: Can the “Protective Custody” of Women Amount to Torture?

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Introduction

*Whoever enters that place is lost. And whoever leaves it is born again.*²

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as:

*[A]ny 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. (emphasis added)*

One of the long neglected aspects of this definition has been the infliction of severe pain and suffering “for any reason based on discrimination of any kind.”³ However, recent years have seen an emerging discussion of discrimination in the context of torture. Much of the limited discussion in this context has considered gender-based violence against women.⁴

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2 SBS, *Dateline: Jordan – Jailing the Innocent*, 1 October 2008. A transcript is available at: <http://www.sbs.com.au/news/dateline/story/jordan-jailing-innocent>.

3 For convenience, this will be referred to as the discriminatory purpose element of the definition throughout this article, although, as will be discussed, this may not be a purpose in the true sense of the word. Copelon, R, “Gender Violence as Torture: The Contribution of CAT General Comment No. 2”, *New York City Law Review*, Vol. 11, 2008, p. 250.

4 See, for example, Copelon, R., “Recognizing the Egregious in the Everyday: Domestic Violence as Torture”, *Columbia Journal of Human Rights Law Review*, Vol. 25, 1994; *Ibid.*; and Cochrane Alexander, B., “Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims”, *American University International Law Review*, Vol. 15, 2000.

However, this discussion has largely related to the Article 1 requirement for some degree of state involvement in violence against women carried out by non-state actors,⁵ rather than the discriminatory purpose element of the definition.

Similarly, while attention has focused on a state's failure to protect women from violence,⁶ little attention has been paid to the situation in which the state does take steps to protect women, successfully preventing violence from occurring, but through means which potentially amount to discrimination or torture or other ill-treatment. This is the situation that faces women at risk of violence in Jordan. These women, at risk from family members due to domestic violence or honour crimes, may be placed in "protective custody" on the determination of a governor. They are often held for several years in prison without their consent and with no real ability to challenge their detention or seek alternative shelter. It is a practice that occurs in response to patriarchal attitudes towards women in Jordan, which see them targeted for violence, and which is highly discriminatory. However, at least on some occasions, protective custody is implemented with "good intentions"; those ordering the detention of the women genuinely believe that it is in the best interest of the women.

The practice of protective custody therefore provides an ideal case study for exploring the recently emerging discussions of whether actions carried out by state authorities with "good intentions", which are nonetheless discriminatory, can amount to torture.⁷ This article has two purposes: to highlight the draconian measures that are sometimes used by states to protect women from violence, such as protective custody; and in doing so, to discuss the potential reach of the little used discriminatory purpose element of the definition of torture, which is of particular significance in considering whether practices such as protective custody can be considered torture.

1. Protective Custody in Jordan

Just under half of all women imprisoned in Jordan in 2014 were administrative detainees whose cases had never been subject to any judicial process. Several of these women were held in what is known as protective custody; detained for their own protection due to the

5 McGregor, L., "Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings", *Human Rights Quarterly*, Vol. 36, 2014, p. 211.

6 See, for example, *Opuz v Turkey*, Application No. 33401/02, 9 June 2009; see above, note 4, Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture"; see above, note 3; and see Cochrane, above note 4.

7 Jordan acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 13 November 1991. Although Jordan has not made a declaration under Article 22 of the Convention to allow for individual complaints to be made, it must still implement criminal laws, which, at a minimum, meet the elements required under Article 1 of the CAT. See, CAT, Article 4; and Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, Para 8.

threat of violence against them from family members.⁸ Prior to 2005, the number of women held in protective custody according to government figures were staggering:

Recent statistics indicate that the cumulative yearly total numbers of women placed in protective custody between 1997 and 2004 ranged between 400 and 800. In 1997 there were 402 such women; by 2001 the total had risen to 899, while in 2002 there were 885. In 2003 the number declined to 540, and in 2004 it declined further, to 524. We may note at this point that these figures may be inflated as a result of the method of record-keeping (...) no more than between 50 and 70 women are being held in protective custody at any given time.⁹

In 2007, steps were taken to reduce the number of women held in prisons, including the opening of women's shelters.¹⁰ However, it is clear that the practice of holding women in protective custody in prisons has continued.¹¹ It is difficult to determine how many women are currently being held in protective custody or have been held in more recent years.¹² A 2010 report estimated that around 25 women were held in protective custody at any one time.¹³ Other reports detail various figures: in 2007 this was reported as only five women;¹⁴ in 2008, 12 women were reported as being held in Jweideh;¹⁵ at the beginning of 2010,

8 National Centre for Human Rights, *The Status of Female Inmates at Reform and Rehabilitation Centers in Jordan*, September 2014, p. 40; and Azzeh, L., "Nearly half of women prisoners are administrative detainees – study", *Jordan Times*, 5 March 2015. This figure was estimated to be as high as 69% in another report, see 7iber, "Imprisoning the Victim: Detaining Women Under the Pretext of Protecting Them From 'Honour' Crimes", 21 January 2015, available at: <http://www.7iber.com/2015/01/women-administrative-detention/> (in Arabic).

9 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Combined third and fourth reports of States Parties: Jordan*, UN Doc. CEDAW/C/JOR/3-4, 10 March 2006, Para 22.

10 CEDAW Committee, *Fifth periodic report of States parties: Jordan*, UN Doc. CEDAW/C/JOR/5, 24 September 2010, Para 37; UN agencies in Jordan, *Violence Against Women in Jordan: Assessing the Situation*, 2010, pp. 26–28; and Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: Addendum, Mission to Jordan*, UN Doc. A/HRC/20/16/Add.1, 14 May 2012, Para 28.

11 See National Centre for Human Rights above note 8, p. 40; see Azzeh above note 8; see 7iber, above note 8; *Ibid*, Human Rights Council, Para 28; and Mizan Law Group for Human Rights, *Alternative Report for Consideration Regarding the Hashemite Kingdom of Jordan's Amalgamated Second, Third and Fourth Periodic Reports to the United Nations Committee Against Torture (CAT)*, 12 April 2010, Para 7.7.

12 Statistics are apparently not kept on the reasons for women's administrative detention by the Department of Correction and Rehabilitation Centers, see 7iber, above note 8.

13 Huesseni, R., "Jordan" in Kelly, S. and Breslin, J. (eds.) *Women's Rights in the Middle East and North Africa: Progress Amid Resistance*, Freedom House; 2010, p. 6.

14 Human Rights Watch, *Guests of the Governor: Administrative Detention Undermines the Rule of Law in Jordan*, 2009, p. 12.

15 See above, note 2.

13 women were reported to be in protective custody;¹⁶ 25 women were reported to be in protective custody in November 2011;¹⁷ and at least seven women were being held as at February 2015.¹⁸ A 2008 documentary clearly indicated reluctance on the part of some officials to disclose the number of women held in protective custody.¹⁹ The majority of women held in protective custody appear to be held in Jweideh Correctional and Rehabilitation Centre, the main prison for women in Jordan.²⁰ They are housed with other inmates in the prison under largely the same rules.²¹

The decision to place a woman in protective custody is made by a local governor on the basis of the Crime Prevention Law of 1954.²² Article 3 of this Law outlines the circumstances in which a person may be subject to administrative detention:

1. *Any person who is found in a public or private place in circumstances that convince the District Governor that he is about to commit, or help in committing crime.*
2. *Any person who is used to banditry, theft or the possession of stolen money, is used to protect or harbor thieves, or helps hiding or disposing of stolen money.*
3. *Any person whose release without a bail might be dangerous to people.*²³

The law is clear in that it applies to those suspected of committing or intending to commit a crime. Yet it is used to justify the detention of women who are themselves the intended victims of crimes, particularly honour crimes.²⁴ Protective custody is used in response to threats or perceived threats against women from their families as a result of being perceived to be immoral due to adultery, consensual sex outside marriage (zina), being seen in the company of a man

16 See above, note 10, Mizan Law Group for Human Rights, Para 7.7.

17 See Human Rights Council above note 10, Para 27.

18 7iber, "Seven Oppressed Women: Witness Accounts on Administrative Detention Under The Pretext of Protection from 'Honor' Crimes", 25 January 2015, available at: <http://www.7iber.com/2015/01/women-detention-testimonials/> (in Arabic).

19 See above, note 2.

20 See National Centre for Human Rights, above note 8, p. 40; see Azzeh above note 8. A new Women's Detention Centre at Um Al-Lulu has recently been opened, Baker, J. and Søndergaard, E., *Conditions for Women in Detention in Jordan: Needs, vulnerabilities and good practices*, DIGNITY, December 2015, p. 14.

21 *Ibid.*, Baker and Søndergaard, p. 29.

22 7iber, "The Honour Decision-Maker: Interview with Regional Governor Hijzai Assaf" 11 February 2015, available at: <http://www.7iber.com/2015/02/administrative-detention-governor/> (in Arabic); see Human Rights Council above note 10, Para 27; Warwick, C., *Law in the Service of Legitimacy: Gender and Politics in Jordan*, Ashgate, 2009, p. 92; and see above, note 14, p. 10.

23 See translation of the law from the National Centre for Human Rights, above note 8, pp. 12–13.

24 See 7iber above note 22; see Human Rights Council, above note 10, Para 27; see Warwick above note 22, p. 92; and Human Rights Watch above note 14, p. 10.

they are not related to, divorcing, marrying without permission and even simply for being absent from or leaving home.²⁵ The Government states that protective custody is for the protection of the women involved as they face threats from their families.²⁶ While some of the governors detaining women may be motivated by a desire to punish them for perceived wrongdoing,²⁷ it is apparent that many genuinely see this as the only option open to them to protect these women.²⁸

The length of time that women may be detained for can extend to many years, with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noting cases of detention of up to 14 years.²⁹ The case of Maysun Shobaki, who at the time of the rapporteur's report had been detained for 10 years, is illustrative of the situation that women may find themselves in. Maysun was detained in 1996 for three and a half years following a conviction for unlawful sex, having been raped by her brother and nephew. The doctor who examined her following the rape called the police as she was unmarried and had become pregnant. At the end of her sentence, she remained in prison for her own protection, detained by the Governor under the Crime Prevention Law, to be released only if she marries or finds a sponsor. Her inability to leave has led her to contemplate committing suicide.³⁰

Similar stories to Maysun's have been reported elsewhere, although the length of time that women are being detained for has shortened significantly since 2007.³¹ Human Rights Watch reported on several cases of protective custody in 2009, including that of Nizrin. Nizrin was detained by the Governor of Karak having run away from home after she was sexually assaulted by her uncle. She was then raped by a stranger while hiding in an abandoned building. Her uncle reported her missing and she was found by the police. At the time at which she was interviewed, Nizrin had sent more than 10 letters asking to be released and received only two replies asking who would be able to act as her guarantor. Her reply was that she wished to act as her own guarantor. She had been detained for three years.³²

25 Penal Reform International, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014, pp. 7, 14; see National Centre for Human Rights, above note 8, p. 41; see above, note 14, pp. 10–16; and see Warwick, above note 22, pp. 90–91.

26 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Addendum, Mission to Jordan*, UN Doc. A/HRC/4/33/Add.3, 5 January 2007, Appendix, Para 41.

27 See above, note 2.

28 Equal Rights Trust interview with Jordanian lawyer, 8 August 2015.

29 See above, note 26, Para 39. Other cases of detention of more than 10 years and up to 15 years have been reported, see above, note 2; see above, note 14, p. 11; and Amman Centre for Human Rights Studies, NGOs Coalition Report Universal Periodical Review of Human Rights in Jordan NGOs Coalition for the UPR – Joint UPR Submission – Jordan, October 2013, October 2013, Para 4.

30 See above, note 26, Para 40.

31 See above, note 28; and see Tiber, above note 18.

32 See above, note 14, p. 16.

Nadia-Bahia turned herself into the authorities on finding out she was pregnant, worried that her brothers might kill her. The police handed her over to the Governor, who placed her in protective custody. She gave birth to a baby boy who she saw once a month for three years, before he was placed in foster care against her wishes. She has not seen him since.³³ Azza was detained as a minor accused of zina. She was never charged but at the time of being interviewed had been held for 11 years, the last four of which were in protective custody. She described the way she felt about her detention as follows:

*I beg the minister of interior, the minister of justice, the queen and the king to let me out of this place. I've lived here all of my life. Why are we treated this way? I've written so many letters to the Ministry of Interior. So I have a risk from my family? So what? What right do they have to keep people in prison until they die?*³⁴

The feelings of despair and devastation at being detained against her will are not unique to Azza. Rita, detained for 14 years, described her feelings of hopelessness:

*When I entered that place, I was terrified, I was afraid. I never thought I would set foot in that place or meet the people there (...) I got into that place and I felt like a bird locked up in a cage, suffocating and unable to fly around. It's the same with a human being when locked up in a room within four walls. You can't breathe the air. You can't see anything (...) Whoever enters that place is lost. And whoever leaves it is born again. Whoever enters that place feels on the first day that she's going to a funeral (...) There was no freedom. You're locked up 24 hours a day. You have breakfast, lunch and dinner. They'd open the door for you to get it and then they'd lock you up (...) I'm telling you, I thought I'd be there forever.*³⁵

Sophia, detained for 15 years, described similar feelings:

*I used to pray to God for help (...) I used to convince myself that I was moving, but my feelings were numb, as if I didn't exist (...) I felt dead, not alive. But I tried to convince myself that it was wrong to commit suicide and die (...) When you're locked up within four walls for long and you ask yourself why (...) There's no answer.*³⁶

33 See above, note 18, 7iber.

34 See above, note 14, Human Rights Watch, p. 14.

35 See above, note 2.

36 *Ibid.*

One woman reported going on a hunger strike every year due to her inability to secure her release.³⁷ Although women have the right to contest the decision to place them in custody, there are no known cases of women choosing to do so; this is attributed to the weak position of women compared to the pressure and risks they would face in bringing attention to their case.³⁸ Women will be released from custody only if the governor determines that they can be safely released to a guarantor, usually a male family member, sometimes on the written pledge that if he harms her he will forfeit a monetary penalty (reported to be between JD 5,000 and JD 30,000 (approximately US(\$ 7,050 to 42,3000)).³⁹ In some cases, women may be released if they marry the person with whom they were accused of having sex.⁴⁰ In one case, a woman married a man who raped her.⁴¹ Despite guaranteeing that they will not harm the women released to them, there have been numerous cases reported of women who have been killed after being released to male family members. In 2010, a man was convicted of murdering his sister by stabbing her 33 times and beating her with a rock a week after he had signed a guarantee not to hurt her in order to have her released from protective custody.⁴²

The conditions in Jweideh have been described as sparse, relatively clean and with minimal natural light and some ventilation problems. The prison has reportedly been overcrowded at times.⁴³ Some women, particularly those who are considered to have broken social codes, have reported facing stigma and disdain from prison staff.⁴⁴ Although a recent report noted some instances of women being beaten or slapped (including while strip searched),⁴⁵ it is not clear if this has been the case for women in protective custody, and there are no other known reports of any physical violence towards women detained in protective custody or during the process of detaining them.⁴⁶

37 See above, note 20, Baker and Søndergaard, p. 29.

38 See 7iber, above note 8.

39 See Warwick, above note 22, p. 91; Human Rights Watch, *UPR Submission: Jordan*, March 2013, p. 4 (pages unnumbered); see above, note 10, Human Rights Council, Para 28; see above, note 25, Penal Reform International, p. 8; and above, note 14, p. 13.

40 *Ibid.*, Warwick, p. 91.

41 See above, note 20, Baker and Søndergaard, p. 30.

42 Hussein, R., *Man receives 10 years for killing sister*, The Jordan Times, 13 July 2010, available at: <http://www.jordantimes.com/news/local/man-receives-10-years-killing-sister>. For additional examples see Warwick, above note 22, p. 91.

43 See Baker and Søndergaard, above note 20, p. 40.

44 *Ibid.*, p. 31.

45 *Ibid.*, pp. 44–45.

46 None of the individual cases reviewed documented any complaints of physical or mental abuse. One woman noted that, “it wasn’t such a bad centre but it was still a prison”, see above, note 2.

What is clear is that many of the women who are kept in protective custody have faced significant physical or mental abuse, including honour crimes, prior to their detention, for which they require specialist medical care. However, the physical health care provided to these women is not always adequate and mental health care appears to be woefully lacking.⁴⁷ Women are allowed very limited contact with family members, including children. Women with children born outside of marriage are now reportedly allowed no contact at all with these children. These restrictions cause pain and anxiety and often reinforce feelings of isolation. Women in protective custody who have been ostracised by their families have almost no contact with the outside world.⁴⁸

As can be seen from the above, the key features of protective custody are detention in prison: not in accordance with national law; following the determination of a non-judicial state authority that a woman is at risk of harm; which may be prolonged and is likely to be indefinite; and which may lead to severe feelings of despair and hopelessness because of the inability to be released, the lack of control over the risk of being released to the possibility of harm and due to the fact of being detained itself.⁴⁹ Also key is that it is discriminatory, being largely applied to women as a result of the risk of violence directed towards them because they are women.

2. Can Protective Custody Amount to Torture?

The definition of torture is commonly broken down into four elements: severe pain and suffering; intentionally inflicted; for a purpose; and by or with the consent or acquiescence of a public official.⁵⁰ In the context of protective custody, the last of these elements, the involvement of a state official is not in dispute; the women are detained on the authority of the governor. Nor is this a question of a lawful sanction; while it is argued by some that the Crime Prevention Law permits protective custody, it clearly does not.⁵¹ Finally, while there may be some women who consent to protective custody, there are many who do not and it is their experiences that are the subject of this article. While not considered in

47 See Baker and Søndergaard, above note 20, p. 48–51.

48 *Ibid.*, pp. 32, 61.

49 Such features, of course, mean that protective custody is likely to violate a range of human rights, including the rights to freedom of movement and liberty. However, the purpose of this article, as noted above, is to consider only whether protective custody may amount to torture.

50 See above, for example, note 4, Copelon, “Recognizing the Egregious in the Everyday: Domestic Violence as Torture”, p. 308.

51 See the discussion in section one above. Even if the law was amended to allow for protective custody, this would not result in the finding that protective custody is a lawful sanction. Lawfulness in this context includes not just in accordance with national law, but in accordance with international human rights law. Such a discriminatory sanction could never be lawful under international human rights law. Commission on Human Rights, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B*, UN Doc. E/CN.4/1997/7, 10 January 1997, Paras 7–8.

this article, it is also extremely difficult to see how women without any alternative option open to them such as a shelter or refuge, could be seen as giving free consent. The failure to provide alternatives to protect women from gender-based violence, or indeed to tackle the causes of such discriminatory violence, can hardly lead to an argument that the women consent to detention.⁵²

a. Severe Pain and Suffering

Before considering the pain and suffering caused by protective custody, it is helpful at this point to briefly consider the distinction between torture and other ill-treatment. Unlike the comprehensive definition of torture, the CAT provides only limited reference to acts that are often collectively referred to as “other ill-treatment”. Article 16 states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.

As with torture, such acts are only prohibited if they “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”.⁵³ Different approaches have been suggested to distinguish between torture and other ill-treatment. One approach is that torture requires a higher or aggravated degree of pain and suffering than other ill-treatment (that is, something beyond severe pain and suffering).⁵⁴ A similar approach also distinguishes between torture and other ill-treatment on the basis of relative pain and suffering, but starts from the premise that only torture requires severe pain and suffering, and other ill-treatment requires pain and suffering that is less than severe. This approach has been termed the severe-minus approach.⁵⁵ The first approach, requiring something more than severe pain and suffering, goes beyond what is required in Article 1 of the CAT, which is severe pain and suffering, and appears now to

52 States are required to take measures to protect women from gender-based violence, including through the provision of refuges. An overview of the obligations of states in relation to discrimination against women and gender-based violence can be found in Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Doc. A/HRC/23/49, 14 May 2013, Paras 70–71; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence Against Women*, Eleventh Session, 1992, Para 7.

53 CAT, Article 16.

54 No definition is provided in any of the other general human rights treaties. See, for example, International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 1966, Article 7; European Convention on Human Rights, Article 3; and American Convention on Human Rights, Article 5(2).

55 See, for example, Committee Against Torture, *Keremedchiev v. Bulgaria*, Comm. No. 257/2004, UN Doc. CAT/C/41/D/257/2004, 21 November 2008, Para 9.3; and Rodley, N. with Pollard, M., *The Treatment of Prisoners Under International Law*, 3rd ed., Oxford University Press, 2009, pp. 98–99, 114.

have fallen out of favour.⁵⁶ A different approach altogether distinguishes torture from other ill-treatment on the basis of the purposes set out in Article 1 of the CAT.⁵⁷ In practice, as will be seen below, it is often difficult to understand the basis on which distinctions between torture and other ill-treatment are made,⁵⁸ and in some cases, a combination of both relative severity and purpose appears to be used.⁵⁹

On either of the approaches relevant to the CAT definition (severe-minus or purpose), in order for protective custody to be considered torture, it must involve the infliction of severe pain and suffering. If the severe-minus approach is adopted, something less than severe pain and suffering may suffice for protective custody to be classified as other ill-treatment. If a purely purposive distinction is adopted, then for protective custody to be either torture or other ill-treatment, it must cause severe pain and suffering. The relevance of this latter distinction to the purpose element of the Article 1 definition will be considered in the following section. For now, with the above discussion of relative severity in mind, this section turns to consider the severity of pain and suffering caused by protective custody.

The individual circumstances of the case in question are key to determining whether protective custody may amount to torture. This includes considering the particular characteristics, and the

56 Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that torture was an “aggravated and deliberate” form of other ill-treatment. However, this wording was deleted during the drafting of Article 1 of the CAT. Nowak, M., “What Practices Constitute Torture?: UN and US Standards” *Human Rights Quarterly*, Vol. 28, 2006, pp. 820–821; see Rodley with Pollard, above note 55, p 99; and Rodley, N., “The Definition(s) of Torture in International Law”, *Current Legal Problems*, Vol. 55, 2002, p. 476.

57 See Rodley with Pollard, above note 55, pp. 98–99. Nowak also takes this approach, but adds also the element of powerlessness of the victim, “the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim”, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. E/CN.4/2006/6, 23 December 2005, Para 39; Nowak, M. and McArthur, E., *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p. 77; and Nowak, M. and McArthur, E., “The distinction between torture and cruel, inhuman or degrading treatment”, *Torture*, Vol. 16, 2006. To the extent that this can be considered as adding an additional requirement of powerlessness in order for the definition of torture to be met, this proposition has been strongly contested, see above, for example, note 3, p. 242. Leaving to one side the difficulties inherent with the use of the term powerlessness, in accordance with the meaning Nowak appears to ascribe to this term as meaning in the control of or detained, this element is not problematic in the context of protective custody, where the women are, by definition, detained.

58 For example, the Human Rights Committee, in relation to Article 7 of the ICCPR, will find a violation of the article without making a distinction between whether the circumstances amounted to torture or to other ill-treatment. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, Para 4.

59 See, for example, *Salman v Turkey*, App. No. 21986/93, 27 June 2000, Para 114. See above, note 7, Committee Against Torture, Para 10.

vulnerability of, the woman involved.⁶⁰ It is clear from the definition in Article 1 that mental suffering alone may be sufficient to meet the threshold of severe pain and suffering required for an act to be considered torture.⁶¹ The conditions of detention are also relevant; conditions which are particularly egregious have of themselves been considered severe enough to amount to cruel, inhuman and degrading treatment and sometimes even to torture.⁶² Although now evidently shorter than it once was, protective custody can be prolonged, stretching from many months to years in some cases. In all cases, detention is arbitrary and in many cases, it is also indefinite. Although legally the women detained may challenge their detention, it is clear that this is not a viable option in practice due to the vulnerability of these women and the risks that they would face in doing so. Women therefore wait on the discretion, often not exercised, of the governor to be released.⁶³

The suffering caused by detention in and of itself has been recognised as both inhuman and degrading treatment, and considered within the ambit of torture. In *Vinter v United Kingdom*,⁶⁴ the applicants alleged that the sentence of life imprisonment with whole life tariffs (with only the possibility of release on compassionate grounds if the applicant was to die within three months of release) violated Article 3 of the European Convention on Human Rights (ECHR) because of the sense of hopelessness it imposed. The European Court of Human Rights (ECtHR) held that “grossly disproportionate” sentences would violate Article 3 of the ECHR.⁶⁵

In a 2013 complaint, the Human Rights Committee (HRC) found that periods of detention of 14 months and of two years violated Article 7 of the International Covenant on Civil and Political Rights (ICCPR):

*The Committee considers that the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.*⁶⁶

60 Committee Against Torture, *Dzemajl v Yugoslavia*, Comm. No. 161/2000, UN Doc. CAT/C/29/D/161/2000, 21 November 2002, Para 9.2; and Human Rights Committee, *Vuolanne v Finland*, Comm. No. 265/1987, 1989, Para 9.2.

61 See, for example, Human Rights Committee, *Estrella v Uruguay*, Comm. No. 74/1980, UN Doc. CCPR/C/18/D/74/1980, 1983, cited in note 55, Rodley with Pollard, pp. 97–98.

62 This latter finding was in relation to “infernal conditions”, Human Rights Commission, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1994/37 Addendum: Visit by the Special Rapporteur to the Russian Federation*, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1995, Para 71.

63 See discussion in section one above.

64 *Vinter and Others v the United Kingdom*, App. Nos. 66069/09, 130/10 and 3896/10, 9 July 2013, Para 78.

65 *Ibid.*, Para 102.

66 Human Rights Committee, *F.K.A.G. et al v Australia*, Communication No. 2094/2011, 20 August 2013, Para 9.8.

It is not clear whether the HRC or the ECtHR considered that indefinite detention could amount to torture, as each referred to a violation of the prohibition against torture and other ill-treatment taken as a whole. However, the Special Rapporteur on torture has stated that uncertainty over the length of detention may lead to mental suffering severe enough to constitute torture. Recognising the sense of hopelessness that detention can cause, he noted:

With respect to indefinite detention of detainees the mandate finds that the greater the uncertainty regarding the length of time, the greater the risk of serious mental pain and suffering to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.⁶⁷

As discussed above, women in protective custody reported feelings of despair and hopelessness in response to their ongoing arbitrary and indefinite detention such that they considered committing suicide or went on hunger strikes. This mental suffering may be further compounded by the other circumstances that women may face in protective custody, the cumulative effect of which must be considered together.⁶⁸ Women in protective custody are often in a situation of particular vulnerability due to the experiences that lead to them being detained, which can involve serious physical and mental abuse. Some women have survived being stabbed, burnt or shot, or have seen their sisters killed. In addition to this, some are forced to give up their new-born babies.⁶⁹ These vulnerabilities are then exacerbated by a lack of both physical and mental health care in detention, and in some cases, by the stigma that they face from staff. It is clear that women may therefore have, or be at risk of developing, mental health problems while in detention, and reports of self-harm support this conclusion.⁷⁰ Denial of health care itself, including mental health care, has been considered a violation of Article 3 of the ECHR and Article 7 of the ICCPR.⁷¹ Reports that isolation is used in response to cases of self-harm, and that staff react with disdain to such incidents, have been made in relation to Jweideh, although it is not clear if these reports relate to women in protective custody.⁷²

67 OCHCR, “Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay”, 3 October 2013, available at, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&#sthash.fpmPLPXh.K0ZINBd3.dpuf>. See also OHCHR, “IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health reiterate need to end the indefinite detention of individuals at Guantanamo Naval Base in light of current human rights crisis”, 1 May 2013, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13278&LangID=E#sthash.RL8zOgfs.dpuf>.

68 See Rodley with Pollard, above note 55, pp. 92–94.

69 See Baker and Søndergaard, above note 20, p. 50.

70 *Ibid.*, p. 32.

71 See Rodley with Pollard, note 55, pp. 408–410.

72 See Baker and Søndergaard, above note 20, pp. 46, 51.

The circumstances that women face may also include feelings of fear or powerlessness due to the risk of being released to family members who may harm them (or who have the ability to control whether they are released or not), the pain of being denied the ability to see their children, and in some cases, being effectively shut off from the outside world. Women may also face discriminatory attitudes from prison staff and are at least at risk of some physical violence. The level of mental suffering that women in protective custody experience can drive them to what can only be described as utter desperation, such as in the case of the woman who married her own rapist to secure her release, or where women self-harm.⁷³

The previous Special Rapporteur on torture, speaking about protective custody in Jordan, concluded that “depriving innocent women and girls of their liberty for as long as 14 years can only be qualified as inhuman treatment, and is highly discriminatory.”⁷⁴ It is not clear what the circumstances of the cases being considered by the Rapporteur were or why they were not considered torture. However, the current Special Rapporteur, speaking about women who have experienced rape, honour crimes or other abuse, has noted that placing women in custody to “protect” them “can amount to torture or ill-treatment per se.”⁷⁵ Based on the circumstances described above, some extreme cases of protective custody may lead to mental suffering severe enough to reach the necessary threshold for torture, particularly where detention is prolonged and without hope of release, women experienced violence and abuse prior to entering custody, and when women are experiencing mental health problems and are effectively shut off from the outside world. The next part of this section will therefore consider whether the remaining elements in the definition of torture, intent and purpose, can be found in cases of protective custody.

b. Intent and Purpose

The second and third elements of the definition of torture are the requirements that the pain and suffering be intentionally inflicted on the person, and that this must be for one of the listed purposes.⁷⁶ While these are commonly considered as two separate elements,⁷⁷ they will initially be addressed together here as the line between them often appears blurred when the discriminatory purpose element of the definition is being considered. Both the intent and purpose elements have been subject to considered discussion

73 *Ibid.*, pp. 30, 54.

74 See above, note 26, Para 39.

75 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/31/57, 5 January 2016, Para 24.

76 CAT, Article 1.

77 See above, for example, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 308.

elsewhere.⁷⁸ However, what does not appear to have been explored is how the relationship between intent and a discriminatory purpose interact, if at all, and the significance of the differently phrased discrimination element. The significance of this lack of discussion becomes evident when considering those cases of protective custody in which a woman is detained with “good intentions” (to protect her) but which arise from discrimination. When no other purpose (punishment, intimidation or similar) applies, the sole way in which a woman’s detention may meet the definition of torture is to meet the discriminatory purpose requirement, “for any reason based on discrimination of any kind”.

Discussions of discriminatory purpose often appear to lack detailed reasoning – links between the act, perpetrator and discriminatory purpose often appear to be assumed rather than carefully examined. Similarly, comments made by the Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment and the Committee Against Torture, are often brief and do not appear to shed clear light on the issue. In his annual report to the HRC, then Special Rapporteur on torture, Manfred Nowak, stated that:

*In 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. Moreover, if it can be shown that an act had a specific purpose, the intent can be implied.*⁷⁹ (footnote omitted)

Acts that are gender-specific are noted to be:

*I.e. violence that is gender-specific in its form or purpose in that it is aimed at “correcting” behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.*⁸⁰

Referring to this statement, the current Special Rapporteur, Juan Mendez, has noted that:

*The mandate has stated, with regard to a gender-sensitive definition of torture, that the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the Convention is discrimination.*⁸¹

78 See, for example, Hathaway, O., Nowlan, A. and Spiegel, J., “Tortured Reasoning: The Intent to Torture Under International and Domestic Law” *Virginia Journal of International Law*, Vol. 52; see Nowak and McArthur, above note 57, *The United Nations Convention Against Torture: A Commentary*; and Burgers, J. H. and Danelius, H., *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment*, Martinus Nijhoff Publishers, 1988.

79 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. A/HRC/7/3, 15 January 2008, Para 30.

80 *Ibid.*, Para 30, fn 5.

81 United Nations General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc. A/HRC/22/53, 1 February 2013, Para 37.

It is not clear what the reference to a “specific purpose” is in relation to Nowak’s first statement, and how this relates to the requirement for intent, presumably this is something more than the discrimination shown which fulfils the purpose element. In relation to intent, Nowak later stated:

[T]he requirement of intent in article 1 of the Convention against Torture can be effectively implied where a person has been discriminated against.⁸²

Specifically referring to the concept of “good intentions”, Mendez, in a 2013 report, noted that:

The mandate has stated previously that intent, required in article 1 of the Convention, can be effectively implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment, where serious violations and discrimination against persons with disabilities may be defended as “well intended” on the part of health-care professionals. Purely negligent conduct lacks the intent required under article 1, but may constitute ill-treatment if it leads to severe pain and suffering.⁸³ (footnote omitted)

These various statements appear to indicate that either, or both of, intent and purpose can be assumed where there is discrimination. In relation to the situation of “good intentions”, Mendez went on to note that:

Although it may be challenging to satisfy the required purpose of discrimination in some cases, as most likely it will be claimed that the treatment is intended to benefit the “patient”, this may be met in a number of ways. Specifically, the description of abuses outlined below demonstrates that the explicit or implicit aim of inflicting punishment, or the objective of intimidation, often exist alongside ostensibly therapeutic aims.⁸⁴ (footnotes omitted)

No indication is provided of what is required to satisfy the required purpose of discrimination; rather, reference is made to the other purposes listed in Article 1. Lorna McGregor, in her article examining the application of the definition of torture to human trafficking, also notes the difficulties in establishing the discriminatory purpose of trafficking in order to meet the definition:

The difficulty with discrimination under the Convention definition, however, is that it requires a specific purpose of discrimination, as opposed to international

82 United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/63/175, 28 July 2008, Para 49.

83 See above, note 81, Paras 19–20.

84 *Ibid.*, Para 22.

*human rights law more generally which can find discrimination on grounds of discriminatory effect.*⁸⁵

In his most recent report, which did not reference the issue of “good intentions”, Mendez stated that “[t]he purpose and intent elements of the definition of torture (...) are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex.”⁸⁶ It is not made clear what acts may be considered gender-specific, but general reference is made to Nowak’s report explaining gender-specific acts (noted above).

These various statements give rise to several questions. What is required in order to demonstrate a discriminatory purpose? What is the relationship between discrimination and establishing intent, if any, and how is this established? Is there a requirement that the perpetrator of torture intend to discriminate? These questions are particularly significant in light of the evolution of the international human rights law prohibition of discrimination, which does not require proof of a discriminatory intention on the part of the perpetrator, but allows for a finding of discrimination on the basis of discriminatory effect.⁸⁷ This part will turn to examining whether the language of the CAT or its drafting history shed any light on these questions. The significance of the prohibition of discrimination to the interpretation of the CAT will then be explored in section three.

At this point, it is helpful to return to the language of Article 1 itself as a starting point. Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention) sets out the basic rule of treaty interpretation, namely that:

*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*⁸⁸

In order to confirm the meaning arrived at from the application of the basic rule, or where the application of this basic rule leaves the meaning obscure or ambiguous, “[r]ecourse may be

85 See above, note 5, p. 219.

86 See above, note 75, Para 8.

87 *Declaration of Principles on Equality*, the Equal Rights Trust, London, 2008, Principle 5. See, for example, the definitions of discrimination contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), G.A. Res. 2106 (XX), 1965; Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, 1979; and Article 2 of the Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006. See also the discussion in section three of this article.

88 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969; and Hall, K.C., “The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad”, *European Journal of International Law*, Vol. 18, 2008, p. 923.

had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”⁸⁹

The drafting history of the CAT sheds very little light on the discriminatory purpose aspect of the definition, other than that it was included by Sweden in a revised version of its proposed draft of Article 1, which formed the basis for the discussions of the Working Group responsible for the CAT.⁹⁰ The UK objected to its inclusion, requesting that the following statement be included in the drafting history:

*The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.*⁹¹

This objection was not apparently discussed further and the inclusion of the discriminatory purpose clearly subsequently found favour. The fact that other delegates did not apparently share the concern of the UK may indicate that they did not consider that there would be any need to demonstrate a discriminatory motive, or that they did not think that establishing this would be problematic. However, given the absence of any recorded discussion, it is impossible to draw a conclusion one way or the other. There was otherwise no discussion of the wording of the discriminatory purpose or its inclusion in the definition and so there is no indication of any reasons why discrimination was set apart from the other purposes.⁹² This leaves the ordinary meaning of the words to stand for themselves.

What is clear on reading Article 1 for its ordinary meaning, is that the wording of the discriminatory purpose section – “for any reasons based on discrimination of any kind” – is set apart from, and differs from, the wording in relation to the other purposes – “for such purpose as”. The phrase is clearly set apart by the use of the words “or for”⁹³ and is distinct in that it refers

89 *Ibid.*, p. 923.

90 Compare the wording in the 1979 revised draft, “Draft convention against torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sweden”, UN Doc. E/CN.4/WG.1/WP.1, 1979, with that in the 1978 original draft, “Draft convention against torture and other cruel, inhuman or degrading treatment or punishment, submitted to the Commission on Human Rights by Sweden,” UN Doc. E/CN.4/1285, 1978. For an overview of the drafting history, see above, note 57, Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 29–50.

91 United Nations, *Report of the Commission of Human Rights on its Thirty-Fifth Session*, UN Doc. E/CN.4/1347, 1979, p. 39.

92 See above, note 57, Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 29–50.

93 Miller, G.H., *Defining Torture*, Floersheimer Center for Constitutional Democracy, Benjamin N. Cardozo School of Law, 2005, p. 16.

to *reasons based on* discrimination rather than purposes – the discriminatory purpose is not truly a purpose at all; what the definition does not say is “for such purposes as discrimination”. Arguably, the latter may require knowing or intentional discrimination. When read in the context of the entire definition, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on discrimination of any kind”, the infliction of the act is linked to the reason, which reason must be based on discrimination, but not itself, discrimination.

The question then becomes, what does it mean for a reason to be *based on* discrimination? There are two alternatives: to read this as requiring some knowing or intentional discrimination, or to read this as requiring that discrimination is taking place, albeit unknown to the perpetrator. In the context of protective custody (assuming that there is no alternate purpose), the reason for the act (of detention) is to protect the woman from violence. The person placing the woman in detention may or may not know that the practice of protective custody is discriminatory, both in that it affects significantly more women than men and that it is based on traditional views of women which require them to accord with their family’s wishes. The perpetrator may, in fact, be aware of both of these things, but not consider them to be discrimination.

The first view – to require knowing or intentional discrimination – would eliminate from the definition’s reach all those situations of “good intentions” which are based unknowingly on discriminatory notions, such as the practice of sterilising women with disabilities for “their own good”. This view would be supported by those who consider that torture requires an element of *mens rea* because it requires the pain and suffering to be inflicted *for a purpose*; that is, the definition of torture taken as a whole requires specific intent (this should be distinguished from the element of intent in the definition itself, which is discussed below).⁹⁴ It could be argued that the discriminatory purpose, coming as it does immediately following the list of purposes, may also similarly require an element of *mens rea*. However, many of those who argue for a *mens rea* element do not appear to have considered whether the different wording of the discriminatory “purpose” renders it not a purpose at all in light of the use of the words “any reason based on”.⁹⁵ In light of the different wording, the argument can be made that no element of *mens rea* is required. In the case of protective custody, if a requirement of *mens rea* is contained in the definition of torture (as it relates to discrimination), whether protective custody could possibly amount to torture at all would require a finding of knowing or intentional discrimination on the part of the perpetrator. Such a requirement would fail to highlight the discriminatory *effect* of protective custody on women.

If an element of *mens rea* is required, this would seemingly place an almost insurmountable hurdle in the way of those trying to argue that a perpetrator discriminated, by requiring

94 See Hathaway, Nowlan and Spiegel, above note 78, p. 795.

95 Hathaway et al, for example, do not give any consideration to the different wording, simply placing discrimination in with the list of other purposes. *Ibid.*

proof of knowing or intentional discrimination. However, as Hathaway notes, the Committee Against Torture has inferred the requisite mens rea from the facts of the case, without requiring direct evidence of the perpetrator's state of mind.⁹⁶ The Committee has itself noted that:

*[E]lements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.*⁹⁷

Nonetheless, this is arguably more difficult in relation to discrimination, which may be much less evident than, for example, an attempt to force a confession through violence. In cases of protective custody, how can any distinction be drawn between those governors who place women in detention knowing that this is discriminatory and those who do not? The factual scenario could arguably be almost identical (unless some express discriminatory statement is made to this effect). Problematically, even in a case where the torture was blatantly discriminatory in motive, the discriminatory aspect was completely overlooked by the Committee Against Torture.⁹⁸ This casts some doubt on whether knowing or intentional discrimination will always be identified when it must be inferred from the facts. If mens rea is required, can the comments of the Special Rapporteurs be taken such that in any case of discriminatory effect, it will be assumed that there is the requisite knowing discrimination? Mendez's hesitation over the challenges in establishing the required discriminatory purpose would suggest perhaps not,⁹⁹ although his more recent comments may suggest discriminatory effect is sufficient.¹⁰⁰

Similar considerations come in to play when considering the intent element of the definition of torture. As noted above, it is argued that the definition of torture taken as a whole requires specific intent due to the use of the words, *for a purpose*. In addition to this, some have argued that the element of intent itself imports a requirement that the perpetrator must intend to both cause pain and suffering and intend to do so for a purpose. Nowak states that, following from the wording of the section, "[i]ntent must intend that the conduct inflict severe pain and suffering and intend that the purpose be achieved by such conduct."¹⁰¹ Thus if severe

96 *Ibid.*, p. 823.

97 See above, note 7, Committee Against Torture, Para 9.

98 In *Dragan Dimitrijevic v Serbia and Montenegro*, Comm. No. 207/2002, UN Doc. CAT/C/33/D/207/2002, 29 November 2004, despite accepting the evidence of the complainant that the police officers referred to his "gypsy mother", knowing that the complainant was of Roma origin and the complainant's allegation of discriminatory motive on the part of the police, the Committee made no mention whatsoever of discrimination in its finding of torture.

99 See above, note 81, Para 22.

100 See above, note 75, Para 8.

101 See Nowak, above note 56, p. 830. See also Nowak and McArthur, above note 57, *The United Nations Convention Against Torture: A Commentary*, p. 74; and Hathaway, Nowlan and Spiegel above note 78, pp. 799–800.

pain and suffering was caused as part of necessary medical treatment, the doctor would lack the required intent because the severe pain and suffering was unintended and a side effect.¹⁰² This may have been what Nowak meant by “if it can be shown that an act had a *specific purpose*, the intent can be implied (emphasis added)”.¹⁰³

The distinction between general and specific intent in regard to causing pain and suffering has been a much debated and contentious aspect of the definition, as was highlighted by the criticism over the US “torture memos”.¹⁰⁴ General intent would require that the act that caused pain and suffering was done deliberately in the sense that it was not accidental or the result of disease (that is, the act was volitional). On the other hand, specific intent would require the perpetrator to intend to cause the pain and suffering (i.e. his or her objective must be to cause severe pain and suffering and to do so for one of the purposes specified).¹⁰⁵ In the case of protective custody, taking this latter view would require that the woman was detained as a result of a deliberate act and that the purpose was to cause her pain and suffering through that detention. This approach again rules out instances of “good intentions” from falling within the definition of torture.

The requirement of a specific intention to cause pain and suffering has been rejected by many on the basis that it can be used to excuse acts that are clearly within the traditional conception of torture. The torture memos provide one example, excluding interrogation from the definition where pain and suffering was not the “precise objective”, but a “side-effect”. Returning again to the language of the definition, a requirement that the perpetrator specifically intend to cause pain and suffering also appears to be superfluous, given that the definition goes on to require that the act be carried out “for a purpose” or “for any reason based on discrimination”.¹⁰⁶ The drafting history in this regard does shed some light on the situation and would appear to support a reading that does not require specific intent to cause pain and suffering. Proposals by the US that the pain and suffering be “deliberately and maliciously inflicted” and by the UK that it be “systematically” inflicted both failed.¹⁰⁷ The failure of its proposal led the US to clarify its understanding upon ratification that “in

102 See Nowak and McArthur above note 57, *The United Nations Convention Against Torture: A Commentary*, p. 74, fn 179; and Burgers and Danelius, above note 78, p. 119.

103 See above, note 79, Para 30.

104 See Hathaway, Nowlan and Spiegel, above note 78, pp. 792–794.

105 *Ibid.*, pp. 792–794; Rodley, N. and Pollard, M., “Criminalisation of torture: state obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, *European Human Rights Law Review*, 2006, pp. 124–125; and above, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 325.

106 *Ibid.*, Rodley and Pollard, pp. 124–125.

107 See Hathaway, Nowlan and Spiegel, above note 78, pp. 803–804; and see above, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 325.

order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering”.¹⁰⁸

What then of the comments of the Special Rapporteurs that intent can be implied “where a person has been discriminated against”?¹⁰⁹ The better view, in light of the reasons given above, is simply that the intent requirement is one of general intent, and there is therefore no need to show intent when it is evident that the act was simply not accidental or negligent. Alternatively, if specific intent to cause pain and suffering is required, does discrimination against the person suffice to show that specific intent? Is the assumption made that the perpetrator will always intend to cause pain and suffering in instances of discrimination? Perhaps the Rapporteurs here may be, as noted above, making a reference to intent being assumed in the broader sense, in line with those who argue for an element of *mens rea* when the definition is read as a whole.

What is evident from the above is that there is not a clear answer to any of the questions posed. In relation to the element of intent, the position most supported by the language and drafting history of Article 1 is that there is no need to show an intent to cause pain and suffering, however; this is not undisputed. In relation to the purpose element, while there is clearly a distinction between “for such purpose as” and “for any reason based on discrimination”, this does not help to draw any concrete conclusions about what a reason *based on* discrimination amounts to and whether the discriminatory aspect of the definition also requires an element of *mens rea*. At its narrowest, it could be argued that Article 1 requires an intent to discriminate, whereas at its widest, it could incorporate acts that inflict severe pain and suffering and that are shown on the whole to impact a particular group more than others (without the need to show any particular intent on the part of a specific perpetrator towards a specific person). In the middle – and arguably supported by the wording of the Article – is the idea that the perpetrator must have a reason for carrying out the act and this reason must in some way be related to discrimination. There are then two variations of this middle ground: a requirement of knowing discrimination (some awareness on the part of the perpetrator of their own prejudices); or no requirement of knowing discrimination, simply an objective link between the reason and the discrimination (that is, the perpetrator’s reason is related to discrimination). The next section will argue that any need to demonstrate intent or awareness of discrimination on the part of the perpetrator is apparently at odds with both the intention of the CAT itself and the prohibition of discrimination in international human rights law.

108 United Nations, “United Nations Treaty Collection: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en (online database); see Nowak, above note 56, p. 830; and Bagchi, A., “Intention, Torture, and the Concept of State Crime”, *Penn State Law Review*, Vol. 114, 2009, p. 15.

109 See above, note 82, Para 49; and above, note 81, Para 20.

3. An Argument for a Broad Reading of Article 1

As noted above, the basic rule of treaty interpretation is that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. What has been absent from the above discussion so far is a consideration of the context, and the object and purpose, of the CAT. This section will demonstrate that, when Article 1 is considered in light of both its context and its object and purpose, an argument can be made that any reading of the Article which requires an intent to discriminate or some conscious or knowing discrimination on the part of the perpetrator should be rejected, thus bringing situations of “good intentions” which are based on discriminatory notions within the scope of Article 1.

At the outset, it must be remembered that the object and purpose of human rights treaties sets them apart from other international treaties. By their very nature, they are treaties designed to protect the rights of individuals from infringement by the state.¹¹⁰ Human rights treaties should therefore be read to make effective the protections that they offer to those rights.¹¹¹ It is clear from the Preamble of the CAT, and the entirety of its provisions, that its object and purpose is to prevent torture and other cruel, inhuman and degrading treatment.¹¹² It requires states to prohibit torture and also to implement a number of steps that aim to prevent torture from occurring.¹¹³ It must be remembered that torture involves acts with some form of state involvement (i.e. it is concerned with the culpability of the state) and not the acts of private individuals (except to the extent that these invoke the state’s due diligence obligations).¹¹⁴ If a requirement of intentional or knowing discrimination was read into Article 1, protective custody could only amount to torture in those instances where governors were aware that the practice was discriminatory (assuming none of the other purposes was met). Therefore, all other circumstances being equal, the attitude of the governor would be the determining factor in whether the practice may amount to torture. This inconsistency of results would appear to completely defeat the object and purpose of the CAT; the state is at fault in both cases as the use of protective custody arises from discriminatory attitudes against women (which the state fails to address)¹¹⁵ and the impact on the women involved

110 See, for example, Inter-American Court of Human Rights, *Advisory Opinion OC-2/82: The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, 24 September 1982, Para 29; and *Wemhoff v Germany*, App. No. 2122/64, 27 June 1968, Para 8.

111 See, for example, *Soering v the United Kingdom*, App. No. 14038/88, 7 July 1989, Para 87.

112 The Preamble includes the words, “[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”.

113 See above, note 7, Committee Against Torture, Para 2.

114 See Bagchi, above note 8, p. 6.

115 It is recognised that in such circumstances the state may be considered to have acquiesced in the treatment of the woman that resulted in her needing protection. However, this would make the initial act against the woman torture (if all other elements were met), and not the subsequent detention. See above, for example, note 75, Paras 10–12.

is identical regardless of the governors' motives. Therefore, a requirement of intentional or knowing discrimination becomes increasingly questionable.¹¹⁶

Perhaps even more significant is considering the CAT in light of “[a]ny relevant rules of international law applicable in the relations between the parties”, the last of three factors specified by the Vienna Convention to be taken into account together with context, when interpreting a treaty.¹¹⁷ This reference to the rules of international law includes both treaties and customary international law.¹¹⁸ The International Court of Justice has held that the interpretation of a treaty must take into account developments in the law since its adoption and moreover; that a treaty must be interpreted in light of the legal framework in place at the time of interpretation.¹¹⁹ This opens the way for, and in fact requires, the CAT to be interpreted in light of the understanding of the prohibition of discrimination in current international human rights law.¹²⁰

International human rights law does not require intent in order to find that there has been discrimination. It is clear from the definitions contained in the treaties relating to discrimination that they encompass both intended and unintended discrimination. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example, employs the wording:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.

The use of the phrasing “purpose or effect” shows that unintended discrimination is included. Similar wording, “effect or purpose” is used in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 2 of the Convention on the Rights of Persons with Disabilities. In addition, the HRC has adopted a definition of discrimination encompassing both purpose and effect in relation to the IC-

116 *Ibid.*

117 Vienna Convention on the Law of Treaties, Article 31(3)(c).

118 Fitzmaurice, M., “Interpretation of Human Rights Treaties” in Shelton, D. (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 749.

119 International Court of Justice, *Legal Consequences for States of the continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276*, 21 June 1971, Para 53; *ibid.*, p. 750.

120 The recent comments of the current Special Rapporteur on torture support this approach, “[t]he protection framework must be interpreted against the background of the human rights norms that have developed to combat discrimination.” See above, note 75, Para 9.

CPR.¹²¹ To require a discriminatory intent or knowledge on the part of the perpetrator in order for torture to be found would therefore in effect read down the scope of discrimination for the purposes of the CAT. To do so would appear to fail to take into account the current, relevant legal framework.

Moreover, although discrimination law has continued to evolve in the three decades since the CAT was adopted, these definitions of discrimination were already in place at the time of its adoption in both the CERD¹²² and the CEDAW.¹²³ Therefore, there is limited scope for dispute over a reading in line with the evolution of discrimination law as the concept of discriminatory effect was already known to international law.

Finally, and significantly, to exclude situations where no discriminatory intent or awareness can be shown on the part of the perpetrator would run contrary to the requirement on states to prohibit discrimination, apparent in both treaties and international customary law.¹²⁴ The ICCPR requires both that states apply the rights contained therein without distinction of any kind¹²⁵ and that national laws “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”.¹²⁶ To require discriminatory intent to be shown in order to find that torture has occurred would apply a distinction in the application of the right through the omission of unintended discrimination. Similarly, it would build situations of unintended discrimination into national laws prohibiting torture. It would allow the state to turn a blind eye to discrimination or condone discrimination, so long as the individual perpetrators themselves had “good intentions”. But such “good intentions” are themselves often the result of discrimination.

121 Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1, 1994, Para 7.

122 CERD, Article 1(1).

123 CEDAW, Article 1.

124 The scope of the prohibition in international customary law is subject to debate, but arguably race, religion and gender are recognised as prohibited, with the prohibition on racial discrimination having reached the status of a pre-emptory norm. See, De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 64–68 and the materials referred to therein; Pellett, A., “Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excess of Fragmentation” *Finnish Yearbook of International Law*, Vol. 17, 2006, p. 85; Cassel, D., “Equal Labor Rights for Undocumented Migrant Workers”, in Bayefsky, A. (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, Martinus Nijhoff Publishers, 2006, pp. 511–512; and Bianchi, A., “Human Rights and the Magic of Jus Cogens”, *The European Journal of International Law*, Vol. 19, 2008, p. 506.

125 ICCPR, Article 2(1).

126 *Ibid.*, Article 26.

Conclusion

What is most evident from the discussion above is that there is a need for clarity in relation to discriminatory torture. This area has been long neglected to date, and its development can at best be described as patchy and lagging behind many other areas of international human rights law. Cases of discriminatory “good intentions” such as protective custody further evidence that this aspect of the torture definition must now be addressed. Protective custody may, in extreme cases, result in pain and suffering severe enough to be considered torture. However, if the definition of torture requires intentional or knowing discrimination, such practices, when implemented with “good intentions”, will not be considered torture. This seems a particularly odd result when protective custody is very often implemented in response to gender-based violence, which itself can be considered torture.¹²⁷ In order to ensure that the discriminatory aspect of such practices and their severity is highlighted and subsequently combated, a reading of Article 1 which does not require the perpetrator to intend to discriminate or have any awareness of their own discriminatory attitudes should be preferred. While this discussion has focussed on the CAT definition, it is also evident, and has been touched upon, that the lack of clarity around torture extends to other treaty bodies and mandates and regional courts. Given the absolute nature of the prohibition of torture, clarity is required across jurisdictions, in particular to ensure that discriminatory torture cannot ever be allowed in the guise of “good intentions”, which arise as a result of discriminatory attitudes in a particular country.

127 See above, note 81, Para 37.