

### DEFINITION(S) OF TORTURE

Torture is universally and absolutely prohibited by international treaty and customary law.<sup>1</sup> The internationally recognised definition<sup>2</sup> of torture is found in the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT).<sup>3</sup> This has been adopted by regional and domestic legal frameworks.

#### ARTICLE 1 (1) OF THE UNCAT

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

### ELEMENTS OF TORTURE

All four elements of (1) severe pain or suffering, (2) intentionality, (3) specific purpose, and (4) official capacity are considered and required by a court to rule whether alleged ill-treatment amounts to torture.

**Severe pain or suffering, whether physical or mental:** could be an individual method or a combination of methods, occurring on one occasion or over time.<sup>4</sup> Pain need not be prolonged;<sup>5</sup> it can be short-lived.<sup>6</sup> Mental pain can constitute torture on its own, and need not be coupled with physical pain. Interpreting ‘severe’ has proven difficult,<sup>7</sup> as it involves the intensity of pain based on a multitude of factors, objective and subjective, including duration, a victim’s health, age, and sex.<sup>8</sup>

**Intentionality:** refers to the perpetrator’s motive to deliberately inflict severe pain. This is to be determined not subjectively but objectively.<sup>9</sup> Recklessness, but not negligence, might also satisfy this element.<sup>10</sup>

**Purpose:** includes obtaining information or confession, intimidation, punishment, or discrimination of any kind, towards a victim or a third person.<sup>11</sup>

**Official capacity:** has been interpreted to include persons with any officially recognized role, whether formally or informally. ‘**Acquiescence** of a public official’ has also garnered attention recently with states increasingly using private contractors.<sup>12</sup> State inaction on issues of gender-specific violence are discussed under this element.

### CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CIDTP)

Whilst also prohibited, CIDTP is not defined in international law. The line between torture and CIDTP is clear in a number of cases, where the given ill-treatment does not amount to torture because one or more of the four elements is missing. However, due to the complexity of the severity assessment this line may be unclear in other cases<sup>13</sup> Wherever the line is drawn, CIDTP can never be clearly delinked from torture, as CIDTP embodies acts which are considered to ‘fall short’ of torture. It is, therefore, relatively defined.<sup>14</sup>

It is also important to note that there is also a ‘minimum level of severity’ that needs to be fulfilled before any treatment could be said to amount to any form of ill-treatment, whether torture, inhuman or degrading treatment or punishment. There is also no clear distinction between what amounts to cruel and inhuman and what amounts to degrading.<sup>15</sup> CIDTP is to be interpreted as expansively as possible to offer the broadest protection<sup>18</sup>

#### TORTURE METHODS

There is no exhaustive list of methods inherently constituting torture. The following, however, are recognized by the literature, legal and medical, as being methods which, given a particular set of circumstances (duration, purpose, degree, severity, cumulation, other environmental factors etc.), constitute torture: beatings, falanga, denial of basic human need (water, food, sleep, etc.), sexual humiliation, threats, stress positions. See accompanying fact-sheets for more information.

### MOREOVER

- Torture and CIDTP are both absolutely and universally prohibited, with no exceptions or justifications. All states, whether or not they are parties to the UNCAT, are therefore prohibited from resorting to torture. Individuals are also able to sue governments for violating this obligation.
- The ‘lawful sanctions’ clause remains contested. By one prominent authority, it effectively lacks any meaning or force.<sup>19</sup> By others, these are to be defined as sanctions in line with international standards such as imprisonment.<sup>20</sup>
- The understanding of torture is evolving and, therefore, unfixable, as it is informed by developments in the uses of state power (for example in terms of policing and punishment) and the societal expectations around its legitimate boundaries.
- Regional bodies and states are free to adopt broader, but not narrower, definitions of torture.<sup>21</sup>

## REFERENCES

<sup>1</sup> Universal Declaration of Human Rights, 10 December 1948, Article 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); United Nations International Covenant on Civil and Political Rights, Article 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”); European Convention on Human Rights, Article 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”); American Convention on Human Rights, Article 5 (“(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.”); African Charter on Human and Peoples’ Rights, Article 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”); Arab Charter on Human Rights, Article 8 (“1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.”); United Nations Convention on the Rights of the Child, Article 37 (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”); United Nations Convention on Persons with Disabilities, Article 15 (“1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation”); Geneva Conventions (GC), Common Article 3 (“(1)(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...] (c) outrages upon personal dignity, in particular humiliating and degrading treatment); GCI, Article 12, GCII, Article 12, GCIII, Articles 17 and 87, GCIV, Article 32 (prohibition of biological experiments); GCI, Article 50, GCII, Article 51, GCIII, Article 130, GCIV, Article 147 (prohibition of “wilfully causing great suffering or serious injury to body or health”); Rome Statute for the International Criminal Court, Article 8 (2) (a)(“(ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health”).

<sup>2</sup> Inter-American Convention to Prevention and Punish Torture, 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 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.); Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2008, Article 4 (adopting UNCAT definition under Article 1); United Nations, Human Rights Committee, *Giri v Nepal*, HRC, UN Doc. CCPR/C/101/D/1761/2008 (2011) para. 7.5, guided by UNCAT, Article 1.

<sup>3</sup> A/RES/39/46, 10 December 1984, found here: [www.un.org/documents/ga/res/39/a39r046.htm](http://www.un.org/documents/ga/res/39/a39r046.htm)

<sup>4</sup> ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber) 15 March 2002, para 182: torture “may be committed in one single act or can result from a combination or accumulation of several acts, which, taken individually and out of context, may seem harmless ... The period of time, the repetition and various forms of mistreatment and severity should be assessed as a whole”.

<sup>5</sup> Concluding Observations of CAT: USA, UN Doc. CAT/C/USA/CO/2 (2006), para. 13.

<sup>6</sup> ICTY, *Naletilic and Matinovic*, Appeal Judgement, 3 May 2006, para. 300: (“no rigid durational requirement is built into the defi-

inition”).)

<sup>7</sup> The concept of severity has been critiqued by prominent commentators as being ‘vague and open to interpretation’, ‘not susceptible to precise gradation’ and ‘virtually impossible’.

<sup>8</sup> *Selmouni v. France*, 25803/94, 29 July 1999, ECtHR, para. 100: “, it remains to establish in the instant case whether the “pain or suffering” inflicted on Mr Selmouni can be defined as “severe” within the meaning of Article 1 of the United Nations Convention. The Court considers that this “severity” is, like the “minimum severity” required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”

<sup>9</sup> CAT, General Comment 2, para. 9 (“The elements 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.”)

<sup>10</sup> J. Mendez and A. Nicolescu, ‘Evolving Standards for Torture in International Law’ in M. Basoglu, *Torture and Its Definition in International Law* (2017), p. 244. For the point on negligence, see see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), p.118.

<sup>11</sup> The United Nations Committee against Torture (CAT), the supervisory body of the UNCAT, has explained that “discrimination of any kind can create a climate in which torture and ill-treatment of the ‘other’ group subjected to intolerance and discriminatory treatment can more easily be accepted” (Contribution of the Committee against Torture to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, UN Doc. A/CONF.189/PC.2/17, 26 February 2001, p. 2.)

<sup>12</sup> CAT, General Comment 2, para. 15.

<sup>13</sup> CAT, General Comment 2, para 3.

<sup>14</sup> UNCAT, Article 16 (1) refers to CIDTP as acts ‘which do not amount to torture’.

<sup>15</sup> *Ireland v. U.K.*, 5310/71, 18 January 1978, ECtHR, para. 167.

<sup>16</sup> M. Nowak, ‘What Constitutes Torture? US and UN Standards’ (2006) *Human Rights Quarterly* 28 (4), p. 830; N. Rodley, ‘The Definition(s) of Torture in International Law’, 55 *Current Legal Problems*, 467 (2002), p. 489.

<sup>17</sup> *Ireland v. U.K.*, 5310/71, 18 January 1978, ECtHR, para. 167 (“The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”).

<sup>18</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, Principle 6 (“The term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”)

<sup>19</sup> M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), p. 84.

<sup>20</sup> *Ibid*, pp. 79-80.

<sup>21</sup> See UNCAT Article 1 (2); embodying a broader definition, the Inter-American Convention Against Torture only requires that severe pain be intended and not necessarily inflicted, and has a more inclusive purposive element.