RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

The Element of Severe Pain in the Definition of Torture

Guidelines developed for the Ministry of Justice of the Republic of Armenia

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MINISTRY OF JUSTICE
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Introduction

This publication presents guidelines developed by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) in collaboration with the Ministry of Justice of the Republic of Armenia, under the RWI's human rights capacity development programme in Armenia. The programme is implemented with financial support from Swedish Development Cooperation (Sida).

The RWI programme aims to support key actors in Armenia, including selected policymakers, academic institutions and civil society organisations, to increase their capacities to apply international human rights standards in support of ongoing reforms. Under this programme, RWI has engaged with the Ministry of Justice of the Republic of Armenia to support implementation of the country's National Human Right's Action Plan 2020-2022 (NHRAP). The NHRAP enshrines a number of activities related to the fight against torture and inhuman, degrading treatment, including the development of guidelines for interpreting and applying the terms "severe physical pain or mental suffering" in compliance with international standards.

The study is a result of teamwork combining international and local expertise. It was developed by RWI experts Syuzanna Soghomonyan (Armenia) and Ergün Cakal (Australia) and supported by stakeholder consultations held on 31 May and 1 June 2021 with relevant Armenian state institutions and civil society organisations.

The guidelines are intended to be adopted and used within training for law enforcement officials.

I. Executive summary

The element of "severe pain or suffering, whether physical or mental" remains core to the definition and interpretation of torture under international law, namely in Article 1 of the UN *Convention Against Torture* (UNCAT) and in the contemporary interpretation of related international and regional instruments including the *European Convention on Human Rights*. Its interpretation has, however, presented challenges for legal professionals, whether lawyers, prosecutors or judges. Recognising these challenges in their practical context, the *Guidelines* at hand offer operational guidance for relevant legal professionals (particularly prosecutors and judges) towards more clearly understanding and applying the element of severity in everyday practice.

As pain can be complex, so can its legal application. The *Guidelines* aim to guide the practitioner through this complexity and provide a coherent and comprehensive point of reference – and are presented as such. To this end, the *Guidelines* offer a unique synthesis of the authoritative caselaw and commentary on the element of severity, with a particular orientation towards the Armenian legal system. Following the overview of the prominent definitions and prohibitions of torture in international law, the practitioner will be taken through the central conceptual dimensions of the element – with full reference to essential sources and authorities.

The element plays a number of significant roles as an *aggravator* and relatedly *differentiator* between forms of ill-treatment. It also captures the core of a victim's experience. Given the variability of such experiences, the element has been widely interpreted to include both physical and psychological pain as realised through official actions and inactions. The general interpretive context is all attended to with pertinent discussions on situating the element in the broader assessment of torture and the use of evidence. It is hoped that the practitioner will find their concerns readily attended to in what follows. Further resources, beyond the space and scope of the current *Guidelines*, are found at the end.

A principled approach to understanding severe pain

The *Guidelines* present and provide clarifications on the following principles as emanating from relevant caselaw and commentary:

— Severity of pain is a legal concept used to identify the gravity of wrong
— Whilst severity is an aggravating factor, it is not the determinative differentiator between torture and cruel and inhuman treatment
— Severe pain is complex as is the nature of pain, and can be inflicted and manifested through a multitude of means and modes: physical or mental, short or prolonged, single or cumulative; actions and inactions can both cause severe pain
— There is no hierarchical difference between physical and mental; they are usually combined but perhaps at varying degrees
— Torture, cruel and inhuman treatment all require severe pain
— Degrading treatment does not require severe pain – but needs to attain a minimum level of severity
— Minimum level of severity does not simply refer to level of pain: it is a related but different (broader) assessment: a first test preceding the "severe pain" test
— "Pain" and "Suffering" do not hold different meanings in international law
— There are no scientifically guaranteed means of using force without inflicting severe suffering; the use of force always comes with the risk of amounting to severity (as it depends on the victim's reaction)
— Assessing severity must be approached strictly on a case-by-case basis, factoring in factors such as gender, health, age, culture and other personal factors
— Documentation of impact must not to be exclusively concerned with physical, permanent, long-lasting bodily damage, visible marks
— Documentation and adjudicatory practices must be kept "dynamic" to follow the changes in state practice and socio-cultural attitudes around state-inflicted pain
— Severity can be better assessed by using victim, witness and medical evidence

II. Prohibition and definition in international and regional law

The element of "severe pain or suffering, whether physical or mental" remains core to the definition and interpretation of torture under Article 1 of UN Convention Against Torture (UNCAT) and in the contemporary interpretation of related international and regional instruments. In what follows, the most prominent of these provisions will be presented.

a. Prohibitions

Torture, cruel/inhuman and degrading treatment are all absolutely prohibited under international law. In fact, the prohibition is seen as part of customary international law.[1] In a codified form it is found in numerous international and regional instruments including the *Universal Declaration of Human Rights,* the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*, which predate the UNCAT.[2] Article 3 of the *European Convention,* for example, reads as follows: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*".[3] However, while they all

[1] By its judgment on *Prosecutor v. Furundzija* of 10 December 1998, for instance, the ICTY held that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency. This is linked to the fact that the prohibition on torture is a peremptory norm or jus cogens. The Tribunal states that these treaty provisions impose upon States the obligation to prohibit and punish torture. The Tribunal holds that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. The prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community. According to the Court, clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. *Prosecutor v. Furundzija* IT-95-17/1-T judgment of 10 December 1998, § 144-154.

[2] The American Declaration of the Rights and Duties of Man (ADRD)[2], also known as the Bogota Declaration, is the world's first international human rights instrument of a general nature. According to the Article 26 of the declaration *"Every person accused of an offence has the right (...) not to receive cruel, infamous or unusual punishment".*
https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf; According to the Article 5 (2) of the American Convention on Human Rights (ACHR) *"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] The *European Convention on Human Rights* (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. It was signed on 4 November of 1950 and entered into force on 3 September of 1953. Article 15 of the Convention prescribes that *"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not*

expressly and absolutely *prohibit* torture and other ill-treatment, they do not offer *express* definitions.[4]

b. Definition(s)

With the purpose to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world, the General Assembly of the United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the *United Nations Convention against Torture* (hereafter also referred to as the Convention *and* UNCAT)) on 10 December of 1984. The Convention opened for signature, ratification and accession by General Assembly resolution 39/46, adopted on the same day, and entered into force on 26 June of 1987. Article 1 (1) of the Convention stipulates that:

> For the purposes of the 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.[5]

At least four essential elements find their reflection in this. First, an act inflicting severe pain or suffering, whether physical or mental; second, the element of intent; thirdly, the specific purpose; and fourthly, the involvement of a State official, at

inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision." https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9

[4] According to the Article 5 of the Universal Declaration of Human Rights (UDHR) *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment":* https://www.un.org/sites/un2.un.org/files/udhr.pdf; According to the Article 7 of the International Covenant on Civil and Political Rights *"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"* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[5] According to the definition "it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". The second part of the same Article prescribes that it is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

least by acquiescence. Taken together, these elements contribute to a comprehensive concept of torture, as distinguished from other forms of cruel, inhuman or degrading treatment or punishment.

The *UNCAT* clearly draws its wording from the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[6] Whilst instructive, the *Declaration* does not stand as the authoritative definition. There are differences between the *UNCAT* and the *Declaration* which have proven to be of interpretive significance.

Moreover, there is a similar but divergent definition found in the *Inter-American Convention to Prevent and Punish Torture* (IACPPT).[7] This too represents divergences (particularly in terms of not expressly including the element of "severe" pain) which must be taken into account and carefully approached.

Related definitional elements and provisions under the UNCAT[8]

Article 1 explicitly names several **purposes** for which torture can be inflicted: extraction of a confession; obtaining information from a victim or a third person; punishment, intimidation and coercion; and discrimination. However, there is a general acceptance that these stated purposes are only of an indicative nature and

[6] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. According to the Article 1 (1) of the *Declaration* "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners". The second paragraph of the same Article prescribes that "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".

[7] Signed on 9 December of 1985, Entered into force on 28 February of 1987. According to the Article 2 of the Convention "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"
https://www.oas.org/juridico/english/treaties/a-51.html

[8] This section draws substantially on the Report of the UN SR on Torture A/HRC/22/53: https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53_english.pdf

not exhaustive. At the same time, only purposes which have "something in common with the purposes expressly listed" are sufficient. Noteworthy of the examples included in Article 1 is that most of these purposes are related to "the interests or policies of the State and its organs." They are linked to the work of law enforcement authorities and similar State agents, and implicitly refer to situations in which the victim finds themself "at least under the factual power or control of the person inflicting the pain or suffering." Torture constitutes a particularly aggravated form of ill-treatment. It differs from cruel, inhuman or degrading treatment, not necessarily by the intensity of the pain or suffering inflicted, but by the specific purpose of the act.

The element of **intent** contained in the definition of torture in the Convention requires that severe pain or suffering be intentionally inflicted on the victim in order to achieve a certain purpose. From this follows that torture can never be inflicted by negligence. A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture, given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with Article 1, would qualify as torture. It is also important to underline that the intentional infliction of severe pain or suffering has to be committed for a specific purpose referred to in the Convention, such as the extraction of a confession or information. For example, severe pain, inflicted during a medical intervention, with the purpose of treating a patient, does not satisfy the element of intent.

The term "**act**" is not to be understood in any way as to exclude omissions. An examination of the *travaux préparatoires* of the Convention does not reveal any indication whatsoever that the drafters would have intended e.g. to exclude from the definition of torture the intentional deprivation of a detainee of his or her food for a certain purpose leading to severe pain. It is well established by numerous decisions by the UN Committee against Torture and other relevant monitoring bodies that torture can be committed by omission.

The act needs to be inflicted in an **official capacity** in order to qualify the abuse as torture or cruel, inhuman or degrading treatment or punishment. Article 1 states that severe pain or suffering has to be "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". The Convention goes beyond the traditional concept of State responsibility and includes acts which are not directly inflicted by the State

officials, but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture.

Furthermore, Article 16 of the Convention also ensures prevention of other acts of cruel, inhuman or degrading treatment or punishment. In particular, according to that article:

> 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 I, 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.

It is worth mentioning that Article 2 of the Convention stipulates that "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*". With the purpose to highlight the absolute nature of the prohibition of torture the same article stipulates that "*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*".

At the same time, the Article 7 of the Convention also prescribes that

> (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

c. Related instruments

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

On 28 September 1983 the Consultative Assembly of the Council of Europe adopted Recommendation 971 (1983) on the protection of detainees from torture

and from cruel, inhuman or degrading treatment or punishment. In this text, the Assembly in particular recommended that the Committee of Ministers adopt the draft European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment which was appended to the Recommendation.[9] The Explanatory Report to the Convention, prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe, illustrates that one of the reasons for the elaboration of the new system was the need for wider and more effective international measures, in particular to strengthen the protection of persons deprived of their liberty.[10]

Hereby, within the Council of Europe, the supervisory system established by the Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950, could usefully be supplemented by non-judicial machinery of a preventive character, whose task would be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. That is why the European Convention established a Committee which may visit any place within the jurisdiction of the Parties where persons are deprived of their liberty by a public authority.[11] As is mentioned in the Explanatory Report to the Convention, the Committee's function includes carrying out visits and, where necessary, suggesting improvements as regards the protection of persons deprived of their liberty from torture and inhuman or degrading treatment or punishment.[12]

The Convention was adopted by the member states of the Council of Europe, meeting at Strasbourg on 26 November 1987, and entered into force on 1 February 1989.

Article 1 of the Convention prescribes that *"There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a*

[9] Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 26.XI.1987, §1, available here: https://rm.coe.int/16800ca43b.
[10] *Ibid,* §12
[11] *Ibid,* §§13-14.
[12] *Ibid*, §15.

view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment".

Article 2 of the Convention stipulates that *"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".*

With the purpose to increase effectiveness of the non-judicial machinery, Article 3 of the Convention prescribes that *"In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall cooperate with each other"*[13].

European Union law

Directive (EU) 2016/343 of the European Parliament and of the Council of the European Union, of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the prohibition of torture and inhuman or degrading treatment. It stipulates that when assessing statements made by suspects or accused persons or evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, courts and judges should respect the rights of the defence and the fairness of the proceedings. In that context, regard should be had to the case-law of the European Court of Human Rights, according to which the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 ECHR as evidence to establish the relevant facts in criminal proceedings would render the proceedings as a whole unfair.[14]

Another important document is the Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019, concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. This Regulation lays down Union rules governing trade with third countries in goods that could be used for the purpose of capital punishment or for the purpose of torture or other cruel, inhuman

[13] Available here: https://rm.coe.int/16806dbaa3.

[14] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, §§ 45-47.

or degrading treatment or punishment, and rules governing the supply of brokering services, technical assistance, training and advertising related to such goods.[15]

According to Article 2 of the aforementioned document, for the purposes of the Regulation '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 that person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either 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, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties. Capital punishment is not deemed a lawful penalty under any circumstances.

At the same time, 'other cruel, inhuman or degrading treatment or punishment' means any act by which pain or suffering attaining a minimum level of severity, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either 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 also does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties

The operational section of the Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment identifies the concrete measures that the EU will urge third countries to take in order to prohibit torture and other ill-treatment in law and in policy. It includes the following directions: Prevention of torture and other ill-treatment; Combatting impunity; and Redress, including rehabilitation, for victims. The first direction includes the following measures: Prohibit torture and other ill-treatment in law; Reaffirm the absolute prohibition of torture and other ill-treatment in policy; Comply with safeguards and procedures relating to detention; Provide efficient and

[15] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods, which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, art. 1.

safe complaints mechanisms; and Allow efficient detention monitoring and oversight mechanisms.[16]

d. Relevant mechanisms

UN Committee against Torture (CAT)

The Committee against Torture (CAT) was established pursuant to Article 17 of the Convention and began to function on 1 January 1988.. The Committee constitutes a new United Nations body, entrusted with the specific supervision of a multilateral instrument for protection against torture and other inhuman treatment. The Convention sets out a number of obligations designed to strengthen the sphere of protection of human rights and fundamental freedoms, while conferring upon the Committee against Torture broad powers of examination and investigation calculated to ensure their effectiveness in practice.[17]

According to the last report of the Committee, as of 15 May 2020, since 1989 it had registered 1,003 complaints concerning 39 States parties. Of those, 300 complaints had been discontinued and 113 had been declared inadmissible. The Committee had adopted final decisions on the merits of 398 complaints and found violations of the Convention in 158 of them. During the reporting period, the Committee adopted two decisions of admissibility and postponed the examination of three complaints. Some 192 complaints were pending consideration.[18]

The Committee in its General Comment No. 2 (2008), on the implementation of Article 2 by States parties, pointed out that States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in Article 1 of the Convention, and the requirements of Article 4.[19]

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[16] Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines, 10842/19, Brussels, 16 September 2019.
[17] Fact Sheet No.17, The Committee against Torture, available here: https://www.ohchr.org/Documents/Publications/FactSheet17en.pdf.
[18] Report of the Committee Against Torture, United Nations, General Assembly, Official Records Seventy-fifth Session Supplement No. 44, A/75/44, New York, 2020, §58.
[19] Committee Against Torture, the general comment No. 2 (2008) on the implementation of Article 2, CAT/C/GC/2, §8.

At the same time, the Committee recognized that most States parties identify or define certain conduct as ill-treatment in their criminal codes. According to the Committee, in comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasized that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.[20]

By defining the offence of torture as distinct from common assault or other crimes, the Committee considered that States parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment. According to the Committee, naming and defining this crime will promote the Convention's aim by, *inter alia,* alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Moreover, the Committee highlighted that codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence, (b) strengthen the deterrent effect of the prohibition itself, (c) enhance the ability of responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention.[21]

European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) has stated on many occasions that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[22] Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 of the Convention, even in the event of a public emergency threatening the life of the nation.[23]

In assessing the evidence on which to base the decision as to whether there has been a violation of Article 3, the Court has generally applied the standard of proof

[20] *Ibid*, §10.
[21] *Ibid*, §11.
[22] *Labita v. Italy [GC],* no. 26772/95, 6 April 2000, § 119.
[23] *Selmouni v. France [GC],* no. 25803/94, 28 July 1999, § 95.

"beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[24] According to the Court, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation[25]. Similarly, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused.[26] Otherwise, torture or ill-treatment may be presumed in favour of the claimant and an issue may arise under Article 3 of the Convention.[27]

Committee for the Prevention of Torture (CPT)

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, or shortly Committee for the Prevention of Torture (CPT), is the anti-torture committee of the Council of Europe. Its purpose is to enforce the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. The main task of the Committee is to visit places of imprisonment in signatory countries and issues reports on violations of the convention. As a result, the CPT delivers a number of recommendations:

— The possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.[28]
— The importance of accurate recording of all police interviews (including the start and end times and the names of all persons present during the interview). The electronic recording of police interviews (with audio/video-recording equipment) has also become an effective means of preventing ill-treatment during police interviews whilst presenting significant advantages for the police

[24] *Ireland v. The United Kingdom*, no. 5310/71, 18 January 1978, § 161.
[25] *Salman v. Turkey [GC]*, no. 21986/93, 27 June 2000, § 100.
[26] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 61.
[27] *Mikheyev v. Russia*, no. 77617/01, 26 January 2006, § 127.
[28] Extract from the 21st General Report of the CPT, CPT/Inf(2011)28-part1, 10/11/2011, Access to a lawyer as a means of preventing ill-treatment, §§18-25.

officers involved. Electronic recordings should be kept securely for a reasonable period, be made available to the detained persons concerned, and/or their lawyers, and be accessible to representatives of international and national monitoring bodies (including National Preventive Mechanisms), as well as to any officials responsible for investigating allegations or reports of police ill-treatment.[29]

— Keeping persons in police custody in centralised police detention facilities rather than in police cells located in smaller establishments or special operational departments, as observed in a number of countries.[30]

— That, as a matter of principle, remand prisoners should not be held in law enforcement establishments; such facilities are not designed for lengthy periods of stay. Moreover, prolonged detention on the premises of law enforcement agencies increases the risk of intimidation and ill-treatment by law enforcement officials dealing with the criminal investigation against the person concerned. Therefore, persons remanded in custody should always be promptly transferred to a prison. Further, the return of remand prisoners to detention facilities of law enforcement agencies should be sought and authorised only very exceptionally and when it is absolutely unavoidable, for specific reasons and for the shortest possible time. Such a return should in each case be subject to the express authorisation of a prosecutor or judge. As a rule, the prisoners concerned should not be held overnight in law enforcement establishments. It is axiomatic that the fact that a remand prisoner has been returned to a law enforcement establishment should be duly recorded (at both the prison and the law enforcement establishment concerned) and that, upon readmission to the remand prison, the prisoner concerned should again be subjected to medical screening. If further police questioning is necessary, it is far preferable for this to be carried out at the remand prison, rather than transferring the remand prisoner concerned back to a law enforcement establishment.[31]

CPT's minimum standards regarding cell space, whilst authoritative, are ultimately subject to adjudication. That is, whilst guided by CPT standards, only a court is empowered to determine whether a certain treatment or punishment amounts to a violation, taking into account all kinds of factors, including the individual's personal constitution. The number of square metres available per person is but one factor, albeit often a very significant or even decisive one. Conditions where

[29] Extract from the 28th General Report of the CPT, CPT/Inf(2019)9-part, 26/04/2019, Preventing police torture and other forms of ill-treatment – reflections on good practices and emerging approaches / Investigative interviewing – a paradigm shift, §81.
[30] *Ibid*, §82.
[31] Extract from the 26th General Report of the CPT, CPT/Inf(2017)5-part, 20/04/2017, Remand detention / 4. Remand detention in law enforcement establishments, §70.

inmates are left with less than 4m² per person in multiple-occupancy cells, or single cells measuring less than 6m² (both excluding a sanitary annexe) have consistently been criticised by the CPT, and authorities have regularly been called upon to enlarge (or withdraw from service) single cells or reduce the number of inmates in multiple-occupancy cells. The CPT expects that these minimum living space standards will be systematically applied in all prison establishments in Council of Europe member states, and hopes that more and more countries will strive to meet the CPT's "desirable" standards for multiple-occupancy cells.[32]

Whilst its standards and recommendations are practically instructive for preventive purposes, it must be recalled that CPT is not an interpretive body.

International criminal law and related mechanisms

International criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) as well as the International Criminal Court (ICC) are guided by the foregoing jurisprudence. The ICTY, in particular, has decided a number of cases which usefully (but at times controversially) elaborate the definition adopted under Article 1 of the UNCAT. The *Rome Statute for the ICC* also codifies and defines the crime of torture in line with the UNCAT.[33]

III. Prohibition and definition in national law

a. Relevant provisions

Article 26 (1) of the Constitution of the Republic of Armenia enshrines that *"No one may be subjected to torture, inhuman or degrading treatment or punishment".*[34] Article 11 (7) of the Criminal Procedure Code of the Republic of Armenia prescribes that

[32] Living space per prisoner in prison establishments: CPT standards, CPT/Inf(2015)44, 15/12/2015, §§ 24-25.
[33] See article 7 (2) (e): (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions
[34] Adopted on 5 July 1995 (with the amendments adopted on 6 December of 2015), available here: https://www.president.am/en/constitution-2015/ (accessed May 7, 2021).

In the course of criminal proceedings, no one shall be subjected to torture, unlawful physical or mental violence, including the use of drugs, hunger, exhaustion, hypnosis, deprivation of medical aid, and any other cruel treatment. It shall be prohibited to use force, threats, fraud, violation of rights, and other unlawful methods while trying to obtain testimony from the suspect, the accused, the defendant, the injured party, the witness, and other persons participating in criminal proceedings.[35]

Before the adoption of legislative amendments and supplements to the Criminal Code of the Republic of Armenia[36] on 18th of June 2015 by the Parliament of Armenia, the definition of torture was specified in Article 119 of the Criminal Code and read as follows:

1. *Torture is wilfully inflicting severe pain or bodily or mental sufferance to a person, if this did not cause consequences envisaged in Articles 112 [Infliction of wilful heavy damage to health] and 113 [Infliction of wilful medium-gravity damage to health], is punished with imprisonment for the term up to 3 years.*

2. *The same actions, committed:*

1) in relation to two or more persons;
2) in relation to the person or his relatives, concerned with this person in the line of duty or carrying out one's public duty;
3) in relation to a minor or a person dependent financially or otherwise on the perpetrator, as well as, in relation to a kidnapped person or hostage;
4) in relation to a pregnant woman;
5) by a group of persons or by an organized group;
6) with particular cruelty;
7) with motives of national, racial or religious hatred or religious fanatism,

is punished with imprisonment for the term of 3 to 7 years".

[35] Adopted on 1 July 1998, available in Armenian here: https://www.arlis.am/DocumentView.aspx?DocID=151467 (accessed May 7, 2021).
[36] Adopted on 18 April 2003, available in Armenian here: https://www.arlis.am/DocumentView.aspx?DocID=151885 (accessed May 7, 2021).

Hence, as it is mentioned above, this law is now ineffective. In order to prevent further similar violations, structural legislative reforms have been undertaken to bring national legislation in line with international best practices. Taking into account that national legislation criminalizing torture does not include crimes committed by public officials, as well as that it lacks the purposive element recognised in the UNCAT, the article defining torture was completely changed and brought into conformity with the requirements of Article 1 of the UNCAT by the *Law on Making Amendments and Supplements to the Criminal Code and on Making Amendment to the Criminal Procedure Code* of the Republic of Armenia which was adopted on 8th June 2015 by the Parliament.[37]

As a result of adopted legislative amendments and supplements to the Criminal Code of the Republic of Armenia on 18 June 2015 by the Parliament of Armenia, the definition of torture currently is stipulated in the new Article 309.1 and reads as follows:

1. *By or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity intentionally inflicting severe physical pain or mental suffering for the purpose of obtaining information or a confession from that or a third person or to punish him for that act, which the perpetrator or third person has committed or is suspected of or accused of committing, as well as for the purpose of intimidating or coercing that person or a third person to commit or refrain from any act or for any reason based on discrimination of any kind, is punished with imprisonment for the term of 4 to 8 years, with deprivation of the right to hold certain posts or practice certain activities up to 3 years.*

2. *The same actions, committed:*

    1) *in relation to two or more persons;*
    2) *in relation to a minor or a person dependent financially or otherwise on the perpetrator;*
    3) *in relation to a pregnant woman;*
    4) *by a group of persons or by an organized group;*
    5) *with particular cruelty;*

[37] Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure Fourth periodic reports of States parties due in 2016 Armenia, Committee Against Torture, 16 October 2015, §1.

6) *in relation to the person or his relatives, concerned with this person in the line of duty or carrying out one's public duty;*
7) *negligently caused grave circumstances,*

is punished with imprisonment for the term of 7 to 12 years, with deprivation of the right to hold certain posts or practice certain activities up to 3 years".[38]

The new amendments are designed to ensure that all public officials engaged in conduct constituting torture are charged accordingly, and that the penalty for this crime reflects the gravity of the act of torture as required by the UNCAT. The amended article imposes a suitable penalty for such acts, which is in conformity with international best practices. Moreover, in contrast with the existing legislation, which stipulates the private criminal prosecution for cases of torture where the sole ground for the initiation of criminal proceedings in such cases is the victim's complaint, new amendments to the Criminal Procedure Code consider a subject of public criminal prosecution, which is initiated by a decision of the supervising prosecutor. Moreover, according to the new amendments, acts of torture by private actors should also be subjected to public prosecution. This can be considered as an additional guarantee for ensuring the initiation of criminal proceedings in each such case.[39]

In particular, after adoption of new legislative amendments and supplements to the Criminal Code of the Republic of Armenia, Article 119 reformulated torture as a criminal act of inflicting severe physical pain or mental suffering by private actors and read as follows:

1. *Wilfully inflicting severe physical pain or mental sufferance to a person, if this did not cause consequences envisaged in Articles 112 [Infliction of wilful heavy damage to health] and 113 [Infliction of wilful medium-gravity damage to health], and if there are no elements of crime under Article 309.1 [Torture] of this Code, is punished with imprisonment for the term up to 3 years.*

[38] Available in Armenian here: https://www.arlis.am/DocumentView.aspx?DocID=151885 (accessed May 7, 2021).
[39] Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure Fourth periodic reports of States parties due in 2016 Armenia, Committee Against Torture, 16 October 2015, §2.

2. The same actions, committed:

1) in relation to two or more persons;
2) in relation to the person or his relatives, concerned with this person in the line of duty or carrying out one's public duty;
3) in relation to a minor or a person dependent financially or otherwise on the perpetrator, as well as, in relation to a kidnapped person or hostage;
4) in relation to a pregnant woman;
5) by a group of persons or by an organized group;
6) with particular cruelty;
7) with motives of national, racial or religious hatred or religious fanatism,

is punished with imprisonment for the term of 3 to 7 years".[40]

b. Interpretations under Armenian law

On the domestic level, the Cassation Court of the Republic of Armenia is authorized to issue precedential decisions, which are mandatory for the lower instance courts with the same factual circumstances. Before the adoption of the aforementioned legislative amendments and supplements to the Criminal Code of the Republic of Armenia, the Cassation Court of the Republic of Armenia issued a precedential decision concerning the qualification of an act as a torture.

The Court expressed that there may be cases when one blow is stronger than several. According to the Court, the number of blows is significant in determining the act only if it did not cause physical harm as an inherent feature of crime. That is, if one blow causes, for example, severe, medium or light damage to health, it is qualified according to the actual effect, and in the case where one blow did not cause physical pain or physical suffering and did not characterize as intentional, then it cannot be considered a crime because of its low significance.

In addition to the above, the Court of Cassation emphasized that in assessing with one blow infliction of physical pain, physical or mental suffering or existence of such intention, it is necessary to take into account the victim's age, state of health, as well as the offender's physical descriptions, location of a blow, nature and other circumstances, which combination can prove that the victim was physically hurt.

[40] Available in Armenian here: https://www.arlis.am/DocumentView.aspx?DocID=151885.

The Court of Cassation noted that inflicting severe pain on a victim once or inflicting one blow at a time, regardless of the severity of the blow, can be qualified as torture if the perpetrator realized that their actions intentionally caused the person severe pain or physical or mental suffering.[41]

According to the interpretations of domestic experts,[42] the consequence of a criminal act of torture must be severe physical pain or mental suffering, otherwise, the act cannot be considered complete. It is noteworthy that bodily injury, as a mandatory feature of the crime, is not mentioned as an element of an offence. The experts conclude that such a consequence is of course not excluded as a result of torture, as is the possibility of causing serious damage to the health of varying degrees. However, in some situations it may be problematic that "causing bodily injury" is not a fixed factor in the crime. They mention that the problem is practical, that there are possible cases when a person, due to their physiological characteristics, is not receptive to pain, even if they are injured. It is not excluded that, for example, in case of light or medium health damage, the victim claims that they did not feel severe physical pain. In these circumstances, since the occurrence of severe physical pain or severe mental suffering is required, and the intent and purpose of the offender are not sufficient to consider the crime completed, we cannot speak about the completed criminal act of torture. The situation would have been different if after the words "severe physical pain or severe mental suffering" the phrase "bodily injury" had been used in the article.[43]

Related legislation under Armenian law

According to the Article 2 of the Constitutional law of the Republic of Armenia on the Human Rights Defender:

> *The Defender shall be entrusted with the mandate of the National Preventive Mechanism provided by the Optional Protocol — adopted on 18 December 2002 — to the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

Article 27 (1) of the same law stipulates that:

[41] Decision of the Cassation Court adopted on 1 November 2012, no. ARD/0176/01/11, §§26-27.
[42] S.Galyan, D.Tumasyan, A.Nikoghosyan, *Criminal Description of torture and specificatons of investigation*, Yerevan, 2019.
[43] S.Galyan, D.Tumasyan, A.Nikoghosyan, p. 27.

The objective of the Defender's activities as the National Preventive Mechanism shall be the prevention of torture and other cruel, inhuman or degrading treatment in places of deprivation of liberty (...).

Article 28 of the law prescribes that as the National Preventive Mechanism, the Defender shall be entitled to:

(1) make regular, as well as ad hoc visits to places of deprivation of liberty, including of his or her choice buildings or structures adjunct thereto for the purpose of preventing torture and other cruel, inhuman or degrading treatment or punishment. The Defender shall not be obliged to inform in advance on the time and purpose of the visits;

(2) visit in a confidential and unimpeded manner, persons of his or her choice held in places of deprivation of liberty, as well as have conversations in private with them, the staff members of the corresponding institutions or any other person in the place in question, where necessary engage an interpreter, use technical means. Conversations in private shall not be subject to intervention or wiretapping by anybody or a third person;

(3) submit recommendations to competent bodies and organisations for the purpose of improving the conditions of detention at any place of deprivation of liberty, as well as preventing torture and other cruel, inhuman or degrading treatment or punishment;

(4) receive information on the number and location of the places of deprivation of liberty, as well as the number of persons held therein;

(5) receive information and clarifications on the treatment and conditions of persons held in places of deprivation of liberty, as well as on any other issue necessary for exercising the powers thereof;

(6) get familiar with all the documents necessary for exercising the powers of the Defender, obtain the copies thereof;

(7) submit recommendations to the competent bodies on legal acts or draft legal acts;

(8) exercise other powers prescribed by this Law.[44]

[44] Constitutional law of the Republic of Armenia on the Human Rights Defender, adopted on 16 December of 2016, available here: https://www.ombuds.am/en_us/site/AboutConstitution/79 (accessed May 7, 2021).

IV. International and regional interpretation of severe pain

The element of "severe pain or suffering, whether physical or mental" remains core to the definition and interpretation of torture under international law, namely in Article 1 of UN *Convention Against Torture* (UNCAT) and in the contemporary interpretation of related international and regional instruments including the *European Convention on Human Rights*. Its interpretation has however presented challenges for legal professionals, whether lawyers, prosecutors or judges. Recognising these challenges in their practical context, the *Guidelines* at hand offer operational guidance for relevant legal professionals (particularly prosecutors and judges) towards more clearly understanding and applying the element of severity in everyday practice.

The element plays a number of significant roles as an *aggravator* and relatedly *differentiator* between forms of ill-treatment. It also captures the core of a victim's experience. Severity hence is understood to be complicated and complex. Its complexity, contextuality and relativity must be embraced. Expectations of precision, causality and objectivity must be downplayed or outright discarded. There is no one-size-fits-all assessment here. Given the variability of such experiences, the element has been widely interpreted to include both physical and psychological pain as realised through official actions and inactions.

a. Severe pain as aggravating factor

The word "severe" is a long-standing term in relation to defining and interpreting torture.[45] There is a distinct criminal law logic and a consequentialist perspective here which holds the degree of "damage caused" to be closely aligned to the "gravity of wrong". There is a distinct nuance to be drawn here from the outset and to be kept front of mind throughout the discussion: that suffering/damage/injury does not represent the *totality* of the wrong. There is more to the wrong than the suffering (such as intentionality and purpose (*mens rea*), which too add to wrongfulness).

[45] See M Nowak, "What Practices Constitute Torture?: US and UN Standards", 28 (4) *Human Rights Quarterly* (2006); M Nowak and E McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP, 2008); M Nowak et al, *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed., OUP, 2019).

To clarify, the language around "gravity",[46] "intensity",[47] "degree" or "level" of pain or suffering, as emanating from the literature and caselaw, hold no special technical meanings beyond evoking gradations of harm – and as such can be taken as near-synonymous or interchangeable. It may be instructive to recall the drafting history which traces rejected state proposals. Of particular salience here are proposals to add "extremely" before (or "extreme" instead of) "severe" – which reveal potent attitudes which prevail in some imaginaries, though now authoritatively rejected. The European Court of Human Rights has also used the related phrases "very serious and cruel suffering"[48] and "particularly serious and cruel"[49] on numerous occasions to refer to severity. One review of the Inter-American Court compiles the words (citations omitted): "grave, extreme, barbarous, intense, following conduct that has been referred to as acts of aggression, or extremely aggressive or grave acts of violence".[50] Other adjudicators have also referred to "serious physical pain and suffering",[51] "considerable physical pain, fear, anguish and mental suffering".[52]

Whilst the European Court now recognises the universal application of the UNCAT definition,[53] its caselaw still refers back to the problematically divergent case law such as *Ireland v. UK* which (though prescient on some accounts) also represents the position that there needs to be *more* than severe pain for an act to amount to torture.[54] To be clear, the pain required in the European jurisprudence now is "simply" severe, and no more, given explicit adoption of UNCAT in *Selmouni*.

b. Severe pain as differentiating factor

There exists a lengthy and complicated debate about the role of severity in differentiating between forms of ill-treatment. There are two models (or schools) emanating from the literature: the vertical/hierarchical (or "severe-plus") and the horizontal/qualitative (purpose-centric). The hierarchical depicts the relationship between the three categories of torture, cruel/inhuma and degrading, with torture sitting at the apex, representing and requiring the highest intensity of pain, with

[46] ECtHR, *Egmez v Cyprus*, 30873/96, §78.
[47] ECtHR, *Ireland v. UK,* §167, "intensity of the suffering".
[48] See e.g., ECtHR, *Aydin v. Turkey* 23178/94, §82; ECtHR, *Cestaro v. Italy, 6884/11,* §171.
[49] See e.g., ECtHR, *Bati v. Turkey*, 33097/96, 57834/00, §123; ECtHR, *Ilascu v. Turkey,* 48787/99, §447.
[50] S Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law*, (Intersentia, 2011), p. 91.
[51] ECtHR, *Krastanov v. Bulgaria*, 50222/99, §53.
[52] ECtHR, *Selami and Others v. 'the Former Yugoslav Republic of Macedonia,* 78241/13, §49.
[53] ECtHR, *Selmouni v. France*, 25803/94, §100.
[54] N Rodley and M Pollard, *The Treatment of Prisoners under International Law* (3rd ed., 2011), p. 92.

cruelty/inhumanity requiring relatively less severity, though severe nonetheless, and degradation as not necessarily requiring severe pain.[55] Although its progenitors in the European Commission and Court have since moved away due to its explicit alignment with UNCAT,[56] hierarchical understandings still prevail amongst practitioners based on the understanding that the categories differ on harm suffered.[57] This can be attributed to the lack of conclusive consensus on the subject, the contingent interpretive construction, and the continued citation of *Ireland v. UK* (which often is the departure point for a review of European jurisprudence on torture) and its principle of "special stigma" (though conceivably open-ended itself) amongst other implicit approaches to judicial reasoning.

Torture	*"Severity-plus", official, purpose, intent*
Cruel or inhuman	*"Simply severe", official*
Degrading	*Severity not necessary*
Lawful sanctions	*Below minimum level of severity, inherent*

Figure 1. Vertical/hierarchical/severe-plus model

Prominent commentators find no textual support to render severity as the differentiating pivot[58] and in turn propose a horizontal or qualitative approach (or a "branched manner"[59]). This model focuses on and locates the qualitative differences between the categories away from severity and towards purpose – in which they "all stand alongside each other", e.g., torture – cruel and inhuman

[55] ICTY, *Prosecutor v. Radoslav Brdjanin* (Trial Judgement), IT-99-36-T, 1 September 2004, §483: "The seriousness of the pain or suffering sets torture apart from other forms of mistreatment."
[56] Rodley and Pollard, p. 107.
[57] CAT exudes an ambivalently open version in its General Comment 2, §10: "In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes". See e.g., P v Dijk et al, *Theory and Practice of the European Convention on Human Rights* (5th ed., Intersentia, 2018), p. 391: inhuman treatment "differs from torture as regards the level of intensity (it does not require 'very' serious suffering)".
[58] Nowak (2006), p. 818; N Rodley, "The Definition(s) of Torture in International Law", 55 *Current Legal Problems* (2002) 467, p. 491; Rodley and Pollard, p. 123; UN Special Rapporteur on Torture (Nowak), Thematic Report, A/HRC/13/39, §60.
[59] R Morgan and M Evans, *Combating torture in Europe,* p. 66.

treatment – degradation.[60] It holds torture and inhumanity as being closely grouped, as "species of inhuman treatment". This is partly based on the statement that torture and cruel and inhuman treatment often involve similar levels of severe pain.[61] So, if the act concerned is cruel and inhuman treatment, with an additional dimension e.g., purpose or intent, the wrong is aggravated and heightened to torture. Degradation, on the other hand, operates with a different logic: it gravitates around humiliation (or debasement) and not necessarily purpose, intention, or severe pain. That is to say, degradation may be found even when the "severity threshold […] has not been attained".[62] The overarching commonality is that torture, cruel and inhuman treatment, and degradation are all affronts to human dignity.[63]

Torture as ("simply") severe, purposeful, intentional, official	*Cruelty-inhumanity* as severe, official No purpose/intent ["torture-minus"[64]]
Degradation: above minimum level of severity but not severe as torture/cruelty-inhumanity	
Lawful sanctions: below minimum level of severity and not torture/cruelty-inhumanity/degradation	

Figure 2. Horizontal/qualitative model[65]

[60] M Evans, 'Getting to Grips with Torture', 51 *International and Comparative Law Quarterly* 365 (2002), p. 382.
[61] See P Pérez-Sales, *Psychological Torture* (Routledge, 2017), p. 261: "The distinction between torture and CIDT [cruel, inhuman or degrading treatment or punishment] on the basis of the amount of pain and physical suffering has no basis […] this definition reflects the reality of contemporary torture (as well as torture in the foreseeable future), in which interrogators use more subtle mechanisms that are not necessarily based on pain or suffering."
[62] ECtHR, *Bouyid v Belgium*, 23380/09 [GC], §101.
[63] ECtHR, *Bouyid v Belgium*, 23380/09 [GC], §101.
[64] Y Ginbar, "Making Human Rights Sense of the Torture Definition" in M Başoğlu (ed)., *Torture and Its Definition in International Law: An Interdisciplinary Approach*, (OUP, 2017), p. 274.
[65] This figure represents the model as the preponderance of the current literature and caselaw. There is clearly a partial hierarchy here between "torture/cruelty-inhumanity" and "degradation". See N Mavronicola, Torture,

Where is cruelty in all of this? For no clear reason, the UNCAT expressly includes the term "cruelty" and the European Convention does not. As such cruelty has not been attended to here and in the literature as much as categories of "torture", "inhuman" and "degrading". If anything it is more usually coupled as "cruel and inhuman" – and sensibly so. It too is argued to require severe pain.[66] Textual analysis of the use of the term "cruel" or "cruelty" by the European Court presents us with another confusion as to where they fit in the categorical schema. The Court has on occasion folded these terms into its assessment of severity and in shifting to a point of objectivity as to the evil nature of treatment ("very serious and cruel suffering" (*Selmouni*, §96); "level of cruelty required to attain the threshold of torture" (*Gaefgen*, §108, *Cestaro*, §176); "this treatment was of such a serious and cruel nature that it can only be described as torture" (*Aksoy*, §64); "occasion suffering of the particular intensity and cruelty implied by the word torture as so understood" (*Ireland*, §167)). Whilst one commentator interprets such formulations as illustrating "that cruelty is a notion distinct from intensity of suffering",[67] these are loose judicial formulations with no material effect.

An early study into the work of the European Committee for the Prevention of Torture (CPT) similarly found a "terminological inexactitude" but nevertheless attempted to navigate the tricky terrain. This study provides a useful analysis which points to the CPT "reserving" torture for "what are perhaps best described as specialised, or exotic, forms of violence"[68] and almost exclusively for "physical ill-treatment employed instrumentally by the police" – which is definitely too narrow (and has since been broadened). Furthermore, it draws our attention to the inconsistent use of adjectives and importance of relative and contextual assessments. Crucially, the CPT is a preventive mechanism and not an interpretive or adjudicatory authority – not tasked with legally determining or qualifying acts as torture or otherwise.

To be sure, characterising torture as an "aggravated" form of inhuman treatment still serves a confusion here. The language around "special stigma" and "apex", being reserved for the most grave, remains centred not in the broader criminal law sense of aggravating factors (which as above includes intention and purpose etc.)

Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs (Hart Publishing 2021), p. 90, where she argues that if we are to appreciate all three categories to "encompass distinct qualities", all three boxes should be situated side-by-side thus qualitatively different, not hierarchically.

[66] Nowak (2006), p. 822.

[67] Mavronicola, p. 67.

[68] Morgan and Evans, p. 60.

but unduly on the level of suffering. Relatedly, the language around acts "falling short" rather than "which do not amount to torture" as found in Article 16 UNCAT at least vaguely support vertical illustrations. To end, the most well-reasoned position is that of Amnesty International – which adopts the position that the difference should not be pinned to any one constitutive element of torture's definition, as this would arguably weaken protection. Any one element (intention, purpose, severity), when missing, is rendered a form other than torture.[69]

c. Physical v. mental

There is no theoretical or empirical hierarchy between physical and mental aspects of pain. Yet, experience has shown that in practice mental aspects of ill-treatment are often downgraded, overlooked or dismissed in codification,[70] documentation and adjudication.[71] Mental elements had also not attracted much attention, including during the drafting of UNCAT itself.[72] The UN Special Rapporteur on Torture (UNSRT) has also pointed out that although "equally destructive as physical torture methods [psychological methods are] very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations".[73]

A study of the reports of the States parties submitted to the CAT reveals the approaches concerning the implementation of the definitions of the Convention into domestic legislation. For instance, according to the Report of the United States of America, the United States Government believed there was no inconsistency between its understanding of the definition of torture and that contained in Article 1 of the Convention. Where official mistreatment resulted solely in mental suffering, it did constitute torture provided it involved prolonged mental harm and was caused by or resulted from four sources: intentional or threatened infliction of severe physical pain or suffering; the administration or threatened administration of mind-altering substances or other procedures calculated to disrupt the senses or the personality; the imminent threat of death; or the imminent threat that another person would be subjected to death, severe physical pain or suffering or the administration

[69] Amnesty International, *Combating Torture: A Manual for Action*, (2016), pp. 75-77.
[70] See e.g., *Myumyun v. Bulgaria*, §74: "The Court has already expressed concern that the offence of bodily harm under Articles 128-30 of the Bulgarian Criminal Code […] does not appear sufficiently to take into account psychological suffering"; see also UNSRT, A/HRC/13/39/Add.5, §144.
[71] See E Cakal, "Debility, dependency and dread: On the conceptual and evidentiary dimensions of psychological torture", *Torture*, 28(2) (2018); see also UNSRT, Thematic Report, A/HRC/43/49, (2020).
[72] A Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (1999), p. 18.
[73] UNSRT, Thematic Report, A/HRC/13/39/Add.5, (2010), §55.

of mind-altering substances or other procedures calculated to disrupt the senses or the personality. According to the Report that understanding did not modify the meaning of Article 1, but rather clarified it, adding the precision required by the United States domestic law.[74]

In an early case, *East African Asians v. UK*, the European Court reiterated its recognition of non-physical torture and ill-treatment. Responding to the UK's arguments that "degrading treatment" must be interpreted as referring to physical acts only (§190), the Court reasoned that this interpretation would be "too restrictive" and unnecessary. In a more recent case, it has stressed that "one of the distinguishing characteristics of torture is that it not only – and not always – seriously damages the physical health of the person subjected to it but also affects in a very serious way that person's dignity and psychological well-being".[75] The clear approach states as follows:

> 'Severe pain and suffering' relates to physical and mental suffering equally, with psychological torture and other forms of ill-treatment being 'by no means less severe than physical abuse'. This is very important, as mental suffering of the same intensity than physical pain and suffering can be inflicted without actual physical contact.[76]

An early interpretation of "non-physical torture" held it "to cover the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."[77] Recently, the UNSRT proposed that psychological torture:

> ..should be interpreted to include all methods, techniques and circumstances which are intended or designed to purposefully inflict severe mental pain or suffering without using the conduit or effect of severe physical pain or suffering. The Special Rapporteur is further of the view that "physical torture" should be interpreted to include all methods, techniques and environments intended or designed to purposefully inflict severe physical pain or suffering, regardless of the parallel infliction of mental pain or suffering.[78]

[74] Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Initial report of the United States of America, CAT/C/SR.427, §6.
[75] ECtHR, *Myumyun v. Bulgaria*, (2015), 67258/13, §74.
[76] Nowak (2019), p. 50.
[77] The *Greek Case*, §186.
[78] SRT, Thematic Report, A/HRC/43/49, §19.

Other convincingly advanced conceptualisations of mental pain usefully include: the "process by which psychological pain is transformed into humiliation and dehumanisation, where the essence of being human – namely personal agency, values, emotions, hope, relationships, and trust is under attack",[79] or "cognitive, emotional or sensory attacks that target the conscious mind and cause psychological suffering, damage and/or identity breakdown in most persons subjected to them".[80]

d. Pain v. suffering

There is no meaningful difference between "pain" and "suffering" – with the two words essentially synonymous and interchangeable.[81] The distinction that pain is more physical and suffering is more mental circulates amongst practitioners – but there is no reliable basis for this. The discourse also trades in related by-words or phrases such as "mental anguish", physical/bodily/psychological/mental "integrity", intention to "obliterate the personality of victim or to diminish his physical or mental capacities", "affecting the personality", "anguish and distress" or "great suffering and anguish", "breaking the will", "permanent state of anxiety" – which all capture a dimension of pain and damage without using the words severity, pain or suffering. These can be put down to attempts to innovate and communicate the nature of the acts before adjudicators.[82]

What is pain?[83] and where do we look for it: is it at the nature of the act or its impact? The European Court, for instance, attempts to do this in its relative assessments of severity. It accepts rape for instance as "leav[ing] 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".[84] Lengthy police beatings in *Selmouni v. France* led the Court to conclude that "[w]hatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain".[85] The same approach has been taken in relation to electric shocks which the Court accepts as "a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering and therefore falling to be treated as torture, even if it does

[79] N Sveaass, *Destroying Minds: Psychological Pain and the Crime of Torture*, 11 N.Y. City L. Rev. 303 (2008), p. 304.
[80] Pérez-Sales, p. 8.
[81] On this question, see Dewulf, pp. 99-100; 104.
[82] There is a strong critical social scientific scholarship around the representation of violence. As a first port of call, see E Scarry, *The Body in Pain: The Making and Unmaking of the World (*OUP, 1986).
[83] This is a broad discussion that demonstrates that pain is "a multifaceted and multidimensional phenomenon", see Dewulf, pp.100-104.
[84] ECtHR, *Aydin v. Turkey,* §83.
[85] ECtHR, *Selmouni v. France,* §102.

not result in any long-term health damage".[86] This broadly fits with the Inter-American approach, which has not required severe pain on the whole and does not look to impact (to any degree) where the methods used "are intended to obliterate the personality of the victim or to diminish his physical or mental capacities" – and as such "clearly aimed at sophisticated medical or psychological techniques used as an aid to interrogation".[87] The danger is to essentialise and associate certain techniques with severity and reifying such understandings to the exclusion of lived experiences especially of emergent techniques of torture and the corresponding understanding of their impact. And let us not forget that flawed reasoning indeed flows from an excessive focus on "long-term consequences"[88] – as this is not strictly a requirement under Article 1 of UNCAT. The European Court may be moving away from such a requirement – but this remains to be institutionalised. The correct approach is to be open-ended as a matter of first order principle. As such:

— pain need not be extreme, "prolonged",[89] "permanent",[90] "difficult for the subject to endure";[91] need not involve "death, organ failure, or serious impairment of body functions";[92] severe pain can be short-lived,[93]

— severity could arise from an individual method or an accumulation or combination of methods (as is usually the case in infliction of pain), occurring on one occasion or over time;[94]

[86] See ECtHR, *Polonskiy v. Russia*, 30033/05, § 124.
[87] N Rodley, p. 479.
[88] ECtHR, *Egmez v. Cyprus*, 30873/96, §78; ECtHR, *Denizci v. Cyprus,* 25316-25321/94 and 27207/95, §385.
[89] CAT, Concluding Observations, USA, CAT/C/USA/CO/2 (2006) §13; this is still found in the US codification 18 US Code §2340
[90] ICTY, *Prosecutor v. Brdanin*, §484: "Permanent injury is not a requirement for torture".
[91] This is a formulation as found in the Torture Memos, see R Goldman, "Trivializing Torture. The Office of Legal Counsel's 2002 Opinion Letter and International Law against Torture", 12 No. 1 *Human Rights Brief* 1 (2004), p. 5.
[92] Another example from the much-chided "Bybee Memo", p. 6.
[93] ICTY, *Prosecutor v. Naletilic and Matinovic*, Appeal Judgement, 3 May 2006, §300: "no rigid durational requirement is built into the definition".
[94] Rodley and Pollard, p. 92, see 2.2.1 "The cumulative approach"; ECtHR, *Aydin v Turkey*, §86; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber) 15 March 2002, §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 harm- less [...] The period of time, the repetition and various forms of mis- treatment and severity should be assessed as a whole".

— impact need not be physically visible;[95] relatedly, mental pain can constitute severity without being coupled with physical pain;[96]

— the infliction of pain cannot be easily managed or controlled to avoid amounting to severe.[97]

e. Action/commission v. inaction/omission

In theory, severity can flow from both official actions as well as inactions.[98] This is also what emanates from drafting history.[99] There is no need, therefore, for an official to do anything. That said, the caselaw seems to (unduly) attribute more weight to actions rather than inactions. The perpetrator need have intended to inflict pain but need not have known that it would be severe.[100] The ICTY has itself pointed this out where it stated ""the most characteristic cases of torture involve positive acts".[101] This necessitates a sustained challenge.

f. Minimum level of severity

There is another threshold test which uses the notion of severity. The European Court employs a "minimum level of severity" test to assess whether the alleged conduct falls in the scope of the prohibition against torture and inhuman and degrading treatment. The European Court stated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim[102]. In respect of a person deprived of their liberty, any recourse to physical force which has not been made

[95] ICTY, *Prosecutor v. Brdanin*, §484: "evidence of the suffering need not even be visible after the commission of the crime".
[96] See e.g., ECtHR, *Gaefgen v. Germany*, 22978/05, 2010, §108. The Court eventually found that the threats in this case amounted to inhuman treatment. Notably, despite this well-circulated principle, the European Court has only found torture where psychological torture was combined with physical.
[97] See Cakal.
[98] Nowak (2006), p. 819
[99] Boulesbaa, p. 14.
[100] Amnesty International, p. 68.
[101] ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, §468; ICTY, *Prosecutor v. Kunarac*, §483; ICTY, *Prosecutor v. Brđanin*, §481.
102 *Labita v. Italy [GC],* no. 26772/95, 6 April 2000, § 120.

strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.[103]

What role does this actually involve or serve? This serves as a lower threshold that encompasses a broader assessment than that simply of pain, though that too is included. It draws in considerations of "duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim".[104] For the European Court, it also serves a role analogous to article 1 of UNCAT's "lawful sanctions clause" – in that it seeks to exclude altogether forms of treatment that are viewed by adjudicators as being lawfully inherent to criminal justice practice. The Court has interpreted this in various ways as something other than difficult or "undoubtedly unpleasant or even irksome"[105] requiring the conduct in question to be "discreditable and reprehensible", "distressing and humiliating"[106] or "interfering with human dignity".[107] When determining degrading acts, the European Court has looked for treatment which "grossly humiliates [the victim] before others or drives to act against his will or conscience"[108] or "humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[109]

The confusion here arises from associating this threshold exclusively with the "quantum" of suffering.[110] The confusion is also expected given the deceptively synonymous use of the word "severity" and its already problematic ambiguity in the jurisprudence of the European Court.[111] Whilst they are both relative (i.e. contextually-dependent),[112] the "minimum level of severity" assessment is qualitatively different (broader) to the "severity of pain" assessment. One useful clarification here is to point out that: "the minimum in question, i.e., to constitute degrading treatment, falls some considerable distance below the severe pain or

[103] *Sheydayev v. Russia*, no. 65859/01, 7 December 2006, § 59.
[104] ECtHR, *Ireland v UK*, 5310/71, (1977) §162.
[105] ECtHR, *Guzzardi v. Italy*, 7367/76 (1990) §107 as quoted in E Webster, *Dignity*, *Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018), p. 27.
[106] *Id.*
[107] ECtHR, *Raninen v. Finland,* 20972/92, §50.
[108] *The Greek Case*, Comm Rep, 5 Nov. 1969, (1969), 12 ECHRYb, §186.
[109] ECtHR, *Strelets v. Russia,* 28018/05, §54.
[110] Mavronicola, p. 7.
[111] Mavronicola, p. 91.
[112] *Selmouni v. France,* §100.

suffering required for the notion of cruel or inhuman treatment to be applicable."[113] It also draws in the proportionality test.

What about legitimate uses of severe force? One prominent perspective holds that there are legitimate uses of severe force as assessed through a proportionality test and limited to purposes outside of those envisaged in article 1 (namely, purposes such as obtaining information or confession, coercion, punishment, discrimination). In other words, uses of severe force towards purposes listed in Article 1 UNCAT will never be legitimate. Proposed examples of legitimate purposes, which fall out of this ambit, are said to include: "lawful arrest of a person suspected of having committed a crime, preventing a person lawfully detained from escaping, quelling a riot or insurrection, dissolution of a violent demonstration, defending a person against crime and unlawful violence, and the use of force by the military in case of armed conflict".[114] To be clear, the legitimate purpose does not allow for the use of any level of force. For instance, 13 officers cannot violently arrest a single suspect.[115]

g. Instructive caselaw

These cases present reasoning which do not unduly dwell on prolonged or permanent pain nor on the physical nature of the acts. They exude a careful and contextually-sensitive approach and attention to medical evidence and the situated experience of the victim. Importantly, they illustrate the severity of pain as an aggravating factor.

— *Novoselov v. Russia* (interrogation (with intent and purpose) – a few hours – physical and psychological pain – the ECtHR held to be torture): On 27 April 2004, the victim [male adult with no notable health conditions] "was kidnapped by police officers in disguise posing as private security guards and that the operation lasted for at least a few hours, during which the applicant was severely beaten and interrogated under threat, which lead to his having repeatedly lost his consciousness. This method of ill-treatment was undoubtedly applied to the applicant intentionally, its only aim having been to intimidate, humiliate and debase him and break his physical and moral resistance with a view to forcing him to confess to a crime".[116]

[113] Rodley and Pollard, p. 124.
[114] Nowak (2006), p. 821; see Rodley and Pollard on this question, p. 134.
[115] Rodley and Pollard, p. 134. See example provided before the conclusion.
[116] ECtHR, *Novoselov v. Russia,* 33954/05 (2014), §§63.

— *Menesheva v. Russia* (interrogational (intention and purpose) – torture): the victim [19-year-old woman] was taken into custody on suspicion of murder. During the arrest, she was verbally threatened and injured as police threw her in the police car. She was detained for three days when she was interrogated, twice beaten and not offered medical assistance. She presented a forensic report to corroborate her allegations. The Court concluded that this was torture, explicitly noting 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. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral abuse".[117]

— *Gerasimov v. Kazakhstan* (interrogational (intent and purpose) – torture):[118] the victim [male adult] went to the police station to see his detained stepson on the evening of 27 March 2007. He was locked in a room for around half an hour before "five police officers entered the office and demanded that he confess to the murder [which he denied for over an hour]. One of the officers inflicted several heavy blows to his kidneys. The officers then threatened him with sexual violence" (§2.2). He was subsequently pinned to the floor and had a plastic bag put over his head which was pulled backwards suffocating him before losing consciousness. This was repeated multiple times as the victim regained consciousness (§2.3). On the following day, he was interrogated by a police interrogator who hit him over the head with a large book – after which he was released without charge. The victim suffered with severe headaches and nausea, and diagnosed with brain and kidney injuries (§2.5) and hospitalised for 13 days. His pains continued following release. A medical examination on 23 April 2007 diagnosed him with PTSD. The CAT held that "treatment can be characterized as severe pain and suffering inflicted deliberately by officials with a view to obtaining from the complainant a confession of guilt" and amounted to torture (§12.2).

— *Necdet Bulut v. Turkey* (extra-custodial – shot in the leg by police during arrest fracturing the fibula – severe pain, unspecified ill-treatment established): The victim was sixteen-year-old boy. Police, responding to reports of suspicious activity in the early hours, were shot at (by as it later discovered a toy cap-gun) and chased suspects for one hour. Police shot the victim in his left knee in effecting his arrest. The Court reasoned that, whilst the appreciating assumptions around the reported activity and the (toy cap-gun) shots, it could not "overlook the fact that the police

[117] ECtHR, *Menesheva v. Russia,* 59261/00 (2006), §61.
[118] CAT, *Alexander Gerasimov v. Kazakhstan* (2012), 433/2010.

officers, who largely outnumbered the suspects, gave chase for about an hour before they cornered the applicant and the other suspects in a tent where the applicant was shot and arrested. [The police] were thus able, with the lapse of time, to properly evaluate the situation and to organise and coordinate their efforts accordingly". Of additional importance in its view, the Court found it "noteworthy that the bullet trajectory indicates that the applicant was not facing towards the police officers when he was hit […] and that consequently he could not have been shooting at the police officers, at least at that precise moment, as the Government suggested. In these circumstances, the Court finds that the Government have failed to provide convincing or credible arguments which would justify the degree of force used against the applicant in order to arrest him." […] Finally, although the applicant's injury - a single gunshot wound to a non-vital organ - appears not to have had any lasting consequences for his health, the Court finds that it must have led to severe pain and suffering, particularly when account is taken of his young age at the time."[119]

— In *Archip v. Romania* the applicant contended that the handcuffing had not only humiliated him but had also caused him severe physical pain. In this regard, the Court considered that handcuffing a person outdoors on a cold and wet day in November could cause intense physical pain, not only to a person suffering from coxarthrose, but also to a person in good health. As a result, the Court found that there has accordingly been a violation of Article 3 (inhuman and degrading treatment) of the Convention.[120]

— In *Sadykov v. Russia* the applicant indicated that police officers of the Oktyabrsky VOVD had subjected him to various forms of ill-treatment. In particular, they had punched, kicked and beaten him with automatic rifle butts and had burnt various parts of his body with a red-hot metal bar. The intensity of the abusive treatment inflicted on the applicant is attested by the medical documents, listing a number of serious after-effects of that treatment, including traumatic extraction of at least eleven teeth, fracture of at least four ribs, scars on the left side of the lower jaw, possible fracture of the bridge of the nose, possible fracture of the right leg and a scar on the palm of the right hand. The Court had no doubt that the aforementioned forms of ill-treatment caused the applicant severe physical pain and suffering, and that they were inflicted on him intentionally, in particular with a view to obtaining from him a confession or information about the

[119] ECtHR, Necdet Bulut v. Turkey, 77092/01 (2007).
[120] *Archip v. Romania,* no. 49608/08, 27 September 2011, § 55.

offence of which he had been suspected. As a result, the Court found that there has accordingly been a violation of Article 3 (torture) of the Convention.[121]

— In *Gorobet v. Moldova* the applicant argued that his confinement and forced psychiatric treatment in the psychiatric hospital caused him severe mental suffering amounting to inhuman and degrading treatment. In the circumstances of the present case, the Court saw no reasons to disagree with the applicant and noted that no medical necessity to subject the applicant to psychiatric treatment has been shown to exist and that his subjecting to psychiatric treatment was unlawful and arbitrary. Moreover, the Court noted the considerable duration of the medical treatment which lasted for forty-one days and the fact that the applicant was not allowed having contact with the outside world during his confinement. In the Court's view such unlawful and arbitrary treatment was at the very least capable to arouse in the applicant feelings of fear, anguish and inferiority. Accordingly, the Court considered that the psychiatric treatment to which the applicant was subjected could amount at least to degrading treatment within the meaning of Article 3 of the Convention.[122]

In the number of cases the Court found that the disappearance of a person based on the existence of special factors may cause severe mental suffering. The Court stated that the question of whether a member of the family of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give 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. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further emphasized that the essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct. In *Taymuskhanovy v. Russia* the applicants complained that, as a result of their son and father's disappearance and

[121] *Sadykov v. Russia*, no. 41840/02, 7 October 2010, § 235.
[122] *Gorobet v. Moldova,* no. 30951/10, 11 October 2011, §52.

the State's failure to investigate it properly, they had endured severe mental suffering. The Court found that the first applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and her inability to find out what happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.[123] Similarly, the Court found a violation of Article 3 in the cases of *Kukayev v. Russia*[124], *Khamila Isayeva v. Russia*[125], *Bersunkayeva v. Russia,*[126] etc.

Beyond such a canvassing, it will be unquestionably instructive for the practitioner here to examine cases of degradation by way of contradistinction to torture and inhuman treatment.[127] Similarly, we should also attend to treatment that was not determined to attain the minimum level of severity.[128] The following cases represent facts where minimum level of severity was satisfied but the treatment only amounted to degrading treatment on the basis of pain not being severe enough:

— In *Sochichiu v. Moldova* the applicant alleged, in particular, that he had been ill-treated during his arrest contrary to Article 3 of the Convention. The Court noted that the operation was carried out by four police officers, who, as appeared from the video of the arrest, were of approximately the same size and build as the applicant and, unlike the applicant, were armed. The task of the four police officers was to arrest a suspect who was not armed and was not known to have a history of violence. On the contrary, the applicant had a family, a job, a permanent place of residence, was not wanted by the police and was suspected of a white-collar crime. Furthermore, the arrest was to take place in front of a kindergarten at a time when the applicant and other parents would ordinarily be taking their children home, thus potentially in front of the applicant's family and other people, including small children. In such circumstances, the Court was not persuaded by the findings

[123] *Taymuskhanovy v. Russia*, no. 11528/07, 16 December 2010, §124.
[124] *Kukayev v. Russia*, no. 29361/02, 15 November 2007, §§103-110.
[125] *Khamila Isayeva v. Russia*, no. 6846/02, 15 November 2007, §§142-146.
[126] *Bersunkayeva v. Russia*, no. 27233/03, 4 December 2008, §§120-125.
[127] Heavy handed nature of police operation to arrest politician at his home in the presence of his wife and minor children: ECtHR, *Gutsanovi v. Bulgaria*; Metal cage in courtroom: ECtHR, *Svinarenko and Slyadnev v. Russia*; police slapping a child on the face *Bouyid v. Belgium;* shared exposed toilet: ECtHR, *Georgiev v. Bulgaria*, and ECtHR, *Peers v. Greece;* head-shaved before court: ECtHR, *Yankov v. Bulgaria*.
[128] Handcuffed: *Raninen v. Finland*; routine no-touch strip search of a person with severe disabilities: ECtHR, *Navalnyy and Yashin v. Russia*, 76204/11, §§ 111–112; police beating on adult hands held "not particularly excessive": ECtHR, *Stefan Iliev v. Bulgaria;* forceful arrest: ECtHR, *Caloc v. France,* 33951/96, §101.

of the domestic authorities to the effect that the applicant represented such a serious threat to the arresting officers as to justify such brutal methods on their part. Even assuming that the applicant's initial reaction to four individuals in plain clothes wanting to arrest him was some form of resistance, the Court remained persuaded that other less harmful methods and techniques were available to a group of four trained police officers. Besides the brutal force used against the applicant, the Court noted from the video of the arrest that the conduct of the police officers was far from being respectful of the applicant's dignity. In particular, one of the police officers stepped on his head and did not remove his foot, even when brushing his trousers. In the Court's opinion, such conduct was inhuman and degrading. The Court also noted the mocking of the applicant's losing some of his teeth and the swearing by one of the officers. As a result, the Court found that there has accordingly been a violation of Article 3 of the Convention[129].

V. Documentation, litigation and adjudication of torture generally

This section focuses on issues arising from the application of the foregoing concepts in practical and professional contexts, looking first at the demands of assessment (bringing in the broader factors of interpretations); and, finally working through the use of medico-legal documentation in a court setting.

Documentation and litigation

It is easy to overlook that conventional understandings of severity have also significantly depended on the nature of the cases, available and strength of evidence and the deliberations brought before adjudicators. Experience here demonstrates that the use of expert evidence is conducive for a more complete and correct adjudication around severity. Medical reports have proven probative,[130] at times instrumental, in raising assessment of pain to severe.[131] The internationally-recognised standard for documentation of torture is found in the UN *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman*

[129] *Socichiu v. Moldova*, no. 28698/09, 15 May 2012, §§ 38-40.
[130] See, eg. ECtHR, *Daşlik c. Turquie,* 38305/07, §44: "Elle rappelle aussi que, comme l'illustrent nombre d'affaires soumises à son examen, ces personnes produisent habituellement à cette fin des certificats médicaux décrivant des blessures ou des traces de coups, auxquels elle reconnaît une importante valeur probante"

[131] ECtHR, *Savin v. Ukraine*, 34725/08, §61: "the Court attaches weight to the forensic medical experts' findings according to which the applicant's disability was a direct result of the ill-treatment in question"; ECtHR, *Lyapin v. Russia*, 46956/09, §116: "There is medical evidence of the applicant's injuries following his release from police custody including reports by forensic medical experts, which corroborates his account".

or Degrading Treatment or Punishment (Istanbul Protocol*)*. An update is due to be published at the time of writing these *Guidelines*.

The use of the document requires its user to have a degree of competence and capacity, for which it has been critiqued. That said, adjudicators have been mindful of the limited availability of medical reports and risks involved in expectation, as in where the Court noted (worth quoting in full):[132]

> that although medical evidence plays a decisive role in establishing the facts for the purpose of the Convention proceedings, the absence of such evidence cannot immediately lead to the conclusion that the allegations of ill-treatment are false or cannot be proven. Were it otherwise, the authorities would be able to avoid responsibility for ill-treatment by not conducting medical examinations and not recording the use of physical force or special means.

In addition to the issues just canvassed, there are numerous issues that complicate the documentation of torture. These include the following:

— *The most evident issue is that torture is a dark practice*: this usually means that the evidence (whether by means of interrogation or prison records) remains in the hands of the impunity-seeking state;[133]

— *Physical marks tend to disappear over time*: states have resorted to keeping torture victims in detention longer for marks to disappear; given issues of access or apprehensiveness, victims may approach a legal or health professional too late for physical marks to be adequately documented; these render psychological sequalae as even more important;[134]

[132] ECtHR, *Artyomov v. Russia*, 14146/02, §153.

[133] ECtHR, *Othman (Abu Qatada) v. UK*, 8139/09, §276: "due regard must be had to the special difficulties in proving allegations of torture. Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process. It is practiced in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim. All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment. In a criminal justice system where the courts are independent of the executive, where cases are prosecuted impartially, and where allegations of torture are conscientiously investigated, one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture. However, in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate."

[134] See Cakal.

— *Undue demands on documentation*: documentation cannot establish direct causality: documentation protocols and practices cannot precisely determine that sequalae are exclusively and conclusively due to particular acts or techniques; there is also a risk here to effectively heighten standards and related demands of proof in legal proceedings. That is, given that such documentation may not be possible for a victim (for instance, due to issues of access), the adjudicator's insistence on such evidence may lead to *de facto* denial of redress.

— *Act v. environment*: there is a fluid continuum between acts and methods and conditions and context. Yet, there is an inclination to treat detention conditions, albeit harmful, as background factors "rather than as an independent force or factor that exacerbates the harm, or as a form of torturous treatment itself".[135]

Adjudication

— *Case-by-case basis*: each and every allegation must be assessed on a case-by-case basis, examining all relevant circumstances. Whilst some may yearn for a list of what conduct necessarily amounts to severe pain, this will readily prove too limiting and exclusionary, given variability of experiences and evolution of understandings.

— *Relative assessment with emphasis on subjectivity*: relatedly given that no two victims identically react to identical treatment, it has been claimed that only the victim themselves can "bear witness to the pain and its intensity".[136] Whilst an admirable proposal, acknowledgement of that experience remains in the hands of an adjudicator, and, as such, socio-culturally and juridically constructed, filtered and assessed. That said, problems with interpretive practice to date would have arguably been avoided if the victim's experience and perspective were attended to instead of adjudicators relying on their own – without victim, witness or expert evidence.[137]

[135] Başoğlu, p. 140.

[136] C Ingelse, *The UN Committee Against Torture: An Assessment* (2001), p. 209; see also Mavronicola, p.95: "The Court does not regularly engage in its own technical evaluation of the physical or mental pain or suffering actually experienced by the particular individual in the instant of the particular treatment [no witnesses in Ireland v UK], although it accepts medical evidence and expert input that it treats as indicative of the suffering or anguish that can be shown or assumed to have been experienced as a result of the treatment at issue."

[137] Cullen, p. 33.

— In relation to *forward-looking assessments of severity*, as in non-refoulement assessments, the CAT has underscored that "severe pain or suffering cannot always be objectively assessed" and that it "depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age and state of health and vulnerability of the victim or any other status or factors."[138]

— *Control, constraint, power:* Another emergent contextual factor in assessing severity has been that of the degree of control or constraint leading to a power-differential between the victim and the perpetrator. This has also been epitomised in the concept of "powerlessness" where "someone is over-powered, 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".[139] Control, the argument establishes, "underlines the limitlessness of the victim's potential suffering and aggravates the cruelty of its infliction".[140] In any case, it foregrounds situational, contextual and environmental dynamics beyond a narrow, technique-orientation (or "act/impact" equation) anticipating and facilitating fuller appreciation of the victim's experience.

— *Dynamic interpretation*: States are increasingly using torture which leaves fewer physical marks, making it more difficult to detect, document and challenge. Increased prevalence of solitary confinement, sleep deprivation and threats are well-documented by human rights organisations. Concurrently, the understanding of what constitutes torture and ill-treatment is also purported to be evolving – with adjudicators preoccupied with keeping pace with the mutations in the practices of torture. The assessment of torture as being subject to "present-day conditions and the changing values of democratic societies"[141] has come to be widely-accepted juridically. Previously unrecognised forms of violence can readily be identified as now successfully recognised and conceptualised (at least gaining traction and capturing societal and in turn juridical imaginations) under the remit of torture; forms of sexual and gender-based violence, 'conversion therapy', solitary confinement and contexts such as street-level policing and health-care settings spring to mind. This expansion of

[138] CAT, General Comment 4, §17.
[139] Nowak (2019), pp. 56-57; see also M Nowak, "Powerlessness as a Defining Characteristic of Torture" in Başoğlu.
[140] Mavronicola, p. 72.

[141] UNSRT, Thematic Report, A/HRC/22/53 (2013), §§14-15.

scope is owed to dynamic interpretation. The doctrine of "dynamic" (or alternatively "evolutive") interpretation, therefore, is presented with a progressive potential – instilling faith in the system capable of update and fuller realisation. The UNCAT and the *European Convention on Human Rights* (ECHR) are thus considered to be living instruments to be interpreted dynamically. The contemporary jurisprudential authority is attributed *Tyrer v. UK* (1979) and later more expansively in *Selmouni v. France* (1999). The doctrines forged in those cases merit noting here without too much factual detail. The Court in *Tyrer* characterised the ECHR as "a living document [to be] interpreted in the light of present-day conditions" (§31). The Court's next most-cited utterance on evolutive interpretation came in *Selmouni* where, recognising the 'living instrument' doctrine, it held that: "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." [§101] Conceivably, this articulation allows us to get a closer insight into the prevailing logics here – primarily one of historical progression.

These aspects help situate and contextualise the severity assessment(s) in its practice. They also naturally complicate and render a straightforward understanding of severity (or torture for that matter) as difficult. There are, however, issues with the practices of the authoritative bodies tasked with adjudication (namely, the CAT, ECtHR, and the UN Human Rights Committee). The most common deficits in reasoning include:

— *Consistency and specificity* in caselaw is in short supply. There are various explanations for this. A generous version has it that: "this is probably inevitable given the intentionally broad scope of the prohibition, the somewhat subjective nature of some forms of suffering, the upward evolution of social expectations over time, and a reluctance by institutions to tie themselves too closely to a set formula given the creativity of authorities in improvising abuses in particular situations."[142] Additionally, specific findings between torture and orbiting forms of ill-treatment are rare[143]– leaving practitioners without necessary particulars of

[142] Rodley and Pollard, p. 131.
[143] UN Human Rights Committee is the most adamant in this respect: see General Comments 7 and 20 where it justifies its position.

judicial reasoning to operationally guide them. If nothing else, cases with dissenting opinions prove that assessing severity is difficult and divisive.[144]

— *Evidentiary shortcuts*: Another slippage is evidentiary "convenience" or shortcuts where, although the principled stance is not to require *physical*, *prolonged* or *permanent* damage, adjudicators continue to take these as central considerations (or as "as a proxy for the intensity of suffering experienced")[145] to conduct their assessment leaving more difficult facts ill-considered, overlooked,[146] or "distorting the specification of torture" away from the psychological nature of contemporary torture techniques.[147] "Actual bodily injury" holds the most valuable evidentiary currency despite the widely-recognised stance that "the absence of such physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars"[148] or that "there are circumstances where proof of the actual effect on the person may not be a major factor".[149] The impulse for convenience devices, therefore, is alive. Some cases assert that there are a few types of conduct purported to come close to such rules of thumb.[150] Related reasoning here is one which exudes an objectivist or universalist inclination that there are acts "egregious that a finding of severe harm is presumed or inferred based upon the nature of the acts".[151] Whilst serving the most spectacular cases, it eludes a better appreciation of cases that may be more difficult to assess. Notwithstanding adjudicatory convenience, these shortcuts should be avoided where possible.

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[144] We need look no farther than *Ireland v. UK* and *Bouyid v. Belgium.*

[145] Mavronicola, p. 65

[146] See *Bati v. Turkey*, 2004, §115: concerning a combination of physical and mental suffering, is one such example. Having found a violation with respect to the physical, the Court overlooked the non-physical, reasoning that it did "not consider it necessary to go on to assess whether the other allegations of physical or psychological abuse are true, particularly in view of the difficulty of proving such treatment".

[147] Mavronicola, p. 64.

[148] UN *Istanbul Protocol*, §§161, see also §§159, 259 and 260.

[149] ECtHR, *Keenan v UK*, 27229/95, §113.

[150] See e.g., UN OHCHR/UNFVT, "Interpretation of Torture in the Light of the Practice and Jurisprudence of International" (2011), pp. 13-14; rape: *Brdanin,* §485: "Some acts, like rape, appear by definition to meet the severity threshold"; "Palestinian hanging": *Aksoy*; falanga: *The Greek Case*; solitary coffins: CAT, Art. 20 inquiry; UN *Nelson Mandela Rules*: prolonged or indefinite solitary confinement; solitary confinement of children, persons with disabilities (when exacerbated) and pregnant or breastfeeding women (it must be noted that these standards have not been entirely adopted by the ECtHR, the Council of Europe's *European Prison Rules* (2020), nor the CAT, see *Ali Aarrass v. Morocco*, CAT/C/68/D/817/2017, §8.5.

[151] Mavronicola, p. 96.

VI. Further resources

International standards

UN Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, HR/P/PT/8/Rev.

UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175,

Code of Conduct for Law Enforcement Officials, UNGA resolution 34/169 of 17 December 1979

Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA resolution 37/194 of 18 December 1982

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UNGA resolution 40/33 of 29 November 1985

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173 of 9 December 1988

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UNGA resolution 45/113 of 14 December 1990

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990

Expert commentaries

Amnesty International, Combating Torture: A Manual for Action, (2016).

N Mavronicola, Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs (Hart Publishing 2021), p. 61.

M Nowak et al, The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd ed., OUP, 2019).

S Dewulf, The Signature of Evil: (Re)Defining Torture in International Law, (Intersentia, 2011).

N Rodley and M Pollard, The Treatment of Prisoners under International Law (3rd ed., 2011).

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