

**INTERPRETATION OF TORTURE
IN THE LIGHT OF THE PRACTICE
AND JURISPRUDENCE OF
INTERNATIONAL BODIES**

The UNVFVT has been established by the General Assembly of the United Nations (Resolution 36/151 of 16 December 1981), with a Board of Trustees to provide advice to the Secretary-General on the administration of the Fund. The Assembly “recognized the need to provide assistance to the victims of torture in a purely humanitarian spirit” and the mandate of the Fund is to distribute “contributions through the established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture”. Therefore, it is among the responsibilities of the Board of Trustees, in order to decide to fund a project or not, to assess whether the cases of human rights violations presented by the organisations may amount to torture in the light of the practice and jurisprudence of international bodies. In doing so, the Board only determines whether the assistance can be provided to the victims with the financial support of the Fund or not.

I. Torture under International Law

Many acts, conducts or events may be viewed as torture in certain circumstances, while they will not be viewed as torture in some other situations. In fact, there is no single definition existing under international law but most international dispositions and bodies tend to agree on four constitutive elements of torture, as further explained in the first part of this paper “Elements of definition”. It should be recalled that usually in legal dispositions, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. Torture is not an act in itself, or specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. Therefore, the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious. It is clear that, because of the specific intensity or nature of certain acts, the qualification of torture may be easily granted in certain cases. However, in some others, the vulnerability of the victim (age, gender, status, etc), as well as the environment and the cumulative effect of various factors, should be taken into account to determine whether this case amounts to torture or whether it does not reach this ultimate threshold and should be considered as cruel, inhuman or degrading treatment or punishment.

The present document aims to provide elements that may help organisations, as well as the Board of Trustees, to identify acts, conducts or events, which in the circumstances of their own case, might be qualified of torture under international law, on the basis of the practice and jurisprudence of various international bodies. Of course, all the acts mentioned in this paper should not automatically and systematically be considered as acts of torture. In fact, in various instances, these acts, because of the specific circumstances of the case, were not considered as amounting to torture by the international body. However, the legal reasoning behind such decision might be of interest for the organisations, and should the circumstances be different, these acts could be viewed as amounting to torture.

A Elements of definition

Preliminary remark on the absence of definition of torture

The 1966 International Covenant on Civil and Political Rights (ICCPR), which prohibits torture and cruel, inhuman and degrading treatments,¹ does not provide a legal definition of these acts. In fact, the Human Rights Committee considered that:

*“The Covenant does not contain any definition of the concepts covered by article 7 nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied”.*²

However, this position, far from being a handicap for the durability of the prohibition, allows the Committee to develop a dynamic case-law by broadening the concept of torture. This factual approach enables the Committee to encompass within the scope of this prohibition, acts that would not necessarily fall within the concept of torture at the time were a strict legal definition would have been adopted.

The practice of the UNVFVT is to consider article 1 of the United Nations Convention against Torture (UNCAT) as the basis of the definition of torture, which states that:

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

Thus, elements to be taken into account for qualifying an act as torture are the following:

- Nature of the act
- Intention of the perpetrator
- Purpose
- Involvement of public officials or assimilated

1. The nature of the act

The legal definition of torture encompasses both acts and omissions that inflict severe pain or suffering. Indeed, the term “act” which is mentioned in the article 1 of UNCAT, must not be given a narrow interpretation. Its origins can be found in the *Greek* case decision delivered

¹ International Covenant on Civil and Political Rights, article 7

² Committee on Civil and Political Rights, General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, para 4

by the European Commission of Human Rights.³ This decision explicitly held that deprivation of food and other items constitutes an “act” of torture.⁴

Moreover, pain and suffering may be either physical or mental.⁵ Thus, the threat of torture or mock executions is comprised within this concept of mental suffering.⁶

The element of severity of the ill-treatment will be discussed later in relation to the distinction between torture and cruel, inhuman and degrading treatment.

2. The intention of the perpetrator

Pain and suffering must intentionally be inflicted to the victim in order to qualify as torture. Therefore, even if it has been recalled at one occasion that negligence is “*a well-established subjective component of criminal liability*”,⁷ nevertheless, for the time being, negligence is not sufficient to qualify an act as torture under international law, whereas recklessness might suffice.

3. The purpose

The different purposes that an act of ill-treatment must fulfil to be considered as torture or cruel, inhuman and degrading treatment are the following:

1. for extracting a confession ; or
2. for obtaining for the victim or a third person information ; or
3. for punishment ; or
4. for intimidation and coercion ; or
5. for discrimination

This list, established according to UNCAT may be viewed as indicative rather than exhaustive.⁸

4. The involvement of public officials or assimilated

While the question of the involvement of public official is usually straightforward, the recognition of “other person acting in an official capacity” may be more problematic. Similarly, while it is easy to consider that ill-treatment inflicted at the instigation of a public official is torture, such act inflicted “with the consent or acquiesce” of the same public official, is a more delicate issue.

³ European Court of Human Rights, “*The Greek case*”, *Danemark v. Greece*, Communication 3321/67

⁴ M Novak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p 75

⁵ See also Committee on Civil and Political Rights, General Comment 20 on article 7 ICCPR, para 5

⁶ Committee against Torture, A/45/44 para 190

⁷ Discussion of Denmark, Committee against Torture, Summary record of the 757th meeting, UN Doc. CAT/C/SR/SR.757 (8 May 2007), para 35

⁸ M Novak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p 75

(a) “Other person acting in an official capacity”

The Committee against Torture (CAT) recognizes as “person acting in an official capacity” *de facto authorities* whose authority is comparable to governmental authority. For example, CAT agreed that a given Somali clan was a non-state actor exercising effective authority over a particular territory:

*“for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase “public officials or other persons acting in an official capacity” contained in article 1.”*⁹

However, it should be highlighted that such recognition is made case by case, on the basis of the circumstances in a given country and at a given time. Thus, only three years after having recognized a Somali clan as a *de facto* authority, the Committee reconsidered the situation in the country, and concluded that the situation had changed:

*“with three years having elapsed since the Elmi decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in Elmi, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.”*¹⁰

(b) “Consent or acquiesce”

The European Court of Human Right (ECHR) has a flexible understanding of the meaning of involvement of public officials. Indeed, it considered that States’ responsibility has both a procedural and a substantial aspect. Thus, States have the obligation to refrain from committing any act of torture or cruel, inhuman and degrading treatment, but also to protect persons under its jurisdiction from being subject to these acts by State or non-state actors. Furthermore, State has the obligation to investigate any act of torture or cruel, inhuman and degrading treatment inflicted either by its agents or non-state actors.

As a consequence, States have been found responsible for acts of torture or cruel, inhuman and degrading treatment committed by private actors. For example, the European Court held that a State was in breach of its obligations under article 3 of the ECHR because it did not have taken sufficient measures to prevent some acts of torture/cruel, inhumane and degrading treatment administered by non-state actor (corporal punishment inflicted by the step-father or corporal punishments on children when the social worker(s) knew or should have known about them).¹¹ The same Court also found that a State was responsible for acts of torture

⁹ Committee on Civil and Political Rights, *Elmi v. Australia*, Communication 120/1998, 14 May 1999

¹⁰ Committee on Civil and Political Rights, *H.M.H.I. v Australia*, Communication 177/2001, 1 May 2002

¹¹ European Court of Human Rights, *A v United Kingdom*, 23 September 1998; European Court of Human Rights, *Z and others v. United Kingdom*, 10 May 2001 – European Court of Human Rights, *DP et JC v. United Kingdom*

committed by a husband on his wife because the State officials were aware of these acts but did nothing to prevent them, and furthermore did not open a full and impartial investigation about this case, in violation of its procedural obligations.

In a similar approach, the Human Rights Committee, in its General Comment No. 20 on article 7 of the ICCPR prohibiting torture and cruel, inhumane and degrading treatment stated that:

“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.

(c) Perpetrators of torture in the context of an armed conflict

The International Criminal Tribunal for the ex-Yugoslavia (ICTY) is of the view that in the specific context of an armed conflict regulated by international humanitarian law (IHL), individuals acting in their personal capacity may be held responsible for their international crimes, including acts of torture, without taking into account the involvement of State actors.¹² It should be recalled that under IHL, torture is criminalised as form of war crime, crime against humanity or grave breach, while under human rights law, torture is considered *per se*. Furthermore, the objectives of ICTY was to determine whether such acts could be attributable to an individual for criminal purposes not to determine *per se* if such acts amounted to torture.

B Elements of distinction between Torture and Cruel, Inhuman and Degrading Treatment

Torture and cruel, inhuman and degrading treatment are concepts that might be difficult to distinguish. Indeed, while it might be easy to differentiate between degrading and inhuman treatment/torture, the separation between inhuman treatment and torture is much more complex. Torture is a severe form of inhuman treatment, but there is no objective element of distinction between the two categories.¹³ Acts at stake are usually identical and only the level of intensity/severity of the ill-treatment, taking into account the vulnerability of the victim, may vary. The distinctive element being subjective, the whole complexity of this distinction is illustrated below with the various elements that can be taken into account to determine the threshold between the two.

(a) Powerlessness of the victim

The United Nations Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Manfred Nowak, stated that:

Kingdom, 10 October 2002 – European Court of Human Rights, *Pantea v. Romania*, 3 June 2003 (ill-treatment by co-detainees)

¹² International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v. Kunarac, Kovac et Vukovic*, Communication IT-96-23-T&IT-96-23/I-T, 21 February 2001, para 469-497.

¹³ M Nowak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, page 73

“a thorough analysis of the travaux préparatoires of articles 1 and 16 of the Convention as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.”¹⁴

Accordingly, it might be the *powerlessness* of the victim that can enable to distinguish between torture and cruel or inhuman treatment. Thus, ill-treatments applied in a situation of powerlessness (e.g. detention) will be more likely to amount to torture.¹⁵

(b) Severity of the treatment

The European Court considers that, in order to fall within the scope of Article 3, an act of ill-treatment, whether it is torture, inhuman or degrading treatment or punishment, must attain a minimum level of severity. The assessment of this threshold of severity is made in regard of the specific circumstances of the case and the Court considers the following:

- duration of treatment;
- physical effects of treatment;
- mental effects of treatment; and
- sex, age and state of health of the victim.¹⁶

Thus, in one instance, the European Court held that methods of interrogation using the “five techniques” (sleep deprivation, maintaining in painful positions, deprivation of food and drink, subjection to noise and hooding) caused “*if not actual bodily injury, but at least intense physical and mental suffering...and also led to physical disturbances during the interrogation*”, and therefore fall into the category of inhuman treatment. However, it did not recognize that these practices “*occasion[ed] suffering of the particular intensity and cruelty implied by the word torture*”.

In some other instances, the Court held that the so-called “Palestinian hooding” was sufficiently severe to amount to torture,¹⁷ and that the rape of an individual by two police officers during custody also amounted to torture.¹⁸

Parameters used to define whether the perpetrated acts amounted to torture might be as follow:

*“The question would then be: was the applicant's pain and suffering severe and did the police have the specific intent (dolus specialis), for example, to discriminate against or punish the applicant? If we considered the pain and suffering undergone by the applicant to be less than “severe” then, in terms of the CAT, we would be speaking of “inhuman and degrading treatment”.*¹⁹

¹⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2006/6, para 39.

¹⁵ Manfred Nowak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p. 77

¹⁶ European Court of Human Rights, *Irlande v. United Kingdom*, para 162 ; see also ECHR, *Selmouni v. France* para 160

¹⁷ European Court of Human Rights, *Aksoy v. Turkey*, Communication 21987/93 18 December 1996, para 64

¹⁸ European Court of Human Rights, *R Aydin v. Turkey*, Communication 23178/94, 25 September 1995 para 86

¹⁹ European Court of Human Rights, *Rehbock v. Slovenia*, Communication 29462/95, 28 November 2000.

(c) **Purpose of the ill-treatment**

The late European Commission of Human Rights held that while the severity of pain and suffering enables to distinguish between inhuman and degrading treatment, it is the purpose of such conduct that is the decisive feature in distinguishing cruel, inhuman and degrading treatment from torture.²⁰ Thus, when it considered the five interrogation techniques described above, The Commission viewed them in the circumstances of that case as amounting to torture

(d) **Constant evolution of the threshold**

The European Court held that the European Convention on Human Rights must be interpreted in light of the present-day conditions. Thereby, acts which were considered as amounting to cruel, inhuman and degrading treatment formerly may now amount to torture:

*“The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions”, the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. 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”.*²¹

Thus in 2000, the European Court was of the view that the presence of some twenty-five traces of skin lesions, erosions, abrasions and bruises on the first applicant’s lower and upper limbs, *“taken as a whole and having regard to its purpose and duration, was particularly serious and cruel and was capable of causing “severe” pain and suffering. It therefore amounted to torture within the meaning of Article 3 of the Convention”.*²²

C The absolute prohibition of torture

The prohibition of torture and cruel, inhuman and degrading treatment is an absolute and non-derogatory right²³. This means that no derogation or exceptional circumstances, such as war, terrorism and similar public emergency threatening the life of the nation can be invoked as a justification.²⁴ Likewise, an order of a superior officer cannot be invoked as a justification of such act.²⁵

For example, in the *Furundzija* case, the ICTY stated that:

²⁰ European Court of Human Rights, *“The Greek case”, Denmark v. Greece*, Communication 3321/67

²¹ European Court of Human Rights, *Selmouni v. France*, op.cit.

²² European Court of Human Rights, *Dikme v. Turkey*, Application no. 20869/9, 11 July 2000, para. 96.

²³ See also art 5 Universal Declaration of Human Rights, common art 3 of the Geneva Convention, art 3 European Convention on Human Rights, art 31 to 34 of the UN Minimum Rules for the Treatment of Prisoners, art 7 ICCPR, art 5 Inter-american Convention on Human Rights, art 5 African Charter on Human and People’s Rights and General Comment n20 Committee on Civil and Political Rights para 3

²⁴ Convention against Torture, article 2

²⁵ Convention against Torture, article 2

*“Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules”.*²⁶

D Proof that torture occurred

In case of torture or ill-treatment alleged to have taken place during detention, the burden of proof lies on the State. For example, the European Court estimated that in the case of an individual who complained of having been suspended from his arms (“Palestinian hanging”), which caused his paralysis in both arms:

*“[...] if an individual is taken into police custody in good health but found to be injured on release, it is incumbent upon State to provide plausible explanation.”*²⁷

II. Typology of acts that may amount to torture and/or cruel, inhuman and degrading treatment

A. Conditions of detention

Detention facilities are the most common places where serious violations of peoples’ integrity arise, especially because of the powerlessness of the detainees.

1. Living conditions

With respect to the UN Standard Minimum Rules for the Treatment of Prisoners, detainees must be treated with humanity and dignity, and prisons must not be turned into lawless areas.

Accordingly, the Human Rights Committee stated that:

“The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware that in other respects the modalities and conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by article 2(1).

*Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions.”*²⁸

In one of its Concluding Observations on a State Party’s report, the Committee added that:

“prison conditions fail to meet requirements of articles 7 and 10 CCPR, severe overcrowding and poor quality of basic necessities and services, including food, clothing and medical care, to be incompatible with right to be treated with humanity and with respect for inherent dignity of human person to which all persons are entitled to. It

²⁶ International Criminal Tribunal for Ex-Yugoslavia, *The Prosecutor v. Furundzija*, Trial Chamber, 10 dec. 1998 para 153

²⁷ European Court of Human Rights. *Aksoy vs. Turkey*, Communication 21987/93, 26 November 1996.

²⁸ Committee on Civil and Political Rights, General Comment No. 9 on article 10 International Covenant on Civil and Political Rights, para 1

*has been established, in addition, that there are abuses of authority by prison officials, such as torture and ill-treatment, and corruption”.*²⁹

Similarly, the European Court of Human Rights held that under article 3 of the European Convention regarding the prohibition of torture, the State is required:

*“[...] to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance (...).”*³⁰

Certain standards can be deduced from these general rules. For example, States have the obligation to separate juvenile from adult prisoners, but also male and female prisoners.³¹ Furthermore, authorities have the obligation to occupy detainees during the day by providing various types of activities. Thus, detaining a prisoner in a cell for 22 hours a day without meaningful activities to occupy the prisoner’s time does not comply with the minimum standards.³²

Detention in special centres/retention centres must be accompanied by special safeguards and limitations. Thus, the long term detention of asylum seekers while their asylum claims are considered is prohibited.³³ Moreover, the detention of child offenders as young as the age of seven in specialized hospitals and protection units is banned.³⁴

2. Solitary confinement/incommunicado

Incommunicado detention and solitary confinement are two notions that must be distinguished. In effect, the first refers to a situation where nobody, apart from the authorities, has contact with the detainee. While solitary confinement may be authorised in certain circumstances (prevent evidence from being distorted) and within certain strict limits, incommunicado detention is strictly forbidden.³⁵

In order to assess the severity and proportionality of the solitary confinement and thus to determine whether it amounts to torture or cruel, inhuman and degrading treatments, the

²⁹ Committee on Civil and Political Rights, Concluding Observations on Argentina, third periodic report, para 11

³⁰ European Court of Human Rights, *Gelfmann v France*, 14 December 2004, para. 50.

³¹ Committee against Torture, Concluding Observations on Bosnia and Herzegovina’s initial report (2005) UN Doc. CAT/C.BIH/CO/1, para 14

³² Committee against Torture, Concluding Observations on Croatia’s third periodic report (2004) UN Doc. CAT/C.CR/32/3, para 8; Concluding Observations on Spain’s third periodic report (2002) UN Doc. CAT/C.CR/29/329 para 56.

³³ Committee against Torture, Concluding Observations on Latvia’s initial report (2004) UN Doc. CAT/C.CR/31/3, para 6; Concluding Observations on Croatia’s third periodic report (2004) UN Doc. CAT/C.CR/32/3, para 9

³⁴ Committee against Torture, Concluding Observations on Yemen’s initial report (2004) UN Doc. CAT/C.CR/31/4, para 6.

³⁵ Committee on Civil and Political Rights, General Comment 20, para 6 and Committee on Civil and Political Rights, *El-Megrisi v. Libya*, Communication 449/1990, 23 March 1994, para 5.4; see also *Celis Laureano v. Peru*, Communication 540/1993, 25 March 1996, para 8.5; *Mukong v. Cameroon*, Communication 458/1991, 24 July 1994, para 9.4; *El Alwani v. Libyan Arab Jamahiriya*, Communication 1295/2004, 11 July 2007, para 6.5; *Medjnoune v. Algeria*, Communication 1297/2004, 14 July 2006, para 8.4.

international instance will carefully examine the factual situation of each case, for example the Late European Commission of Human Rights:

“It has stated that prolonged solitary confinement is undesirable, especially where the person is detained on remand (cf. Decision on Application No. 6038/73 v. FRG, Coll. 44, p. 151). However, in assessing whether such a measure may fall within the ambit of Article 3 of the Convention in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security, the prohibition on torture and inhuman treatment contained in Article 3 being absolute in character (cf. the Report of the Commission on Application No. 5310/71, Ireland v. the United Kingdom; Opinion, p. 379)”.³⁶

These elements will enable Courts and other international instances to draw a line between acts which are tolerated and acts which are not tolerated. Thus, it is considered that complete sensory and social isolation destroys the personality and constitutes a form of cruel, inhuman and degrading treatments:

*“Complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment.”*³⁷

Nonetheless, certain forms of solitary confinement will be tolerated because of the necessity of the situation and their proportionality:

“With regard to the duration of their detention on remand and detention under security conditions, the Commission finds that each of these periods was fairly brief considering the circumstances of the case. As to the special isolation measures to which the applicants were subjected, neither the duration nor the severity of these exceeded the legitimate requirements of security. In any case, the applicant's exclusion from the prison community was not prolonged excessively”.³⁸

The prohibition of incommunicado detention has also been asserted by the Inter-American Court of Human Rights (IACHR) where the victim was submitted to grave acts of physical and mental violence during a prolonged period of time, the Court qualified that as amounting to both physical and mental torture:

“prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human

³⁶European Court of Human Rights, *G. Esslin, A. Baader and J. Raspe v. Federal Republic of Germany*, Communication 7572/76, 7586/76 & 7587/76, 8 July 1978

³⁷European Court of Human Rights, *Messina vs. Italy*, Communication 25498/94, 28 December 2000, par. 191

³⁸European Court of Human Rights, *Kröcher-Möller v. Switzerland*, Communication 8463/78,

*being*³⁹. *Solitary confinement produces moral and psychological suffering in the detainee, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centres*⁴⁰,⁴¹

Thus, the following acts can be considered as a form of torture or cruel, inhuman and degrading treatments:

“incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule”.⁴²

“prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being”.⁴³

It also argued that such acts amount to a violation of article 5 of the American Convention on Human Rights prohibiting torture, regarding both the victim and the relatives:

“Detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families”.⁴⁴

Similarly, the African Commission considered that:

“Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention (...)”.⁴⁵

³⁹ Inter-American Court of Human Rights, *Fairén-Garbi and Solís-Corrales v. Honduras*. 15 March 1989. Series C No. 6, par. 149; *Godínez-Cruz v. Honduras*. 20 January 1989. Series C No. 5, par. 164 and 197; *Velásquez-Rodríguez v. Honduras*. 29 July 1988. Series C No. 4, par. 156 and 187.

⁴⁰ Inter-American Court of Human Rights, *Castillo-Petruzzi et al. v. Peru*. 30 May 1999. Series C No. 52, par. 195; *Suárez-Rosero v. Ecuador*. 12 November 1997. Series C No. 35, par. 90.

⁴¹ Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala*. 25 November 2000. Series C No. 70, para 150

⁴² Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*. 17 September 1997. Series C No. 33, para 58

⁴³ Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*. 20 January 1989. Series C No. 5, par. 164 and 197; see also *Fairén-Garbi and Solís-Corrales v. Honduras*. 15 March 1989. Series C No. 6, par. 149; *Velásquez-Rodríguez v. Honduras*. 29 July 1988. Series C No. 4, par. 156 y 187.

⁴⁴ African Commission on Human Rights, *Law Office of Ghazi Suleiman v. Sudan*, Communication. 222/98 and 229/99 (2003); see also *Amnesty International and Others v. Sudan*, Communication. 48/90, 50/91, 52/91, 89/93 (1999), para 43

⁴⁵ African Commission on Human Rights, *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, Communication 250/2002 (2003), para 55

3. Unlawful detention

A person illegally detained is in an exacerbated situation of vulnerability that creates a real risk of violating other rights such as the right to be treated with humanity and dignity.⁴⁶ In this sense, the Inter-American Court considered that:

*“The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance”.*⁴⁷

It also admitted the existence of torture related to an illegal detention:

*“(…) the Court has considered proven that the alleged victim’s head was covered by a hood, she was kept handcuffed to a bed, in a room with the light on and the radio at full volume, which prevented her from sleeping. In addition, she was subjected to very prolonged interrogations, during which she was shown photographs of individuals who showed signs of torture or had been killed in combat and she was threatened that she would be found by her family in the same way. The State agents also threatened to torture her physically or to kill her or members of her family if she did not collaborate. To this end, they showed her photographs of herself and her family and correspondence from her to her former husband (...). Lastly, Maritza Urrutia was obliged to film a video, which was subsequently broadcast by two Guatemalan television channels, in which she made a statement against her will, the contents of which she was forced to ratify at a press conference held after her release”.*⁴⁸

4. Typology of acts of torture arising mainly in detention centres

Several hanging methods have been identified and considered as constitutive of torture:

- Jaguar: victim’s wrists are tied to his feet. He is then suspended from a bar and thus kept upside down, sometimes over a fire, and is beaten in the soles of his feet.⁴⁹
- Palestinian hanging or strappado: victim's hands are first tied behind their back, and then he or she is suspended in the air by means of a rope attached to wrists, which most likely dislocates both arms. Weights may be added to the body to intensify the effect and increase the pain.⁵⁰
- Hands or ankles tied together resulting or not to paralysis⁵¹

⁴⁶ Inter-American Court of Human Rights, *Cantoral-Benavides v. Peru*. 18 August 2000. Series C No. 69, par. 90; the “*Street Children case*” (*Villagrán-Morales et al.*) v. *Guatemala*. 19 November, 1999. Series C No. 63, par. 166; and see also, European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25. par. 167.

⁴⁷ Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*. 17 September 1997. Series C No. 33 ; See also European Court of Human Rights, *Ribitsch v. Austria*, 4 December 1995, Series A no. 336, par. 36; *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, par. 167.

⁴⁸ Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*. 27 November 2003. Series C No. 103, para 85

⁴⁹ African Commission of Human Rights, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para 20

⁵⁰ European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25. para. 167.

⁵¹ Committee on Civil and Political Rights, *Weinberger v. Uruguay*, *Communication 28/1978*, 29 October 1980, para 2 and 16

Usually, victims are systematically beaten on certain sensitive parts of the bodies (head or kidney)⁵², usually with a metal bar or a baseball bat⁵³. They may also be subject to electric shocks on different parts of victim's body (finger, tongue, head, and genitals)⁵⁴, the long nail technique⁵⁵ or violently shackled.⁵⁶ Jailors may also put an important pressure on very sensitive parts of the body, such as the thumbs (thumb press).⁵⁷ They are usually constantly short shackled or handcuffed.⁵⁸

Water or any other liquids can be used in order to impose physical and mental suffering to prisoners. For instance, water-boarding is a technique of immobilization of the subject on their back with the head inclined downwards; water is then poured over the face into breathing passages, causing the captive to experience the sensations of drowning.⁵⁹ Victims may also be subject to the submarine technique which consists in "repeated immersion in a mixture of blood, urine, vomit and excrement".⁶⁰ They can also pour cold water on persons' body and leave him outside in winter so that clothes would freeze on his body.⁶¹

Detainees may also be deprived of some basics needs when imprisoned. This deprivation may concern food⁶², water⁶³, sleep (by playing very loud music to prevent the person to sleep or pouring cold water on a person who is falling asleep)⁶⁴, medicine⁶⁵ or toilettes⁶⁶.

The technique of *plantones* may be applied to prisoners. It consists of forcing prisoners to remain standing for extremely long periods of time.⁶⁷ Some of them may also be burned⁶⁸ or buried while alive/slow death.⁶⁹

⁵² Committee on Civil and Political Rights, *Khalilova v. Tadjikistan*, Communication 973/01, 18 October 2005, para 6.2 ; see also Committee on Civil and Political Rights, *Ashurov v. Tadjikistan*, 20 March 2007, para 2.2 and 6.2 ; Committee on Civil and Political Rights, *Muteba v. Zaire*, Communication 124/82, 24 March 1983, para 8.2 ; See also Committee against Torture, Concluding Observations on Yugoslavia, (1999) UN Doc. A/54/44, para 47

⁵³ Committee against Torture, *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication 207/02, 24 November 2004, para 2.1 and 5.3 ; see also CAT, *Dimitrov v. Serbia and Montenegro*, Communication 171/00, 3 May 2005, para 2.1 and 7.1 ; See also CAT, Concluding Observations on Israel (1997), UN Doc. A/52/44, para 257

⁵⁴ Committee on Civil and Political Rights, *Muteba v. Zaire*, Communication 124/82, 24 March 1983, para 8.2

⁵⁵ International Criminal Tribunal for Rwanda, *The prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Communication 99-46-T, 24 February 2004

⁵⁶ See also Committee against Torture, Concluding Observations on Israel (1997), UN Doc. A/52/44, para 257

⁵⁷ Committee on Civil and Political Rights, *Muteba v. Zaire*, Communication 124/82, 24 March 1983, para 8.2

⁵⁸ Committee against Torture, Concluding Observations on USA, UN Doc. CAT/C.USA/CO/2, para 24

⁵⁹ Committee against Torture, Concluding Observations on USA, UN Doc. CAT/C.USA/CO/2, para 24

⁶⁰ Committee on Civil and Political Rights, *Grille Motta v. Uruguay*, Communication 11/1977, 29 July 1980, para 2

⁶¹ See also Committee against Torture, Concluding Observations on Israel (1997), UN Doc. A/52/44, para 257

⁶² Committee on Civil and Political Rights, *Ashurov v. Tadjikistan*, 20 March 2007, para 2.2 and 6.2

⁶³ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12

⁶⁴ Committee on Civil and Political Rights, *Ashurov v. Tadjikistan*, 20 March 2007, para 2.2 and 6.2; See also Committee against Torture, Concluding Observations on Israel (1997), UN Doc. A/52/44, para 257

⁶⁵ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12

⁶⁶ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12

⁶⁷ Committee on Civil and Political Rights R, *Sendic v. Uruguay*, Communication 63/1979, 28 October 1981, para. 16.2

⁶⁸ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12

Acts which cause permanent damage will be given due weight when assessing whether the treatment to which the person has been subjected is constitutive of torture. However, the permanent nature of injuries is not a condition for them to be considered as torture. Typical sequelae are bruises, fractures or hearing damages.⁷⁰

B. Deportation

Deportation of a person in a third country may give rise to concerns in two situations: where a person would be deported to a country still applying death penalty and where it is deported to a country where there is a real risk of being tortured or subject to cruel, inhuman and degrading treatments.

1. Deportation to a country where an individual would face death penalty

While considering that deportation does not *per se* raise an issue under article 7 of the ICCPR, the Human Rights Committee held that a State which has already abolished death penalty but deports somebody to a country where he/she may be sentenced to death penalty would be in breach of article 7 of the ICCPR:

“Only countries that have not abolished the death penalty can avail themselves of the exceptions created in paragraphs 2 to 6 [of article 6]. For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.”⁷¹

2. Deportation to a country where there is a real risk for the an individual to be subject to torture or other cruel, inhuman and degrading treatments

States having ratified either the ICCPR or the CAT are bound to not remove a person to a country where he/she might face a real risk of being subject to torture or cruel, inhuman and degrading treatments.⁷² This has been reaffirmed by the Human Rights Committee. However, there must be “*substantial grounds*” for believing that the risk of torture is a “*necessary and foreseeable consequence of [the individual’s] removal*”.⁷³

In assessing whether the deportation of a person to a foreign state would amount to a real risk, the Human Rights Committee will consider the factual situation in each case:

⁶⁹ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 116

⁷⁰ Committee against Torture, *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication 207/02, 24 November 2004, para 2.1 and 5.3

⁷¹ Committee on Civil and Political Rights, *Judge v Canada*, Communication 829/1998, 5 August 2002, para. 10.4.; See also European Court of Human Rights, *Soering v United Kingdom*, case 14038/88, 07 July 1989 para 91

⁷² Committee on Civil and Political Rights, General Comment No. 20 para 9 and CAT, art 3

⁷³ Committee on Civil and Political Rights, *T. v. Australia*, Communication 706/1996, 4 November 1997, paras.8.1 and 8.2; *A.R.J. v. Australia*, Communication 692/1996, 28 July 1997, para.6.9; *T. v. Australia*, Communication 706/1996, 4 November 1997, paras.8.1 and 8.2; and *A.R.J. v. Australia*, Communication 692/1996, 28 July 1997, para.6.9.

“Consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.”

However, the Human Rights Committee is very cautious with the use of diplomatic assurances and can held that the State party had not:

“Shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.”⁷⁴

Regional jurisdiction followed the same pattern. Thus, the African Commission considered that the deportation, the threats of deportation and its consequences amounted to inhuman and degrading treatment:

“The facts of this case reveal that the Complainant was deported four times to South Africa, and on all these occasions, he was rejected. He was forced to live for eight years in the "homeland" of Bophuthatswana, and then for another seven years in "No Man's Land", a border strip between the former South African Homeland of Bophuthatswana, and Botswana. These acts exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment guaranteed under Article 5”⁷⁵.

C. Gender based violence

1. Domestic violence

According to the general recommendation on the Convention on the Elimination of All Forms of Discrimination against Women No 19, it is now generally accepted that domestic violence often entails extreme physical and psychological suffering.

However, the issue of “state involvement” is challenging since they are often considered to be “*a private matter between spouses rather than a state problem*”. But States have a duty to prevent harm being inflicted upon women, including harm which occurs in a domestic context. This approach to domestic violence has been accepted by the CAT Committee which has condemned “*the prevalence of violence against women and girls, including domestic violence*” in its Concluding Observations.⁷⁶

⁷⁴ Committee on Civil and Political Rights, *Alzery v Sweden*, Communication 1416/2005, 25 October 2006, para. 11.3 to 11.5.

⁷⁵ African Commission on Human Rights, *John K. Modise v. Botswana*, *African Commission on Human and Peoples' Rights*, Comm. No. 97/93 (2000), para 91; see also ECHR, *Soering v. UK*

⁷⁶ Committee against Torture, Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, §4 and 5. See also Committee against Torture, Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, §17; Committee against Torture, Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, §6; Committee against Torture, Concluding Observations on Bahrain, (2005) UN doc. CAT/C/CR/34/ BHR, §§6-7; Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 27.

Thus, if a States fails to prevent acts of ill-treatment amounting to torture or cruel, inhuman and degrading treatments by a non-state actor when it knew or could have known but did nothing; it will be held responsible for a violation of the prohibition against torture or cruel, inhuman and degrading treatments (i.e. no investigation or inquiry, no prosecution, no sentence where evidence of ill-treatment have been disclosed...)⁷⁷.

2. Female genital mutilation

CAT has consistently expressed concern over the absence of legislation banning female genital mutilation (FGM) in a number of States parties. These comments indicate that such an absence of legislation, or an absence of the enforcement of such legislation, amounts to “acquiescence” of FGM by State agents.⁷⁸

In one of its Concluding Observations, the Committee against Torture called on the State party to “*prohibit and criminalize the practice of female genital mutilation so as to send a clear and strong signal to those concerned*”.⁷⁹

Similarly, the Human Rights Committee emphasised States’ obligation to protect women against FGM and their obligation to prosecute people engaged in such acts:

*In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.*⁸⁰

3. Reproductive rights

The Human Rights Committee highlighted the importance of the protection of reproductive rights of women, which are part of their physical and psychological dignity; considering that any violation of these rights might entail a violation of article 7 of the ICCPR:

*Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7, might also be at stake.*⁸¹

⁷⁷ See Committee on the Elimination of Discriminations against Women, communication No.2/2003, *Ms. A.T. v. Hungary*, 26 January 2005, and also European Court of Human Rights, *Opuz v Turkey*, Communication 33401/02, 09 June 2009, para 176

⁷⁸ See Committee against Torture, Concluding Observations on Cameroon’s third periodic report (2004) UN Doc. CAT/C/CR/31/6, para 7.

⁷⁹ See Committee against Torture, Concluding Observations on Mali, UN Doc. CCPR/CO/77/MLI para 11

⁸⁰ Committee on Civil and Political Rights, General Comment No. 28 on article 3 ICCPR, UN Doc. CCPR/C/21/Rev.1/Add.10, para 11

⁸¹ Committee on Civil and Political Rights, General Comment No. 28 on article 3 ICCPR, UN Doc. CCPR/C/21/Rev.1/Add.10, para 20

(a) Restrictive laws on abortion

In one of its Concluding Observations, the Human Rights Committee requested the State party to “ensure that women are not compelled to continue with pregnancies where that is incompatible with obligations arising under article 7 of the ICCPR and General Comment No. 28”.⁸²

The Committee has stated that forced abortion and denial of access to safe abortion to women who have become pregnant as a result of rape constitutes a breach of article 7:

*“To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization.”*⁸³

(b) Uninformed and involuntary sterilization of Roma women

The Committee against Torture expressed concerns about the uniformed and involuntary sterilization of women in Czech Republic and implicitly considers that it may amount to a violation of the Convention against Torture.⁸⁴

4. Rape

Rape is considered by all courts as a grave violation of women’ integrity and therefore may amount either to torture or to cruel, inhuman and degrading treatment. In this regard, the Special Rapporteur on Torture, Manfred Nowak, stated that

*“It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials”.*⁸⁵

For example, the European Court of Human Rights held that in certain circumstances rape can amount to torture. In one case, a young woman was held in detention by police on suspicion of involvement in the group considered as terrorist by State authorities. Whilst in detention, she was stripped of her clothes, beaten, sprayed with cold water from high pressure jets, blindfolded and raped. The European Court held that rape was constitutive of torture.⁸⁶

⁸² Committee on Civil and Political Rights, Concluding Observations on Ireland, second periodic report

⁸³ Committee on Civil and Political Rights, General Comment No. 28, UN Doc. CCPR/C/21/Rev.1/Add.10, para 11

⁸⁴ Committee against Torture, Concluding Observations on Czech Republic, (2004) UN doc. CAT/C/CR/32/2, para 5;

⁸⁵ Special Rapporteur on Torture report before the Human Rights Council, 15 January 2008, A/HRC/7/3, para 36

⁸⁶ European Court of Human Rights, *Aydin v. Turkey*, Communication 23178/94, 25 September 1997.

Rape in armed conflicts

The same approach has been followed by the International Criminal Tribunal for Rwanda in the context of the genocide where women had been victims of rape. With respect to the definition of torture, such acts entail a violation of the prohibition of torture where they were used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.⁸⁷ Nonetheless, the element of public involvement is still necessary for these acts to be considered as torture:

*“constitutes torture when 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”.*⁸⁸

Rape has also been considered as a crime against humanity.⁸⁹ However, to be qualified as such, it must be committed:

- (a) *as part of a wide spread or systematic attack;*
- (b) *on a civilian population;*
- (c) *on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds*⁹⁰

However, similarly to the absence of an exhaustive list for acts of torture, the Tribunal refused to establish a list of acts that would be included in the definition of rape, leaving the possibility always open to enlarge the acts that could be encompassed in this concept.⁹¹ Therefore:

*“variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”*⁹²

*“Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”*⁹³

Thus, the following acts amount to rape:

⁸⁷ International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Communication Ictr-96-4-T, 2 September 1998, para 596; see also *The Trial of the Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the AFRC Accused), 20 June 2007, para. 718; See also *Akayesu Trial judgement*, para. 597

⁸⁸ European Court of Human Rights, *Aydin v. Turkey*, Communication 23178/94, 25 September 1997, para 597 and 689

⁸⁹ International Criminal Tribunal for Rwanda, *The Prosecutor v. Laurent Semanza*, Communication ICTR-97-20-T, 15 May 2003 para 346

⁹⁰ International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Communication Ictr-96-4-T, 2 September 1998 , para 598

⁹¹ International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Communication Ictr-96-4-T, 2 September 1998 , para 597

⁹² International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Communication Ictr-96-4-T, 2 September 1998 , para 596

⁹³ International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Communication Ictr-96-4-T, 2 September 1998 , para 688

Rape with foreign bodies: “An act such as that described by Witness KK in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view”.⁹⁴

Sexual humiliation: “The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence”.⁹⁵

Forced fellatio: “The Chamber notes that in the Furundzija Judgement, the Trial Chamber considered forced penetration of the mouth as a humiliating and degrading attack on human dignity and largely for this reason included such conduct in its definition of rape even though State jurisdictions are divided as to whether such conduct constitutes rape”.⁹⁶

Sexual slavery: “Sexual slavery is an act of humiliation and degradation so serious as to be generally considered as outreach upon personal dignity”.⁹⁷

Stripped naked: “Systematic beatings, electric shocks to the fingers, eyelids, nose and genitals, when tied naked to a metal bed frame or in coiling wire around fingers and genitals”.⁹⁸

Irritating elements placed in various body orifices, including genitals: “Electrical shocks were administered to their genital organs and they had weights tied on to them. Their heads were plunged into water to the point of provoking suffocation; pepper was smeared on their eyes and some were permanently kept in small, dark or underground cells which got very cold at night”.⁹⁹

D. Death Penalty

While neither the Committee against Torture nor the Human Rights Committee have yet decided whether death penalty *per se* amounts to torture, the methods for carrying out the sentence as well as the death row phenomenon may amount to torture or inhumane treatment.

1. Execution of death penalty

The Human Rights Committee has considered that “the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering”.¹⁰⁰ Thus certain may be tolerated. Lethal injection was not considered in the present case as breaching article 7 of the ICCPR. However, in cases where gas asphyxiation would be used to carry out the

⁹⁴ The *Prosecutor v. Jean-Paul Akayesu*, Case No. Ictr-96-4-T, 2 September 1998 para 686

⁹⁵ The *Prosecutor v. Jean-Paul Akayesu*, Case No. Ictr-96-4-T, 2 September 1998 , para 688 ; see also Committee against Torture, Concluding Observations on USA, UN Doc. CAT/C.USA/CO/2, para 24

⁹⁶ International Criminal Tribunal for Rwanda, The *Prosecutor v. Alfred Musema*, Communication. ICTR-96-13-A, 27 January 2000 para 223

⁹⁷ International Criminal Tribunal for Rwanda, The Trial of the *Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the AFRC Accused), 20 June 2007, para. 719.

⁹⁸ Committee on Civil and Political Rights R, *Angel Estrella v. Uruguay*, Communication 74/1980, 29 March 1983

⁹⁹ African Commission on Human Rights, *Malawi African Association and Others v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12

¹⁰⁰ Committee on Civil and Political Rights, *Kindler v Canada*, Communication 470/1991, 30 July 1993

sentence, the Human Rights Committee expressed the view that there will be a real risk of cruel and inhumane treatment.¹⁰¹

2. Death row phenomenon

The traditional position of judicial bodies has always been that the length of detention on death row per se does not entail a violation of article 7 of the Covenant in the absence of some further compelling circumstances.¹⁰² However, whenever the time spent on this death row is too long, this may have an effect on the mental health of the detention and thereby amount to torture or cruel, inhuman and degrading treatments.

Subsequently, the Human Rights Committee set the factors to be considered in determining the existence of a violation of articles 7 and 10 by the length of detention. It did not define a period after which detention in the death row would amount to torture to avoid expeditious executions. It invites States to carefully analysis the case-law in order to determine which elements are taken into account to determine the severity of the treatment:

“In addressing whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatments and to treat them with humanity, the Committee noted that the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (...). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

(...) The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication

¹⁰¹ Committee on Civil and Political Rights, *NG v Canada*, Communication 469/1991, 5 November 1993, para 16

¹⁰² Committee on Civil and Political Rights R, *Earl Pratt and Ivan Morgan v. Jamaica*, Communications 210/1986 and 225/1987, 6 April 1989, para 12.6; *Randolph Barrett and Clyde Sutcliffe v. Jamaica*, Communications 270/1988 and 271/1988, 30 March 1992; *Kindler v. Canada*, Communication 470/1991, 30 July 1993; and *Benett v Jamaica*, Communication 590/1994, 25 March 1999, para 6.7.

cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, per se, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.”¹⁰³

The European Court of Human Rights has expressed the views when holding that the deportation of a young man by the United Kingdom to the United States of America where he could face death penalty and thus suffer from the death row phenomenon would violate article 3 of the European Convention of Human Rights that prohibits torture.¹⁰⁴

3. Imposition of death penalty after an unfair trial amounts to a violation of article 7 of the ICPPR

The imposition of a death sentence following an unfair trial would automatically entail a violation of the prohibition of torture because of the anxiety rising from the fear of being killed. For example, the Human Rights Committee held that:

“To impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. [...] The imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7.”¹⁰⁵

E. Psychological torture

Physical and psychological torture can be defined as “acts prepared and carried out deliberately against the victim in order to suppress their psychic resistance and force him to incriminate himself or confess certain criminal behaviours or to submit him to punishment modalities additional to deprivation of liberty itself”.¹⁰⁶

Psychological and mental torture has been considered in the following:

¹⁰³ Committee on Civil and Political Rights, *Errol Johnson v. Jamaica*, Communication 588/1994, 22 March 1996, paras.8.2 and 8.3.

¹⁰⁴ European Court of Human Rights, *Soering v United Kingdom*, case 14038/88, 07 July 1989 para 91

¹⁰⁵ Committee on Civil and Political Rights R, *Larrañaga v The Philippines*, Communication 1421/2005, 24 July 2006, para. 7.11, see also, *Pratt and Morgan v Jamaica*;

¹⁰⁶ Inter-American Court of Human Rights, *Tibi v. Ecuador*. 7 September 2004. Series C No. 114, par. 146; *Maritza Urrutia v. Guatemala*. 27 November, 2003. Series C No. 103, par. 93; *Cantoral-Benavides v. Peru*. 18 August 2000. Series C No. 69, par. 104.

Threat to be tortured: “*the threats and real danger of submitting a person to physical injuries produces, in certain circumstances, a moral anguish of such degree that it may be considered psychological torture*”¹⁰⁷

Threat to be tortured: “*the simple threat of the occurrence of a behaviour prohibited by Article 5 of the American Convention, when it is sufficiently real and imminent, may constitute in itself a transgression of the norm dealt with. To determine the violation to Article 5 of the Convention, not only physical suffering but also psychic and moral anguish must be taken into account. The threat of suffering a serious physical injury may constitute a form of “psychological torture.”*”¹⁰⁸

Psychological impact of physical torture: “*According to the testimonies received in this proceeding, the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purpose and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture*”¹⁰⁹

Threat against his/her life or life of relatives: “*repeated threats against his life by the police, often accompanied by acts of brutality, caused him grave psychological suffering*”¹¹⁰

Threat of using a syringe infected by AIDS/HIV: “*Following that ill-treatment, they brandished a syringe, threatening to inject me with it.*”¹¹¹

Threat by dogs: “*rescind any interrogation technique, including methods involving sexual humiliation, waterboarding, short shackling and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment*”¹¹²

Force persons to watch other persons being tortured

Some international instances, including international criminal tribunals have recognized mental suffering of relatives that are forced to watch severe mistreatment inflict can rise to the level of gravity required under the crime of torture:

Torture of other persons: “*(...) it has been proved that Maritza Urrutia was subjected to acts of mental violence by being exposed intentionally to a context of intense suffering and anguish, according to the practice that prevailed at that time (...). The Court also considers that the acts alleged in this case were prepared and inflicted deliberately to obliterate the victim’s personality and demoralize her, which constitutes a form of mental*

¹⁰⁷Inter-American Court of Human Rights, *Baldeón-García v. Peru*. 06 April 2006. Series C No. 147, par. 119; see also *Maritza Urrutia v. Guatemala*. 27 November 2003. Series C No. 103, par. 92.

¹⁰⁸Inter-American Court of Human Rights, *Tibi v. Ecuador*. 7 September 2004. Series C No. 114, par. 147; See also *Baldeón-García v. Peru.*; in the same sense, ECHR, *Soering v. United Kingdom*, 7 July 1989, Series A Vol. 161, par. 111; and CCPR, *Miguel Angel Estrella v. Uruguay* (74/1980), 29 March 1983, par. 8(3) and 10.

¹⁰⁹Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala*. Merits. 25 November 2000. Series C No. 70.

¹¹⁰Committee on Civil and Political Rights, *Njaru v Cameroon*, Communication 1353/2005, 19 March 2007

¹¹¹European Court of Human Rights, *Selmouni v. France*, Communication 25803/94, 28 juillet 1999, para 24 and 82

¹¹²Committee against Torture, Concluding Observations on USA, UN Doc. CAT/C.USA/CO/2, para 24

torture, in violation of Article 5(1) and 5(2) of the Convention to the detriment of Maritza Urrutia”¹¹³

Sexual assault: “Similarly, the Furundzija Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped”.¹¹⁴

Watching relatives’ torture: “a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. The Chamber is also of the opinion that the Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where, at the time of the act, the Accused had reasonable knowledge that this act would likely cause serious mental suffering on the third party”.¹¹⁵

Nonetheless, not every person can be considered as a relative of a torture victim. The following issues need to be considered when determining whether a relative can be considered as a victim of torture:

- the existence of a close family tie;
- the particular circumstances of the relationship with the victim;
- the manner in which the next of kin witnessed the events that constitute a violation and the degree of involvement in the quest for justice;
- the answer provided by the State to the different steps undertaken¹¹⁶;

F. Trafficking in person

A State involved in or tolerating trafficking and exploitation, including sexual exploitation, will be held responsible for a violation of the UNCAT under article 16 prohibiting cruel, inhuman and degrading treatments.¹¹⁷

*Reminder: the definition of trafficking in persons is given by article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children:

“(a) *“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of*

¹¹³ Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*. 27 November, 2003. Series C No. 103.

¹¹⁴ Furundzija judgement quoted in *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcać*, (Trial Chamber), 2 November 2001, para 149

¹¹⁵ International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor vs. Moinina Fofana and Allieu Kondewa*, 2 August 2007, para. 153

¹¹⁶ Inter-American Court of Human Rights, *Miguel Castro-Castro Prison v. Peru*. 25 November 2006. Series C No. 160, par. 335; IACHR, *Servellón-García et al. v. Honduras*. 21 September 2006. Series C No. 152, par. 128; *Bámaca-Velásquez v. Guatemala*. 25 of November 2000. Series C No. 70, par. 163.

¹¹⁷ Committee against Torture, Concluding Observations on Nepal, (2005) UN Doc. CAT/C/NPL/CO/2, para 32; see also Committee against Torture, Concluding Observations on Austria, (2005) UN Doc. CAT/C/AUT/CO/3, para 4; Committee against Torture, Concluding Observations on Greece, UN Doc. (2004) CAT/C/CR/33/2, para 4.

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. "Exploitation" shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

G. Forced disappearances

According to the Human Rights Committee, forced disappearances constitute an act of torture and/or cruel, inhuman and degrading treatments towards the victim and his/her family members. In these cases, the ICCPR is breached not only with regard to the disappeared, but also with regard to his/her relatives, because of anxiety and anguish they suffer as a result of the disappearance of their relatives.¹¹⁸ Thus, in cases of forced disappearances, family members may be considered as primary victims of torture.

1. Victim

The Human Rights Committee stated that “the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7”. That is, people who “disappear” are often tortured.¹¹⁹

The Working Group on Enforced and Involuntary Disappearances stated that: “*The very fact of being detained as a disappeared person, isolated from one's family for a long period of time is certainly a violation of the right to humane conditions of detention and has been considered by the Group as torture*”.¹²⁰

If a person is detained by authorities shown to practice torture or other cruel, inhuman or degrading treatment, even if there is no direct evidence that the victim suffered any mistreatment, a violation of Article 5 of the American Convention may be found. Such a finding is based on the State's failure to ensure the rights under Article 5.2, as required by Article 1.1 of the American Convention.¹²¹ There will be a presumption that the person has been tortured while in custody.

¹¹⁸ See Committee on Civil and Political Rights Communications 107/1981, *Quinteros v. Uruguay*, 21 July 1983, para. 14; 540/1993, *Celis Laureano v. Peru*, 25 March 1996, para. 8.5; 458/1991, *Mukong v Cameroon*, 24 July 1994, para. 9.4; 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, 23 March 1994, para. 5; 950/2000, *Sarma v. Sri Lanka*, 31 July 2003, para. 9.5; 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, 11 July 2007, paras 6.5 and 6.6; and 1327/2004, *Grioua v Algeria*, 10 July 2007, paras. 7.6 and 7.7.

¹¹⁹ Committee on Civil and Political Rights, *Mojica v. Dominican Republic*, Communication 449/91, Views of 15 July 1994.

¹²⁰ Report, Working Group on Enforced and Unvoluntary Disappearances UN Doc. E/CN.4/1983/14, para 131

¹²¹ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*. 29 July 1988. Series C No. 4, par 155-158; see also *Godínez-Cruz v. Honduras*. 20 January 1989. Series C No. 5.

2. Relatives as victims in forced disappearances cases

The Human Rights Committee also pointed that:

“The anguish and stress caused to the author (wife of the victim) by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts” reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author herself.¹²²

The European Court adopted the same position and found a violation of Article 3 of the European Convention in respect of the relative of a disappeared. In respect of the victim himself, the Court held that:

“the authorities have failed to offer any credible and substantiated explanation of the whereabouts and the fate of the applicant's son. They have failed to discharge their responsibility to account for him”. Accordingly, the Court finds that *“there has been a particularly grave violation”*.

This Court noted that victim's mother was:

“left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time”.

Accordingly, the Court considered that *“the suffering of the mother was severe enough to find the State responsible for the breach of Article 3”*.¹²³

However, the definition of victims must be understood in a narrow sense.¹²⁴ Special factors must be established in order for claims by relatives to succeed. The emotional suffering must have a special character which distinguishes it from *“the emotional distress which may be regarded as inevitable caused by serious human rights violations”*. The special factors must be:

- *“Proximity in time and in space to alleged violation*
- *Proximity in relationship (certain weight will attach to parent-child bond)*
- *The nature of the relatives' involvement with the attempts to obtain information*
- *The way in which the authorities respond to the inquiries”*¹²⁵

The Inter-American Court equally held that disappearance constitutes an implicit violation of Article 5 given the nature of the crime. In addition to the harm to the victim's physical and mental integrity, a disappearance causes by its very nature great anxiety and suffering to the victim's family.¹²⁶

¹²² Committee on Civil and Political Rights, *Bousroual v. Algeria*, Communication 992/2001

¹²³ European Court of Human Rights. *Kurt vs. Turkey*, Communication 24276/94, 25 May 1998.

¹²⁴ European Court of Human Rights. *Kurt vs. Turkey*, Communication 24276/94, 25 May 1998.

¹²⁵ European Court of Human Rights. *Çakici vs. Turkey*, Communication 23657/94, 8 July 1999.

¹²⁶ Inter-American Court of Human Rights, *Blake v. Guatemala*. 24 January 1998. Series C No. 36, par. 65 - 67

H. Corporal punishment

The UNCAT explicitly states in article 1 that lawful sanctions do not fall within the scope of this Convention. However, the fact that a sanction is considered as lawful under national or even constitutional law does not mean that it would fall outside the scope of article 1 or 16 of the UNCAT. Thus sentencing a detainee to ten strokes of the tamarind birch is contrary to article 1 and will amount to torture (i.e. torture or cruel, inhuman and degrading treatments).¹²⁷ The same conclusion will be established where students were convicted to 25 to 40 lashes on their bare backs, publicly.¹²⁸

The position of the Committee against Torture regarding *shariah* punishments is not clear. Indeed, it classified them as breaches of the Convention but it failed to specify whether the breaches were of Article 1 or 16.¹²⁹

The European Court has established some criteria which can help to determine whether a punishment will be lawful or not¹³⁰:

- Specific nature of the inhuman or degrading punishment: "*expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment in general. In the Court's view, in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph.(.)*" (§30)
- Relative nature of the criteria for interpreting: "*The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.*" (§30).
- Impossibility to authorize a treatment on the sole basis of its deterrent effect: "*As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be.*" (§31).
- Subjective aspect of humiliation: "*Publicity may be a relevant factor in assessing whether a punishment is "degrading" within the meaning of Article 3 (art. 3), but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.*" (§32).
- Universal nature of the protection: "*(.) the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney-General for the Isle of*

¹²⁷ Committee on Civil and Political Rights *Osbourne v Jamaica*, Communication 759/1997, 15 March 2000

¹²⁸ African Commission on Human Rights, *Curtis Francis Doebbler v. Sudan*, *African Commission on Human and Peoples' Rights*, Communication 236/2000 (2003).

¹²⁹ Committee against Torture, Concluding Observations on Saudi Arabia (2002) UN doc. CAT/C/CR/28/5, para 100; Committee against Torture, Conclud on Yemen's initial report (2004) UN doc. CAT/C/CR/31/4, para 6; Committee against Torture, Concluding Observations on Egypt, (2002) UN doc. CAT/C/CR/29/4 A/58/44, para 39.

¹³⁰ European Court of Human Rights, *Tyrer v UK*, Communication 5856/72, 25 April 1978, paras 30 to 35

Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review." (§31).

- Appreciation of institutionalised violence: *"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.*

Annex: Compilation of text

A. United Nations instruments

1) The International Covenant on Civil and Political Rights

Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Article 10.1: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

2) The United Nations Convention against Torture

Article 1: “For the purposes of this Convention the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions.”

Article 16 calls on each State party to: “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, 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.”

B. Regional instruments

1) European instruments

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 3: “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

2) Inter-American Instruments

American Declaration of the Rights and Duties of Man (ADRDM)¹³¹

Article I: “Every human being has the right to life, liberty and the security of his person.”

¹³¹ While largely superseded in the current practice of the inter-American Human Rights System by the more elaborate provisions of the American Convention on Human Rights (in force since 18 July 1978), the terms of the Declaration are still enforced with respect to those States that have not ratified the Convention, such as Cuba and the United States.

Inter-American Convention on Human Rights (ACHR)

Article 5: “1. Every person has the right to have his physical, mental and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

3) African Instruments

African Charter on Human and Peoples’ Rights (ACHR)

Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

C. International criminal law

The Rome Statute

Article 7: Crimes against humanity

“1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(...); (f) Torture; (...); (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(...); (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;”

Article 8: War crimes

“1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, ‘war crimes’ means:

(...); (ii) Torture or inhuman treatment, including biological experiments; (...)

...

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”