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Vasyl Lazumirskyi

Comparative Analysis of the Concepts of Torture and Inhumane Treatment in International Law: Perspectives from UN Human Rights Bodies, the European Court of Human Rights, and International Criminal Tribunals

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About the author

Vasyl Lazumirskyi is a Human Rights Officer at the Office of the United Nations High Commissioner for Human Rights (OHCHR), currently based at the Regional Office for Central Asia in Kyrgyzstan. He has previously worked on human rights investigations and reporting with OHCHR in Ukraine, South Sudan, and Armenia, as well as with the UN Group of Independent Experts on the Human Rights Situation in Belarus, based in Vienna. His academic background is in human rights and international law, with a focus on accountability for grave human rights violations and the prohibition of torture.

Preface

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Editor
Lehrstuhl Prof. Dr. Thomas Giegerich
Universität des Saarlandes
Postfach 15 11 50
66041 Saarbrücken
Germany

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A. Introduction

Many acts may constitute torture in one context but not in another. The classification of ill-treatment under international law often depends on a complex interplay of factors: the nature of the act, the intention behind it, the purpose it serves, and whether it is carried out by or with the acquiescence of state agents. Despite a growing corpus of international instruments prohibiting torture, there is no singular, universally accepted definition. Most legal frameworks, however, converge on four constitutive elements: the severity of pain or suffering inflicted; the deliberate intention of the perpetrator; a prohibited purpose, such as punishment, coercion, or discrimination; and a nexus with public authority.

What distinguishes torture from other forms of ill-treatment is not only the gravity of harm but the conceptual weight it carries in international law. Torture's prohibition is among the rare norms that have attained the status of *jus cogens*, a peremptory norm of general international law from which no derogation is permitted. This exceptional legal status was first clearly articulated in *Prosecutor v Furundžija*, where the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that the prohibition of torture enjoys a "higher rank in the international hierarchy than treaty law and even ordinary customary rules."[1] Similarly, the International Court of Justice confirmed in the *Nicaragua* case that the prohibition of torture forms part of customary international law, as embedded in common Article 3 of the Geneva Conventions.[2]

Torture is one of a small number of rights that are absolutely protected in all circumstances, including times of war, public emergency, or national security threat.[3] It shares this status with only a handful of other prohibitions, such as slavery, genocide, and retroactive criminal punishment. As Manfred Nowak has noted, it is not only an absolute prohibition in treaty law but also an *erga omnes* obligation: all states are required to prevent, prosecute, and punish acts of torture regardless of where they occur.[4] Under Article 4 of the UN Convention against

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[1] ICTY, *Prosecutor v Furundžija*, ICTY-95-17/1-T, Judgement of 10 December 1998, para. 153.
[2] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 14, Judgement of 27 June 1986, para. 218.
[3] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 2(2).
[4] *Nowak*, Netherlands Quarterly of Human Rights 2005, 674.

Torture, states are obliged to criminalise torture domestically, and to impose penalties commensurate with the gravity of the offence. This is a rare and exacting duty for a human rights treaty, further underscoring the normative weight of torture's prohibition.

Nonetheless, international jurisprudence remains far from uniform. While CAT defines torture with considerable precision, it does not define inhumane or degrading treatment – terms which are often used interchangeably but may reflect very different legal consequences. The Human Rights Committee, interpreting Article 7 of the ICCPR, deliberately avoids rigid distinctions. The European Court of Human Rights, interpreting Article 3 of the ECHR, adopts a layered typology of torture, inhuman, and degrading treatment and has recalibrated the thresholds of each over time. Meanwhile, international criminal tribunals, such as the ICTY, ICTR, and ICC, have progressively adapted the definition of torture to fit the contours of individual criminal responsibility, at times departing from human rights law by removing the requirement of official capacity.

This thesis undertakes a comparative analysis of how torture and inhumane treatment are conceptualised, interpreted, and applied across three legal regimes: United Nations human rights bodies (CAT and the Human Rights Committee), the European Court of Human Rights, and international criminal tribunals (ICTY, ICTR, and ICC). The aim is not merely to catalogue definitional divergences but to explore their normative foundations and practical implications. Do these institutions merely differ in language and emphasis, or do they reflect competing legal and moral paradigms? What are the effects of these distinctions on accountability, redress, and the broader enforcement of human rights?

This thesis first outlines the definitional frameworks of torture and inhumane treatment across key legal regimes, before turning to the evolution of their jurisprudence through landmark cases. It then examines how institutional aims and evidentiary standards shape the legal construction of torture. The study employs a doctrinal method, focusing on treaty interpretation, case law, and scholarly analysis with emphasis on severity, purpose, intent, and official involvement. While all regimes uphold the absolute prohibition of torture, they diverge in their interpretative approaches, reflecting the distinct legal and institutional contexts in which they operate. A comparative lens thus offers insight into both the coherence and complexity of international law's response to ill-treatment.

B. Definition and elements of torture and inhumane treatment

I. International bodies

1. UN human rights bodies

a) Torture

The international prohibition of torture finds its origins in early efforts to safeguard the humane treatment of prisoners of war. One of the earliest codified expressions of this principle appears in the 1863 Lieber Code, [5] which, under Article 16, affirmed that military necessity could not be invoked to justify acts of cruelty, including torture, to extract confessions. This principle was echoed in the 1907 Hague Convention which, although it did not explicitly refer to torture stipulated in Article 4 that prisoners of war must be treated humanely.[6]

In the aftermath of the Second World War, the scope of protection against torture expanded considerably.[7] What had previously been confined to the laws of war evolved into a universally applicable norm of international human rights law. This transformation was enshrined in a series of landmark United Nations instruments: the Universal Declaration of Human Rights (1948)[8], the Declaration on the Protection of All Persons from Being Subjected to Torture (1975)[9], and ultimately, the Convention against Torture (1984).[10]

The CAT marked a significant milestone by providing in Article 1 the first comprehensive legal definition of torture under international law. Yet this definition has since become the subject of

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[5] General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, art 16.
[6] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), art 4.
[7] *Kretzmer*, Max Planck Encyclopedia of Public International Law (MPEPIL) 2022, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1414 (last accessed 15 April 2025).
[8] UNGA Res 217A (III) (10 December 1948) UN Doc A/RES/217(III).
[9] UNGA Res 3452 (XXX) (9 December 1975) UN Doc A/RES/3452(XXX).
[10] UNGA Res 217A (III) (10 December 1948) UN Doc A/RES/217(III).

considerable debate in both legal theory and practice reflecting enduring tensions over its scope and interpretation.[11] Article 1 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 acquiesce 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."[12]

Thus, several elements must be considered when determining whether an act constitutes torture: the nature of the act, whether physical or mental; the intent of the perpetrator; the purpose behind the act; and the involvement of a public official or someone acting in an official capacity. Each of these elements may be examined in detail separately.

Manfred Nowak, former United Nations Special Rapporteur on Torture, has argued that the term "act" within the definition of torture should be interpreted broadly to encompass not only affirmative actions but also omissions. This expanded interpretation has been supported by a consistent body of jurisprudence from the UN Committee against Torture and other international monitoring mechanisms, which have affirmed that torture may be committed through acts of omission. [13]

Regarding the element of intent, Nowak explains that the Convention against Torture requires that severe pain or suffering be inflicted intentionally and for a specific purpose. As such, torture can never result from mere negligence. He notes: *"Purely negligent conduct can never be considered torture. For example, when a detainee is forgotten by prison guards and slowly*

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[11] *Nowak/Birk*, Giuliana Monina From: The United Nations Convention Against Torture and its Optional Protocol: A Commentary.
[12] UNGA Res 217A (III) (10 December 1948) UN Doc A/RES/217(III), art. 1.
[13] *Nowak*, Human Rights Quarterly 2006, 809 (823).

starves to death, the detainee certainly endures severe pain and suffering, but the conduct lacks intention and purpose and, therefore, can 'only' be qualified as cruel or inhuman treatment."[14]

According to Nowak, "*the requirement of a specific purpose is the most decisive criterion distinguishing torture from cruel or inhuman treatment*."[15] He notes that during the drafting of Article 1 of the Convention against Torture, it was largely uncontested that ill-treatment qualifies as torture only when it serves a specific purpose. However, there was broad consensus that the purposes listed in Article 1 are indicative rather than exhaustive. While views differed on the precise formulation of those purposes, most delegations agreed that the list was not intended to be limiting. On this basis, it may be argued that any severe ill-treatment could amount to torture, insofar as it serves a qualifying purpose, including, as Nowak observes, the sadistic gratification of the perpetrator.[16]

The Human Rights Committee has likewise affirmed that purpose constitutes the primary distinguishing criterion between torture and other forms of ill-treatment. Given that the ICCPR does not provide a definition of the terms used in Article 7 and that no distinct legal consequences necessarily follow from the precise classification of a particular act, the Committee has previously stated that it does not deem it necessary to draw strict distinctions between the various forms of prohibited treatment or punishment.[17] However, in *Giri v Nepal*, the Committee, while affirming its adherence to the definition of torture under the UN Convention against Torture, clarified that "the critical distinction between torture, on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element."[18]

The element of purpose was clearly central to the assessment made by the Special Rapporteur of the UN Commission on Human Rights in at least one instance concerning the definition of torture. Following his visit to the Russian Federation, where he focused primarily on pre-trial

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[14] Ibid p. 830.
[15] Ibid.
[16] *UN General Assembly*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 20 July 2017, UN Doc A/72/178, para 31.
[17] *Human Rights Committee*, General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 1992 UN Doc HRI/GEN/1/Rev.9, para 4.
[18] *Human Rights Committee*, Giri v Nepal, Communication No 1761/2008, UN Doc CCPR/C/101/D/1761/2008, 27 April 2011, para 7.5.

detention facilities, he described the conditions in some centres as so inhuman that they could be characterised as "torturous." However, he refrained from using the term "torture" in its strict legal sense, noting the absence of sufficient evidence to establish the required purposive element. Still, he observed: "*To the extent that suspects are confined there to facilitate the investigation by breaking their wills with a view to eliciting confessions or information, they can properly be described as being subjected to torture*."[19]

Another important feature of the concept of torture, though not expressly stated in the Convention against Torture, is the powerlessness of the victim. Nowak notes that "*the powerlessness of the victim was an essential criterion when the distinction between torture and cruel, inhuman and degrading treatment was introduced into the Convention*."[20] This view is echoed by another former Special Rapporteur on torture Nils Melzer, who observed that "*the aggravated threshold of torture is always reached when, additionally, severe pain or suffering is intentionally and purposefully inflicted on a powerless person*."[21]

b) Inhumane treatment

Although the Convention against Torture sets out a clear legal definition of torture it does not offer a corresponding definition for cruel, inhuman, or degrading treatment or punishment (CIDT). The inclusion of a precise definition for torture was necessary, given that certain obligations, most notably the duty to criminalise acts of torture and impose appropriate penalties, apply specifically to that offence. By contrast, the Convention's broader obligations, such as the duties to prevent and investigate ill-treatment, extend to both torture and CIDT. This is reflected in Article 16(1) of the Convention, which states:

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

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[19] *Rodley*, Current Legal Problems 2002, 467 (485).
[20] *Nowak*, in: Nowak/Birk/Monina (eds.), The United Nations Convention Against Torture and Its Optional Protocol: A Commentary, p. 833.
[21] *UN General Assembly*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 20 July 2017, UN Doc A/72/178, para 31.

the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment."[23]

Put differently, within the framework of the Convention, certain acts fall outside the definition of torture either because they do not reach the required threshold of pain or suffering, or because they lack the requisite purposive element. As a result, conduct that causes severe pain but serves no specific purpose would, under the terms of the Convention, be more appropriately classified as inhuman or degrading treatment rather than torture. This distinction entails major legal consequences: while the Convention obliges states to establish jurisdiction over acts of torture and to prosecute or extradite suspected perpetrators these obligations do not apply to acts considered merely inhuman or degrading. Likewise, the Convention's provisions on redress and compensation for victims, as well as the exclusion of evidence obtained under torture, do not extend to other forms of ill-treatment. [24]

This definition is closely tied to the understanding of torture, as well as inhuman and degrading treatment, as intentional acts committed by or with the involvement of public officials. The emphasis on the official character of such acts in the UN CAT reflects its core objective, that is to ensure that states establish jurisdiction over acts of torture, including those committed by or against non-nationals outside their territory. This framework relies on a model of universal jurisdiction grounded in the recognition that states are often reluctant to take meaningful actions against their own agents. As such, it becomes necessary to empower other states to act thereby preventing torturers from benefiting from *de facto* impunity.[25]

According to Nowak, a systematic and historical reading of Articles 1 and 16 of the CAT indicates that the key factors distinguishing torture from CIDT are the purpose underlying the conduct, the perpetrator's intent, and the victim's state of powerlessness.[26] However, not all

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[23] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Art. 16(1).
[24] *Evans*, International and Comparative Law Quarterly 2002, 365 (373 f., 376).
[25] Ibid p. 376.
[26] *Nowak*, in: Nowak/Birk/Monina (eds.), The United Nations Convention Against Torture and Its Optional Protocol: A Commentary, pp. 832–833.

bodies adopt this approach.[27] The European Court of Human Rights and the ICTY have each developed alternative frameworks for distinguishing torture from other forms of ill-treatment, which will be considered further. Similarly, the Human Rights Committee has stated that "*the distinctions depend on the nature, purpose and severity of the treatment applied*."[28] The Committee against Torture, in its General Comment, has noted that *"in comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes,*"[29] and that "*in practice, the definitional threshold between ill-treatment and torture is often not clear.*"[30] Despite these varying perspectives, there is a growing consensus that the presence of a specific purpose is the most relevant factor in distinguishing torture from other forms of prohibited treatment. [31]

Concerning degrading treatment or punishment, it is understood as the deliberate infliction of physical or mental pain or suffering aimed at humiliating the individual. Even if the harm falls short of being severe, it may still qualify as degrading when it involves a distinctly humiliating dimension.[32]

2. European Court of Human Rights

Among the essential rights safeguarded by the European Convention on Human Rights, few are as absolute and uncompromising as the prohibition of torture and other forms of ill-treatment under Article 3 which declares unequivocally: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*[33] This language reflects not only a moral imperative but a legal one from which no derogation is permitted even in times of war or public emergency. [34] Unlike CAT which offers a detailed definition of torture and its constituent

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[27] ICTY, *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-T, Trial Judgment of 2 November 2001, para. 142.
[28] *Human Rights Committee*, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 1992, UN Doc HRI/GEN/1/Rev.9, para 4.
Vatcharadze, 29 Law & World 2024, 114 (115).
[29] *Committee Against Torture*, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc CAT/C/GC/2, para 10.
[30] Ibid para 3.
[31] *Zach*, in: Nowak/Birk/Monina (eds.), The United Nations Convention Against Torture and Its Optional Protocol: A Commentary, para 24.
[32] Ibid para 9.
[33] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, ETS No. 5, Art. 3.
[34] *Vatcharadze*, Law & World 2024, 114 (115).

elements, the Convention adopts a broader framework distinguishing between three categories of prohibited treatment: torture, inhuman treatment, and degrading treatment. Each embodies a distinct threshold of severity and humiliation, yet all fall within the same absolute ban.

To assess whether a specific form of ill-treatment amounts to torture, the Court draws on the internal distinction made in Article 3 between torture and inhuman or degrading treatment. The Convention deliberately reserves the label of "torture" for conduct that inflicts especially severe pain or suffering with intent, thereby attaching a distinct moral and legal stigma. This differentiation is not merely semantic; it reflects the Convention's broader aim of ensuring that its protections are not theoretical but effective in practice. Accordingly, the Court interprets Article 3 in a manner that gives real substance to its safeguards, reinforcing the principle that the Convention must serve as a living instrument in the protection of human dignity.[35]

The Court repeatedly mentioned in its judgments that the Convention is a living instrument that must be interpreted in light of present-day conditions. Acts previously classified as "inhuman and degrading treatment" could be reclassified as "torture" in the future, reflecting evolving standards for the protection of human rights and fundamental freedoms; higher standards now apply to safeguard the core values of democratic societies. While some acts are clearly identifiable as torture due to their severity others may require a more nuanced analysis to determine whether they meet the threshold of torture or fall under CIDT. These distinctions depend on the unique circumstances of each case and are not always straightforward.[36] As the Court stated in *Atkas v. Turkey*:

"*In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering*."[37]

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[35] Council of Europe, Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture, updated 31 August 2022, p. 6.
[36] *Vatcharadze*, Law & World 2024, 114 (120).
[37] ECtHR, *Atkas v. Turkey*, No. 24351/94, Judgment of 30 May 2002, para. 49.

ICTY gave its assessment in *Kunarac* case holding that: *"The three main elements of the definition of torture under the European Convention are thus the level of severity of the ill-treatment, the deliberate nature of the act and the specific purpose behind the act*."[38]

As some scholars observe, the judgments of the European Court of Human Rights finding a violation of Article 3 can be broadly classified into three categories: those establishing torture; those establishing inhuman or degrading treatment or punishment; and those establishing a failure to conduct an effective investigation. More precisely, the Court has often found violations of the substantive and/or procedural aspects of Article 3.[39]

According to OHCHR, torture is not defined by specific physical or mental acts but rather by the legal qualification of behavior, assessed comprehensively in context. This determination considers factors such as the victim's vulnerability (e.g., age, gender, or status), the environment, and the cumulative impact of various elements.[40]

First of all, it is relevant to analyse which actions constitute torture and which fall under the lesser categories of ill-treatment prohibited by Article 3.

a) Torture

In this respect, *The Greek Case*[41] and *Ireland v United Kingdom*[42] are leading authorities on the distinction between the various forms of ill-treatment prohibited by Article 3. In these cases, the then European Commission of Human Rights adopted a general approach that differentiated between torture, inhuman treatment, and degrading treatment. Both the European Commission and the European Court of Human Rights have continued to apply this framework in subsequent

[38] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, Trial Judgment of 22 February 2001, para. 478.
[39] *Krstevska Savovska*, Iustinianus Primus Law Review 2020 (Special Issue), 1–10.
[40] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978, para. 162; *OHCHR*, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, United Nations, 2011, pp. 2, 12; *Nowak/McArthur*, Torture in International Law: A Guide to Jurisprudence, APT and CEJIL, 2008, p. 57.
[41] *ECommHR*, Denmark, Norway, Sweden and the Netherlands v. Greece (The Greek Case), (1969) 12 YB ECHR 1.
[42] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978.

jurisprudence. While the definitions have been refined over time, torture remains marked by a particular gravity and stigma that sets it apart from other forms of ill-treatment.

Torture is defined less by the form or intensity of the act and more by the specific purpose behind its commission.[43] As mentioned in *The Greek Case*, "[…] *all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable [...] Torture [...] has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience*."[44]

In the landmark case *Ireland v United Kingdom*, the European Court of Human Rights introduced the notion that, for acts of ill-treatment to constitute torture, they must attain a minimum level of severity:[45]

"[…] if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[46]

In the same judgment the Court provided a clearer distinction between the meanings of each term contained in Article 3:[47]

"In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. […] it was the intention that the Convention, with its distinction between

[43] *Nowak/McArthur*, Torture in International Law: A Guide to Jurisprudence, APT and CEJIL, 2008, p. 57.
[44] See: Denmark, Norway, Sweden and the Netherlands v. Greece (The Greek Case).
[45] *Cullen*, California Western International Law Journal 2003, 29 (35).
[46] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978, para. 162.
[47] *Cullen*, California Western International Law Journal 2003, 29 (35).

"torture" and "inhuman or degrading" treatment, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[48]

Although the definitions have evolved since these early cases torture remains marked by a particular stigma that sets it apart from other forms of ill-treatment. The Court has consistently applied the threshold of minimum severity in numerous cases, including *Bouyid v Belgium*,[49] *Muršić v Croatia*,[50] and *Semikhov v Russia*.[51]

b) Inhuman treatment

In *The Greek Case*, the Commission distinguished not only between torture and other forms of ill-treatment, but also between inhuman and degrading treatment:

"The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable."[52]

Subsequently, in the later case *Ireland v United Kingdom*, the Commission stated that "any definition of the provisions of Article 3 of the Convention must start from the notion of inhuman treatment."[53]

Although the Court and the Commission have offered fewer explicit definitions of inhuman treatment compared to other forms of ill-treatment, it is often defined by contrast: it denotes conduct that lacks either the specific purpose or the degree of severity necessary to amount to torture, yet still surpasses the upper threshold of degrading treatment.[54]

Importantly, not only physical but also mental suffering may qualify as inhuman or degrading treatment, a point expressly acknowledged by the Court in *Labita v Italy*:

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[48] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978, para. 165.
[49] ECtHR, *Bouyid v. Belgium*, No. 23380/09, [GC], Judgment of 28 September 2015.
[50] ECtHR, *Muršić v. Croatia*, No. 7334/13, [GC], Judgment of 20 October 2016.
[51] ECtHR, *Semikhov v. Russia*, No. 2689/12, Judgment of 6 February 2018.
[52] *Cullen*, California Western International Law Journal 2003, 29 (35).
[53] *ECommHR*, Ireland v. United Kingdom, Commission Report, Series B, Vol. 23-I, 1976, para. 389.
[54] *Nowak/McArthur*, Torture in International Law: A Guide to Jurisprudence, APT and CEJIL, 2008, p. 60.

"Treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."[55]

Degrading treatment, in contrast to inhuman treatment, has received more detailed conceptual attention, likely because it marks the threshold at which Article 3 is engaged. A foundational point of reference in this regard is *The Greek Case*, where the Commission noted that degrading treatment must involve a form of "gross humiliation." This approach was subsequently echoed in *Ireland v United Kingdom*, in which the Court emphasised that any ill-treatment must reach a minimum level of severity to fall within the ambit of Article 3.[56] Notably, in 2014, Ireland requested a revision of the 1978 judgment, arguing that the five techniques should be reclassified as torture in light of newly uncovered material. However, the Court dismissed this request in 2018 reaffirming its original conclusion and maintaining the inhuman and degrading treatment classification.

In addition, in *Gäfgen v Germany*, the Court held that treatment may be considered degrading when it provokes in the victim feelings of fear, anguish, or inferiority capable of humiliating and debasing them, potentially breaking their physical or moral resistance, or compelling them to act against their will or conscience.[57]

3. International tribunals

a) Torture

The definition of torture has developed progressively through the jurisprudence of international tribunals, each shaping its interpretation within the broader context of international law.

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[55] ECtHR, *Labita v. Italy*, No. 26772/95, Judgment of 6 April 2000, p. 120.
[56] *Nowak/McArthur*, Torture in International Law: A Guide to Jurisprudence, APT and CEJIL, 2008, p. 61.
[57] ECtHR, *Gäfgen v. Germany*, No. 22978/05, Judgment of 1 June 2010, para. 89.

Notably, the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda did not contain explicit definitions of torture. Rather, both tribunals drew upon customary international law and relevant human rights instruments, formulating a working definition through their judicial decisions.

With the exception of torture as a crime against humanity under Article 7 of the Rome Statute which notably omits the requirement of a specific purpose the element of purpose remains central to the legal concept of torture under international law. This holds true across both state responsibility under human rights law and individual criminal liability in international criminal law. Virtually all instruments defining torture include a purposive requirement: Article 1 of both the UN Convention against Torture and the UN Declaration on Torture, Article 2 of the Inter-American Convention to Prevent and Punish Torture, and the Elements of Crimes for the war crime of torture under the Rome Statute, specifically in the context of international armed conflict (Article 8(2)(a)(ii).1) and non-international armed conflict (Article 8(2)(c)(i).4).[58]

The ICTY, established to prosecute serious violations of international humanitarian law during the Yugoslav Wars contributed significantly to the development of a detailed definition of torture through its case law. The Tribunal first addressed the legal contours of torture in the landmark *Prosecutor v Delalić et al.* (Čelebići case)[59] where it defined torture as the intentional infliction of severe pain or suffering, physical or mental, by act or omission, for purposes such as obtaining information or a confession, punishment, intimidation, coercion, or based on discrimination. [60] This definition was strongly influenced by Article 1 of CAT, but was adapted to reflect the context of armed conflict. The formulation set out in *Prosecutor v Kunarac* confirmed and aligned with this approach.[61]

The ICTR likewise followed the jurisprudence of the ICTY in shaping its understanding of torture, most notably in *Prosecutor v Akayesu*, where the definition was applied in the context of sexual violence.[62] The Tribunal affirmed that acts such as rape can amount to torture when

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[58] *Rodley*, Current Legal Problems 2002, 467 (483).
[59] ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-96-21-T, Trial Judgment of 16 November 1998, paras. 459–470.
[60] Ibid para 494.
[61] ICTY, *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, Trial Judgment of 22 February 2001, para. 497.
[62] ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Trial Judgment of 2 September 1998, paras. 596–598.

they involve the intentional infliction of severe physical or mental suffering for a specific purpose, such as punishment, intimidation, or discrimination. This interpretation broadened the legal scope of torture to encompass not only physical abuse but also psychological harm and sexual violence reflecting the nature of the crimes committed during the Rwandan Genocide.

The ICC defines torture under Article 7(2)(e) of the Rome Statute as the intentional infliction of severe physical or mental pain or suffering upon a person who is in the custody or under the control of the accused, excluding pain or suffering arising solely from lawful sanctions.[63] Remarkably, this definition does not require a specific prohibited purpose distinguishing it from most other definitions of torture in international law. Notably this formulation introduces a novel objective element, the requirement that the victim shall be under the control or in the custody of the perpetrator. Unlike other international instruments the provision omits any reference to the perpetrator's status as a public official.

Additionally, the ICC recognises torture as a war crime under Article 8 of the Rome Statute, applicable in both international and non-international armed conflicts.[64] Whether prosecuted as a crime against humanity or a war crime the fundamental definition of torture remains the intentional infliction of severe pain or suffering. However, the applicable legal context differs: when classified as a crime against humanity, torture must form part of a widespread or systematic attack directed against a civilian population; in contrast, as a war crime, it must be connected either to the conduct of hostilities or to the treatment of persons protected under the legal regimes governing armed conflict.

b) Inhumane treatment

The ICTY, ICTR, and ICC have all addressed the broader category of inhumane treatment, which includes acts falling short of the threshold required for torture but nonetheless constituting grave violations of human rights. The ICTY and ICTR have consistently treated inhumane treatment as encompassing conduct that results in serious suffering or significant injury to physical or mental health, even in the absence of the specific intent or severity

[63] UN, Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90, Art. 7(2)(e).
[64] Ibid art. 8(2).

characteristic of torture. In *Prosecutor v Krnojelac*[65] the Tribunal affirmed that "*only acts of substantial gravity may be considered to be torture"* thereby aligning its interpretation with that of the European Court of Human Rights.[66] This approach was reiterated in *Prosecutor v Brđanin*, where the Tribunal observed that "*the seriousness of the pain or suffering sets torture apart from other forms of mistreatment.*" [67]

Distinction between torture and other inhumane acts within the framework of the ICC remains a subject of ongoing legal and intellectual debate as the definitions set out in the Rome Statute and the Elements of Crimes reveal a significant degree of overlap. Article 7(1)(f) defines torture as a crime against humanity involving the intentional infliction of "severe pain or suffering," while Article 7(1)(k), addressing other inhumane acts, refers to conduct causing "great suffering, or serious injury," whether physical or mental. This close alignment raises questions about the feasibility and necessity of maintaining a distinction based on gradations of harm. The ambiguity deepens when examining Article 8: both the war crime of torture (Article 8(2)(a)(ii)-1) and inhuman treatment (Article 8(2)(a)(ii)-2) require the infliction of severe pain or suffering. Moreover, the absence of an explicit aggravating element in footnote 3 of the Elements of Crimes for Article 6(b) implies that the ICC does not treat torture as inherently more serious than inhuman treatment, thereby suggesting that both may demand an equally high threshold of suffering.[68]

II. Mental torture

As noted above, all major definitions of torture recognise that it is not confined to the infliction of physical pain; it also expressly includes the deliberate infliction of mental or psychological suffering. As the Special Rapporteur on Torture observed in 1986, "*There are two main types of torture: physical and psychological or mental. In physical torture, pain is inflicted directly*

[65] ICTY, *Prosecutor v Krnojelac*, IT-97-25-T, Judgement of 15 March 2002, para 181.
[66] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978.
[67] ICTY, *Prosecutor v Brđanin,* IT-99-36-T, Judgement of 1 September 2004, para 483.
[68] ECtHR, *Gäfgen v. Germany*, No. 22978/05, Judgment of 1 June 2010; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, No. 61498/08, Judgment of 2 March 2010; *Burchard*, Journal of International Criminal Justice 2008, 159 (167).

on the body; in psychological or mental torture, the aim is to injure the psyche. The two types are interrelated and, ultimately, both have physical and psychological effects."[69]

Neither CAT nor other core human rights treaties explicitly refer to threats of torture. Nonetheless, such threats can fall within the scope of inhuman or cruel treatment prohibited under Article 16 of the CAT and comparable provisions in other instruments. In certain circumstances, threats may even amount to torture, particularly where they result in severe mental suffering.[70] Jurisprudence from the UN CAT, the Human Rights Committee, the European Court of Human Rights, and international criminal tribunals has consistently affirmed that threats of torture may, depending on the context, constitute torture itself. This is rooted in the recognition that the definition of torture encompasses both physical pain and psychological harm. In *Njaru v Cameroon*, the Committee concluded that threats to the victim's life by police officers, coupled with the state's failure to intervene, were incompatible with the prohibition of torture and other forms of ill-treatment.[71] In some instances, the fear of impending physical torture may reach the threshold of mental torture. Whether such threats amount to psychological torture or merely inhuman or degrading treatment depends on the specific facts of each case, including the intensity of the pressure and the mental impact on the victim.

The European Court of Human Rights has consistently affirmed that even the threat of conduct prohibited under Article 3 may, in itself, constitute a violation of that provision. In cases such as *Gäfgen v Germany*,[72] *Al-Saadoon and Mufdhi v United Kingdom*,[73] *Al-Nashiri v Romania*,[74] and *Campbell and Cosans v United Kingdom*, the Court underlined that threatening an individual with torture may, in certain circumstances, amount to inhuman treatment. As the

[69] *UN Commission on Human Rights*, Report by the Special Rapporteur, Mr. P. Kooijmans, on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1986, UN Doc E/CN.4/1986/15, para. 118.
[70] ECtHR, *Gäfgen v. Germany*, No. 22978/05, Judgment of 1 June 2010, p. 149.
[71] HRC, Njaru v. Cameroon, Communication No. 1353/2005, CCPR/C/89/D/1353/2005, 19 March 2007, paras. 3.1, 6.1.
[72] ECtHR, *Gäfgen v. Germany*, No. 22978/05, Judgment of 1 June 2010.
[73] ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, No. 61498/08, Judgment of 2 March 2010.
[74] ECtHR, *Al-Nashiri v. Romania*, No. 33234/12, Judgment of 31 May 2018.

Court has observed, "*to threaten an individual with torture might in some circumstances constitute at least inhuman treatment*."[75]

The CAT has emphasised that psychological torture is not confined to acts resulting in "prolonged mental harm," but encompasses a broader range of conduct capable of causing severe mental suffering:

[…] acts of psychological torture, prohibited by the Convention, are not limited to "prolonged mental harm" […], but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration."[76]

It is important to recognise that not only the direct victim but also their close relatives may be subjected to torture or CIDT, for example, in the context of enforced disappearances which might result in numerous human rights violations including torture. The Human Rights Committee has held in several cases that the prolonged uncertainty, anguish, and psychological distress caused by enforced disappearances can amount to cruel, inhuman, or degrading treatment, and in some circumstances, to torture. For instance, in *Jegatheeswara Sarma v Sri Lanka*, the Committee found that the victim's father had himself suffered a violation of Article 7 of the ICCPR due to the mental suffering caused by his son's disappearance and the continuing lack of information about his fate.[77]

The Istanbul Protocol,[78] the UN's official guide for effective investigation and documentation of torture and CIDT, proves that the recognition of torture is not contingent upon the presence of physical scars or visible injuries and emphasises that absence of physical evidence does not reduce the seriousness of the act. The level of trauma suffered cannot be assessed solely by physical indicators, as psychological and emotional harm may be equally, if not more, debilitating. As the Protocol makes clear, the lack of visible marks does not constitute proof

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[75] ECtHR, *Campbell and Cosans v. United Kingdom*, Nos. 7511/76 and 7743/76, Judgment of 25 February 1982, para. 26.
[76] *CAT*, Concluding Observations on the Second Report of the United States of America, 18 May 2006, UN Doc CAT/C/USA/CO/2, para. 13.
[77] *HRC*, Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, UN Doc CCPR/C/78/D/950/2000, 2003, para. 9.5.
[78] UN OHCHR, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc HR/P/PT/8/Rev.1, 2022, pp. 43–44.

that torture did not occur. This principle was powerfully reiterated by the late Professor Sten Jacobsson, a Swedish expert on torture, who observed that "*the worst scars are in the mind*."[79]

III. Sexual violence as a form of torture

Sexual violence has increasingly been recognised as a form of torture or inhuman treatment under international human rights law, international humanitarian law, and international criminal law. International courts and treaty bodies have consistently affirmed that acts of sexual violence can inflict severe physical and psychological suffering, thereby meeting the threshold for torture when committed intentionally and for a prohibited purpose. Even where the severity does not rise to the level of torture, such acts are widely acknowledged as constituting inhuman or degrading treatment. This confines a broad range of conduct, including rape, threats of rape, forced nudity, sexual humiliation, forced sterilisation and other forms of sexual violence.

The prohibition of sexual violence represents a significant area of convergence between international human rights and international criminal law, with each reinforcing the other's normative framework. The jurisprudence of human rights bodies provides numerous examples where sexual violence has been found to amount to torture or cruel, inhuman, or degrading treatment. The prohibition against the use of sexual violence of any kind as a form of official punishment is firmly established in international law, though the full extent of such prohibited conduct is by no means limited to the examples cited above.

The CAT has played a significant role in affirming that sexual violence may constitute torture under international law. In *C.T. and K.M. v Sweden* (2007), the Committee found that the first complainant had been repeatedly raped while in detention, concluding that these acts amounted to torture.[80] In assessing the sexual violence she endured, the Committee determined that the repeated rapes by state officials while she was in custody met the threshold for torture. Moreover upon reviewing the chronology of her detention and the birth of her child the

[79] *Reyes*, International Review of the Red Cross 2007, 591 (601).
[80] *CAT*, C.T. and K.M. v. Sweden, Communication No. 279/2005, 17 November 2006, UN Doc CAT/C/37/D/279/2005.

Committee concluded that her son was the result of rape committed by public officials, thereby becoming a permanent reminder of the suffering inflicted.

While the Committee recognised that the perpetrators of the rape were public officials, its reasoning reflects a relatively flexible application of the pain, suffering, and purpose elements required under Article 1 of the Convention. The absence of a detailed analysis of these components suggests that the Committee may consider the infliction of severe pain or suffering, as well as the requisite intent to be inherently present in cases of rape. As one of the Committee's earliest rulings stating that rape constitutes torture within the meaning of Article 1 the decision, stating simply that the victim was repeatedly raped and thus subjected to torture, represents a significant milestone in the legal recognition of sexual violence as a form of torture, albeit articulated with a succinct justification.[81]

A more comprehensive legal articulation of torture was offered by the Committee in *V.L. v Switzerland* (2007), where it expressly characterised multiple acts of rape as constituting torture under Article 1 of the Convention.[82] The Committee found that the conduct in question inflicted severe physical and psychological pain and suffering, thereby meeting the threshold required for a finding of torture. Crucially, the acts were carried out for prohibited purposes, including interrogation, intimidation, punishment, retaliation, humiliation, and gender-based discrimination. In light of the fact that the perpetrators were police officers acting in an official capacity, the Committee concluded that the sexual abuse amounted to torture.

The decision in V.L. v Switzerland is especially significant in that the Committee's reasoning implies that the element of severe pain and suffering is inherently satisfied in cases involving numerous episodes of rape. This marks a notable evolution from earlier human rights jurisprudence, which at times characterised rape as inhuman or degrading treatment rather than torture. For instance, in its assessment of mass rapes committed during Turkey's 1974 invasion of Cyprus, the European Commission of Human Rights did not examine whether these acts amounted to torture, instead categorising them solely as inhuman treatment.[83] Since that time,

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[81] *Fortin*, Utrecht Law Review 2008, 145 (148).
[82] *CAT*, V.L. v. Switzerland, Communication No. 262/2005, 20 November 2006, UN Doc CAT/C/37/D/262/2005.
[83] ECommHR, Cyprus v. Turkey, Admissibility Decision of 26 May 1975, Applications Nos. 6780/74 and 6950/75, p. 128, para. (b).

however, both human rights bodies and international criminal tribunals have progressively affirmed that rape must be recognised as a form of torture, given the profound physical and psychological suffering it inflicts.

The European Court of Human Rights has played a pivotal role in affirming that sexual violence may constitute torture or inhuman treatment under Article 3 of the European Convention on Human Rights. In *Aydin v Turkey*[84] the Court found that the rape of a 17-year-old girl while in custody, accompanied by beatings, forced nudity, and other forms of degrading treatment intended to extract information, amounted to torture. This landmark judgment marked the first time the Court explicitly recognised rape as a form of torture. The ruling was praised by various commentators for advancing protection of human rights and reinforcing the accountability of state agents for committing sexual violence. The Court has since repeatedly stated that a state's failure to prevent, investigate or punish sexual violence may itself be in breach of Article 3.

Both the ICTY and ICTR have developed extensive jurisprudence affirming that sexual violence can constitute torture under international criminal law. A key ruling in this regard was issued by the ICTY Appeals Chamber in *Kunarac, Kovač, and Vuković*, where the Tribunal held that the severe physical or mental pain or suffering required to establish torture is inherently present in acts of rape.[85] In *Prosecutor v Akayesu*, the ICTR defined sexual violence as "*any act of a sexual nature which is committed on a person under circumstances which are coercive*,"[86] and clarified that such acts are not limited to physical penetration or even physical contact.[87] This expansive definition underscores that sexual violence is a broader concept than rape alone.

In *Delalić et al.* the ICTY considered both the physical and psychological dimensions of harm in evaluating allegations of sexual torture. The court took into account not only the immediate

[84] ECtHR, *Aydin v. Turkey*, No. 23178/94, Judgment of 25 September 1997, paras. 83–86.
[85] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 150.
[86] ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Trial Judgment of 2 September 1998, para. 688.
[87] Ibid para. 688.

effects of sexual violence but also the broader impact on the victim's social position and psychological well-being within their community.[88]

The CAT has also affirmed that certain forms of violence falling short of torture, such as involuntary sterilisation, may constitute cruel, inhuman, or degrading treatment.[89] Similarly, the European Court of Human Rights has recognised that various forms of sexual violence and related practices amount to degrading treatment. In *Valasinas v Lithuania* (2001), the Court held that subjecting a male prisoner to a strip search in the presence of a female officer constituted degrading treatment, reinforcing the principle that sexual humiliation may fall within the scope of Article 3 of the European Convention on Human Rights.[90]

Sexual violence is now firmly established in international jurisprudence as a form of torture or CIDT. International courts and treaty bodies have consistently affirmed that it causes profound physical and psychological suffering, often with enduring consequences. As jurisprudence continues to develop, international law strengthens the absolute prohibition of sexual violence in all circumstances, contributing to the advancement of accountability mechanisms and the realisation of justice for survivors.

C. Evolution, interpretation and approaches to torture and inhumane treatment

I. United Nations human rights bodies

1. The Committee Against Torture

This section focuses on the analysis of relevant case law from UN treaty bodies, the European Court of Human Rights, and international tribunals. It will explore specific elements of the definition of torture and inhumane treatment.

Torture is frequently understood as an "aggravated form" of cruel or inhuman treatment, distinguished by a heightened degree of suffering.[91] In its jurisprudence, the CAT has

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[88] ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-96-21-T, Trial Judgment of 16 November 1998, para. 486.
[89] *CAT*, Concluding Observations on the Fourth Periodic Report of Peru, UN Doc CAT/C/PER/CO/4, 25 July 2006, para. 23.
[90] ECtHR, *Valasinas v. Lithuania*, No. 44558/98, Judgment of 24 July 2001, para. 117.
[91] *Sadiqova*, Baku State University Law Review 2015, 44.

occasionally emphasised the intensity and impact of harm as key factors in assessing whether the threshold of torture has been crossed.

In *Hajrizi Dzemajl et al. v Yugoslavia* (2002), for instance, the destruction of the victims' homes by a mob, with the acquiescence of law enforcement authorities, resulted in grave harm and psychological terror. Nevertheless, the Committee characterised the acts as CIDT, rather than torture.[92] It concluded that the coordinated arson attack on an entire Roma settlement, though severe, fell under Article 16 of the Convention. The Committee cited racially motivated violence and the victims' heightened vulnerability as aggravating factors supporting a finding of CIDT. This decision illustrates that even when harm is serious, a classification of torture may be precluded where other definitional elements, such as a specific purpose or direct official involvement, are lacking. As Manfred Nowak has observed,[93] there is *"no objective element of distinction"* between torture and inhuman treatment beyond the aggravated nature of the suffering and its contextual elements; the boundary is therefore often determined by degree and circumstance.[94]

a) Severity element

At the same time, the CAT has repeatedly cautioned that the severity of suffering, while essential, is not determinative on its own. Both jurisprudence and scholarly analysis underscore that what elevates an act to the level of torture is not merely the intensity of pain, but the combination of severity with specific intent and a prohibited purpose. [95] The Committee has recognised a broad spectrum of abuse as meeting the severity requirement, provided the requisite intent is established.

In *Patrice Gahungu v Burundi* (2015), for example, the complainant, a former police officer, was beaten and subjected to torture with tools during a period of incommunicado detention. The Committee concluded that the acts inflicted severe physical and psychological pain and

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[92] *CAT,* Hajrizi Dzemajl et al. v. Yugoslavia, Communication No. 161/2000, 21 November 2002, UN Doc CAT/C/29/D/161/2000, paras. 9.2–9.6.
[93] *Nowak/McArthur*, Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture, 2006, pp. 147–151.
[94] *Sadiqova*, Baku State University Law Review 2015, 44.
[95] Ibid.

therefore amounted to a violation of Article 1 of the Convention.[96] In contrast, the degrading prison conditions he later experienced, including overcrowding and lack of medical care, were assessed under Article 16. The Committee concluded that while those conditions caused suffering they were not imposed with a prohibited purpose and thus constituted CIDT rather than torture. This distinction illustrates the Committee's view that even where the suffering is grave the absence of intent and purpose precludes a finding of torture under Article 1.[97]

Similarly, in *B.N. and S.R. v Burundi* (2021), the enforced disappearance of the victim and the repeated threats directed at his father, B.N., inflicted severe psychological harm on the family. B.N. was explicitly warned that he would "meet the same fate" as his son if he continued to search for him.[98] The Committee came to conclusion that the resulting mental anguish culminating in hypertension constituted serious harm. The authorities' deliberate infliction of psychological suffering on the father amounted to a violation of the Convention. In its assessment, the Committee referenced both Articles 1 and 16 of the UNCAT, recognising that the combination of severe mental pain and the intent to intimidate was sufficient to qualify the threats and intimidation as torture or, at minimum, cruel, inhuman or degrading treatment. This case reaffirms the Committee's position that severity alone is not the defining element of torture. Rather, severity is assessed in conjunction with intent and purpose. Acts that produce intense suffering but lack a prohibited purpose may be classified as CIDT, whereas less severe harm intentionally inflicted for such a purpose may constitute torture.

b) Intention and purpose

The CAT emphasizes that the presence of a prohibited purpose often elevates an act to torture in a way that severity alone cannot. [99] Indeed, the Committee frequently identifies purposeful cruelty as the decisive factor, classifying acts as torture if deliberately inflicted for an illicit purpose under Article 1.

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[96] *CAT*, Gahungu v. Burundi, Communication No. 220/2012, 7 December 2015, UN Doc CAT/C/55/D/220/2012, paras. 7.4–7.6.
[97] *CAT*, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2, para. 10.
[98] *CAT*, B.N. and S.R. v. Burundi, Communication No. 983/2020, 30 July 2021, UN Doc CAT/C/72/D/983/2020, paras. 7.5–7.8.
[99] *Sadiqova*, Baku State University Law Review 2015, 44.

This emphasis is evident across numerous CAT decisions. For example, in *Nino Colman Hoyos Henao et al. v. Mexico* the victim was beaten, asphyxiated and threatened with death by police to force him to plead guilty to a crime he did not commit. The Committee found that Mexican authorities tortured Hoyos Henao, the specific intent to coerce a false confession clearly brought the abuse under Article 1.[100] Similarly in *Ronald James Wooden v. Mexico*, a case concerning an American citizen tortured by local police, the purpose was reportedly to extract information related to criminal allegations. The CAT's decision held that the intentional infliction of severe pain to obtain a confession qualified as torture.[101]

In *R.M. v. Burundi* and *M.D. v. Burundi*, the detained victims were subjected to severe beatings and abuse during interrogations.[102] The Committee determined that these acts were carried out intentionally by security forces to punish the individuals for suspected opposition activity and to intimidate others.[103] Because the aim was punitive and coercive, the CAT had little difficulty classifying the conduct as torture under Article 1. Even when the exact motive is not explicitly confessed by perpetrators, the CAT will infer purpose from context, for instance, where an individual in custody is brutalized during questioning or as retaliation, the purposive element (to extract information or punish) is presumed from the circumstances.[104] As Sir Nigel Rodley observed, courts and treaty bodies apply a three-part test focusing on: the intensity of pain, the purpose for inflicting it, and the perpetrator's official capacity.[105] The CAT's jurisprudence aligns with this test, often giving primacy to the intent/purpose prong.

Crucially, if an act of abuse lacks a discernible purpose or is not inflicted intentionally, the Committee will not label it "torture" but it may still amount to CIDT. The UNCAT definition excludes pain or suffering arising only from lawful sanctions, and by interpretation also excludes harm resulting from negligence or accident[106]. In *Patrice Gahungu v. Burundi*, for

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[100] *CAT*, Hoyos Henao et al. v. Mexico, Communication No. 893/2018, 22 August 2022, UN Doc CAT/C/75/D/893/2018, para. 9.4.
[101] *CAT*, Ronald James Wooden v. Mexico, Communication No. 759/2016, 29 July 2021, UN Doc CAT/C/71/D/759/2016, para. 10.3.
[102] *CAT*, R.M. v. Burundi, Communication No. 811/2017, 13 August 2021, UN Doc CAT/C/71/D/811/2017.
[103] *CAT*, R.M. v. Burundi, Communication No. 811/2017, 13 August 2021, UN Doc CAT/C/71/D/811/2017, para. 6.1; para. 6.2.
[104] *De Vos*, Human Rights Brief 2007, 1.
[105] Ibid.
[106] *Sadiqova*, Baku State University Law Review 2015, 44.

example, beyond the torture he suffered, Gahungu also complained of prison conditions and lack of medical care. The CAT did not find those poor conditions to constitute torture because there was no evidence the suffering was intentionally imposed for an Article 1 purpose rather, it was a product of neglect and systemic problems. It therefore fell under Article 16.[107] Likewise, general police brutality or excessive force, if meted out without a specific interrogational or punitive purpose, might be deemed inhuman or degrading treatment rather than torture (depending on severity).

The CAT has clarified in its General comment No. 2 that certain acts, even if they do not satisfy the full criteria for torture under Article 1, particularly due to the absence of intent or a prohibited purpose, may nonetheless fall within the scope of cruel or inhuman treatment under Article 16. Furthermore, when conduct is primarily aimed at humiliating the victim without causing intense suffering, it may be classified as degrading treatment[108]. In sum, the CAT places great weight on intent and purpose as the distinguishing features of torture. Indeed, the *mens rea* and *motivation* behind the abuse often take precedence over the *quantum* of pain in the CAT's analysis. This is why the Committee has rejected approaches that rely on a strict severity standard alone. Instead, an act's purposeful cruelty such as extracting a confession, silencing dissent, or persecuting a minority is what "elevates its gravity" to torture.[109] The jurisprudence shows that whenever security forces or officials intentionally inflict suffering for such ends, the CAT is inclined to find a torture violation.

c) Official element

The third defining element of torture under Article 1 of UNCAT is state involvement, meaning the act must be committed by, or with the consent or acquiescence of, a public official or person acting in an official capacity. This requirement distinguishes torture and other forms of ill-treatment under the Convention from purely private acts of violence.

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[107] *CAT*, Gahungu v. Burundi, Communication No. 522/2012, 26 July 2015, UN Doc CAT/C/55/D/522/2012, paras. 7.3–7.5.
[108] *CAT*, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc CAT/C/GC/2, para. 3.
[109] *De Vos*, Human Rights Brief 2007, 21 (22).

In *Dzemajl et al. v Yugoslavia*, private actors destroyed Roma homes while police officers stood by without intervening. Although officials themselves did not directly commit violence, the CAT concluded that the state's deliberate inaction constituted "acquiescence," leading to responsibility under Article 16 for cruel, inhuman or degrading treatment.[110]

More explicitly, cases such as *Alexander Gerasimov v Kazakhstan*, *B.N. and S.R. v Burundi*, and *Sidi Abdallah Abbahah v Morocco* involved severe abuses directly inflicted by state officials, clearly fulfilling the public official criterion.[111] Similarly, in *Ronald James Wooden v Mexico* and *Hoyos Henao et al. v Mexico*, abuses by law enforcement to extract confessions demonstrated explicit state involvement and resulted in findings of torture.[112]

The Committee interprets "official involvement" broadly, including passive acquiescence or failure to prevent abuse, as reaffirmed in General Comment No. 2. Thus, the critical distinction for CAT jurisdiction is that abuse must have an official nexus, either active participation or passive complicity of state agents. Acts by purely private individuals, without any form of official consent or acquiescence, typically fall outside Article 1, though states remain obligated under international law to prevent and address them.

It can therefore be concluded that CAT jurisprudence confirms that state involvement, directly or through acquiescence, is essential for conduct to qualify as torture or CIDT under UNCAT, ensuring that these abuses reflect the misuse or deliberate abdication of state authority.

2. Human Rights Committee

In contrast to the definition-oriented approach of the CAT, the Human Rights Committee adopts a more holistic interpretation of the prohibition of torture and ill-treatment under Article 7 ICCPR. Rather than categorically distinguishing torture from CIDT, the HRC assesses whether

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[110] *CAT*, Dzemajl et al. v. Yugoslavia, Communication No. 161/2000, 21 November 2002, UN Doc CAT/C/29/D/161/2000, para. 9.2.
[111] *CAT*, Gerasimov v. Kazakhstan, Communication No. 433/2010, 7 June 2012, UN Doc CAT/C/48/D/433/2010; *CAT*, B.N. and S.R. v. Burundi, Communication No. 578/2013, 15 January 2017, UN Doc CAT/C/59/D/578/2013; *CAT*, Sidi Abdallah Abbahah v. Morocco, Communication No. 646/2015, 1 May 2019, UN Doc CAT/C/66/D/646/2015.
[112] *CAT*, Ronald James Wooden v. Mexico, Communication No. 205/2002, 16 May 2007, UN Doc CAT/C/38/D/205/2002; *CAT*, Hoyos Henao et al. v. Mexico, Communication No. 1008/2020, 19 August 2022, UN Doc CAT/C/75/D/1008/2020.

the overall conduct violates the individual's right to humane treatment. If such a violation is established the Committee typically finds a breach of Article 7 without explicitly labeling the conduct as torture or another form of ill-treatment. This approach aims to avoid creating hierarchies of abuse and underscores the equal prohibition of all severe mistreatment under Article 7.

The HRC explicitly articulated this stance in General Comment No. 20 (1992), stating that it is not necessary "to draw sharp distinctions between the various prohibited forms of treatment or punishment" under Article 7.[113] Although severity, purpose, and context remain relevant, the Committee emphasizes comprehensive protection of human dignity over formal classifications.[114] The ICTY similarly noted this characteristic of the HRC's jurisprudence, highlighting that the Committee "generally has not drawn a distinction between the various prohibited forms of ill-treatment," making precise definitions of torture challenging to discern from its decisions.[115]

This reluctance to categorically label violations as torture or CIDT is consistently reflected in the HRC's individual communications. In notable cases such as *Estrella v. Uruguay* and *Celiberti de Casariego v. Uruguay*, involving severe beatings and electric shocks to detainees, the Committee found clear breaches of Article 7 without explicitly characterizing them as torture.[116] Similarly, in *Polay Campos v. Peru*, involving prolonged solitary confinement and sensory deprivation, the Committee concluded there was an Article 7 violation without further classification.[117]

More recent jurisprudence follows the same pattern. In *Aleksandr Simekha v. Kyrgyzstan* (2018), the victim suffered severe beatings, leading to epileptic seizures and forced confessions.

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[113] *Human Rights Committee*, General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7), 10 March 1992, UN Doc HRI/GEN/1/Rev.9 (Vol I) 2008, para. 4.
[114] *Bayefsky.com*, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comments and Recommendations, https://www.bayefsky.com/themes/torture_general-comments.pdf, (last accessed: 15 April 2025), p. 2.
[115] ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-96-21-T, Trial Judgment of 16 November 1998, para. 462.
[116] *HRC*, Estrella v. Uruguay, Communication No. 74/1980, 29 March 1983, UN Doc CCPR/C/18/D/74/1980; *HRC*, Celiberti de Casariego v. Uruguay, Communication No. 56/1979, 17 March 1981, UN Doc CCPR/C/13/D/56/1979.
[117] *HRC*, Polay Campos v. Peru, Communication No. 577/1994, UN Doc CCPR/C/61/D/577/1994, 1997.

The Committee found Kyrgyzstan responsible for violating Article 7, yet refrained from labeling the abuse explicitly as torture or CIDT.[118] Likewise, in *Lydia Cacho Ribeiro v. Mexico* (2018), the HRC identified a clear violation of Article 7 based on repeated sexual assaults, death threats, and intentional denial of medical care, again without employing specific labels beyond the violation itself.[119]

As Christian M De Vos observes, the Human Rights Committee generally refrains from drawing precise distinctions in severity under Article 7, which helps explain why it seldom explicitly labels violations as torture, even when the conduct clearly warrants condemnation.[120] There have been rare exceptions, typically involving extraordinarily egregious abuses or when the Committee sought to emphasize the gravity of the case. For instance, in in *Giri v. Nepal* (2011), involving enforced disappearance, severe beatings, and simulated executions, and in *Khalilov v. Tajikistan* (2009), involving electric shocks used for confessions, the HRC explicitly identified the abuses as torture cruel and inhuman treatment.[121] But such explicit classification stands out because they deviate from the Committee's general practice. As one academic survey highlights, specific findings of torture by the HRC were virtually unprecedented until notable cases in the 2000s, such as *Khalilov*.[122]

However, within the ICCPR framework, legal consequences do not differ significantly based on labeling, remedies and condemnations remain consistent regardless of whether the treatment is termed torture or another form of ill-treatment. Thus the Committee typically feels little pressure to categorize explicitly. Instead, the HRC adopts a context-sensitive approach assessing factors such as the severity duration, victim vulnerability, and perpetrator intent. This allows the Committee to flexibly evaluate abuses such as prolonged solitary confinement or

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[118] *HRC*, Aleksandr Simekha v. Kyrgyzstan, Communication No. 2217/2012, UN Doc CCPR/C/123/D/2217/2012, 2018
[119] *HRC*, Lydia Cacho Ribeiro v. Mexico, Communication No. 2761/2016, UN Doc CCPR/C/126/D/2761/2016, 2019.
[120] *De Vos*, Human Rights Brief 2007, 1 (4).
[121] *HRC*, Validzhon Khalilov v. Tajikistan, Communication No. 973/2001, UN Doc CCPR/C/83/D/973/2001, 13 April 2005, para. 7.2.
[122] *Joseph/Castan*, in: Joseph/Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 3rd edn, pp. 215–328.

sensory deprivation without rigidly labeling them, while still maintaining a strong stance against all severe violations of Article 7.

In *Vuolanne v. Finland* (1989), the Committee found the treatment involved, a military disciplinary confinement, to fall significantly below the severity threshold required under Article 7 stating, "nor does it appear that the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him."[123] It ultimately determined that it did not constitute ill-treatment. Conversely, in cases concerning prison conditions, such as *Brown v. Jamaica* (1999), where an inmate endured deplorable and unsanitary conditions, the Committee concluded these conditions were in breach of both Article 7 and Article 10, without needing to categorize the abuses.[124]

A distinctive feature of the HRC's approach is its lack of requirement for a specific purpose (such as interrogation intent) to establish an Article 7 violation. Unlike the Convention Against Torture, which necessitates a specific intent to label an act as torture, the HRC may find a violation based on purely punitive or arbitrary cruelty without such specific objectives. Examples include police beatings administered as informal punishment or prison guard brutality motivated by sadism.[125]

Moreover, the Human Rights Committee recognizes state responsibility for private acts under specific circumstances. If a state is aware, or reasonably should be aware, of the risk of ill-treatment by non-state actors and fails to ensure adequate protection, it may violate Article 10 of the ICCPR. Article 10's scope includes all institutions and establishments within a state's jurisdiction, implying continued state responsibility for detainees' well-being even in privately-run facilities. In *Cabal and Pasini Bertran v. Australia*, the Committee emphasized that delegating core state functions such as detention and use of force to private entities "does not

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[123] *HRC*, Vuolanne v. Finland, Communication No. 265/1987, UN Doc CCPR/C/35/D/265/1987, 7 April 1989, para. 9.2.
[124] *HRC*, Brown v. Jamaica, Communication No. 775/1997, UN Doc CCPR/C/65/D/775/1997, 23 March 1999, para. 6.13.
[125] *OMCT*, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, 2020, para. 3.1.4, https://www.omct.org/site-resources/legacy/handbook4_eng_03_part3_2020-12-11-144643.pdf, (last accessed: 13 April 2025).

absolve the State party of its obligations under the Covenant" and found the state party in breach of Article 10 for improper treatment and inhuman prison conditions.[126] This broader interpretation sometimes extends beyond CAT's narrower confines, given that CAT explicitly addresses only acts committed by or with the consent or acquiescence of public officials. Under HRC jurisprudence, any act causing severe physical or mental suffering that a state could prevent or which occurs under state control could constitute an Article 7 violation, irrespective of who directly inflicts the suffering. The Committee consistently emphasizes states' positive obligation to protect individuals from torture and CIDT through law enforcement training, detention monitoring and complaint mechanisms.

Ultimately, the HRC's interpretation of Article 7 ICCPR is holistic and victim-centered, prioritizing the violation of fundamental human dignity over rigid categorizations of abuse types. This approach deliberately avoids strict distinctions that might suggest certain abuses are less severe or acceptable. While the Committee rarely labels acts explicitly as torture, its qualitative and context-sensitive method clearly communicates that all deliberate infliction of severe suffering by authorities is prohibited and must be addressed.

3. Conclusion

Through its jurisprudence, the CAT has established a nuanced distinction between torture and other forms of ill-treatment under Articles 1 and 16 of the Convention. Severity, intent and purpose, and state involvement are the foundational elements distinguishing torture. Specifically, torture requires severe suffering intentionally inflicted for a prohibited purpose by or with state complicity. When one of these elements is absent, such as purposeless brutality or acts not attributable to the state, the abuse may still constitute CIDT but not torture. This approach emphasizes that all ill-treatment is prohibited reinforcing the message that states cannot avoid responsibility based on severity alone. Simultaneously it preserves the distinct stigma attached to torture, highlighting state-inflicted abuses aimed at destroying individual's dignity and will.

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[126] *HRC*, *Cabal and Pasini Bertran v. Australia*, Communication No. 1020/2002, UN Doc CCPR/C/78/D/1020/2002, 2003, para. 8.2.

In contrast, the Human Rights Committee applies a holistic, victim-centered interpretation under Article 7 ICCPR, focusing on fundamental human dignity rather than rigid abuse categories. The HRC avoids strict labels, acknowledging that all deliberate infliction of severe suffering by authorities demands accountability, whether explicitly termed torture or not. Collectively, both Committees underscore a shared commitment: all serious abuses, particularly those violating human dignity at its core, must be unequivocally prohibited and remedied.

II. The European Court of Human Rights

This chapter explores the progressive development of the European Court of Human Rights' interpretation and application of Article 3 of the European Convention on Human Rights, which prohibits torture, inhuman, and degrading treatment. Starting with *The Greek Case* and continuing through landmark judgments such as *Cyprus v. Turkey, Ireland v. United Kingdom, Tyrer v. United Kingdom*, and *Selmouni v. France* the analysis demonstrates how the Court has gradually refined and broadened the scope of Article 3. This jurisprudential evolution reflects both changing societal values and a growing emphasis on the protection of human dignity.

1. The Greek Case, 1969

One of the earliest substantive examinations of Article 3 was *The Greek Case*, following a complaint by several states against Greece after a military coup. The European Commission of Human Rights (ECommHR) analyzed widespread allegations of ill-treatment and, in doing so, articulated key interpretative principles of Article 3. This foundational case laid the groundwork for the European Court of Human Rights' subsequent jurisprudence. A pivotal passage from the Commission's decision states:

"The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual

may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."[127]

This passage is significant because the ECommHR explicitly defined and analyzed the terms in Article 3, placing inhuman treatment at the core and framing torture as "an aggravated form of inhuman treatment" inflicted with a specific purpose. Inhuman treatment itself involved deliberate, unjustifiable severe suffering, while degrading treatment entailed gross humiliation or forcing someone "to act against his will or conscience." The Commission's hierarchical interpretation where degrading treatment stands alone, inhuman treatment is inherently degrading, and torture necessarily includes both established a lasting analytical framework known as the "ladder of pain and suffering".[128]

Nevertheless, in two significant respects, the ECommHR adopted a more integrated view of Article 3 in The Greek Case. Firstly the Commission acknowledged the overlapping nature of the terms within Article 3. Secondly the opinion consistently employed the collective phrase "torture and ill-treatment", emphasizing the commonality rather than differences among these concepts. This comprehensive approach was reflected in the Commission's final determination that violations of Article 3, through acts of torture or ill-treatment, had occurred in multiple instances.[129]

The ECommHR's opinion in *The Greek Case* was the first detailed attempt by an international body to define the terms "torture," "inhuman treatment," and "degrading treatment" under Article 3. However, the decision remained ambiguous in practice, as the specific treatment of prisoners was classified generally as ill-treatment without definitively labeling individual acts as torture. Poor detention conditions were also found to breach Article 3 without clear categorization. Thus, while *The Greek Case* significantly advanced legal understanding of torture, it lacked clarity in terms of practical enforcement.[130]

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[127] *European Commission of Human Rights*, The Greek Case (Denmark, Norway, Sweden and the Netherlands v. Greece), (1969) 12 YB Eur Conv on HR 186.
[128] *Rodley/Pollard*, The Treatment of Prisoners under International Law, 3rd edn., pp. 107, 129–130.
[129] *Simonsen*, European Journal of International Law 2018, 49.
[130] Ibid p. 51.

2. Cyprus vs Turkey, 1975

In 1975, the ECommHR reviewed an application by Cyprus against Turkey relating to the Turkish invasion of Northern Cyprus, alleging multiple human rights violations, including a breach of Article 3. While the Commission did not extensively analyze Article 3, its decision notably concluded that the widespread and systematic rape of Greek Cypriot women constituted inhuman treatment, not torture, even though victims ranged widely in age, from 12 to 71.[131] Given the extreme severity of these acts the classification as inhuman treatment rather than torture appears to reflect the Commission's view that specific characteristics essential for torture were absent. For example, these rapes seemed motivated by vengeance rather than aimed at interrogation or extracting information. This suggests a qualitative distinction in the interpretation of Article 3 terms, rather than a strictly hierarchical one.[132]

3. Ireland vs UK, 1976, 1978 and 2018

In its decision on internment practices in Northern Ireland, the ECommHR assessed the use of the "five techniques" and broader allegations of detainee abuse under Article 3. It found that the combined application of these methods deliberately used to break resistance and extract information amounted to torture. While not all techniques caused lasting physical harm, the Commission regarded them as a modern form of torture, functionally equivalent to historical practices aimed at securing confessions.[133]

The Commission thus reaffirmed the principle established in *The Greek Case*, recognizing torture. The Commission viewed the five techniques as a deliberate form of inhuman treatment used for a specific purpose. It found that while individual beatings caused serious mental and physical suffering and qualified as inhuman treatment, and certain humiliating acts amounted to degrading treatment, they did not meet the threshold of torture due to the absence of premeditation, interrogation purpose, or systematic application. In contrast the cumulative use

[131] ECommHR, *Cyprus v. Turkey*, Applications Nos. 6780/74 and 6950/75, (1976) 4 EHRR 482, paras. 373–374.
[132] *Rodley/Pollard*, The Treatment of Prisoners under International Law, 3rd edn., pp. 129–130.
[133] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978, para. 402.

of methods like sleep or food deprivation did meet that threshold reinforcing a hierarchical understanding of Article 3.[134]

The European Court, upon reviewing the Commission's decision, adopted a different stance and held that the combined use of the "five techniques" amounted to inhuman and degrading treatment but not torture. While recognizing that these methods were systematically employed to extract confessions or information, the Court determined the resulting suffering lacked the specific intensity and cruelty required to qualify as torture.[135]

The Court has articulated a clear three-tiered hierarchy of severity under Article 3 ECHR. At the lowest tier are acts described as "mere rough handling," which, although ethically unacceptable and often punishable under domestic criminal law, do not necessarily rise to the level of a violation under Article 3. At the highest tier stands torture, considered the most serious and reprehensible form of ill-treatment, meriting a distinctive stigma and categorical condemnation in international law. Between these poles lies the category of "inhuman or degrading treatment," encompassing conduct that breaches Article 3 but lacks the particularly aggravated features, such as extreme intensity or a specific purpose, required to constitute torture.[136] The Court explicitly suggested that this distinction was intentional on the part of the Convention's drafters, who sought to assign torture a singularly severe moral and legal stigma.[137] The Court's adoption of this hierarchical framework stressed the uniquely serious nature of torture compared to other forms of CIDT, playing a crucial role in shaping the development and implementation of international human rights law.

The Court consistently underscores the particular gravity and distinct stigma attached to torture, distinguishing it from other forms of ill-treatment. Yet, it seldom clarifies this distinction in concrete terms, often reverting to the language established in *Ireland v. United Kingdom*. Across its jurisprudence, the Court has reaffirmed that torture entails not only severe suffering but also a specific purpose, typically the extraction of information or confessions—thereby

[134] *Simonsen*, European Journal of International Law 2018, 49 (65).
[135] ECtHR, *Ireland v. United Kingdom*, No. 5310/71, Judgement of 18 January 1978, para. 167.
[136] *Simonsen*, European Journal of International Law 2018, 49 (66).
[137] *Cavanaugh*, Human Rights Quarterly 2020, 527.

framing torture as a compound assessment of both intensity and intent.[138] This dual requirement was explicitly reaffirmed by the Grand Chamber in its 2018 judgment rejecting Ireland's request to revise the original *Ireland v. United Kingdom* ruling.

The approach taken by the European Court in *Ireland v. United Kingdom* was also reflected in later cases such as *Tomasi v. France* (1992), where beatings resulting in medically documented injuries were classified as ill-treatment.[140] Similarly, in *Ribitsch v. Austria* (1995), beatings causing bruises on the victim's arm were again considered ill-treatment.[141] Remarkably, in both cases applicants explicitly complained only of ill-treatment and not torture. Thus, the Court consistently maintained its practice of categorizing severe beatings as inhuman treatment rather than torture.[142]

Yet, in 2014, Ireland submitted a request under Rule 80 of the Rules of Court seeking revision of the Court's 1978 judgment arguing that newly uncovered material showed that the effects of the five techniques amounted to torture.[143] The Irish Government relied primarily on documents declassified between 2003 and 2008 that, in its view, demonstrated a deliberate policy of concealment by the UK authorities at the time of the original proceedings. However, in its 2018 judgment the Grand Chamber dismissed the request by six votes to one finding that the alleged new facts were not of a decisive nature within the meaning of the Court's jurisprudence and thus did not justify revising the original judgment.[144] In dissent, the Irish judge O'leary expressed concern that the Court's approach to new evidence failed to adequately reflect the gravity of the allegations and the evolving interpretation of Article 3.[145] However, the matter has was resumed in January 2024 when Ireland filed a new inter-State application against the United Kingdom (Appl. 1859/24), currently pending before the Court.[146] This application invokes, inter alia, violations of the procedural limb of Article 3 ECHR alleging that the UK

[138] *Cavanaugh*, HumRtsQ 2020, 527 (533).
[140] ECtHR, *Tomasi v. France*, No. 12850/87, Judgement of 27 August 1992.
[141] ECtHR, *Ribitsch v. Austria*, No. 18896/91, Judgement of 4 December 1995.
[142] *Rodley*, Current Legal Problems 2002, 467 (476).
[143] ECtHR, *Ireland v. United Kingdom*, App. No. 5310/71, Rule 80 Revision Request, lodged in 2014.
[144] ECtHR, *Ireland v. United Kingdom (Revision)*, Grand Chamber Judgment of 20 March 2018, App. No. 5310/71.
[145] Ibid.
[146] Ibid. para 172.

failed to conduct an effective investigation into the use of the five techniques and the true extent of their consequences.

4. Tyrer v United Kingdom, 1978

The judgment in *Tyrer v. United Kingdom* introduced a further distinction within Article 3 differentiating clearly between inhuman and degrading treatment or punishment. While the earlier *Ireland v. United Kingdom* decision grouped inhuman or degrading treatment together, *Tyrer* explicitly placed degrading treatment lower on the hierarchy of severity. In this case the applicant challenged a judicial sentence involving three strokes of corporal punishment administered by police officers, causing soreness and skin irritation without cuts. Despite the applicant's attempt to withdraw his complaint, the Commission proceeded due to the case's significance.[147] The Commission swiftly concluded the punishment was neither torture nor inhuman, but considered whether it qualified as degrading, ultimately deciding it did because judicial corporal punishment inherently "humiliates and disgraces the offender."[148]

The Court upheld the Commission's position affirming that the threshold for degrading treatment under Article 3 is lower than that required for inhuman treatment or torture. It further stressed that no punishment falling within the scope of Article 3 can be justified, even on grounds of deterrence.[149] This conclusion was important because it manifestly rejected the statement affirmed by the Commission that demonstrated deterrence might justify punishments which might be viewed as degrading.

5. Selmouni v. France, 1999

However, the Grand Chamber's judgment in *Selmouni v. France* marked a serious shift in the European Court of Human Rights' interpretation of Article 3.[150] Mr. Selmouni, who had endured severe physical abuse at the hands of French police officers, pursued his case at the European Court after the domestic courts convicted the officers only of ordinary assault.

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[147] *Simonsen*, European Journal of International Law 2018, 49 (69).
[148] Ibid 70.
[149] ECtHR, *Tyrer v. United Kingdom*, No. 5856/72, Judgment of 25 April 1978, para. 29.
[150] ECtHR, *Selmouni v. France*, No. 25803/94, Judgment of 28 July 1999.

In its judgment, the Court reaffirmed the absolute prohibition of all forms of ill-treatment under Article 3, but specifically emphasized that torture carries a distinct and heightened "special stigma" as "deliberate inhuman treatment causing very serious and cruel suffering".[151] Importantly, the Court invoked the "living instrument" doctrine explicitly stating that acts previously categorized as "inhuman and degrading treatment" could now be qualified as torture due to developing human rights standards which demonstrated the Court's recognition that the threshold for torture is not fixed but can adapt to contemporary perceptions of human dignity.

Applying this evolving interpretation, the Court readily concluded that the treatment inflicted upon Mr Selmouni amounted to torture, given the severity of the physical and psychological harm, repeated beatings resulting in lasting injuries, profound humiliation, and threats of sexual assault, all described by the Court as "particularly serious and cruel" and intentionally inflicted.[152] Although the European Convention itself lacks a specific definition of torture the Court explicitly referred to Article 1 of the UNCAT, noting that torture typically involves severe suffering intentionally inflicted for purposes such as obtaining information, confessions, punishment, or intimidation.[153] Ultimately, the Court determined that the actions inflicted upon Mr Selmouni "aroused in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance," thus clearly exceeding the threshold required for torture[154]. Hence, *Selmouni* broadened the ECtHR's conception of torture reflecting an increased sensitivity to evolving standards of human rights protection.

Importantly, the *Selmouni* judgment clearly emphasized the significance of time and societal progress in interpreting Article 3. The Court explicitly acknowledged that previous rulings, such as *Ireland v. UK*, might warrant reconsideration stating that *"certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future"*.[155] This demonstrated a significant development in the understanding of torture shifting it from a fixed concept rooted in historically serious cases to

[151] Ibid para 96.
[152] Ibid para 105.
[153] Ibid para 97.
[154] Ibid para 99.
[155] Ibid para 101.

a flexible standard that adapts to modern human rights norms. Indeed, this interpretive shift laid the groundwork for Ireland's 2014 request to revise the 1978 judgment in light of new evidence and evolving standards. In essence, *Selmouni* recognized that what qualifies as torture may evolve over time in line with changing societal views on human dignity.

Following *Selmouni*, the ECtHR consistently adopted the principle of "greater firmness" set forth in that decision,[156] increasingly willing to categorize severe brutality by state officials as torture. For example, in *Dikme v. Turkey* (2000) and *Battı v. Turkey* (2004) the ECtHR explicitly classified severe beatings and the use of falaka as acts of torture, emphasizing their deliberate infliction and the intensity of the suffering caused.[157] In a similar vein, the Court has held in cases involving sexual violence, such as *Maslova and Nalbandov v. Russia* (2008), that rape perpetrated by state officials inherently meets the threshold of torture due to its deliberate nature and the severity of the suffering inflicted.[158] Subsequent cases also highlighted torture's purposive aspect, referring specifically to abuse inflicted "for obtaining information or confessions, punishing, intimidating or coercing".[159] In *Cestaro v. Italy* (2015), for example, severe police violence explicitly aimed at punishment and intimidation was classified as torture, with the Court criticizing Italy's inadequate legal provisions.[160] Furthermore, the Court addressed psychological ill-treatment, notably in *Gäfgen v. Germany* (2010), where credible threats of torture alone, despite the absence of physical harm, amounted to a serious violation, though the Court classified this as inhuman treatment rather than torture.[161]

Thus, it may be concluded that post-*Selmouni*, the European Court has progressively strengthened its position against state violence emphasizing procedural accountability and ensuring states adhere to evolving standards of human dignity.

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[156] Ibid para 101.
[157] ECtHR, *Dikme v. Turkey*, No. 20869/92, Judgment of 11 July 2000; ECtHR, *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, Judgment of 3 June 2004.
[158] ECtHR, *Maslova and Nalbandov v. Russia*, No. 839/02, Judgment of 24 January 2008, paras. 106–108.
[159] ECtHR, *Selmouni v. France*, No. 25803/94, Judgment of 28 July 1999, para. 97.
[160] ECtHR, *Cestaro v. Italy*, No. 6884/11, Judgment of 7 April 2015, para. 190.
[161] ECtHR, *Gäfgen v. Germany*, No. 22978/05, Judgment of 1 June 2010, paras. 103–108.

6. Conclusion

This chapter traced the evolution of Article 3 jurisprudence from *The Greek Case* to *Selmouni v. France*, revealing how the European Court of Human Rights has progressively shaped the interpretation of torture and other forms of ill-treatment. In contrast to the CAT, which defines torture in detail, the ECHR leaves its content to judicial elaboration. The Court initially adopted a hierarchical model distinguishing degrading treatment, inhuman treatment, and torture, with torture marked by deliberate infliction of very serious and cruel suffering for a specific purpose.

While *Ireland v. United Kingdom* reaffirmed this approach, emphasizing both the severity and purpose required for the concept of torture, it also showed the Court's cautious position in applying the label. The shift came in *Selmouni*, where the Court invoked the "living instrument" doctrine to allow a more flexible and evolving understanding of what may constitute torture. Afterwards, the Court has adopted a firmer stance against state violence, recognizing a wider range of violations, including sexual and psychological violence which might potentially meet the threshold of torture.

Taken together the case law reflects a steady broadening of protection under Article 3, guided by a deepening sensitivity to human dignity and changing social expectations.

III. International tribunals

The prohibition of torture and inhumane treatment is a fundamental principle of international law, enshrined in the statutes of the ICTY, ICTR, and ICC, the three judicial bodies whose jurisprudence is examined in this chapter. Each tribunal has confronted the challenge of defining torture and distinguishing it from other forms of ill-treatment, such as cruel or inhumane treatment. Through their evolving case law, these institutions have progressively developed legal definitions, outlined essential elements, and established conceptual frameworks for classifying such abuses.

The ICTY, ICTR, and ICC all criminalize torture and inhumane or cruel treatment, drawing on international law and their respective statutes. The ICTY defines torture as both a grave breach (Article 2) and a crime against humanity (Article 5(f)), aligning early with the CAT definition. In *Furundžija*, the ICTY Trial Chamber identified four core elements of torture in armed conflict: (i) an act or omission causing severe physical or mental pain or suffering; (ii)

intentional conduct; (iii) a prohibited purpose, such as obtaining information, punishment, intimidation, coercion, or discrimination; and (iv) the involvement of a public official or a person acting in an official capacity.[162] The forth element, however, was subsequently rejected by the tribunals' jurisprudence.

The ICTR followed a nearly identical definition in cases like *Akayesu*, initially requiring the involvement of a public official.[163] However, *Kunarac* marked a turning point, with the ICTY`s Appeals Chamber affirming the Trial Chamber's approach in omitting the public official requirement. The Chamber held that:

"[…] the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside the framework of the Torture Convention."[164] After this, both tribunals focused on the act's severity, intent, and purpose regardless of status.

The ICC adopts a similar structure in Article 7(2)(e) of the Rome Statute but adds that the victim must be "in the custody or under the control of the perpetrator."[165] Crucially, for crimes against humanity, the ICC does not require a specific purpose departing from ICTY/ICTR jurisprudence. For torture as a war crime, however, a prohibited purpose remains necessary.

Cruel or inhumane treatment, while lacking a uniform definition, refers to intentional acts causing serious suffering without meeting the higher threshold or purposive element of torture. Under ICTY law, "cruel treatment" (Article 3) is a war crime, and "inhumane acts" (Article 5(i)) are crimes against humanity. The *Kvočka* judgment confirmed that the main distinction lies in the presence of a prohibited purpose.[166] In essence, torture is defined by severe suffering inflicted with specific intent, whereas inhumane or cruel treatment covers a broader range of

[162] ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Judgment of 10 December 1998, para. 162.
[163] ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Trial Judgment of 2 September 1998, para. 594.
[164] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 148.
[165] *UN*, Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90, Art. 7(2)(e).
[166] ICTY, *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-T, Trial Judgment of 2 November 2001, para. 152.

serious abuse lacking that intent. The ICC retains this distinction but eases evidentiary burdens for crimes against humanity by omitting the purpose requirement.

D. Thresholds of severity

Torture is consistently defined by the ICTY, ICTR, and ICC as the intentional infliction of severe physical or mental pain or suffering. In contrast, inhumane or cruel treatment, though lacking a single universally accepted definition across tribunals, generally refers to intentional acts causing serious, though lesser, harm, without meeting the same threshold of severity or specific prohibited purpose required for torture. The primary distinction lies in both the degree of suffering and the presence of a purposive element, such as coercion, punishment or discrimination. However, in practice, tribunals do not usually engage in overly fine distinctions when the level of suffering is clearly significant. Instead, they focus on whether the harm was severe enough to constitute torture or merely serious, which would fall under inhumane or cruel treatment. For example, the prolonged denial of food, water, or sleep may amount to torture if done deliberately to break a person's will meeting both the severity and purpose elements. However, if the same treatment is inflicted without such intent it may instead be classified as cruel or inhumane treatment. [167]

Tribunals apply both objective and subjective criteria when assessing severity. Objectively, certain acts, such as rape, electric shocks, or severe beatings are inherently severe. Subjectively, factors like the victim's age, health, or vulnerability are taken into account. As noted in *Kvočka*, severity is context-dependent: the same act may constitute inhumane treatment in one case and torture in another if accompanied by a prohibited intent.[168]

With regard to sexual violence, the ICTY in *Furundžija* affirmed that rape, by its very nature, inflicts severe pain and qualifies as "a particularly vicious form of torture" when committed "by coercion or force or threat of force".[169] Similarly, in *Kunarac*, which involved sexual violence against detained women, the ICTY affirmed that the severity threshold was met by the extreme abuse and that such conduct amounted to torture, even in the absence of a state official

[167] ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-96-21-T, Trial Judgment of 16 November 1998, para. 467.
[168] ICTY, *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-T, Trial Judgment of 2 November 2001, para. 153.
[169] ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Judgment of 10 December 1998, paras. 176, 295.

perpetrator.[170] Similarly, the *Čelebići* Trial Chamber held that rape may constitute torture when it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official; causes severe physical and psychological suffering; and is carried out for purposes such as punishment, coercion, intimidation, or discrimination.[171]

In contrast, inhumane and cruel treatment encompasses serious abuse that lacks either the extreme intensity or "the purposive requirement" associated with torture.[172] The *Čelebići* Trial Chamber defined inhumane and cruel treatment as intentional acts causing serious mental or physical suffering or constituting a serious affront to human dignity.[173] The key distinction lies in both degree and motive: torture requires severe pain inflicted for specific ends (e.g., punishment, intimidation, or coercion), while inhumane treatment involves serious physical or mental suffering or injury absent that intent. Although both categories of abuse are unequivocally condemned under international law, their classification reflects different levels of legal and moral gravity.

The ICC has likewise treated "severe" pain as a high threshold, usually accompanied by evidence of serious physical injury or intense mental trauma. In *Ntaganda's* and *Ongwen's* cases, victims of torture endured extreme beatings, mutilations, sexual violence, and threats of death, treatment clearly meeting any reasonable severity standard.[174] The ICC has not set a rigid threshold in quantitative terms; rather, it evaluates severity in context, often referring to ICTY precedents.[175] Indeed, the *Ongwen* Trial Judgment cited ICTY caselaw (such as *Kvocka* and *Kunarac*) for the proposition that there is no bright-line degree of pain required, only that it be of a serious nature.[176]

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[170] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 148.
[171] ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-96-21-T, Trial Judgment of 16 November 1998, para. 495.
[172] Ibid 552.
[173] Ibid 542.
[174] ICC, *Prosecutor v. Bosco Ntaganda*, Trial Judgment, No. ICC-01/04-02/06-2359, 8 July 2019, para. 588; ICC, *Prosecutor v. Dominic Ongwen*, Trial Judgment, No. ICC-02/04-01/15-1762-Red, 4 February 2021, paras. 2715–2717.
[175] Ibid para 2716.
[176] Ibid para. 2716, citing ICTY, *Prosecutor v. Kunarac et al.*, Appeal Judgment, No. IT-96-23 & IT-96-23/1-A, 12 June 2002; ICTY, *Prosecutor v. Kvočka et al.*, Trial Judgment, No. IT-98-30/1-T, 2 November 2001.

I. Purpose and Intent

Specific intent is a key element distinguishing torture from other forms of ill-treatment in international jurisprudence. Both the ICTY and ICTR require that torture be inflicted for a prohibited purpose. In *Furundžija*, the ICTY referenced CAT Article 1, listing purposes such as obtaining information, punishment, intimidation, coercion, or discrimination.[177] Similarly, in *Akayesu* the court interpreted torture in accordance with the definition set forth in CAT and affirmed that torture involves the intentional infliction of severe pain for such purposes.[178] As various case law further demonstrates, the prohibited purpose need not be the sole motivation, only a significant one. For instance, personal motives do not negate torture if coercive or discriminatory intent is also present.

In *Kunarac*, for example, the sexual enslavement of victims was found to be part of an ethnic cleansing campaign, satisfying intimidation and discrimination purposes required for a torture conviction.[179] Had the same physical acts occurred purely for the perpetrators' sadistic pleasure without those broader aims, the conviction might have been classified instead as CIDT or outrage upon personal dignity. However, in practice, such distinctions often blur, as cruelty is frequently intertwined with discriminatory violence.

By contrast, inhumane treatment or other inhumane acts do not require a specific purpose beyond the intent to commit the act. As established in *Kordić & Čerkez*, these crimes are serious violent acts that cause suffering or injury but lack the purposive element central to torture.[180] Thus, an accused may be convicted of cruel or inhumane treatment without evidence of punitive or interrogational motivation.

The ICC diverges on this point. Article 7(2)(e) of the Rome Statute, defining torture as a crime against humanity, omits the purpose requirement.[181] The Elements of Crimes confirm that "no

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[177] ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Judgment of 10 December 1998, para. 161.
[178] *Schabas*, Case Western Reserve Journal of International Law 2006, 357.
[179] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 153.
[180] ICTY, *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Trial Judgment of 26 February 2001, paras. 245, 256, 271.
[181] *UN*, Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3, Art. 7(2)(e)

specific purpose need be proved" for crimes against humanity, reflecting a deliberate policy choice to simplify prosecution where the broader attack context implies coercive or discriminatory intent. However, for torture as a war crime, the ICC retains the requirement of a prohibited purpose in line with Geneva law. In *Ntaganda* the ICC Trial Chamber convicted the accused of torture as both a war crime and a crime against humanity for the brutal treatment of detainees.[182] The acts, beatings, death threats, and other abuse, were found to meet the severity threshold. Notably, under Article 7(2)(e) of the Rome Statute, torture as a crime against humanity does not require proof of a specific prohibited purpose, unlike torture as a war crime under Article 8(2)(c)(i), which does. This dual approach reflects a departure from the ICTY and ICTR's stricter purpose-based definition illustrating the ICC's broader interpretation for crimes against humanity while preserving traditional standards for war crimes.

II. Official capacity

A significant evolution in jurisprudence concerns the role of the perpetrator. While early interpretations, especially from the CAT, required that torture be committed by or with the acquiescence of a public official, this requirement has been rejected by international criminal tribunals.[183] In *Kunarac*, the ICTY Appeals Chamber held that official status is not required for individual criminal responsibility for torture under customary international law.[184] The court explained that the CAT's official-status element relates to state obligations, not to individual liability. The ICTR followed suit, especially in later judgments, and the ICC has codified this position. Article 7(2)(e) of the Rome Statute does not include any reference to official capacity meaning both state and non-state actors can be held responsible. This shift reflects the realities of modern conflicts, where many atrocities are committed by non-state armed groups.

III. Notable torture decisions – ICTY

Prosecutor v. Furundžija marked one of the earliest comprehensive definitions of torture in ICTY case law. The court adopted the CAT definition as reflective of customary international

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[182] ICC, *Prosecutor v. Bosco Ntaganda*, Trial Judgment, No. ICC-01/04-02/06-2359, 8 July 2019, paras. 950–952, 1206.
[183] *Rodley*, Current Legal Problems 2002, 467.
[184] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 148.

law requiring severe physical or mental pain, intent, and a prohibited purpose. Although the accused was not a state official, his role in an armed group was deemed sufficient to meet the official involvement criterion. The judgment confirmed that rape can amount to torture when committed with coercive intent, and reinforced that human rights concepts could be integrated into international criminal law.[185]

In *Prosecutor v. Kvočka et al.* the court emphasized a two-pronged assessment of severity: objective factors like the nature and duration of abuse and subjective factors such as the victim's age, health, and vulnerability.[186] The judgment reiterated that torture requires deliberate intent and a prohibited purpose. Some accused were convicted of persecution encompassing torture, others for inhumane acts or cruel treatment due to the absence of specific intent. The court clarified that "inhumane acts" under Article 5(i) and "cruel treatment" under Common Article 3 require serious suffering, but not a prohibited purpose, unlike torture.[187] The Appeals Chamber later agreed with the elements of torture defined by the Trial Chamber that the purpose element is the distinguishing feature of torture as opposed to inhumane treatment and stressed that the state-actor requirement from human rights law does not apply in international criminal or humanitarian law.[188]

In case of *Prosecutor v. Kunarac* the court addressed rape, enslavement, and torture of Bosnian Muslim women by paramilitary forces where the accused were convicted of both war crimes and crimes against humanity.[189] On appeal, the defence contended that the definition of torture necessitated involvement by a state official, however, the Appeals Chamber dismissed this argument, and similar to the *Kvočka* case*,* held that under customary international law, individual criminal responsibility for torture does not depend on the perpetrator's official status.[190] It clarified that the CAT's reference to official status concerns state obligations, not individual guilt.[191] *Kunarac* thus confirmed that non-state actors can commit torture under

[185] ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Judgment of 10 December 1998, para. 171.
[186] ICTY, *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-T, Trial Judgment of 2 November 2001.
[187] Ibid para 142
[188] ICTY, *Prosecutor v. Kvočka et al.*, Appeal Judgment, No. IT-98-30/1-A, 28 February 2005, paras. 283, 289.
[189] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002.
[190] Ibid para 148.
[191] Ibid para 147.

international criminal law. The court also emphasized that psychological suffering, such as that resulting from repeated sexual violence, meets the threshold of severe harm required for torture.

IV. Notable torture decisions - ICTR

The case of *Prosecutor v. Akayesu* is primarily recognized for its landmark acknowledgment of rape as an act of genocide in which the ICTR also provided significant jurisprudential developments regarding torture and cruel treatment as crimes against humanity and war crimes.[192] The Trial Chamber explicitly adopted the definition of torture articulated in the Convention Against Torture, including the requirement that the conduct be performed by, or with the acquiescence of, a public official.[193] Accordingly, the court defined torture as: (i) the intentional infliction of severe physical or mental suffering; (ii) committed for prohibited purposes, such as punishment, coercion, or intimidation; and (iii) executed by, or with the consent or acquiescence of, an official.[194] Akayesu was convicted of torture for the deliberate and public beatings inflicted upon Tutsi civilians, which the Trial Chamber found were intentionally perpetrated to punish and intimidate victims on ethnic grounds, thus underscoring torture's nexus to discriminatory intent.[195] Furthermore, the Chamber emphasized that, as a crime against humanity, torture must form part of a widespread or systematic attack directed against a civilian population on discriminatory grounds.[196] While the requirement of official involvement was initially affirmed, subsequent ICTR rulings, aligning with ICTY jurisprudence such as the *Kunarac* judgment, evolved to no longer treat the official-capacity element as indispensable, provided other elements were sufficiently demonstrated.[197]

The ICTR Trial Chamber in *Prosecutor v Musema* considered charges against Alfred Musema, a tea factory director accused of crimes committed during the 1994 Rwandan genocide. While Musema was ultimately acquitted of charges related to inhumane acts and outrages upon personal dignity due to insufficient evidence, the judgment significantly clarified the scope and

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[192] ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Trial Judgment of 2 September 1998
[193] Ibid para 593.
[194] Ibid para 594.
[195] Ibid paras 596-597.
[196] Ibid paras 595.
[197] ICTY, *Kunarac et al.*, Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 148. ICTR, *Prosecutor v. Muhimana*, No. ICTR-95-1B-T, Judgment of 28 April 2005, paras. 497–498; *Prosecutor v. Bikindi*, No. ICTR-01-72-T, Judgment of 2 December 2008, para. 217.

interpretation of the category of "other inhumane acts" under Article 3(i) of the ICTR Statute.[198] These charges primarily concerned acts involving degrading treatment, notably forced nudity and other forms of humiliation inflicted upon victims.[199] The Chamber emphasized that, to qualify as "other inhumane acts," the conduct must possess comparable gravity to specifically enumerated crimes against humanity, requiring proof that the acts intentionally inflicted severe physical or mental suffering upon victims.[200] Unlike torture, however, the Chamber concluded that such inhumane acts do not necessitate proof of a distinct prohibited purpose, such as punishment, coercion, intimidation, or discrimination.[201] Consequently, the Musema judgment provided important jurisprudential guidance by distinguishing clearly between the requirements for torture and other inhumane acts reinforcing the notion that the severity and intentionality of suffering alone can suffice for criminal responsibility under this category, without needing to demonstrate a specific prohibited intent.

Through *Akayesu* and *Musema*, the ICTR helped define the threshold of inhumane acts as serious and intentional, but distinguished them from torture by the absence of special intent. ICTR and ICTY jurisprudence often cross-referenced one another, *Furundžija* and *Čelebići* were frequently cited, leading to a convergence by the early 2000s on the core elements of torture (minus the official status) and the recognition of inhumane treatment as a distinct but serious offense.

V. Notable torture decisions - ICC

The *Bemba* case (2009) was milestone case where the Pre-Trial Chamber declined to confirm separate torture charges where the same conduct was already charged as rape. Citing fairness and avoiding duplication the Chamber held that each crime charged must contain a distinct element not contained in the other.[202] In particular, the court held that *"[…] the specific material elements of the act of torture […] are also the inherent specific material elements of the act of rape"* and that *"the act of rape requires the additional specific material element of penetration,*

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[198] ICTR, *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment of 27 January 2000, para. 975.
[199] Ibid para 965.
[200] Ibid paras 963–965.
[201] Ibid para 285.
[202] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, No. ICC-01/05-01/08-424, 15 June 2009, paras. 204–205.

which makes it the most appropriate legal characterisation".[203] Accordingly, *"[t]he Chamber therefore considers that the act of torture is fully subsumed by the count of rape"* and separate torture counts were not sent to trial.[204] This approach, influenced by jurisprudence on cumulative convictions, meant that victims of rape were legally characterized as victims of rape only (albeit rape itself was charged as both a crime against humanity and a war crime) even though the acts could also be seen as torture. The Chamber explicitly rejected the prosecution's practice of cumulative charging of torture and rape for the same underlying acts, reasoning that charging one offense was sufficient to capture the criminality. It considered this possible only in relation to distinct crimes, meaning that each offence must require at least one additional material element not present in the other.[205]

This early stance suggested a cautious approach in order to safeguard the rights of the accused, but it drew criticism from legal scholars for arguably failing to reflect the full spectrum of harm (rape as a form of torture).[206] Indeed, in the ICTY, by contrast, defendants had been convicted of both rape and torture for the same conduct when each offense's legal elements were met (for example, in *Kunarac* the ICTY convicted defendants of torture as a crime against humanity) for rapes committed in detention, recognizing rape can constitute torture when severe pain and purposive abuse are present).[207] The ICC's reluctance in *Bemba* to allow dual charges of rape and torture therefore marked a more restrictive initial approach than that of the ICTY.

The *Dominic Ongwen* case (2021) marked the first time the ICC convicted an accused of torture both as a crime against humanity and as a war crime.[208] The Trial Chamber applied the dual framework under the Rome Statute: for torture as a war crime (Article 8), a prohibited purpose such as punishment, intimidation, or coercion had to be established; for torture as a crime against humanity (Article 7), no specific purpose was required beyond the intent to inflict severe physical or mental pain in the context of a widespread or systematic attack against civilians. The Chamber held that the purpose requirement for the war crime of torture could be

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[203] Ibid para 204.
[204] Ibid para 205.
[205] *Ambos*, Leiden Journal of International Law 2009, 715 (723).
[206] Ibid.
[207] ICTY, *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002.
[208] ICC, *Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15-1762, Judgement of 4 February 2021 (Trial Chamber IX).

inferred from the context, implicitly fulfilling the legal standard.[209] The severity threshold was met through evidence of traumas and the custody or control requirement was satisfied, as victims were abducted and fully under LRA control.

The Ongwen case also contributed to the ICC's jurisprudence on cumulative convictions and other inhumane acts. Ongwen was convicted of forced marriage as a separate inhumane act, alongside charges of rape, sexual slavery, and enslavement. The defence argued these charges were duplicative; however, the Trial and Appeals Chambers held that each offence protected distinct legal interests and caused materially different harms.[210] This approach marks a shift from earlier ICC jurisprudence which had tended to subsume torture within sexual violence. *The Ongwen* judgment aligns more closely with ICTY/ICTR precedents, which often treated rape and torture as overlapping but independently chargeable crimes, recognizing the need for multiple convictions when each crime reflects a distinct aspect of harm and meets all relevant legal criteria.

In *Bosco Ntaganda's* case (2019), the accused was convicted of numerous war crimes and crimes against humanity in the Democratic Republic of Congo, including murder, rape, sexual slavery, forcible transfer, persecution, and use of child soldiers, but notably no separate count of torture or cruel treatment was charged. Many acts that would qualify as torture (beatings of detained persons, sexual violence amounting to severe suffering) were instead prosecuted under other labels. For example, the torture of detainees was legally subsumed under charges of persecution and attempted murder, and the sexual torture of child soldiers was prosecuted as rape and sexual slavery.[211] This charging choice reflected, in part, the legacy of *Bemba*'s cautious approach, the Office of the Prosecutor avoided adding torture charges that might be considered duplicative.

Nonetheless, the *Ntaganda* Trial Chamber did make factual findings on the extreme abuse suffered by victims. In its sentencing decision, the Chamber described how captives were brutally tortured by Ntaganda's men, highlighting the severe pain inflicted.[212] The Chamber

[209] Ibid para 2706.
[210] Ibid para 73.
[211] ICC, *Prosecutor v. Bosco Ntaganda*, Trial Judgment, No. ICC-01/04-02/06-2359, 8 July 2019, para. 994.
[212] Ibid para 623.

implicitly acknowledged that such conduct met the elements of torture (the victims were bound, beaten, sexually assaulted and humiliated), even though legally the conviction was recorded under other crimes.[213] Thus, while *Ntaganda* does not provide a detailed legal analysis of the definition of torture (since torture was not an independent count), it illustrates the ICC's recognition of torture-like conduct and its gravity. It also set the stage for a more expansive approach to charging in subsequent cases by underscoring that difference.

VI. Conclusion

This chapter traced the evolution of the legal concepts of torture and inhumane treatment in the jurisprudence of the ICTY, ICTR, and ICC. A key shift has been the rejection of the public official requirement, with Kunarac and later ICC case law affirming that individual criminal responsibility for torture does not hinge on official status, reflecting the realities of contemporary conflicts. The distinction between torture and inhumane treatment centres on the severity of suffering and the presence of a prohibited purpose. While acts such as beatings or sexual violence may meet the threshold of torture if inflicted with intent and purpose, they may otherwise qualify as inhumane treatment. Notably, the tribunals have consistently recognised that rape and other forms of sexual violence may amount to torture when these elements are present. Overall, international criminal tribunals have advanced a more coherent and victim centred understanding of torture, refining its elements and aligning international criminal law with evolving human rights standards.

E. Final conclusion

This thesis has traced the evolving legal understandings of torture and inhumane treatment across three primary regimes of international law: United Nations human rights bodies, the European Court of Human Rights, and international criminal tribunals. While all affirm the absolute and non-derogable nature of the prohibition of torture, their interpretations diverge in structure, emphasis, and doctrinal development, differences that are not merely semantic but reflect institutional purposes, normative priorities and procedural contexts.

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[213] Ibid para 943.

Under the UN Convention against Torture, the Committee against Torture has established a relatively strict definitional framework: torture requires severe pain or suffering, inflicted intentionally, for a specific purpose, and by or with the acquiescence of a public official. This four-element model serves to distinguish torture from other forms of CIDT, which may lack one or more of these features. In practice, the CAT has placed particular weight on the purposive element viewing it as the critical criterion that elevates an act to the level of torture. While severity matters, it is not determinative on its own. The jurisprudence demonstrates that acts of substantial brutality, if devoid of intent or a prohibited aim, will typically be classified as CIDT under Article 16 rather than torture under Article 1.

By contrast, the Human Rights Committee, interpreting Article 7 of the ICCPR, avoids drawing sharp distinctions between torture and CIDT. Its jurisprudence emphasizes holistic, victim-centered assessments of suffering and dignity, rather than technical categorization. The absence of a clear textual definition of torture in the ICCPR allows the Committee to assess conduct more flexibly, guided by context, duration, and vulnerability, rather than by a fixed checklist of elements. This approach may obscure analytical boundaries but reflects Committee's broader interpretative position which prefers substance over formalism. Unlike the CAT it does not condition its findings on official involvement or a specific purpose allowing it to address a wider range of abuses, including by non-state actors and in detention systems operated by private entities.

The ECtHR, working within the European Convention framework, has developed a nuanced typology of ill-treatment: torture, inhuman treatment, and degrading treatment. While early judgments like *The Greek Case* and *Ireland v United Kingdom* articulated a hierarchical approach based on severity and purpose, later jurisprudence, particularly *Selmouni v France* signaled a more dynamic and evolutionary reading of Article 3. The Court recognizes that what may once have been classified as inhuman or degrading treatment could, with the passage of time and changing standards, now amount to torture. In this sense, the Court's interpretative method, anchored in the "living instrument" doctrine, has allowed for progressive recalibration of thresholds, especially in relation to police violence, sexual abuse, and psychological harm. At the same time, it retains the purposive element as a distinguishing feature of torture, thereby aligning in part with CAT jurisprudence.

International criminal tribunals, meanwhile, have approached the prohibition of torture from the vantage point of individual criminal responsibility. The ICTY and ICTR adopted the CAT definition in early judgments but gradually moved away from requiring official capacity, as seen in *Kunarac*. This shift shows the tribunals' context, armed conflict and mass atrocities, where non state actors often play central roles. Here, the threshold of severity is evaluated in light of the particular vulnerabilities of victims in conflict settings and the purposive element remains central. The ICC has further modified this framework by omitting the purpose requirement for torture as a crime against humanity, while retaining it for war crimes. In doing so, it has created a dual model: one aimed at structural violence (under Article 7), the other at situational abuse (under Article 8). It also departs from the public official criterion, focusing instead on control over the victim.

In sum, this analysis has demonstrated that the concept of torture is not static, nor is it interpreted uniformly across jurisdictions. CAT, the HRC, ECtHR, and international tribunals share a foundational commitment to its absolute prohibition but diverge in their legal definitions, required elements, and institutional priorities. The CAT emphasizes purpose and official involvement; the Human Rights Committe emphasizes context and dignity; the ECtHR balances severity and evolving societal standards; the international tribunals focus on individual culpability, privileging severity and intent while adapting definitions to complex conflict scenarios.

What unites these bodies is the recognition that torture, whether physical or psychological, inflicted by state actors or non-state agents, represents a fundamental attack on human dignity. While their legal vocabularies differ, their jurisprudence reflects an underlying convergence toward accountability, prevention, and the irreducible value of the human person. The future development of international law in this field will likely continue to be shaped by this tension between definitional precision and moral clarity, between the necessity of legal thresholds and the imperative to respond to human suffering.

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