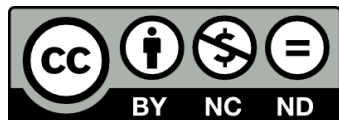




Definition of Torture and Cruel, Inhuman or Degrading Treatment, and Main Obligations to Prevent Them

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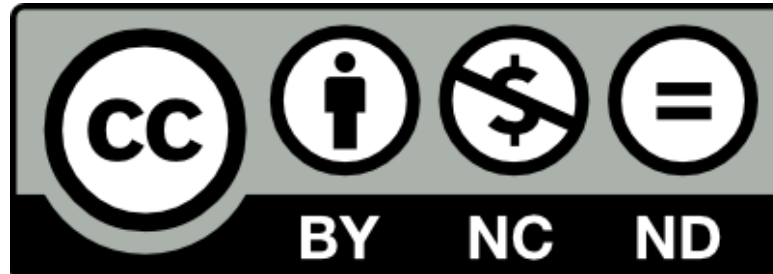
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OVERVIEW

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1. Definition of Torture

Definition of Torture

Torture is defined in the UN Convention against Torture (UNCAT) as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”

Definition of Torture

Four essential elements form the definition of torture, distinguishing it from ill-treatment:

1. Infliction of severe physical and/or mental pain or suffering
2. To achieve a purpose (confession, information, intimidation, discrimination...)
3. Intention (as opposed to negligence)
4. State responsibility, involvement of a public official

Additional criterion: Powerlessness, defenselessness of the victim, which is completely in the torturer's power (especially during detention)

Definition of Torture

1. **Infliction of severe physical and/or mental pain or suffering**
 - Severe pain or suffering must be inflicted
 - Mental pain or suffering is sufficient (e.g. caused by the threat of death or torture)
 - By no means does the severity have to be equivalent in intensity to the pain caused by serious physical injury

Definition of Torture

2. Pain or suffering must have been inflicted to achieve a certain **purpose**, such as:

- extraction of a confession
- obtaining information from a victim or a third person
- punishment, intimidation and coercion
- discrimination.

➔ The list of purposes included in the UNCAT is **not exhaustive**

Definition of Torture

3. The pain or suffering must be inflicted **intentionally**
- Torture cannot be inflicted by negligence
 - Intention must also exist with respect to achieving a certain purpose.

Definition of Torture

4. **State responsibility:** Torture requires the involvement of a public official:
- The instigation, consent or acquiescence are sufficient
 - State responsibility already exists with the active or passive agreement or the lack of possible intervention by a public official

Definition of Torture

- The prohibition of torture takes a special position in international law
 - it is one of the very few **absolute** and **non-derogable** human rights
 - It cannot be balanced against any other right or concern
 - It goes further than the protection of the **right to life** which can be limited under very restricted circumstances
 - Cannot be subject to derogation

Definition of Torture

- *“Cruel, Inhuman and Degrading Treatment and Punishment”*, also called *“ill-treatment”* is not defined in the UNCAT
 - Art. 16: ill-treatment can be negatively delimited from torture by not requiring intention or a specific purpose
 - Qualification of degrading treatment does not require severe pain or suffering, but the particular humiliation of the victim
 - In practice, the distinction between torture and ill-treatment is not always clear

Definition of Torture

- **Powerlessness:** Serves as additional criterion to delimit torture from cruel, inhuman or degrading treatment:
 - Torture is predominantly inflicted on persons deprived of their liberty
 - Complete dependency towards the officials in charge leads detainees to be very vulnerable to abuses

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2. Criminalisation of Torture and Ill-treatment

Criminalisation of Torture and Ill-treatment

- All countries should include a definition of torture in their criminal law
- Art.4 UNCAT: *"ensure that all acts of torture are offences under its criminal law"*
- The definition of torture should contain **the same elements** as Art. 1 UNCAT
- Crimes of torture should not be subject to prescription

Criminalisation of Torture and Ill-treatment (cont´d)

- The accountability of state agents under domestic criminal law also has to be in line with the UNCAT definition
- Art. 5 UNCAT requires States to furnish their courts with **universal jurisdiction**
- ➔ States are under the obligation to initiate criminal proceedings against any alleged perpetrator of torture who is present on that State's territory



3. Investigation

Investigation

- **Impunity** for the perpetrators is one of the principal factors contributing to torture
- Main reason for impunity = lack of investigations
- States have to initiate a prompt and impartial investigation on the basis of an allegation by the victim or wherever there is reasonable ground to believe that an act of torture has been committed (Art. 12, 13 UNCAT, Art. 2 ICCPR)
- Investigations do not require a formal complaint!

Investigation

- Investigations requirements:
 - prompt – otherwise physical traces could disappear
 - impartial, i.e. serious, effective and unbiased
 - carried out by appropriately qualified individuals
 - responsible authorities should not have preconceptions and should not promote interests of one of the parties

Investigation

The most efficient way to determine whether torture or ill-treatment have occurred is the **independent monitoring** of places of detention.

Examples of bodies carrying out monitoring visits:

- National Preventive Mechanisms (NPM), NGOs, ICRC, CPT, the SPT or the UNSRT

Investigation

- Competent authorities to conduct an impartial investigation include:
 - courts
 - ombuds-institutions
 - national human rights institutions
 - detention monitoring commissions
 - public prosecutors
 - special independent police ('police-police')

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4. Remedy and Reparation to Victims of Torture and Ill-treatment

Remedy and Reparation

○ States parties to UNCAT are obliged to assist victims of torture and to grant them adequate reparation. Art. 13 UNCAT:

- grants every victim an effective right to complain to a competent body
- implicates that the State party takes the necessary measures to protect the complainant and witnesses
- constitutes the basic remedy for torture victims
- requires complaint by victim to launch investigation
- completes the obligation to launch an ex-officio investigation under Art. 12

Remedy and Reparation

- Art. 14(1) UNCAT must be seen as a specific manifestation of the general right of victims of human rights violations to a remedy and adequate reparation
- *as enshrined in Art. 2(3) ICCPR*

Remedy and Reparation

○ For victims of torture and ill-treatment, such reparation might consist in:

- a proper investigation of the truth
- an official recognition of the act of torture
- an apology by the responsible authorities
- the criminal prosecution and conviction of the individual perpetrators
- monetary compensation (which is **not** sufficient)
- guarantees of non-repetition, if torture is systematic (amending laws, fighting impunity)

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5. Prevention - Legal Safeguards and Preventive Monitoring

Prevention

- The ultimate aim must be to prevent acts of torture and ill-treatment before they occur. UNCAT reflects this by putting a heavy emphasis on **prevention**. Art. 2(1) UNCAT provides that:
 - *“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.*
- Art. 16(1) extends this obligation to ill-treatment.

Prevention

- Prevention has to be understood in a **very broad sense**, including:
 - adoption of relevant laws
 - provision of effective legal remedies for victims
 - implementation of procedural safeguards
 - establishment of the necessary institutional and organisational capacity to prohibit torture
- A number of **provisions** in the UNCAT and other treaties (ICCPR, UNSMRT) aim directly or indirectly at preventing torture & ill-treatment.

Prevention

- Rights that ensure detainees' **contact** with the outside world:
 - Right to personal liberty & prohibition of arbitrary or secret detention
 - Right of detainees to receive family visits
 - Prohibition of incommunicado detention
 - Right to prompt access to a doctor and lawyer
 - Right to habeas corpus

Prevention

- **Fair trial and due process standards:**
 - right of detainees to be immediately informed of the reasons of their arrest & the charges against them
 - obligation to keep police custody as short as possible (not longer than 48 hours)
 - right of all arrested persons to be brought promptly before a judge

Prevention

- Ensuring that the organisational **structure & capacities** of security forces minimise the risk of torture and ill-treatment through:
 - appropriate education and training of law enforcement (Art. 10 UNCAT)
 - systematic review of interrogation methods and conditions of detention (Art. 11 UNCAT)

Prevention

- **The Standard Minimum Rules for the Treatment of Prisoners (UNSMRT):**
 - keeping of adequate detention registers
 - audio-/video-recording of interrogations
 - mandatory medical examinations upon arrival and detention and after each transfer
 - the prohibition of prolonged solitary confinement.

Prevention

- Measures minimising **incentives** to use torture:
 - Law enforcement bodies provided with appropriate technical equipment to enable professional forensic investigations
 - Domestic law ensuring that evidence tainted by torture is inadmissible in any judicial proceedings (Art. 15 UNCAT)

Prevention

- The obligation to prevent torture and ill-treatment is not limited to the State's own territory, but also has an **extra-territorial** effect:
 - the **principle of non-refoulement** (Art. 3 UNCAT) prohibits State parties from expelling, returning, extraditing or otherwise rendering a person to other States where they are at risk of being subjected to torture.

Prevention

- **Monitoring** of places of detention is one of the most effective measures preventing torture and ill-treatment.
- Examples of independent mechanisms:
 - The UN Subcommittee on Prevention of Torture (SPT)
 - The European Committee for the Prevention of Torture (CPT)
 - National Preventive Mechanisms (NPM) established in accordance with the OPCAT