

The distinction between torture and cruel, inhuman or degrading treatment

Manfred Nowak* & Elizabeth McArthur**

Abstract

The present article seeks to clarify the distinction between torture and cruel, inhuman or degrading treatment. The author argues that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim and that as such the distinction is primarily linked to the question of personal liberty. He concludes that the *scope of application* of CIDT is a relative concept, that outside a situation of detention and similar direct control, the prohibition of CIDT is subject to the proportionality principle. Here, only excessive use of police force constitutes CIDT. In a situation of detention or similar direct control, however, no proportionality test may be applied. Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment and any infliction of severe pain or suffering for a specific purpose as expressed in Art. 1 CAT amounts to torture.

Key words: CIDT, torture, human rights, personal liberty, police force

*) UN Special Rapporteur on Torture
University of Vienna
Ludwig Boltzmann Institute of Human Rights
manfred.nowak@univie.ac.at

***) Research Assistant to Professor Manfred Nowak

Introduction

The human right to personal integrity is usually defined as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (CIDT). Not only is it non-derogable in times of war and emergency in the various regional and universal treaties, it is also ensured without any restriction whatsoever¹. In my report to the UN Commission on Human Rights in December 2005² I sought to make clear the distinction between torture and cruel, inhuman or degrading treatment (CIDT). This issue is one of extreme importance in the present climate as we have observed an increasing number of governments, in the aftermath of 11 September 2001 and other terrorist attacks, adopting a legal position which, while acknowledging the absolute nature of the prohibition of torture, puts the absolute nature of the prohibition of CIDT into question. In particular, it has been argued that certain harsh interrogation methods falling short of torture might be justified for the purpose of extracting infor-

1) Cf. Art. 5 UDHR; Art.3 of all four Geneva Conventions 1949; Art. 3 and 15(2) ECHR; Art. 7 and 4(2) CCPR; Art. 5(2) and 27(2) ACHR; Art. 5 ACHPR.

2) See Chapter IV, UN Doc.E/CN.4/2006/6.

mation aimed at preventing future terrorist acts that might kill innocent people. Most notably the US administration has courted intense criticism in its attempts to re-define torture in a highly restrictive sense while simultaneously distinguishing it from other forms of CIDT.³ This refers, in this context, to its reservations concerning Articles 7 CCPR (Covenant for Civil and Political Rights) and 16 CAT, according to which CIDT shall be interpreted in the sense of cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment to the US Constitution.⁴ Certain European Governments, including the Netherlands, as well as both the Human Rights Committee and the Committee against Torture consider these reservations as incompatible with the object and purpose of the respective treaties and, therefore, null and void.⁵

Definitions

Article 1 CAT defines torture as any act which consists of the intentional infliction of severe pain or suffering (physical or mental), involving a public official (directly

or at the instigation or consent or with the acquiescence of a public official, or another person acting in an official capacity), and for a specific purpose (i.e. extracting a confession, obtaining information, punishment, intimidation, discrimination). Article 1 has to be read in conjunction with Article 16, which requires States parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”. It follows from a combined reading of both provisions that torture is an aggravated form of cruel, inhuman or degrading treatment or punishment. Acts falling short of the definition in Article 1, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise cruel or inhuman treatment under Article 16 of the Convention while acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

The distinction between torture and less serious forms of ill-treatment, all of which are absolutely prohibited under Article 7 CCPR, other international and regional treaty provisions as well as customary international law, was introduced because some of the specific State obligations laid down in CAT were meant to apply to torture only (above all, the obligation to criminalize acts of torture and to apply the principle of universal jurisdiction in this regard). Other obligations aimed at prevention, in particular by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial ex officio investigation, and by ensuring an effective complaints mechanism, as laid down in Articles 10 to 13, must be equally applied to other forms of ill-treatment as well.

3) For a discussion on this issue see Nowak, /What Practices Constitute Torture?: US and UN Standards./, 28 Hum. Rts. Q. 809 (Nov. 2006) (unpublished).

4) See /Multilateral Treaties deposited with the Secretary General/, Status as at 31 Dec. 2004. Vol. 1, 183 and Vol. 1, 286 for the text of reservations to Art. 7 CCPR and 6 CAT respectively. On the ticking time bomb scenario see also REDRESS: /Terrorism, Counter-Terrorism and Torture. International Law in the Fight against Terrorism, 25. /London/, /July 2004. <http://www.redress.org/publications/TerrorismReport.pdf#search=%22terrorism%20counter%20terrorism%20and%20torture%20redress%22>.

5) See e.g. Concluding Observations of the CAT (A/55/44 para. 179 (b)) and the HRC (CCPR/C/79/Add.50 paras. 278 and 279).

The argument behind the legal distinction between torture and CIDT

The argument behind the legal distinction between torture and CIDT runs as follows. Whereas torture might be considered as absolutely prohibited, CIDT by definition is a relative concept. The beating of a detainee with a truncheon for the purpose of extracting a confession must be considered as inhuman or degrading treatment, but the beating of demonstrators in the street with the same truncheon for the purpose of quelling a riot or non-peaceful demonstration might be justified as lawful use of force by law enforcement officials. In other words, since the enforcement of the law against suspected criminals, rioters or terrorists necessarily demands the use of force and even of lethal weapons by the police and other security forces, only excessive use of force can be considered as CIDT. Whether the use of force is to be qualified as lawful or excessive, depends on the proportionality of the force applied in a particular situation. The application of the principle of proportionality is, however, an indicator of the non-absolute character of the right in question.

The principle of proportionality requires first of all the legality of the use of force under domestic law, which is usually regulated in police codes. Secondly, the use of force must aim at a lawful purpose, such as effecting the lawful arrest of a person suspected of having committed an offence, preventing the escape of a person lawfully detained, defending a person from unlawful violence, self-defence, or an action lawfully taken for the purpose of dissolving a demonstration or quelling a riot or insurrection. Thirdly, the type of weapons used and the intensity of the force applied must not be excessive but necessary in the particular circumstances of the case in order to achieve any of the lawful purposes outlined above.

This means that the law enforcement officers must strike a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected. If a thief, for example, has been observed stealing a toothbrush in a supermarket, the use of firearms for the purpose of effecting his or her arrest must be considered as disproportionate. But for the purpose of arresting a person suspected of having committed murder or a terrorist attack, the police may, of course, use firearms if other less intrusive methods have proven non-effective. Firearms, however, should always be used as a measure of last resort and should not be used to kill the person being arrested but only to prevent him or her from escaping. Nevertheless, to shoot into the legs of a person as a least intrusive measure to effect his arrest or prevent his escape causes serious physical injuries and severe physical pain and suffering. While it would definitely constitute an interference with the human right to physical integrity, as a proportional measure it would not constitute CIDT. In other words, since the right to personal integrity and dignity has been defined in both absolute and negative terms, the proportionality test is not applied in relation to a limitation clause which explicitly would allow for lawful and proportional interference, but one step earlier, i.e. in relation to the definition of the scope of application of the right. If the police uses non-excessive force for a lawful purpose, then even the deliberate infliction of severe pain or suffering simply does not reach the threshold of CIDT.

Having concluded that the scope of application of CIDT is a relative concept, the following question is only logical: Why should the same proportionality test not be applied to the use of physical or mental force against a detainee for the purpose of extracting information which might be es-

essential for the prevention of a crime and/or the protection of the life, security and health of other people? Is the interrogation of suspected criminals not as legitimate a purpose of policing as dissolving a demonstration or effecting the arrest of a suspected criminal? Does a little beating of a detainee with the result of obtaining a confession or important information for the criminal investigation or for preventing future criminal offences not cause less severe pain or suffering than shooting into the legs of a person for the purpose of preventing his escape? Are we not applying double standards?

These are difficult questions to answer. Some authors, including Herman Burgers who chaired the Working Group drafting the CAT in the 1980s, have argued that victims of the prohibition of torture and CIDT in the sense of Art. 1 and 16 CAT “must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment”.⁶ This interpretation would, however, exclude excessive use of police force outside detention and similar factual control from the scope of application of this important human right. The European Court of Human Rights, the Committee against Torture and the Inter American Commission on Human Rights has not followed this approach. There are cases in which the excessive use of police force out-

side detention, by applying the proportionality test, has been found to constitute CIDT.⁷ If such use of force is disproportionate in relation to the purpose to be achieved and results in severe pain or suffering, it amounts to cruel or inhuman treatment or punishment. If such force is used in a particularly humiliating manner, it may be qualified as degrading treatment even if less severe pain or suffering is thereby inflicted.

Torture, on the other hand, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness of the victim which usually means deprivation of personal liberty or a similar situation of direct factual power and control by one person over another.⁸ Here I agree with Herman Burgers and Hans Danelius. A thorough analysis of the *travaux préparatoires* of Art. 1 and 16 CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture has led me to the conclusion that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim.

In other words, as long as a person is at liberty and able to resist the lawful use of force by law enforcement officials, the proportionality test applies and even the use of

6) JH Burgers & H Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other cruel, Inhuman or Degrading Treatment of Punishment* (1988), 149.

7) See, e.g., the cases of *R.L. and M.-J.D. v. France* (application no. 44568/98) concerning ill-treatment during police intervention in a dispute at a restaurant which resulted in a violation

of Art.3 ECHR; See *CAT/C/29/D/161/2000* the case where a mob demolished a Roma settlement with the knowledge of the local police and without the police preventing its occurrence that was found to be a violation of Art. 16 CAT. See the *Corumbiara Case*, IACHR No. 11556 of March 11, 2004. Report No 32/04.

8) See, e.g., Burgers & Danelius 120; Ingelse 211; Art. 7(2)(e) of the ICC Statute.

weapons might be justified in the particular circumstances of the case. Although such use of force undoubtedly constitutes an interference with the right to personal integrity, it falls outside the scope of the prohibition of CIDT. As soon as the person concerned is, however, under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted. If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession or information, it must even be considered as torture. It is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test.

Conclusion

In conclusion, the distinction between torture and CIDT is an important one and relates primarily to the question of personal liberty. Outside a situation of detention and similar direct control, the prohibition of CIDT is subject to the proportionality principle. Only excessive use of police force constitutes CIDT. In a situation of detention or similar direct control, no proportionality test may be applied and the prohibition of torture and CIDT is absolute. Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment. Any infliction of severe pain or suffering for a specific purpose as expressed in Art. 1 CAT amounts to torture.