“In truth the leitmotiv”: the prohibition of torture and other forms of ill-treatment in international humanitarian law

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Abstract
The principle of humane treatment, as Jean Pictet wrote in 1958, is in truth the leitmotiv of the four Geneva Conventions of 1949. Article 3 common to these Conventions and other provisions of International Humanitarian Law embody this absolute and minimum rule by prohibiting torture, cruel or inhuman treatment and outrages upon personal dignity. These notions can be interpreted in meaningful and practical ways through the existing instruments and jurisprudence on the prohibition of ill-treatment. Their assessment must take into account the need to respect the human being in all his or her physical, mental and moral integrity, mindful of all the circumstances of the case.

* The article reflects the views of the author alone and not necessarily those of the ICRC. The author would like to thank Roland Bank, Knut Dörmann and Yuval Ginbar for their comments on an earlier draft.
Introduction

The obligation of any party to a conflict to treat anyone in their power humanely, or with humanity, stands at the core of international humanitarian law (IHL). Jean Pictet wrote in 1958 that the principle of humane treatment “is in truth the leitmotiv of the four Geneva Conventions”. No war, no imperative reason of national security, no military necessity can justify inhumane treatment.

Article 3 common to the Geneva Conventions (Common Article 3) embodies this absolute and minimum rule of IHL. Persons in the hands of the party must “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”, and “to this end, the following acts are and shall remain prohibited at any time and in any place whatsoever … violence to life and person, in particular … mutilation, cruel treatment and torture … outrages upon personal dignity, in particular humiliating and degrading treatment”.

The notions “torture”, “cruel treatment” and “outrages upon personal dignity” are analysed in the following article. Jurisprudence, especially of the International Criminal Tribunal for the former Yugoslavia (ICTY), but also of other bodies, has given a clearer contour to these terms and has made it possible to give illustrations as to the prohibited behaviour. The analysis will begin by delineating the framework within which the notions of ill-treatment in Common Article 3 are to be understood. It then describes the notions of “cruel and inhuman treatment”, “torture” and “outrages upon personal dignity”. The last part of the article deals with some examples of treatment contrary to the prohibition of ill-treatment.

The article concentrates on Common Article 3, which contains all three forms of ill-treatment discussed here. The meaning of the notions contained in Common Article 3 is, however, the same as in other provisions which speak of torture or cruel, inhuman, degrading or humiliating treatment. So throughout the analysis, while the emphasis is put on Common Article 3, the definitions described would equally apply to other provisions of IHL, such as Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, Article 75 of Additional Protocol I, Article 4 of Additional Protocol II.

Lastly, it should also be emphasized that the prohibition of ill-treatment does not mean that other treatment which does not reach the threshold of ill-treatment is necessarily lawful. Indeed, other treatment such as intimidation, insults or exposure to public curiosity, unpleasant or disadvantageous treatment, or coercion are equally prohibited.

1 See, e.g., Article 4 of the Hague Regulations of 1907, Article 13 of the Third Geneva Convention (GC III), Articles 4, 27 of the Fourth Geneva Convention (GC IV).
3 Article 13 of GC III.
4 Article 17 of GC III.
5 Articles 17, 99 of GC III; Article 31 of GC IV.
General remarks on Common Article 3

Three strictly prohibited forms of ill-treatment

Common Article 3 prohibits three different forms of ill-treatment: torture, cruel and inhuman treatment, and outrages upon personal dignity. As we shall see, these notions are not identical. In certain respects their legal consequences vary, especially with regard to criminal law obligations such as the exercise of universal jurisdiction. However, the distinction is of no consequence in terms of the prohibition enshrined in that article. Common Article 3 absolutely prohibits all three forms of ill-treatment in all circumstances. Similarly, international human rights law absolutely prohibits all forms of ill-treatment; this prohibition also applies in situations of emergency, such as war or the threat of war. 6 No situation exists in which torture would be prohibited but another form of ill-treatment allowed.

Sources of interpretation for Common Article 3

To interpret Common Article 3 and outline its material content, this analysis draws on a number of sources. First, the article itself and its various notions have been interpreted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and considerable guidance can be found in their jurisprudence.

Second, the notions of ill-treatment in Common Article 3 must also draw on international human rights treaties, soft-law instruments and jurisprudence. Indeed, while there are a number of differences between international human rights law and international humanitarian law, the notions of ill-treatment are so similar in both bodies of law that the interpretation of one body of law influences the other and vice versa. 7

The differences between human rights law and international humanitarian law are in particular as follows: while human rights law is applicable at all times, binding only states and many of its provisions being derogable, international humanitarian law applies only in situations of armed conflict, also binds non-state parties and is in principle not derogable. 8 The prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment

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6 International Covenant on Civil and Political Rights (ICCPR), Article 4; European Convention on Human Rights (ECHR), Article 15; American Convention on Human Rights (ACHR), Article 27; Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2(2). Situations of emergency include situations of terrorist threat, see Inter-American Court of Human Rights (IACHR), Cantoral Benavides v. Peru, Judgment of 18 August 2000, Series C, No. 69, para. 95; European Court of Human Rights (ECtHR), Chahal v. United Kingdom, Judgment of 15 November 1996, Report 1996-V, para. 79.

7 See, e.g., International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Furundzija, Case No. IT-95-17/1 (Trial Chamber), 10 December 1998, para 159.

8 With the sole exception of Article 5 GC IV, which in any case preserves the obligation to treat all persons with humanity.
is not derogable in international human rights law. It must be respected and upheld even in situations of armed conflict. Thus the only difference between international human rights law and international humanitarian law is that under the latter, non-state parties to the conflict can also be held accountable for torture and other forms of ill-treatment committed in the context of the conflict, regardless of whether they act with the consent or acquiescence of the state, whereas to find a violation of human rights law, the act must have been committed by, or at the instigation of or with the consent or acquiescence of, a state agent. In terms of the treatment required, however, there is no difference between the notions in both bodies of law.

Necessarily general definitions

The definitions of torture and cruel, inhuman or degrading treatment and outrages upon personal dignity are necessarily general, for several reasons.

First, the definitions are meant to cover a wide range of situations so that they must remain relatively flexible to do so. Consideration must be given not to an abstract act, but to the situation of a person and all the surrounding circumstances. While it is possible to say in abstract that some acts are always prohibited (e.g. rape or mutilation), it is impossible to define in advance a list of lawful acts for all persons, regardless of such factors as the age, sex, culture and state of health of the individual and without taking into account the particular circumstances of the case. It is equally unworkable to draw up a finite list of interrogation methods that would be acceptable at all times, because such a list would necessarily have to indicate that the accumulation of several methods can amount to various forms of ill-treatment.

9 ICCPR, Article 4; CAT, Article 2(1); ECHR, Article 15; ACHR, Article 27.
11 This is without prejudice to the obligation of non-refoulement (prohibition of forced expulsion) when the person faces a risk of ill-treatment by a non-state party; see, e.g., the Judgment of the European Court of Human Rights in H.L.R. v. France, Judgment of 29 April 1997, Reports 1997-III. The human rights violation in these cases consists in the transfer of the person, not in the treatment that the person faces by the non-state party.

Further, states have positive obligations to prevent, investigate and sanction acts of non-state actors which impair the enjoyment of human rights; see General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10.
13 Besides, certain methods of interrogation would amount to coercion prohibited under IHL, see Articles 17, 99 of GC III; Article 31 of GC IV; “Coercion” covers “all cases, whether the pressure is direct or indirect, obvious or hidden (as for example a threat to subject other persons to severe measures, deprivation of ration cards or of work)”, Commentary on GC IV, above note 2, p. 219.
Second, people subjected to ill-treatment almost invariably suffer not just one isolated act, but experience a number of acts and conditions which, together, amount to ill-treatment.\footnote{14} It is hence often impossible to infer from the jurisprudence of international bodies that specific acts constitute torture or another form of ill-treatment, for the very reason that they are not confronted with such isolated acts. This jurisprudence simply reflects the reality of ill-treatment.

Lastly, the various notions of ill-treatment also evolve with the passage of time, and acts that might not have been considered as torture or ill-treatment in the past might be considered so now.\footnote{15} The 1958 Commentary on the Geneva Conventions acknowledges this by stating that “[i]t seems useless and even dangerous to attempt to make a list of all the factors which make treatment “humane”,\footnote{16} and it is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted [in Common Article 3] is flexible, and, at the same time, precise.\footnote{17}

Necessarily overlapping notions

As we shall see, there is no difference in meaning between cruel and inhuman treatment. Also, the lines between degrading treatment, cruel or inhuman treatment and torture are fluid. While the wording of the Geneva Conventions as well as jurisprudence suggest that cruel and inhuman treatment is of a nature to cause more serious harm than degrading treatment, and that torture is of a nature to cause more severe harm than cruel and inhuman treatment, it is extremely difficult in practice to draw a clear line between the thresholds of suffering.

None of the above means, however, that the notions are so unclear that they are impossible to define or observe in practice. There are numerous...
indicators, lowest thresholds and cases which help to define more clearly what falls under the different definitions in international law. To demand more certainty would be to misunderstand the very nature of ill-treatment.

**Common Article 3 is only a minimum standard of treatment**

Lastly, before entering into the content of the notions in Common Article 3, it must be recalled that this provision only constitutes a minimum standard to be observed, and that the parties to the conflict are encouraged to set a higher standard. In particular, it does not affect the other obligations under treaty law and customary international law with regard to conditions of detention.

**Cruel or inhuman treatment**

The notions of “cruel” and “inhuman” treatment are synonymous. Inhuman treatment is not explicitly mentioned in Common Article 3, which only stipulates that persons taking no active part in hostilities “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. The notion of inhuman treatment appears in other articles of the Geneva Conventions, namely the grave breaches provisions in Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, and in Article 75 of Additional Protocol I and Article 4 of Additional Protocol II.

However, international jurisprudence and state practice show that no differentiation can be made between cruel treatment as prohibited in Common Article 3 and inhuman treatment in the grave breaches provisions. The ICTY has explicitly said that there is no difference between cruel and inhuman treatment. The ICTY, Prosecutor v. Delalic and Others, Case No. IT-96-21 (Trial Chamber), 16 November 1998, para. 552; see also Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Trial Chamber), 26 February 2001, para. 265; Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), 3 March 2000, para. 186.

The European Court of Human Rights (ECtHR) does

**Serious physical or mental suffering or serious attack on human dignity**

To qualify as cruel or inhuman treatment, an act must cause suffering of a serious nature. It must go beyond mere degradation or humiliation.

In this vein, the ICTY defines inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”. The European Court of Human Rights (ECtHR) does
not always follow the same wording in the way that the ICTY does, but it does require “a minimum level of severity” for treatment to attain the threshold of ill-treatment.\textsuperscript{20} The Inter-American Court of Human Rights (IACtHR) has followed the ICTY’s definition.\textsuperscript{21}

Again, the notion of human dignity is central to the definition. As explained in the ICRC Commentary with regard to the grave breaches provisions of Articles 130 of the Third Geneva Convention (GC III) and 147 of the Fourth Geneva Convention (GC IV), inhuman treatment is a wider concept than just an attack on physical integrity or health. It is intimately linked with the general rule that every person must be treated with respect for human dignity. An example given in the Commentary of inhuman treatment violating human dignity is that of a prisoner of war or interned civilian completely cut off from the outside world and in particular from his or her family, or of measures which would cause great injury to his or her human dignity.\textsuperscript{22}

**General and circumstantial criteria**

As far as the seriousness of the physical or mental suffering is concerned, the ICTY considers that, as for the crime of torture, “whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis”,\textsuperscript{23} no durational requirement being built into the definition of the crime.\textsuperscript{24} It has in particular found that conditions of detention can amount to cruel and inhuman treatment. The Geneva Conventions and Protocols contain numerous provisions on the minimal acceptable conditions of detention.\textsuperscript{25}

This jurisprudence echoes that of human rights bodies and texts. The ECtHR has stated in general terms that

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention on Human Rights (ECHR). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.\textsuperscript{26}

It has considered treatment to be “inhuman” because,

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  \item \textsuperscript{20} ECtHR, \textit{Ireland v. United Kingdom}, Judgment of 18 January 1978, Series A, No. 25, para. 162.
  \item \textsuperscript{21} IACtHR, \textit{Caesar v. Trinidad and Tobago}, Judgment of 11 March 2005, Series C, No. 13, para. 68.
  \item \textsuperscript{23} ICTY, \textit{Prosecutor v. Limaj and Others}, Case No. IT-03-66-T (Trial Chamber), 30 November 2005, para. 232.
  \item \textsuperscript{24} ICTY, \textit{Prosecutor v. Naletilic and Martinovic}, above note 19, para. 300.
  \item \textsuperscript{25} See ICTY, \textit{Prosecutor v. Hadzhasanovic and Kubura}, Case No. IT-01-47-T (Trial Chamber), 15 March 2006, paras. 35–36, concerning the conditions of detention in Additional Protocol II.
  \item \textsuperscript{26} See ECtHR, \textit{Kudła v. Poland}, Judgment of 26 October 2000, paras. 90–94 with further references.
\end{itemize}
*inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. On the other hand, the Court has consistently stressed that the suffering and 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.\(^27\)

The African Commission on Human and Peoples’ Rights has clearly followed the ECtHR’s approach.\(^28\)

The Human Rights Committee has similarly relied on “all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.\(^29\)

The Inter-American Court of Human Rights has held that

> The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.\(^30\)

In sum, to assess serious suffering for the purpose of ascertaining cruel or inhuman treatment all circumstances of the case are relevant. It may be committed in one single act or can result from a combination or accumulation of several acts which, taken individually and out of context, may seem acceptable. As said above, ill-treatment frequently does not take the form of an isolated act, but is composed of several factors. It cannot be stressed enough that the cumulative effect of the conditions and treatments can be critical.\(^31\) They include the manner and method or the institutionalization of the treatment, environment, duration, isolation, mental health or strength, cultural beliefs and sensitivity, gender, age, social or political background, past experiences, racial discrimination\(^32\) and the repetition or cumulative effect of one or several acts. This is not to say that the notion is completely contingent on the subjective feelings of an individual. Rather, the question is whether in general one can say that for any person in a situation

\(^{27}\) Ibid.


comparable to that of the person subjected to the specific treatment, this treatment would cause serious mental or physical suffering. It is not necessary to rely on a completely subjective sensitivity. For instance past experiences, while individual, can have an objective impact on the assessment. If someone who has previously been submitted to a certain type of treatment is threatened again with such treatment, that threat can have a stronger impact than for a person who has not had such a past experience. So while the experience is completely subjective, it is objectively possible that this factor contributes to the suffering of any person in a similar position.

Certain specific acts that have been considered cruel or inhuman include such varied situations as lack of adequate medical attention,\(^3\) "holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time",\(^4\) placing someone in the boot of a vehicle even in the absence of any other ill-treatment,\(^5\) the so-called death-row phenomenon,\(^6\) certain methods of punishment, especially corporal punishment,\(^7\) certain methods of execution,\(^8\) certain conditions of detention,\(^9\) the imposition of the death penalty after an unfair trial,\(^10\) involuntary sterilization,\(^11\) gender-based humiliation such as shackling women detainees during childbirth,\(^12\) or the use of electroshock devices to restrain persons in custody.\(^13\)

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39 See text below corresponding to notes 130–148.
40 ECtHR, Ocalan v. Turkey, Judgment of 12 May 2005 (Grand Chamber), paras. 168–175; Committee against Torture, “Concluding observations, Guatemala”, UN Doc. CAT/C/GTM/CO/4, 25 July 2006, para. 22.
42 Committee against Torture, “Concluding observations, United States of America”, above note 38, para. 33.
43 Ibid., para. 35.
It is important to stress that the suffering need not necessarily be physical. Mental suffering in itself can be of such a serious nature as to fulfil the requirement of cruel and inhuman treatment.\textsuperscript{44} For instance, threats of torture can, but must not necessarily,\textsuperscript{45} amount to cruel and inhuman treatment.\textsuperscript{46} Another instance is witnessing others being ill-treated,\textsuperscript{47} raped\textsuperscript{48} or executed.\textsuperscript{49} Again, this understanding derives from the inseparable link between the prohibition of ill-treatment and the obligation of humane treatment. Humane treatment is not confined to preserving a person’s physical integrity.

In this respect, the elimination of the element of “serious attack on human dignity” in the Elements of Crimes of the Rome Statute is problematic. This element of the jurisprudence of the ICTY\textsuperscript{50} was deliberately left out of the definition of inhuman treatment in the Elements of Crimes of the Rome Statute, because it was felt that attacks on human dignity would be covered by the war crime of “outrages upon personal dignity”. However, even after the coming into force of the Rome Statute, the ICTY has not abandoned the element of “serious attack on human dignity”.\textsuperscript{51}

**Torture**

Apart from Common Article 3, the prohibition of torture is also enshrined in the grave breaches provisions of Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions, Article 75 of Additional Protocol I and Article 4 of Additional Protocol II. In the 1958 Commentary on the Fourth Geneva Convention, torture was still understood as “the infliction of suffering on a person to obtain from that person, or from another person, confessions or information”.\textsuperscript{52} Both law and jurisprudence have evolved since that definition, and

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\item \textsuperscript{44} IACtHR, Loayza Tamayo v. Peru, above note 30, para. 57; ECtHR, Ireland v. United Kingdom, above note 20, para. 167; Committee against Torture, “Concluding observations, United States of America”, above note 38, para. 13.
\item \textsuperscript{45} ECtHR, Hüsnüye Tekin v. Turkey, Judgment of 25 October 2005, para. 48.
\item \textsuperscript{47} IACtHR, Caesar v. Trinidad and Tobago, above note 21, para. 78.
\item \textsuperscript{50} See note 19 above.
\item \textsuperscript{51} See ICTY, Prosecutor v. Blaskic, above note 18, paras. 154–155; Prosecutor v. Kordic and Cerkez, above note 18, para. 256; Prosecutor v. Naletilic and Martinovic, above note 19, para. 246. Keeping the notion of “serious attack” in the definition of inhuman treatment would mean that it would constitute a grave breach according to Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions. With regard to Common Article 3, however, the discussion has no practical consequence, since “serious attacks” would in any case be covered by the notion of “outrages upon personal dignity” and therefore be absolutely prohibited.
\item \textsuperscript{52} Commentary on GC IV, above note 2, p. 598.
\end{itemize}
treaty law and practice now give torture a broader meaning, including in particular a wider range of purposes.

**Treaty definitions of torture**

Torture is explicitly defined in human rights law in Article 1 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2 of the Inter-American Convention to Prevent and Punish Torture, and Article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is further defined in Article 7(2)(e) of the Rome Statute of the International Criminal Court, complemented by its Elements of Crimes. While the Inter-American Convention has a broader definition which applies to states parties to the convention, the definition of the Convention against Torture has influenced subsequent international jurisprudence and constitutes the starting point for the interpretation of torture in international humanitarian law as well, and in particular in Common Article 3.

Article 1 of the Convention against Torture reads:

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

It thus contains four elements: (i) intention; (ii) the infliction of severe mental or physical pain or suffering, (iii) for a purpose such as punishment, information, confession, intimidation, coercion or any reason based on discrimination of any kind; and (iv) by or at the instigation of a person in an official capacity.

The ICTY considers this definition to reflect customary international law, as it includes the definitions contained in the Torture Declaration and the Inter-American Convention. However, it has adapted this definition in its case law for the purpose of international criminal law relating to armed conflicts. While it


Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment reads:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or
originally kept the requirement that the perpetrator must be a public official,\textsuperscript{54} it has meanwhile abandoned this element to adapt its case law to international humanitarian law, especially as applicable in non-international armed conflict, where torture can also be committed by a non-state party.\textsuperscript{55} Third, the Tribunal has retained the purposive element from the definition in Article 1 of the CAT and held that this element and the level of severity of the pain or suffering are the two elements that distinguish torture from inhuman treatment.\textsuperscript{56}

**Specific purpose as a constitutive element of torture**

A constitutive element of torture is that it is not only an intentional act, but is committed for a specific purpose or any reason based on discrimination of any kind (see Article 1 of the Torture Convention). While the choice to use the purposive element to distinguish torture from cruel, inhuman or degrading treatment entails a certain limitation of the concept,\textsuperscript{57} it is difficult to argue, against the express definition of the CAT, transferred to international humanitarian law by the ICTY and the Elements of Crimes of the Rome Statute, that the definition of torture in international humanitarian law would not require a purposive element. The requirement of a purpose clearly reflects the position of states.

As far as the purposive element is concerned, the purposes mentioned in Article 1 of the Torture Convention do not constitute an exhaustive list. This is confirmed by the wording of Article 1 of the CAT, which speaks of “such purposes as”. The non-exhaustive list was taken up in the Elements of Crimes for the Rome

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  \item incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
  \item Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’
\end{itemize}

Article 2 of the Inter-American Convention to Prevent and Punish Torture reads:

\begin{quote}
For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.
\end{quote}

\textsuperscript{54} ICTY, Prosecutor v. Furundzija, above note 7, para. 162, and Appeals Chamber Judgment, 21 July 2000, para. 111.

\textsuperscript{55} ICTY, Prosecutor v. Kunarac and Others, above note 10, para. 491; confirmed by the Appeals Chamber Judgment, 12 June 2000, para. 148; Prosecutor v. Kvocka and Others, above note 10, para. 284.

\textsuperscript{56} ICTY, Prosecutor v. Kunarac and Others, above note 10, para. 142; Prosecutor v. Kruželj, Case No. IT-97-25 (Trial Chamber), 15 March 2002, paras. 179, 180; Prosecutor v. Brđanin, Case No. IT-99-36-T (Trial Chamber), 1 September 2004, para. 486. This is in conformity with international human rights law: as is clearly stated in Article 1(2) of the Torture Declaration and recognized in the title of the Convention against Torture, torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.


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Statute of the International Criminal Court. The purpose cannot, however, be of any sort, but must have “something in common with the purposes expressly listed”. The ICTY also considers that the prohibited purpose “need be neither the sole nor the main purpose of inflicting the severe pain or suffering”.

In practice, this leads to an extremely wide notion of purpose. Indeed, “intimidating or coercing him or a third person” and “reason based on discrimination of any kind” are such wide notions that most deliberate acts causing great suffering to a specific person, especially in detention, will be caused for one of these purposes or a purpose very similar to this one.

Severe physical or mental suffering

With regard to the severity of the treatment, the assessment must – as for ill-treatment – be based both on objective criteria and on criteria that pertain to the circumstances of the particular case. The threshold of pain required by the ICTY definition (“severe” rather than “serious”) is higher than that for cruel and inhuman treatment.

The Elements of Crimes of the Rome Statute for the International Criminal Court, on the other hand, require “severe physical or mental pain or suffering” for both forms of ill-treatment. In other words, they require a higher threshold of pain for both forms and only differentiate between the two according to the purpose of the treatment. This was indeed the compromise reached as part of a package, even though the majority of delegations felt that the threshold of “severe” would be too high and inconsistent with the Statute.

Along similar lines as the Elements of Crimes, some experts have challenged the necessity for a hierarchy of suffering between inhuman treatment and torture. For these authors, the only distinguishing element between torture and inhuman treatment should be the purpose required for torture. An argument in favour of this doctrine is certainly that it is difficult to define the threshold of intensity between serious suffering and severe suffering. It is also somewhat absurd to think of treatment more severe than “inhuman”.

58 Elements of Crimes for Article 8(2)(a)(ii) and Article 8(2)(c)(i) of the Rome Statute.
61 Emphasis added. All other elements, concerning the link to armed conflict and the mens rea, are not addressed here, as they are irrelevant to the interpretation of Common Article 3.
The wording of the different treaties leaves the question open. Article 16 of the Convention against Torture speaks of “acts of cruel, inhuman or degrading treatment which do not amount to torture” (emphasis added), which could imply a higher intensity of treatment for torture than for cruel, inhuman or degrading treatment. However, it could also mean that the purpose required for torture constitutes the aggravating element and it seems that the question was left open during the drafting of the Convention.65

Even after the adoption of the Elements of Crimes, the ICTY has continued to require an illegitimate purpose as well as a differentiated threshold of suffering to distinguish between torture and cruel and inhuman treatment. The European Court of Human Rights also requires a higher threshold of pain for torture, in which the purpose of the infliction is a relevant, sometimes a determining,66 factor.67 The Inter-American Commission and Court, like the ICTY, require a higher intensity of pain for torture than for cruel, inhuman or degrading treatment, as well as a purpose.68 The Human Rights Committee, on the other hand, does not attempt to distinguish between the two.69

The main consequence of using the sole criterion of purpose to distinguish between torture and cruel and inhuman treatment is that in situations in which inhuman treatment is inflicted for a purpose, it automatically amounts to torture. Considering the very wide definition of purpose, which includes almost any purpose (especially those of such broad intent as to intimidate or coerce),70 this would leave only an extremely narrow margin for cruel or inhuman treatment between torture and degrading treatment.

As pointed out above, jurisprudence has hitherto not discarded the intensity of suffering as an element distinguishing torture from cruel or inhuman treatment, but it is not excluded that this may change in the future, especially if the International Criminal Court follows the clear wording of the Elements of Crimes for Article 8(2)(c)(i) of the Rome Statute. But if it does so, it should not be at the cost of raising the threshold of severity required for treatment to be deemed cruel or inhuman.

64 Evans, above note 63, pp. 33 ff., esp. p. 49.
65 Burger and Danelius, above note 59, p. 150, only refer to the purpose as a distinctive feature; see also the account in Rodley, above note 63.
68 IACtHR, Caesar v. Trinidad and Tobago, above note 21, paras. 50, 68, 87.
69 HRC, General Comment 20 on Article 7, 10 March 1992, refers in para. 4 to the “nature, purpose and severity” of the treatment; Rodley, above note 63, points out that it is impossible to infer any general criteria from the Human Rights Committee’s early case law.
70 ICTY, Prosecutor v. Kvocka and Others, above note 10, para. 140; ICTR, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, para. 682.
Again, in order to assess the severity of the pain, all the circumstances of the case have to be considered. The assessment of torture is based on a number of factual elements, such as environment, duration, isolation, mental health or strength, cultural beliefs and sensitivity, gender, age, social or political background, or past experiences. It may be committed in one single act or can result from a combination or accumulation of several acts which, taken individually and out of context, may seem acceptable. Relevant factors include “the nature and context of the infliction of pain”, “the premeditation and institutionalisation of the ill-treatment”, “the manner and method used”, and “the position of inferiority of the victim”. The period of time, the repetition and various forms of mistreatment and the severity should be assessed as a whole. As with all forms of ill-treatment, “in certain circumstances the suffering can be exacerbated by social and cultural conditions and the evaluation should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.”

Some acts meet the threshold of severity per se, as they necessarily imply severe pain or suffering. This is the case, in particular, for rape. Other examples of torture in jurisprudence include beating followed by detention for three days where food and water and the possibility of using a lavatory are denied, electric shocks, burying alive, suffocation under water, suspension by the wrists, severe beatings, especially beatings on the soles of the feet, mock executions, rap...
threats to shoot or kill, exposure of detainees under interrogation to severe cold for extended periods, a combination of restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, threats, including death threats, violent shaking and using cold air to chill.

As with ill-treatment, there is no doubt that mental suffering on its own can be severe enough to amount to torture. Indeed, psychological methods of torture as well as the psychological effects of torture can cause suffering as severe as physical torture and its physical effects. The ICTY has considered that being forced to watch serious sexual attacks inflicted on an acquaintance was torture for the forced observer. It has held likewise with regard to threats of death causing severe mental suffering and falsely informing the victim that his father has been killed, or obliging victims to collect the dead bodies of other members of their ethnic group.

Outrages upon personal dignity, in particular humiliating and degrading treatment

Outrages upon personal dignity are prohibited in Common Article 3, Article 75 of Additional Protocol I and Article 4 of Additional Protocol II.

Serious humiliation, degradation or serious attack on human dignity

Outrages upon personal dignity have been defined in the Commentary on Article 75 of Additional Protocol I as “acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, even forcing them to perform degrading acts”. The ICTY has found a definition closer to the wording of Common Article 3 and which distinguishes outrages upon personal dignity from cruel and inhuman treatment. It requires “that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”. Here, too, the

85 ECmHR, *The Greek Case*, above note 84, para. 501.
86 Committee against Torture, “Report of Mexico produced by the Committee under Article 20 of the Convention and reply from the Government of Mexico”, 30th Session, UN Doc. CAT/C/75 (2003), para. 165.
89 ECtHR, *Prosecutor v. Kvocka and Others*, above note 10, para. 149.
ICTY has retained an objective threshold\footnote{Ibid., para. 162.} but takes into account subjective criteria, according to which “[t]he form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed”.\footnote{ICTY, Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Trial Chamber), 25 June 1999, para. 57.} In any case, while the humiliation and degradation must be “real and serious”, it need not be lasting.\footnote{ICTY, Prosecutor v. Kunarac and Others, above note 10, para. 501.} No prohibited purpose such as those which characterize the crime of torture is required.\footnote{ICTY, Prosecutor v. Kvocka and Others, above note 10, para. 226.}

The Elements of Crimes of the Rome Statute define the material element of outrages upon personal dignity as an act in which “[t]he perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons” and “the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity”. While this definition is of course tautological, it gives the indication that the violation does not require severe mental or physical pain but that, on the other hand, it has to be significant in order to be distinguished from a mere insult.

The European Court of Human Rights has considered that in determining whether a particular form of treatment is “degrading” it will have regard to “whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 [of the ECHR]”.\footnote{ECtHR, Raninen v. Finland, Judgment of 16 December 1997, Reports 1997-VIII, para. 55.} However, it has also held that the absence of an intention to debase or humiliate does not exclude a finding of degrading treatment.\footnote{ECtHR, Peers v. Greece, Judgment of 19 April 2001, Reports 2001-III, para. 74; Kalashnikov v. Russia, Judgment of 15 February 2002, Report 2002-VI, para. 95.} The Inter-American Court of Human Rights has stated that “[t]he degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.”\footnote{IACtHR, Loayza Tamayo v. Peru, above note 30, para. 57; IACmHR, Report No. 35/96, Case No. 10.832, Luis Lizardo Cabrera v. Dominican Republic, 19 February 1998, paras. 77.}

Examples of degrading treatment have been: treatment or punishment of an individual if it grossly humiliates the individual before others or drives him or her to act against his or her will or conscience;\footnote{ECmHR, Greek case, above note 84, p. 186.} serious forms of racial discrimination;\footnote{ECmHR, East African Asian Cases, above note 32, p. 76.} not allowing a prisoner to change his soiled clothes;\footnote{ECmHR, Hurtado v. Switzerland, Judgment of 28 January 1994, Series A, No. 280-A, para. 12.} cutting off the hair and beard for punishment;\footnote{ECmHR, Yankov v. Bulgaria, Judgment of 11 December 2003, ECHR 2203-XII, paras. 114, 121.} the use of human shields;\footnote{ICTY, The Prosecutor v. Aleksovski, above note 95, para. 229.} inappropriate conditions of confinement, performing subservient acts, being forced to relieve bodily functions in one’s clothing, or enduring the constant fear of being subjected to physical, mental or sexual violence\footnote{ICTY, The Prosecutor v. Kvocka and Others, above note 10, para. 173.}.
“Humiliating” and “degrading” are synonymous

None of the tribunals have attempted to distinguish between humiliating and degrading treatment. Indeed, despite the wording of Common Article 3, which seems to distinguish between humiliating and degrading treatment (with the formulation “or”), it is hard to conceive of a logical difference between the two terms. The question whether there can conceivably be any treatment that would amount to outrages upon personal dignity but would not be humiliating or degrading (see the formulation “in particular” in Common Article 3) is of a rather academic nature, since both outrages upon personal dignity as well as humiliating and degrading treatment are prohibited by Common Article 3.

Further, the question arises whether the seriousness of the physical or mental suffering must attain a higher threshold to constitute inhuman treatment. The fact that the grave breaches provisions criminalize cruel and inhuman treatment but not outrages upon personal dignity indicates that this is the case. On the other hand, the definitions of cruel or inhuman treatment and of outrages upon personal dignity by the ICTY overlap, since it counts “serious attacks on human dignity” as belonging to both definitions. Indeed, the two notions do necessarily overlap. Depending on the particular circumstances of the case, treatment which is merely considered degrading or humiliating can easily turn into cruel and inhuman treatment if repeated over a certain period of time or committed against a person in a particularly vulnerable situation, or into torture if committed intentionally for an illegitimate purpose.

Specific situations and treatment, especially in detention

The following are but a few examples, taken mainly from jurisprudence, in which certain treatment or conditions of detention have been found to constitute torture or cruel, inhuman or degrading treatment or punishment. They do not constitute an exhaustive list, nor do they address all the elements of the particular situation. It would go beyond the scope of this analysis to consider all conditions and treatment in detention.

As said above, the wealth of jurisprudence and standards in human rights law is essential to understand treatment in detention from the perspective of the proliferation of torture and other forms of ill-treatment. Indeed, as the proliferation in human rights law also applies in armed conflict and overlaps with the proliferation under IHL, human rights jurisprudence and standards inform the legal assessment also in IHL. The reason why some examples are mentioned here is because detention – which is understood here in its broadest meaning, covering all forms of deprivation of liberty\(^\text{107}\) – puts the person at particular risk of ill-treatment. This is all the more true for all forms of unlawful deprivation of liberty.

\(^{107}\) Administrative detention or internment during armed conflict, pre-trial detention, imprisonment after a criminal conviction and all forms of unlawful deprivation of liberty.
detention, such as incommunicado detention and clandestine detention or enforced disappearance.

The special vulnerability of detainees and the difficulty in proving what has happened during the time of detention have led human rights bodies to adopt rules imposing a high burden of proof upon the state authorities. For instance, the European Court of Human Rights has held that where a person is under the control of law enforcement officials, any injury that occurs to that person while under their control gives rise in principle to a strong presumption that the injury was caused by the officials.\(^{108}\) Similarly, the Inter-American Court and Commission of Human Rights have held that if a person is illegally detained and thus under the absolute control of the authorities, then the state has to rebut the presumption that the person was ill-treated.\(^{109}\)

**Incommunicado detention**

Incommunicado detention is understood here as detention without contact with the world outside.\(^{110}\) This means that a person is incommunicado if he or she has no contact with family, friends, lawyer or independent doctor, even if the person has access to a court\(^{111}\) and is being visited by the ICRC.

Numerous human rights bodies have found that prolonged incommunicado detention in itself amounts to ill-treatment or torture because of the mental suffering caused by the victim’s uncertainty as to the length of detention, social isolation and denial of communication with family and friends.\(^{112}\) Many have also concluded that incommunicado, clandestine or unacknowledged detention substantially increases the risk of torture or other forms of ill-treatment.\(^{113}\) Experience does in fact show that such forms of detention, when prolonged, almost invariably go hand in hand with ill-treatment.

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There is no entirely clear norm as to what “prolonged” means. Indeed, there are few indications in treaties as to when a person arrested or detained must be able to contact the outside world. Nonetheless, any person arrested or detained on a criminal charge has the right to be brought promptly before a judge or other officer with judicial power (ICCPR, Article 9(3)) and anyone detained has the right to challenge the lawfulness of the detention before a court for it to decide on the lawfulness thereof “without delay” (ICCPR, Article 9(4)). “Promptly” means, as a rule, no more than a few days. For this right to be exercised effectively, the person should have access to a lawyer. In any case, it should be a matter of days, not a matter of weeks. Similarly, communication with the family should be allowed without delay, which should not exceed a few days.

Enforced disappearance

According to Article 1(2) of the UN Declaration on the Protection of All Persons from Enforced Disappearance, enforced disappearance constitutes torture or other cruel, inhuman or degrading treatment or punishment. This has been confirmed by numerous international bodies, either because they consider that the suffering caused by the disappearance and loss of contact with the outside world causes such serious suffering that it amounts to ill-treatment or because they have considered that enforced disappearance is inseparably linked to torture and ill-treatment.

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114 Human Rights Committee, General Comment 8 on Article 9, 30 June 1982, UN Doc. HRI/GEN/1/Rev.7, para. 2; HRC, Terán Jijón v. Ecuador, UN Doc. CCPR/C/44/D/277/1988, 8 April 1992, para. 5.3 (five days deemed excessive); see also Kurbanov v. Tajikistan, UN Doc. CCPR/C/79/D/1096/2002, 12 November 2003, para. 7.2 (seven days excessive); ECtHR, Aksoy v. Turkey, above note 67, para. 78 (fourteen days excessive even in situation of emergency).

115 Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles).

116 See Article 106 of GC IV ("As soon as he is interned, or at the latest not more than one week after his arrival ... "); Article 11 of GC IV; Body of Principles, Principle 15.

117 Enforced disappearance has been defined in Article 2 of the Convention for the Protection of All Persons from Enforced Disappearance (2006): “enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”; as well as in the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992): “enforced disappearances occur, in the sense that persons are detained, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”.

Furthermore, enforced disappearance not only constitutes ill-treatment for the disappeared person or creates a situation where the person will be subjected to ill-treatment; it can also constitute cruel or inhuman treatment for the members of that person’s family, owing to the mental anguish endured by close family members when a person disappears and the seriousness of its effects on their physical and mental well-being, who can therefore also be considered victims of inhuman treatment.\(^\text{119}\)

**Conditions of detention and ill-treatment**

The obligation in Common Article 3 to treat persons in detention humanely is echoed in some human rights treaties, which stipulate that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”\(^\text{120}\) It is, of course, complemented by other IHL rules on conditions of and treatment in detention as well as procedural safeguards in detention.

People deprived of their liberty are at double risk of being subjected to ill-treatment, namely though conditions of detention which debase and dehumanize them and acts by prison personnel or others which amount to torture or ill-treatment. Here, as above, “objective” conditions of detention are not the only relevant factors to determine a violation of Common Article 3. The special vulnerability of certain persons, for instance of minors, must also be taken into account.\(^\text{121}\)

Detention in itself brings with it severe restrictions for the detainees and a certain level of suffering inherent in the deprivation of liberty. However, it must be carried out in a manner that respects the dignity of the detainee.\(^\text{122}\) In international humanitarian law, Article 5 of Additional Protocol II sets out conditions of detention and standards of treatment in detention which must be respected as a minimum at all times. For international armed conflict, there are numerous provisions on the treatment of persons deprived of liberty, which all contribute to their treatment with humanity.\(^\text{123}\) In addition, numerous international treaties and soft-law instruments have been developed in order to set out the minimum

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\(^\text{120}\) ICCPR, Article 10; ACHR, Article 5(2).


\(^\text{122}\) ICCPR, Article 10; ACHR, Article 5(2).

standards that must be provided to all persons in detention, such as the Standard Minimum Rules for the Treatment of Prisoners (SMRTP), the Basic Principles for the Treatment of Prisoners (BPTP), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the European Prison Rules (EPR), and the Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). These standards are to be upheld, regardless of the reason for the imprisonment and the state’s budgetary constraints. They complement and illustrate the obligation of humane treatment in international humanitarian law and human rights law insofar as their purpose is to prevent ill-treatment.

In certain cases, conditions of detention are so inimical to human dignity that they not only infringe such minimum rules but constitute degrading treatment, cruel or inhuman treatment, or even torture. Since conditions of detention are not usually imposed for a specific purpose, such as punishment or interrogation, they do not generally constitute torture, but they may do so if they cause severe suffering and are imposed on the individual for a specific purpose. Even in the absence of any intention to humiliate, inadequate conditions of detention can violate the dignity of the detainee and inspire in him or her feelings of humiliation and degradation.

Again, it cannot be stressed enough that conditions of detention cannot be considered in isolation. The whole situation of the detainee must be taken into account, including treatment and the lawfulness of the detention. Almost invariably, it is the cumulative effect of several factors that increases the detainee’s suffering to a point that reaches the threshold of ill-treatment. In the words of the European Court of Human Rights,

\[T\]he State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention


and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.\textsuperscript{128}

By way of illustration and without being exhaustive, the following examples are some factors that can, in themselves or in combination with other conditions, amount to being cruel, inhuman or degrading:

- lack of minimum space per person/overcrowding (the European Committee against Torture has fixed at 7 sq m the minimum surface per person in a detention cell);\textsuperscript{129}
- lack of natural light or daylight;\textsuperscript{130}
- artificial light night and day;\textsuperscript{131}
- lack of fresh air or ventilation;\textsuperscript{132}
- insufficient possibility to leave the cells and exercise;\textsuperscript{133}
- inadequate food and drinking water;\textsuperscript{134}
- inadequate material conditions (such as lack of clean bedding, clothes, cleaning material);\textsuperscript{135}
- inadequate sanitary and hygiene conditions;\textsuperscript{136}
- lack or denial of medical care, including psychological care;\textsuperscript{137}
- excessively hot or cold temperatures and exposure to climate;\textsuperscript{138}
- unlawfulness of the detention;\textsuperscript{139}
- isolation or solitary confinement (see in more detail below);\textsuperscript{140}
- lack of contact with the outside world;\textsuperscript{141}

\textsuperscript{130} SMRTP, Article 10; EPR Rule, 18.2.a; CPT Standards, p. 15, para. 47, p. 25, para. 30.
\textsuperscript{131} SMRTP, Articles 10, 11; EPR Rule 18.2.b; CPT Standards, p. 25, para. 30.
\textsuperscript{132} SMRTP, Article 10; EPR Rule 18.2.a;
\textsuperscript{133} At least one hour a day in the open air: SMRTP, Article 21; EPR Rule 27; CPT Standards, p. 15, para. 47.
\textsuperscript{134} Article 5(1)(b) of AP II; SMRTP, Article 20; EPR Rule 20; CPT Standards, p. 10, para. 42, p. 15, para. 47.
\textsuperscript{135} SMRTP, Articles 17–19; EPR Rule 20; CPT Standards, para. 47.
\textsuperscript{136} Article 5(1)(b) of AP II; SMRTP, Articles 12–16; EPR Rule 19; CPT Standards, p. 10, paras 42, p. 15, para. 47, p. 18, para. 47.
\textsuperscript{138} SMRTP, Articles 22, 82; EPR Rules 40.5, 47.
\textsuperscript{139} Article 5(1)(b) of AP II; SMRTP, Article 10.
\textsuperscript{141} SMRTP, Articles 29–32; BPTP Principle 7; EPR Rule 60.5.
\textsuperscript{142} Article 5(1)(c) and 5(2)(b) of AP II; SMRTP, Articles 37–38, 79–80; Body of Principles, Principles 15–19; EPR Rule 24; CPT Standards, p. 18, paras 50, 51.
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• lack of any meaningful occupation or of work under lawful working conditions;\textsuperscript{143}
• lack of respect for religious or spiritual needs;\textsuperscript{144}
• lack of segregation and of protection of detainees from other detainees;\textsuperscript{145}
• prisoner-on-prisoner violence;\textsuperscript{146}
• period of time for which the person is detained or held in such conditions.\textsuperscript{147}

Strip and body searches

No international standards entirely prohibit strip and body searches,\textsuperscript{148} and jurisprudence has not found that strip or body searches are necessarily incompatible with the prohibition of inhuman or degrading treatment.\textsuperscript{149} But searches must be conducted with due respect for human dignity and for a legitimate purpose.\textsuperscript{150} They do amount to inhuman or degrading treatment if the manner in which the search is carried out is debasing,\textsuperscript{151} for instance, where a male prisoner is obliged to strip in the presence of a female officer, his sexual organs touched with bare hands,\textsuperscript{152} where a search is carried out by guards who deride or abuse the prisoner,\textsuperscript{153} where the search is not justified by the preservation of prison security or prevention of disorder or crime,\textsuperscript{154} or where the search is carried out in a “normal” manner but is performed on a regular basis as a matter of practice which lacks clear justification in the particular case of the person and must be perceived by him or her as harassment.\textsuperscript{155}

Solitary confinement, isolation, segregation

Solitary confinement is understood here as the social isolation of detainees from the rest of the prison and also, partly, from the outside world. Solitary confinement can occur in two distinct situations. It is frequently a consequence

\textsuperscript{143} Article 5(1)(e) of AP II; SMRTP, Articles 71–78; BPTP Principle 6, 8; Body of Principles, Principle 28; EPR Rule 26.
\textsuperscript{144} Article 5(1)(d) of AP II; SMRTP, Article 41; BPTP Principle 3; EPR Rule 29.
\textsuperscript{145} Article 5(2)(a) of AP II; SMRTP, Article 8; Body of Principles, Principle 8; United Nations Rules for the Protection of Juveniles Deprived of their Liberty; EPR Rules 11.1, 12.1, 18.8.
\textsuperscript{147} ECtHR, Georgiev v. Bulgaria, Judgment of 15 December 2006, para. 56; Khudoyorov v. Russia, Judgment of 8 November 2005, para. 105.
\textsuperscript{148} See, e.g., EPR Rule 54, explicitly regulating such searches.
\textsuperscript{149} ECmHR, McFeeley et al. v. United Kingdom, application 8317/77, 15 May 1980, 20 DR 44.
\textsuperscript{150} ECtHR, Karakas and Yesilirmak v. Turkey, Judgment of 28 June 2005, paras. 36–41.
\textsuperscript{151} ECtHR, Iwanczuk v. Poland, 15 November 2001, para. 59; Committee against Torture, “Concluding observations, Qatar”, UN Doc. CAT/C/QAT/CO/1, 25 July 2006, para. 21.
\textsuperscript{152} ECtHR, Valasinis v. Lithuania, Judgment of 24 July 2001, Reports 2001-VIII, para. 117.
\textsuperscript{153} ECtHR, Iwanczuk v. Poland, above note 151, para. 59.
\textsuperscript{154} Ibid., paras. 58–59.
\textsuperscript{155} ECtHR, Yankov v. Bulgaria, above note 104, ECHR 2203-XII, para. 110.
of unlawful or incommunicado detention or enforced disappearance, but can also take the form of social isolation during administrative detention, pre-trial detention or imprisonment after conviction. It can be used, for instance, to prevent detainees from influencing witnesses or to preserve prison order. Solitary confinement does not necessarily imply total isolation from the outside world, and is in fact likely to be unlawful the stricter the isolation is, particularly if the detainee has no social contact either inside or outside the prison.

There is no international treaty banning solitary confinement, and international jurisprudence has not found it to be unlawful as such. Nonetheless, it may amount to cruel or inhuman treatment or torture, especially if it is prolonged. Principle 7 of the Basic Principles for the Treatment of Prisoners indicates that solitary confinement is in principle undesirable: “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”

Because of its negative effect on the detainee’s physical and mental well-being, solitary confinement must remain an exceptional measure, justified for legitimate reasons such as preventing the detainee from harming others or from influencing witnesses. It should be imposed “only in exceptional cases and for a specified period of time, which shall be as short as possible”. International standards and jurisprudence have imposed restrictions on the use of solitary confinement. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty strictly prohibit “all disciplinary measures constituting cruel, inhuman or degrading treatment …, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned”. This rule is very clear in condemning close or solitary confinement as ill-treatment for juveniles.

International jurisprudence and soft-law standards also impose limits on solitary confinement, and consider it to amount to cruel or inhuman treatment if it is carried out by placing in a dark cell, if it entails sensory isolation or complete social isolation, if the victim suffers from a disability, or if it is

156 HRC, General Comment 20 on Article 7, 13 March 1992, UN Doc. HRI/GEN/1/Rev.7/Add.1, para. 6; General Recommendations of the Special Rapporteur on Torture, above note 113, para. 26 (m).
157 CPT Standards, p. 20, para. 56; EPR Rule 60.5.
158 UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 67.
159 SMRTP, Principles 32 (1) and 31; EPR Rule 60.3. This could be understood as excluding these types of treatment only as disciplinary punishments but not as punishments for criminal offences. However, that interpretation cannot hold sway, for it would mean that cruel, inhuman or degrading treatment is allowed as a criminal sanction, which is incompatible with its non-derogable nature.
160 Footnote to Principle 6 of the Body of Principles.
imposed for an excessive period of time.\textsuperscript{163} If contact with other prison inmates is completely cut off, solitary confinement can nonetheless be acceptable if the person has other conditions that prevent him or her from being totally isolated, such as access to newspapers, television, radio, contact with prison staff, outdoor exercise, prison teachers and chaplains, counsel, correspondence with and visits from the family, medical staff.\textsuperscript{164} In other words, the detainee must continue to have some meaningful activities and appropriate human contact.\textsuperscript{165}

If solitary confinement is inflicted for any of the purposes that define torture and causes severe harm to the detainee, it amounts to torture.\textsuperscript{166}

**Use of force and restraint in detention**

Detainees are especially vulnerable to abuse and unnecessary or excessive use of force. In comparison with the situation outside detention, unnecessary or excessive use of force is more likely to cause humiliation or constitute an attack on human dignity and have lasting effects on the victim’s physical and mental health.\textsuperscript{167}

The European Court and the Inter-American Court of Human Rights have therefore made it clear that in situations of detention the tolerance for physical force is limited, in view of the vulnerable position of the detainee. The European Court, for instance, has repeatedly held that “in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3”.\textsuperscript{168} Use of force in detention therefore has to be applied with the utmost restriction, and only when it is strictly necessary for the maintenance of security and order within the institution or when personal safety is threatened.\textsuperscript{169} This does not mean that all excessive use of force constitutes ill-treatment. The characteristics of ill-treatment or torture must be fulfilled. Similarly, not all cases of deaths resulting from


\textsuperscript{164} ECtHR, Rohde v. Denmark, Judgment of 21 July 2005, para. 97; Öcalan v. Turkey, above note 40, paras.191–196.


\textsuperscript{166} IACmHR, Lizardo Cabrera v. Dominican Republic, above note 100, para. 86.

\textsuperscript{167} This is not to say that ill-treatment cannot be committed outside detention. For such situations, see in particular Nowak, above note 63, pp. 674, 676–678.

\textsuperscript{168} ECtHR, Selmouni v. France, above note 15, para. 99; Menesheva v. Russia, Judgment of 9 March 2006, para. 56; the Inter-American Court has used very similar language: Loayza Tamayo v. Peru, above note 30, para. 57. In requiring “purpose of the conduct and the powerlessness of the victim”, Nowak seems to follow this approach, but writes that “in a situation of detention or similar direct control, no proportionality test may be applied”. Nowak, above note 63, p. 678.

\textsuperscript{169} Principle 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; EPR Rules 64–70; CPT Standards, p. 19, para. 53.
disproportionate force necessarily amount to ill-treatment, even if they constitute violations of the right to life.\textsuperscript{170}

Often, unnecessary or excessive use of force stems from or can be associated with inappropriate weapons or the inappropriate use of weapons or instruments of restraint. International standards and jurisprudence consequently prohibit the use of instruments of physical restraint that may cause unnecessary pain and humiliation\textsuperscript{171} and especially prohibit them as punishment.\textsuperscript{172} The use of firearms should be avoided.\textsuperscript{173} Jurisprudence has found that inappropriate use of pepper spray\textsuperscript{174} or tear gas\textsuperscript{175} could amount to ill-treatment, or that electro-shock devices such as tasers could be instruments of torture.\textsuperscript{176}

**Conclusion**

Despite their almost succinct terminology, the notions of torture, cruel or inhuman treatment and outrages upon personal dignity can be interpreted in meaningful and practical ways through the wealth of existing instruments and jurisprudence on the prohibition of ill-treatment. Ill-treatment can never be considered as an abstract act, committed outside a concrete context. Its assessment must take into account the need to respect the human being in all his or her physical, mental and moral integrity, mindful of all the circumstances of the case. Common Article 3 only sets out minimum requirements for humane treatment and sets but the lowest common denominator. All obligations and prohibitions enshrined in it are absolute and must be taken with the utmost seriousness and applied in good faith.


\textsuperscript{171} SMRTP, Article 33; EPR Rule 69; Committee against Torture, “Concluding observations, Australia”, UN Doc. A/56/44, paras. 47–53, 21 November 2000, para. 52(b); Committee against Torture, “Concluding observations, United States of America”, above note 38, para. 179(c).

\textsuperscript{172} SMRTP, Article 33; Principles 15 and 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; EPR Rules 60.6, 68.

\textsuperscript{173} Principle 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Article 42 of GC III (escaping prisoners of war).

\textsuperscript{174} Committee against Torture, “Concluding observations, Canada”, UN Doc. A/56/44, paras. 54–59, 22 November 2000, para. 58 (a).


\textsuperscript{176} Committee against Torture, “Concluding observations, Switzerland”, above note 78, para. 4(b)(i).