

“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.

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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).¹ Jean Pictet wrote in 1958 that the principle of humane treatment “is in truth the leitmotiv of the four Geneva Conventions”.² 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,³ unpleasant or disadvantageous treatment,⁴ or coercion⁵ 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).

2 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. IV, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (hereinafter *Commentary on GC IV*), ICRC, Geneva, 1958, p. 204.

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

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 (IACtHR), *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.⁹ 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,¹⁰ 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.¹¹ In terms of the treatment required, however, there is no difference between the notions in both bodies of law.¹²

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.¹³

9 ICCPR, Article 4; CAT, Article 2(1); ECHR, Article 15; ACHR, Article 27.

10 See the wording of Common Article 3, “each Party to the conflict”; ICTY, *Prosecutor v. Kunarac and Others*, Cases No. IT-96-23 and IT-96-23/1 (Trial Chamber), 22 February 2001, para. 491, confirmed by the Appeals Chamber Judgment, 12 June 2000, para. 148; ICTY, *Prosecutor v. Kvočka and Others*, Case No. IT-98-30/1-A (Appeals Chamber), 28 February 2005, para. 284. For an analysis of the development of the ICTY’s jurisprudence, see Jill Marshall, “Torture committed by non-state actors: The developing jurisprudence from the ad hoc Tribunals”, *Non-State Actors and International Law*, No. 3, Vol. 5 (2005), pp. 171–82.

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.

12 There is sometimes a misconception that applying IHL instead of human rights could lead to torture and ill-treatment, see, e.g., Robert Verkaik, “Human rights in Iraq: a case to answer”, *Independent*, 29 May 2007, available at <http://news.independent.co.uk> (last viewed 29 May 2007).

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, deprival 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.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.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”,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.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

14 See references below at notes 130–148; Franz Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, OMCT Handbook Series no. 3, Geneva 2006, p. 38, who note that the cases submitted to the African Commission on Human and Peoples’ Rights usually involve facts that are “very crude and cumulative, and clearly reveal excessive ill-treatment or punishment, such that a careful judicial analysis is rendered redundant”.

15 See ECtHR, *Selmouni v. France*, Judgment of 28 July 1999, Reports 1999-V, para. 101: “the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.” The IACtHR follows the same approach in *Cantoral Benavides v. Peru*, above note 6, para. 99.

16 *Commentary on GC IV*, above note 2, p. 204.

17 *Commentary on GC IV*, above note 2, p. 39.

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.¹⁸ The Elements of Crimes of the Rome Statute of the International Criminal Court confirm this approach. Thus cruel and inhuman treatment is used interchangeably.

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”.¹⁹ The European Court of Human Rights (ECtHR) does

18 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.

19 ICTY, *Prosecutor v. Delalic and Others*, above note 18, para. 543; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T (Trial Chamber) 31 March 2003, para. 246; *Prosecutor v. Kordic and Cerkez*, above note 18, para. 256; *Prosecutor v. Blaskic*, above note 18, paras. 154–155.

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.²⁰ The Inter-American Court of Human Rights (IACtHR) has followed the ICTY’s definition.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.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”,²³ no durational requirement being built into the definition of the crime.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.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.²⁶

It has considered treatment to be “inhuman” because,

20 ECtHR, *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para. 162.

21 IACtHR, *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Series C, No. 13, para. 68.

22 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III, *Geneva Convention relative to Prisoners of War*, ICRC, Geneva 1958, p. 627 (1958), and *Commentary on GC IV*, above note 2, p. 598.

23 ICTY, *Prosecutor v. Limaj and Others*, Case No. IT-03-66-T (Trial Chamber), 30 November 2005, para. 232.

24 ICTY, *Prosecutor v. Naletilic and Martinovic*, above note 19, para. 300.

25 See ICTY, *Prosecutor v. Hadzihasanovic 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.

26 See ECtHR, *Kudła v. Poland*, Judgment of 26 October 2000, paras. 90–94 with further references.

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 discrimination³² 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.

28 African Commission on Human and Peoples’ Rights (ACHPR), Communication 225/98, *Huri-Laws v. Nigeria*, Fourteenth Activity Report, (2000) AHRLR 273 (ACHPR 2000), para. 41.

29 Human Rights Committee (HRC), *Vuolanne v. Finland*, 2 May 1989, CCPR/C/35/D/265/1987, para. 9.2.

30 IACtHR, *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C, No. 33, para. 57. See also ECtHR, *Ireland v. United Kingdom*, above note 20, para. 167.

31 ECtHR, *Dougoz v. Greece*, Judgment of 6 March 2001, Reports 2001-II, para. 46; *Iovchev v. Bulgaria*, Judgment of 2 February 2006, para. 137; Committee against Torture, “Concluding observations, Israel”, UN Doc. A/52/44, paras. 253–260, 9 May 1998, at paras. 255–257.

32 ECtHR, *Moldovan and others v. Romania (No. 2)*, Judgment of 12 July 2005, paras.110–113; racial discrimination can in itself amount to degrading treatment, see *East African Asians v. United Kingdom*, European Commission of Human Rights Report, 14 December 1973, Decision and Reports (DR) 78, p. 62.

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,³³ “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”,³⁴ placing someone in the boot of a vehicle even in the absence of any other ill-treatment,³⁵ the so-called death-row phenomenon,³⁶ certain methods of punishment, especially corporal punishment,³⁷ certain methods of execution,³⁸ certain conditions of detention,³⁹ the imposition of the death penalty after an unfair trial,⁴⁰ involuntary sterilization,⁴¹ gender-based humiliation such as shackling women detainees during childbirth,⁴² or the use of electroshock devices to restrain persons in custody.⁴³

- 33 IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No. 114, para. 157; ECtHR, *Koval v. Ukraine*, Judgment of 19 October 2006, para. 82.
- 34 Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, (Body of Principles), available at http://www.unhcr.ch/html/menu3/b/h_comp36.htm (last visited 6 October, 2007).
- 35 IACtHR, *Castillo-Páez v. Peru*, Judgment of 3 November 1997, Series C, No. 34, para. 66; *Villagrán Morales v. Guatemala*, Judgment of 19 November 1999, Series C, No. 63, para. 164; *Gómez-Paquiyaauri Brothers v. Peru*, Judgment of 8 July 2004, Series C, No. 110, para. 109.
- 36 HRC, *Errol Johnson v. Jamaica*, Communication 588/1994, 27 March 1996, UN Doc. CCPR/C/56/D/588/1994, para. 8.4; ECtHR, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 191, paras. 105–111.
- 37 International humanitarian law absolutely prohibits the use of corporal punishment: Articles 87(3), 89 and 108 of GC III, Articles 32, 118 and 119 of GC IV; Article 74 of AP I; Article 4 of AP II; see also HRC, *Osbourne v. Jamaica*, Communication 759/1997, 13 April 2000, UN Doc. CCPR/C/68/D/759/1997, para. 9.1; IACtHR, *Caesar v. Trinidad and Tobago*, above note 20), paras. 67–89; ACHPR, Communication 236/2000, *Curtis Francis Doebller v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 153 (ACHPR 2003), paras. 42–44.
- 38 Committee against Torture, “Concluding observations, United States of America”, UN Doc. CAT/CO/2, 25 July 2006, para. 31.
- 39 See text below corresponding to notes 130–148.
- 40 ECtHR, *Öcalan 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.
- 41 Committee against Torture, “Concluding observations, Peru”, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.
- 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.⁴⁴ For instance, threats of torture can, but must not necessarily,⁴⁵ amount to cruel and inhuman treatment.⁴⁶ Another instance is witnessing others being ill-treated,⁴⁷ raped⁴⁸ or executed.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 ICTY⁵⁰ 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”.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”.⁵² Both law and jurisprudence have evolved since that definition, and

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.

45 ECtHR, *Hüsnüye Tekin v. Turkey*, Judgment of 25 October 2005, para. 48.

46 IACtHR, *Villagrán Morales v. Guatemala*, above note 35, para. 165; *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112, para. 167; Inter-American Commission on Human Rights (IACmHR), *Prada González and Bolaño Castro v. Colombia*, Case 11.710, Report No. 63/01, Annual Report OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 34.

47 IACtHR, *Caesar v. Trinidad and Tobago*, above note 21, para. 78.

48 IACmHR, *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Report No. 53/01, Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 53.

49 IACmHR, *Tomas Porfirio Rondín v. Mexico (“Aguas Blancas” Case)*, Case 11.529, Report 49/97, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 76.

50 See note 19 above.

51 See ICTY, *Prosecutor v. Blaskić*, above note 18, paras. 154–155; *Prosecutor v. Kordić and Cerkez*, above note 18, para. 256; *Prosecutor v. Naletilić and Martinović*, 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.

52 *Commentary on GC IV*, above note 2, p. 598.

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.⁵³ However, it has adapted this definition in its case law for the purpose of international criminal law relating to armed conflicts. While it

53 ICTY, *Prosecutor v. Zejnir Delalic and Others*, Case No. IT-96-21-T (Trial Chamber), 16 November 1998, para. 459.

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,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.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.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,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

incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’

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

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.

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

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. Kvočka and Others*, above note 10, para. 284.

56 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 142; *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber), 15 March 2002, paras. 179, 180; *Prosecutor v. Brđjanin*, 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.

57 See the Report of the United Nations Special Rapporteur on Torture on his visit to the Russian Federation, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1994, para. 71.

Statute of the International Criminal Court.⁵⁸ The purpose cannot, however, be of any sort, but must have “something in common with the purposes expressly listed”.⁵⁹ The ICTY also considers that the prohibited purpose “need be neither the sole nor the main purpose of inflicting the severe pain or suffering”.⁶⁰

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.⁶¹ 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.⁶²

Along similar lines as the Elements of Crimes, some experts have challenged the necessity for a hierarchy of suffering between inhuman treatment and torture.⁶³ 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”.⁶⁴

58 Elements of Crimes for Article 8(2)(a)(ii) and Article 8(2)(c)(i) of the Rome Statute.

59 J. Herman Burger and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, The Hague 1988, p. 118.

60 ICTY, *Prosecutor v. Kvočka and Others*, above note 10, para. 153; *Prosecutor v. Kunarac and Others*, above note 10, para. 486, and Appeals Chamber, 12 June 2002, para. 155.

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.

62 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, 2003, ICRC, Cambridge, p. 63.

63 Malcolm Evans, “Getting to grips with torture”, in Association for the Prevention of Torture, *The Definition of Torture*, Geneva 2001, pp. 33–49; Nigel Rodley, “The definition(s) of torture in international law”, *Current Legal Problems*, No. 55 (2002), pp. 467–93; Manfred Nowak, “Challenges to the absolute nature of the prohibition of torture and ill-treatment”, *Netherlands Quarterly of Human Rights*, Vol. 23/4 (2005), pp. 674–88, at p. 678; Manfred Nowak, “What practices constitute torture? US and UN standards”, *Human Rights Quarterly*, No. 28 (2006), pp. 809–841, at p. 822.

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.

66 ECtHR, *Kismir v. Turkey*, Judgment of 31 May 2005, paras. 129–132.

67 ECtHR, *Ireland v. United Kingdom*, above note 20, para. 167; *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 64; *Salman v. Turkey* [GC], Judgment of 27 July 2000, Reports 2000-VII, para. 114; *Corsacov. v. Moldova*, Judgment of 4 April 2006, para. 63; *Menesheva v. Russia*, Judgment of 9 March 2006, para. 60. For an analysis of the jurisprudence of the ECtHR see Roland Bank, “Das Verbot von Folter, unmenschlicher oder erniedrigender Behandlung oder Strafe”, in Rainer Grote and Thilo Mahraun (eds.), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, 2006, pp. 479–534.

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. Kvočka 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.⁷¹ 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”.⁷² The period of time, the repetition and various forms of mistreatment and the severity should be assessed as a whole.⁷³ “Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.”⁷⁴ 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.”⁷⁵

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.⁷⁶ 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,⁷⁷ electric shocks,⁷⁸ burying alive,⁷⁹ suffocation under water,⁸⁰ suspension by the wrists,⁸¹ severe beatings,⁸² especially beatings on the soles of the feet,⁸³ mock executions,⁸⁴

71 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 483.

72 ICTY, *Prosecutor v. Krnojelac*, above note 56, para. 182.

73 Ibid.

74 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 484; *Prosecutor v. Kvočka and Others*, above note 10, para. 148.

75 ICTY, *Prosecutor v. Limaj, Bala and Musliu*, above note 23, para. 237.

76 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 485; ICTR, *Prosecutor v. Jean-Paul Akayesu*, above note 70, para. 682; ECtHR, *Aydın v. Turkey*, Judgment of 25 September 1997, Reports 1997-VI, paras. 82–86; Committee against Torture, *T.A. v. Sweden*, UN Doc. CAT/C/34/D/226/2003, 27 May 2005, paras. 2.4, 7.3; IACmHR, *Raquel Martin de Mejía v. Peru*, Case 10.970, Report No. 5/96, Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 rev. (1996), p. 185.

77 Committee against Torture, *Danilo Dimitrijevic v. Serbia and Montenegro*, UN Doc. CAT/C/35/D/172/2000, 29 November 2005, paras. 2.1, 2.2, 7.1, 7.2.

78 HRC, *Rodríguez v. Uruguay*, Communication 322/1988, 9 August 1994, CCPR/C/51/D/322/1988, paras. 2.1, 12.1; ACHPR, *Tshitenge Muteba v. Zaire*, Communication No. 124/1982, 24 July 1984, CCPR/C/OP/2 at 158 (1990), paras.8.2, 12; ECtHR, *Çakici v. Turkey*, Judgment of 8 July 1999, Reports 1999-IV, para. 93; Committee against Torture, “Concluding observations, Switzerland”, UN Doc. CAT/C/CR/34/CHE, 21 June 2005, para. 4 (b) (i).

79 HRC, *Eduardo Bleier v. Uruguay*, Communication R.7/30, 23 May 1982, UN Doc. Supp. No. 40 (A/37/40) at 130 (1982), paras. 2.3, 12.

80 HRC, *Rodríguez v. Uruguay*, above note 78, paras. 2.1, 12.1.

81 ECtHR, *Aksoy v. Turkey*, above note 67, para. 64; HRC, *Torres Ramirez v. Uruguay*, Communication 4/1977, 23 July 1980, UN Doc. CCPR/C/OP/1 at 49 (1984), para. 2.

82 ECHR, *Selmouni v. France*, above note 15, para. 101.

83 ECtHR, *Aksoy v. Turkey*, above note 81, para. 64.

84 ECmHR, *The Greek Case*, Report of 5 November 1969, (1969) 12 Yearbook 186–510, at 501; HRC, *Tshitenge Muteba v. Zaire*, Communication No. 124/1982, 24 July 1984, CCPR/C/OP/2 at 158 (1990), paras. 8.2, 12.

threats to shoot or kill,⁸⁵ exposure of detainees under interrogation to severe cold for extended periods,⁸⁶ 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.⁸⁷

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.⁸⁸ The ICTY has considered that being forced to watch serious sexual attacks inflicted on an acquaintance was torture for the forced observer.⁸⁹ 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,⁹⁰ or obliging victims to collect the dead bodies of other members of their ethnic group.⁹¹

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”.⁹² 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”.⁹³ 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.

87 Committee against Torture, “Concluding observations, Israel”, above note 31, paras. 255–257.

88 IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, Series C, No. 103, para. 93. On this subject see the article by Hernan Reyes, “The worst scars are in the mind: psychological torture” in this issue of the Review.

89 ECtHR, *Prosecutor v. Kvočka and Others*, above note 10, para. 149.

90 ICTY, *Prosecutor v. Naletilic and Martinovic*, above note 19, paras. 294–295.

91 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 511.

92 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhof, The Hague 1987, paras. 3047 ff.

93 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 161.

ICTY has retained an objective threshold⁹⁴ 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”.⁹⁵ In any case, while the humiliation and degradation must be “real and serious”, it need not be lasting.⁹⁶ No prohibited purpose such as those which characterize the crime of torture is required.⁹⁷

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]”.⁹⁸ However, it has also held that the absence of an intention to debase or humiliate does not exclude a finding of degrading treatment.⁹⁹ 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.”¹⁰⁰

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;¹⁰¹ serious forms of racial discrimination;¹⁰² not allowing a prisoner to change his soiled clothes;¹⁰³ cutting off the hair and beard for punishment;¹⁰⁴ the use of human shields;¹⁰⁵ 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 violence¹⁰⁶.

94 *Ibid.*, para. 162.

95 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 (Trial Chamber), 25 June 1999, para. 57.

96 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 501.

97 ICTY, *Prosecutor v. Kvočka and Others*, above note 10, para. 226.

98 ECtHR, *Raninen v. Finland*, Judgment of 16 December 1997, Reports 1997-VIII, para. 55.

99 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.

100 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.

101 ECmHR, *Greek case*, above note 84, p. 186.

102 ECmHR, *East African Asian Cases*, above note 32, p. 76.

103 ECtHR, *Hurtado v. Switzerland*, Judgment of 28 January 1994, Series A, No. 280-A, para. 12.

104 ECtHR, *Yankov v. Bulgaria*, Judgment of 11 December 2003, ECHR 2203-XII, paras.114, 121.

105 ICTY, *The Prosecutor v. Aleksovski*, above note 95, para. 229.

106 ICTY, *The Prosecutor v. Kvočka 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 liberty¹⁰⁷ – puts the person at particular risk of ill-treatment. This is all the more true for all forms of unlawful

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 court¹¹¹ 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.

108 ECtHR, *Salman v. Turkey*, above note 67; para. 100; *Günaydin v. Turkey*, Judgment of 13 October 2005, para. 29.

109 IACtHR, *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003, Series C, No. 99, paras. 97–100; IACmHR, *Joaquín Ortega et al. v. Guatemala*, Case 10.586, Report No. 39/00, Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6. rev. (1999), paras. 253–254.

110 Nigel Rodley, *The Treatment of Prisoners under International Law*, OUP, Oxford 2000, p. 334.

111 HRC, *Marais v. Madagascar*, 24 March 1983, UN Doc. CCPR/C/18/D/49/1979, para. 17.4.

112 See HRC, *General Comment 20 on Article 7*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.7, para. 11; *El-Megreisi v. Libya*, UN Doc. CCPR/C/50/D/440/1990, 24 March 1994, para. 5.4; *Marais v. Madagascar*, 24 March 1983, UN Doc. CCPR/C/18/D/49/1979, para. 19; *Celis Laureano v. Peru*, 16 April 1996, UN Doc. CCPR/C/56/D/540/1993, para. 8.5; IACmHR, *Dayra María Levoyer Jiménez v. Ecuador*, Report No. 66/01, Case 1.992, 14 June 2001, para. 34; IACtHR, *Suárez Rosero v. Ecuador*, Judgment of 12 November 1997, Series C, No. 35, para. 91; *Velázquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 4, para. 156; *Castillo Páez v. Peru*, above note 35, para. 192; ACHPR, Communication 250/2002, *Zegfeld and Ephrem v. Eritrea*, Seventeenth Activity Report, para. 55, available at: http://www.achpr.org/english/_info/index_activity_en.html (last visited 6 October 2007).

113 Committee against Torture, “Concluding observations, Spain”, UN Doc. CAT/C/CR/29/3, 23 December 2002, para. 10; Report of the UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, 12 December 2005, para. 57; Recommendations of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (g).

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.¹¹⁴ For this right to be exercised effectively, the person should have access to a lawyer.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸

114 Human Rights Committee, General Comment 8 on Article 9, 30 June 1982, UN Doc. HRI/GEN/1/Rev.7, para. 2; HRC, *Terán Fijon 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 arrested, 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”.

118 HRC, *Mojica v. Dominican Republic*, UN Doc. CCPR/C/51/D/449/1991, 10 August 1994, para. 5.7; *Celis Laureano v. Peru*, above note 112, para. 8.5; Report of the UN Working Group on Enforced and Involuntary Disappearances, UN Doc. E/CN.4/1435, 26 January 1981, para. 184; IACtHR, *Velázquez Rodríguez v. Honduras*, above note 112, para. 156; IACmHR, *Romer Morales Zegarra et al. v. Peru*, Cases 10.827 and 11.984, Report 57/99, 13 April 1999, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 1013 (1998), paras.71, 72; *Ampara Tordecilla Trujillo v. Colombia*, Case 10.337, Report 7/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 423 (1999), para. 37.

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.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 “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”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 through 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.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.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.¹²³ In addition, numerous international treaties and soft-law instruments have been developed in order to set out the minimum

119 HRC, *Almeida de Quinteros v. Uruguay*, 15 October 1982, UN Doc. CCPR/C/OP/2, paras. 14, 16; ECtHR, *Kurt v. Turkey*, Judgment of 25 May 1998, Reports 1998-III, para. 174; *Bazorkina v. Russia*, Judgment of 27 July 2006, para. 139 (unreported); IACtHR, *Bámaca Velázquez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, para. 129; ACHPR, Communications 222/98, 229/98, *Law Office of Ghazi Sulaiman v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 134 (ACHPR 2003), para. 62. Only those family members who share a relationship of personal affection and closeness, according to ECtHR, *Çakici v. Turkey*, above note 78, para. 98; IACtHR, *Children's Rehabilitation v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112, para. 191.

120 ICCPR, Article 10; ACHR, Article 5(2).

121 See Article 37 of the Convention on the Rights of the Child; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990; IACtHR, *Bulacio v. Argentina*, Judgment of 118 September 2003, Series C, No. 1000, para. 126.

122 ICCPR, Article 10; ACHR, Article 5(2).

123 See, e.g., Articles 13–16, 20, 22, 25–38, 49, 51–53, 69–71 of GC III, and Articles 25, 27, 31–34, 76, 83–95, 103, 106–107, 119, 124, 127 of GC IV.

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.¹²⁴ 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.¹²⁵ 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.¹²⁶

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.¹²⁷ 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

124 HRC, *Womah Mukong v. Cameroon*, Communication 458/1991, 10 August 1995, UN Doc., CCPR/C/51/D/458/1991, para. 9.3; IACmHR, *Joseph Thomas v. Jamaica*, Case 12.183, Report 127/01, Annual Report 2001, OEA/Ser.L/V/VV.114 Doc. 5.rev. (2001), para. 132; The IACmHR has frequently taken the Standard Minimum Rules into account: *Denton Aitken v. Jamaica*, Case 12.275, Report No. 58/02, Annual Report 2002, OEA/Ser.L/V/II.117 Doc.1 rev. 1 (2002), para. 135; *Michael Edwards et al. v. Bahamas*, Cases 12.067 et al., Report No. 48/01, Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 195.

125 See the “Report of the United Nations Special Rapporteur on Torture on his visit to the Russian Federation”, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1994, para. 71; Bank, above note 67, p. 493; IACmHR, *Lizardo Cabrera v. Dominican Republic*, above note 100, para. 86.

126 ECtHR, *Alver v. Estonia*, Judgment of 8 November 2005, para. 55; *Romanov v. Russia*, Judgment of 20 October 2005, para. 81; *Mathew v. Netherlands*, Judgment of 29 September 2005, para. 216.

127 HRC, *Vuolanne v. Finland*, above note 29, para. 9.2; ECtHR, *Dougoz v. Greece*, above note 31, para. 46; *Iovchev v. Bulgaria*, above note 31, para. 137.

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.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);¹²⁹
- lack of natural light or daylight;¹³⁰
- artificial light night and day;¹³¹
- lack of fresh air or ventilation;¹³²
- insufficient possibility to leave the cells and exercise;¹³³
- inadequate food and drinking water;¹³⁴
- inadequate material conditions (such as lack of clean bedding, clothes, cleaning material);¹³⁵
- inadequate sanitary and hygiene conditions;¹³⁶
- lack or denial of medical care,¹³⁷ including psychological care;¹³⁸
- excessively hot or cold temperatures and exposure to climate;¹³⁹
- unlawfulness of the detention;¹⁴⁰
- isolation or solitary confinement (see in more detail below);¹⁴¹
- lack of contact with the outside world;¹⁴²

128 ECtHR, *Kudla v. Poland*, Judgment of 26 October 2000, Reports 2000–XI, para. 95.

129 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (SMRTP), Articles 9, 10; European Prison Rules, Recommendation No. R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 (EPR) Rules 18.5, 18.6; The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Standards (CPT Standards), CPT/Inf/E (2002) 1 – Rev. 2006, p. 8, para. 43.

130 SMRTP, Article 10; EPR Rule, 18.2.a; CPT Standards, p. 15, para. 47, p. 25, para. 30.

131 SMRTP, Articles 10, 11; EPR Rule 18.2.b; CPT Standards, p. 25, para. 30.

132 SMRTP, Article 10; EPR Rule 18.2.a;

133 At least one hour a day in the open air: SMRTP, Article 21; EPR Rule 27; CPT Standards, p. 15, para. 47.

134 Article 5(1)(b) of AP II; SMRTP, Article 20; EPR Rule 20; CPT Standards, p. 10, para. 42, p. 15, para. 47.

135 SMRTP, Articles 17–19; EPR Rule 20; CPT Standards, para. 47.

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.

137 Article 5(1)(a) of AP II; SMRTP, Article 22; Basic Principles for the Treatment of Prisoners, GA Res. 45/111, annex, 45 UN GAOR Supp. (No. 49A) at 200, UN Doc. A/45/49 (1990) (BPTP) Principle 9; Body of Principles, Principle 24; EPR Rules 39–48; CPT Standards, pp 29–38.

138 SMRTP, Articles 22, 82; EPR Rules 40.5, 47.

139 Article 5(1)(b) of AP II; SMRTP, Article 10.

140 ECtHR, *Fedotov v. Russia*, Judgment of 25 October 2005, paras 68–70.

141 SMRTP, Articles 29–32; BPTP Principle 7; EPR Rule 60.5.

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.

- lack of any meaningful occupation or of work under lawful working conditions;¹⁴³
- lack of respect for religious or spiritual needs;¹⁴⁴
- lack of segregation and of protection of detainees from other detainees;¹⁴⁵
- prisoner-on-prisoner violence;¹⁴⁶
- period of time for which the person is detained or held in such conditions.¹⁴⁷

Strip and body searches

No international standards entirely prohibit strip and body searches,¹⁴⁸ and jurisprudence has not found that strip or body searches are necessarily incompatible with the prohibition of inhuman or degrading treatment.¹⁴⁹ But searches must be conducted with due respect for human dignity and for a legitimate purpose.¹⁵⁰ They do amount to inhuman or degrading treatment if the manner in which the search is carried out is debasing,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,¹⁵² where a search is carried out by guards who deride or abuse the prisoner,¹⁵³ where the search is not justified by the preservation of prison security or prevention of disorder or crime,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.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

143 Article 5(1)(e) of AP II; SMRTP, Articles 71–78; BPTP Principle 6, 8; Body of Principles, Principle 28; EPR Rule 26.

144 Article 5(1)(d) of AP II; SMRTP, Article 41; BPTP Principle 3; EPR Rule 29.

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.

146 General Recommendations of the Special Rapporteur on Torture, above note 113, para. 26 (j); HRC, *Griffin v. Spain*, Communication No. 493/1992, UN Doc. CCPR/C/53/D/493/1992, 4 April 1995, para. 3.1; CPT Standards, paragraph 27.

147 ECtHR, *Georgiev v. Bulgaria*, Judgment of 15 December 2006, para. 56; *Khudoyorov v. Russia*, Judgment of 8 November 2005, para. 105.

148 See, e.g., EPR Rule 54, explicitly regulating such searches.

149 ECmHR, *McFeeley et al. v. United Kingdom*, application 8317/77, 15 May 1980, 20 DR 44.

150 ECtHR, *Karakas and Yesilirmak v. Turkey*, Judgment of 28 June 2005, paras. 36–41.

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.

152 ECtHR, *Valasinas v. Lithuania*, Judgment of 24 July 2001, Reports 2001-VIII, para. 117.

153 ECtHR, *Iwanczuk v. Poland*, above note 151, para. 59.

154 *Ibid.*, paras. 58–59.

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.¹⁵⁶ 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”.¹⁵⁷

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”.¹⁵⁸ 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,¹⁵⁹ if it entails sensory isolation¹⁶⁰ or complete social isolation,¹⁶¹ if the victim suffers from a disability,¹⁶² 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.

161 Committee against Torture, “Concluding observations, New Zealand”, UN Doc. CAT/C/CR/32/4, 11 June 2004, para. 5(d); “Concluding observations, United States of America”, above note 38, para. 36; “Conclusions and Recommendations on Spain”, UN Doc. CAT/C/CR/29/3, 23 December 2002, para. 11(d); ECtHR, *Ramirez Sanchez v. France*, Judgment of 27 January 2005, para. 100; *Öcalan v. Turkey*, above note 40, paras.191–196.

162 IACmHR, *Victor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, Annual Report 1998, OAE/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 59.

imposed for an excessive period of time.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.¹⁶⁴ In other words, the detainee must continue to have some meaningful activities and appropriate human contact.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.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.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”.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.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

163 HRC, *General Comment 20 on Article 7*, 13 March 1992, HRI/GEN/1/Rev.7/Add.1, para. 6. See also HRC, *Vuolanne v. Finland*, above note 29, para. 9.2; *Kennedy v. Trinidad and Tobago*, 5 May 2003, CCPR/C/77/D/908/2000, para. 6.4; *Polay Campos v. Peru*, 9 January 1998, CCPR/C/61/D/577/1994, para. 8.6; *Conteris v. Uruguay*, 17 July 1985, CCPR/C/25/D/139/1983, para. 1.6.

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

165 CPT, *Report on Norway*, 11 April 2006, CPT/Inf (2006) 14, paras.52, 56; *Report on Lithuania*, 23 February 2006, CPT/Inf (2006) 9, para. 107; *Report on Azerbaijan*, 7 December 2004, CPT/Inf (2004) 36, para. 133; *Report on Belgium*, 17 October 2002, CPT/Inf (2002) 25, paras.92, 95; 116; *Report on the Russian Federation*, 30 June 2003, CPT/Inf (2003) 30, para. 118.

166 IACmHR, *Lizardo Cabrera v. Dominican Republic*, above note 100, para. 86.

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.

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.

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.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 humiliation¹⁷¹ and especially prohibit them as punishment.¹⁷² The use of firearms should be avoided.¹⁷³ Jurisprudence has found that inappropriate use of pepper spray¹⁷⁴ or tear gas¹⁷⁵ could amount to ill-treatment, or that electro-shock devices such as tasers could be instruments of torture.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.

170 IACtHR, *Durand and Ugarte v. Peru*, Judgment of 16 August 2000, Series C, No. 68, paras.78–79; *Neira Alegria v. Peru*, Judgment of 19 January 1995, Series C, No. 20, para. 86; the ACHPR has sometimes found a violation of Article 5 of the African Charter on Human and Peoples’ Rights in cases where people were “shot or tortured to death”: *Mouvement Burkinabé des Droits de l’Homme et des Peuples v. Burkina Faso*, Fourteenth Activity Report, (2001) AHRLR 51 (ACHPR 2001), para. 43.

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(e).

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.

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).

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

175 IACmHR, *Parque São Lucas v. Brazil*, Case 10.301, Report No. 40/03, Annual Report 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (2003), para. 52.

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