

## MODULE 2

### Purpose of the Convention

The Preamble of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) states that the treaty is intended to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”

The prohibition of torture and cruel, inhuman or degrading treatment or punishment (“CIDTP”) is recognised by numerous other international and regional human rights treaties, and is accepted **as an absolute and non-derogable human right**. The absolute prohibition of torture is generally considered as *jus cogens* (a peremptory norm of international law). This means that all States, regardless of whether they have ratified the relevant treaties, are bound by the prohibition of torture and ill-treatment. The use of torture and ill-treatment cannot be justified under any circumstance, including during internal armed conflicts, in the context of the so called “war against terror”, or other national security threats.

### Definition of torture

Torture is defined in Article 1 of the UNCAT as:

“any act by which **severe pain or suffering**, whether physical or mental, is **intentionally** inflicted on a person for such **purposes** as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted **by** or **at the instigation** of or with the **consent or acquiescence** of a **public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

- Four elements are essential to establish “torture” as defined by the UNCAT:
- Conduct inflicting **severe pain or suffering**, whether physical or mental.
- Element of **intent** (which means pure negligence does not amount to torture).
- Specific **purpose** (e.g., gaining information, punishment, intimidation, coercion, among others – the list given in Article 1 is not exhaustive).
- **Involvement** of a State official, at least by acquiescence.

Torture can be committed both through an **act** or an **omission**. For instance, a State’s failure to respond to basic needs of its prisoners, such as heating in winter, proper washing facilities, clothing or medical care, or the deprivation of food and water for a prolonged period of time can amount to torture. For instance, a REDRESS case in Latin America (S.L. v. Venezuela) revolved around the lack of medical care for a prisoner’s diabetic condition, which eventually resulted in her death.

The infliction of severe **mental harm** can constitute an act of torture. Such acts include sleep deprivation, constant verbal threats of rape, threats of harm against oneself or another person, or forcing the victim to witness a loved one being tortured. Those are all examples of torture methods that generate **mental suffering**, such as fear of being subjected to sexual violence or other forms of physical harm, feelings of guilt, and feelings of complete helplessness. Practices such as **enforced disappearance**, which cause long-lasting and damaging consequences for the disappeared persons as well as for their family and loved ones, generally qualify as causing severe pain and suffering under Article 1 (see CAT, Hernández Colmenarez v. Venezuela, at para.6.4)

Acts of torture are **not necessarily committed during interrogation settings**. What matters is that the victim is in a situation of **powerlessness**. In most cases, torture occurs when individuals find themselves in a situation of complete dependency – be it when they are held in police custody, prison, healthcare facilities, or deprived of their liberty in any other context.

Because of this element of powerlessness, torture is often linked to other crimes, such as enforced disappearance or human trafficking, where victims are completely at the mercy of their captors and thus particularly vulnerable to any form of abuse. Under certain circumstances, domestic violence can also amount to torture.

### Intention

Article 1 of UNCAT requires that severe pain or suffering must be **intentionally** inflicted on the victim in order to qualify as torture. The perpetrator’s intent must be **directed both at the conduct of inflicting severe pain** or suffering and **at the purpose** to be achieved by such conduct.

Intent is assessed objectively, by looking at the nature and gravity of the treatment inflicted (see CAT General Comment 2, at para.9). Intent can also be derived from the length of time over which an act/omission is carried out, or from the “coercive and punitive environment” in which an act/omission takes place.

### Improper Purpose

Article 1(1) of UNCAT contains a **non-exhaustive** list of improper purposes, which is also reflected in jurisprudence, and includes conduct to obtain a confession, to punish, intimidate, coerce, humiliate, degrade, and for any reason based on discrimination.

The purposive element of torture does not require a subjective inquiry into the motivation of perpetrators. There must be “objective determinations under the circumstances”, such that the particular purpose can be derived from the circumstances surrounding the treatment (see CAT General Comment 2, at para.9).

**Azul Rojas Marín, who is transgender, was arbitrarily arrested by police officers. She was raped, beaten, and verbally abused due to her sexual orientation. The Inter-American Court**

found that the purposive element of the definition of torture incorporates discrimination based on sexual orientation and gender identity.

### Involvement of a State official

Article 1 of UNCAT States that the pain or suffering needs to be “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”. The Committee Against Torture (CAT) interprets the required link to encompass State involvement in a **broad sense**.

“Public official” does not only encompass law enforcement officers or security staff, but all those who carry out State functions. Similarly, the reference to “other person acting in an official capacity” covers private contractors acting on behalf of the State, but also all non-State actors whose authority is comparable to governmental authority, such as insurgent groups that exercise *de facto* control over a certain region. See for example, the judgment of the UK Supreme Court in the case of Agnes Taylor.

In cases where the treatment was **not inflicted by State officials**, the State has nevertheless been found to have “consented or acquiesced” to torture where: (i) State officials knew, or should have known, of a real and immediate risk to the personal integrity of a person or group; and (ii) those authorities did not take necessary and reasonable measures to prevent that risk. States are responsible when they do not exercise **due diligence** to stop torture, sanction perpetrators and provide remedies to victims for acts of torture perpetrated by **non-State actors**. This is how factual obligations relating to domestic or sexual violence, or modern forms of slavery (forced labour, forced prostitution, etc) can fall within the ambit of UNCAT.

### Definition of CIDTP

There is no definition of CIDTP in UNCAT. International bodies do not all agree on the distinguishing elements (see UNHRC General Comment 20, at para.4).

The CAT has observed that “the definitional threshold between ill-treatment and torture is often not clear” and that “[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture” (see CAT General Comment 2, at para.3).

There are several lines of distinction:

- For the CAT (e.g. Keremedchiev v. Bulgaria, at para.9.3) and the Inter-American Court (e.g. Caesar v. Trinidad and Tobago at para.50) the key distinguishing factor is the **severity of the pain or suffering inflicted**.
- For the HRC, the principal criterion is the **purposive element** (e.g. Giri v. Nepal, at para. 7.5).
- The ECtHR has adopted shifting views on the distinguishing element: initially purpose (see the “Greek Case” from 1969), then severity (Ireland v. UK, at para.167), and finally both (Selmouni v. France at para.100).

In the Selmouni case the ECtHR re-iterated that the determination of severity “depends on all the circumstances of the case, such as the duration of the treatment, its physical or

mental effects and, in some cases, the sex, age and State of health of the victim, etc.” (at para.98).

The ECtHR has held that inhuman treatment covers “at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.” “Degrading treatment” includes treatment that causes the victim to feel fear, anguish, inferiority, humiliation, or debasement (see Ireland v. UK at para.167).

### Duty to protect and prevent

*Prevention.* Articles 2 and 16 of UNCAT lay out the basic duty of States Parties to take **effective legislative, administrative, judicial, or other measures to prevent** torture and CIDTP in any territory under their jurisdiction.

*Training.* Article 10 creates an obligation to include the prohibition of torture and CIDTP **in the training of law enforcement and prison personnel.**

*Review.* Article 11 requires States parties to keep interrogation rules and methods under **systematic review.**

*Safeguards.* International human rights law recognises the vital importance of safeguards to protect persons in custody. The Human Rights Committee has explained in General Comment 20 that the prohibition of torture includes the obligation to protect persons from torture, and that as part of this obligation, States must put into place safeguards including the right to have one’s detention registered and notified to a third party, the right to access a lawyer, and the provision of an independent medical examination (at para.11). The CAT in General Comment 2 (at paras 8 and 13) has also identified a range of further safeguards, including an official register of detention, independent monitoring of places of detention, promptly informing detainees of their rights, and the right to complain of mistreatment and challenge detention.

*Exclusion of Evidence.* Article 15 prescribes that **no confession or information extracted by torture – or derived from such a confession – shall be admitted as evidence** in any judicial or administrative proceedings.

Oleg Sentsov is a Ukrainian filmmaker who actively opposed the Russian annexation of the Crimea. He was sentenced to a twenty-year prison sentence in 2015 for planning and performing terrorist attacks. He stated that his conviction was based on evidence obtained by torture but his appeal on this ground was rejected by the Russian courts. In this case, REDRESS argued that based on the absolute prohibition of torture, all evidence obtained by torture or other prohibited ill-treatment should be excluded from use at trial. The victim was finally released by the Russian authorities, but Russia never admitted to using evidence obtained by torture.

*Non-Refoulement.* The UNCAT establishes the **principle of non-refoulement** in Article 3: States are not only under an obligation to refrain from and prevent torture on their own territory, but they are also required to **refrain from expelling, returning, or extraditing a person** to another State where there are substantial grounds for believing that they would

be in danger of being subjected to torture or CIDTP. This principle often comes into play with regard to migrants and asylum seekers who must not be sent to a third country or their home country if they face a real risk of torture upon return.

*Diplomatic Assurances.* Sometimes States will make an explicit promise not to torture someone, in order to have them extradited. For example, to extradite Edward Snowden from Russia, the then-US Attorney General wrote to the Russian Minister of Justice to confirm that Snowden would not be tortured or executed if returned to the USA. Generally speaking, it is questionable if such “diplomatic assurances” really suffice to comply with the UNCAT’s principle of non-refoulement.

### Duty to prosecute and punish

*Criminalisation.* Under Article 4, States have the obligation to ensure that **all acts of torture are offences under their criminal law**. States have to *criminalise* acts of torture, and make them punishable by appropriate penalties which take into account the grave nature of the crime. Disciplinary sanctions are not sufficient; light or suspended prison sentences are in most cases not appropriate for the level of harm inflicted by torture.

*Universal Jurisdiction.* Article 5 obliges States to establish **jurisdiction** over acts of torture **on the basis of the territoriality, active and passive personality** as well as under the principle of **universal jurisdiction** (Article 5). This means that there shall be **no safe havens for perpetrators** of torture. As such, immunities, amnesties and pardons are incompatible with the obligations of States to prohibit, prevent and punish torture under international law (see CAT, General Comment 3, at para 38).

*Investigations.* Article 12 requires State parties to carry out **prompt and impartial investigations** on their own initiative wherever there are reasonable grounds to believe that an act of torture or CIDT has been committed. It is sufficient that the victim has alleged acts of torture, or that there are reasonable grounds to believe that acts of torture have been committed. The Istanbul Protocol provides guidance on effective investigations into torture allegations.

*Extradite or Prosecute.* Wherever a perpetrator of torture is travelling or residing, the authorities of the respective State have an obligation to arrest them, to make a preliminary inquiry into the facts, and to decide whether to **extradite the person** to their country of origin, residence, or commission of the act of torture, **or to prosecute** the person before their own domestic criminal courts (Articles 5 to 9).

In 2021 a court in Germany held a trial under the principle of universal jurisdiction of two former officials of the Syrian Intelligence Service who are charged for complicity in the torture of at least 4,000 individuals (“Al-Khatib trial”).

### Duty to provide redress

*Complaint.* The right of victims of torture to a remedy and adequate reparation is closely linked to the right of victims to make a **complaint to a competent authority** under Article 13 of the UNCAT. Article 13 also ensures that this authority shall promptly and impartially examine every allegation and ensure that victims and witnesses are adequately protected against intimidation and reprisals.

*Reparation.* Victims of torture have the right to a remedy and **adequate reparation** for the harm suffered (Article 14). Reparation aims at restoring dignity to survivors, acknowledging wrongdoing, and implementing long-term reforms to avoid the repetition of torture and ill-treatment. To that end, it is vital that reparation is victim-based, gender-sensitive, and comprehensive. It needs to be tailored to the particular needs of the victim and proportionate to the gravity of the harm suffered.

*Five Forms of Reparation.* The CAT has interpreted the right to reparation in a broad way, so as to encompass five forms (see CAT, [General Comment 3](#), para.2). Bearing in mind that torture often entails severe long-lasting consequences that go far beyond the immediate physical and mental harm, the five forms of reparation are not mutually exclusive. They complement each other as they all address different needs.

- **Restitution** focuses on restoring survivors' lives to the circumstances prior to the violence, including restitution of civil status, employment, access to education and property. Given the nature of torture and ill-treatment and its long-lasting physical and psychological impacts, full restitution is often not possible.
- **Compensation** is monetary in nature and should cover both pecuniary and nonpecuniary harm. It is not sufficient by itself to provide relief to victims of torture and should be provided together with other forms of reparation.
- **Rehabilitation** covers medical and psychological care, legal and social services (e.g. housing) and economic rehabilitation through education and employment opportunities. In other words, they focus on providing survivors with all essential services they need to assist them to carry out their life in a dignified way.
- **Satisfaction** focuses on the recognition of the status of the individuals or their communities as survivors of violations, ending ongoing violations, bringing justice and appropriate sanctions against perpetrators, establishing the truth, fact-finding measures, official declarations restoring the dignity of victims, commemoration, and tributes to the victims. For some victims it is also vital that States officially acknowledge the harm done to them and make public apologies.
- **Guarantees of non-repetition**, for example through law reform, address the structural causes of human rights violations. In that, they are essential to ensure that others do not suffer in the same way.

See *Module 9: Reparation*, and *Module 10: Compensation*.