

Introduction

The use of the word torture in Q-CAT's work is that given in the UN Convention (below), which covers state action and other action taken by persons acting in an official capacity.

A popular understanding of what constitutes torture might be as given in the Oxford English Dictionary, viz: 1. *The infliction of excruciating pain, as practised by cruel tyrants, brigands, etc., from a delight in watching the agony of a victim, in hatred or revenge, or as a means of extortion; specifically judicial torture, inflicted by a judicial or quasi-judicial authority for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information.* 2. *Severe or excruciating pain or suffering (of body or mind); anguish, agony, torment; the infliction of such.* 3. *Severe pressure; violent perversion or 'wrestling'; violent action or operation; severe testing or examination.*

A dictionary can, of course, only record actual usage. Nevertheless, the definitions given above, although widely used in everyday parlance, can be unhelpful in seeking consensus on what is, legally, torture, or in providing protection against it. In particular, it incurs the danger that domestic abuse and torture are conflated, with the result that neither gets adequately addressed.

It is, therefore, with the *legal* definition of torture that this briefing is primarily concerned.

Legal Definitions of torture

The United Nations Convention Against Torture (UNCAT)¹

The UN Convention, whose full title is The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, was drafted in December 1984 and came into effect in June 1987. Article 1 defines torture much more specifically 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.*

Article 1 goes on to say that torture *does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.* These words are broad and vague, and are widely debated, although the most widely accepted interpretation of this clause is that it refers to international law.

Article 16 of the Convention refers to *other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.* Because it is recognised as difficult to draw the line in such matters, The UN's Committee Against Torture², which monitors compliance, regards the prohibition on such acts as equally absolute to that on torture.

This definition is essentially based on the Universal Declaration of Human Rights (UDHR), effective 1948, which in Article 5 states that *No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

There are a number of other Conventions which also seek to define torture. The most important of these are summarised below.

Geneva Conventions (1948)³

Probably the best known measures apart from the UNCAT are the Geneva Conventions of 1948 and the protocols added to them in 1977. The Geneva Conventions are intended to provide protection for those who fall in to enemy hands. They provide protection for both combatants and non-combatants. The first, second, third and fourth conventions cover wounded combatants, shipwreck survivors at sea, prisoners of war and most civilians respectively. The fourth convention (civilians) contains a number of exceptions, for example for those engaged in, or suspected of being engaged in, activities hostile to the security of the State, but still requires that such persons be treated with "humanity". In December 2015 the 32nd International Conference of the Red Cross and Red Crescent in Geneva failed to reach agreement on revising and strengthening the Conventions to take account of modern circumstances.⁴

The Inter-American Convention to Prevent and Punish Torture (1987) defined torture rather more widely than UNCAT, as *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 preventative measure, as a penalty or for any other purpose*. It also included *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* (emphasis added), but in similar manner to UNCAT, it excluded *pain or suffering which is inherent in or solely the consequence of lawful measures*. This exclusion is repeated in the US **Torture Victim Protection Act (1991)** which provides remedies to individuals who are victims of torture by persons acting in an official capacity of any foreign nation. Again, however, this act includes remedies against mental pain or suffering, including that caused by threats to the victim or anyone else.

The European Convention on Human Rights (ECHR) (1950),⁵ prohibits torture and inhuman or degrading treatment or punishment. There are no exceptions or limitations on this right. This provision usually applies, in addition to torture, to cases of severe police violence and poor conditions in detention.

The European Court have emphasised the fundamental nature of Article 3 in holding that the prohibition is made in "absolute terms ... irrespective of a victim's conduct". The Court has also held that states cannot deport or extradite individuals who might be subjected to torture, inhuman or degrading treatment or punishment, in the recipient state.

Initially the Court took a fairly narrow view on what constituted torture, preferring instead to find that states had inflicted inhuman and degrading treatment. In 1978, for example, it ruled that sensory deprivation constituted "inhuman or degrading treatment" rather than torture. This ruling, which pre-dated the UN convention by some nine years, influenced subsequent thinking on the matter, and in 1996 the Court ruled that suspending a detainee by his arms while his hands were tied behind his back amounted to torture.

In late 1987, some five months after the UN Convention came in to effect, the members of the Council of Europe adopted the **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**, which established a committee to visit member states to establish how detained persons are treated, and to make appropriate recommendations. Adherence to this convention is now accepted as a precondition of membership of the Council of Europe.

The Rome Statute (2002) established the **International Criminal Court** to provide for the criminal prosecution of those responsible for genocide, war crimes and crimes against humanity. It is mentioned here because tucked away in article 3 the statute defines torture as *intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused*, and again includes specifically that torture *shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions*. The ICC is an intergovernmental organisation, and in effect the court of last resort where national governments are unable or unwilling to prosecute. It is further troubled by the absence of the USA, and now the threat of South Africa to withdraw.

Two recognised definitions which are wider than those previously mentioned are:

(1)The **Declaration of Tokyo (1975)**, adopted by the World Medical Association in 1975, is primarily concerned with the treatment of prisoners or other detainees. It defines torture as *the deliberate systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, (emphasis added) to force another person to yield information, to make a confession or for any other reason*. This declaration is addressed to medical professionals, and is designed to protect them from pressure to participate in acts of torture or other degrading or inhuman treatment (including, in most circumstances, force feeding, which is specifically mentioned) and, of course, to protect potential victims; it might be thought that, in this context, it is important not to limit the scope of its provisions.

And (2) the remit which **Amnesty International** gives itself; *Torture is the systematic and deliberate infliction of acute pain by one person on another, or on a third person, in order to accomplish the purpose of the former against the latter*.

Some points for discussion

With the exception of these last two definitions, which exist for particular purposes, we remain with the concept of torture as being essentially state sponsored. We summarise, below, a number of issues which readers might wish to consider.

Lawful Sanctions

As we have seen, the UNCAT definition of torture specifically excludes “*pain or suffering arising only from, inherent in, or incidental to, lawful sanctions*.” The Inter-American Convention and the Rome Statute have similar exclusions. Yet the concept of legal sanctions is broad and vague. Can a state, in effect, redefine actions which cause pain and suffering as not torture simply by passing laws to allow them? UNCAT and other measures do not define “legal sanctions”, nor do they provide criteria for recognising them. At the time UNCAT was drafted this was probably done deliberately to avoid discussion of the legality (or the morality) of, for example, the death penalty. This provides states with a lot of “wiggle room”.

Currently the most generally accepted interpretation of this clause is that it refers to international law. Does the concept of lawful sanctions need to be revisited in this context?

The corporate state

No matter how carefully “torture” is defined, it can be remarkably difficult to persuade judicial and other actors on the scene to recognise evidence of torture, or to acknowledge the extent to which further torture or abuse may take place in institutional settings. In Britain the authority of the state is now, in many instances – in Immigration Removal Centres and some prisons, for example - vested in private companies and their employees. Some of the implications of this

corporate state are referred to in Q-CAT Briefing 47. There are too many allegations of torture or inhuman and degrading treatment taking place in the UK, in prisons and other places of detention, and when people are being deported, to dismiss these out of hand.

Concerns about alleged abuse in British institutions do not solely apply to the treatment of refugees and asylum seekers; recent allegations have been made against G4S staff of a Young Offenders Institution⁶ although to be fair the members of staff identified were swiftly suspended pending an investigation. As functions of the state continue to be delegated to private contractors, it may be that thought needs to be given to what constitutes a *public official or other person acting in an official capacity* (UNCAT article 1), and what structures of accountability are appropriate to this situation.

Inhuman and degrading treatment

As we have seen, UNCAT distinguishes between torture and “cruel, inhuman or degrading treatment or punishment”, and other conventions make similar distinctions. The distinction is difficult to make in practice, and our understanding continues to evolve, as referred to above in the case of ECHR. Indeed, the European Court has now ruled that, since the Convention is a “living instrument”, treatment which it had previously characterised as inhuman or degrading treatment might in future be regarded as torture. Should the distinction between “inhuman and degrading treatment” and “torture” be reconsidered, or even legally abolished?

References

- ¹ www.ohcr.org/EN/ProfessionalInterest/Pages/CAT (full text)
https://en.wikipedia.org/wiki/United_Nations_Convention_against_Torture (main provisions)
- ² see wikipedia article (above) or search for Committee Against Torture
- ³ International Committee of the Red Cross (full text)
<https://en.wikipedia.org/Geneva-Conventions> (main provisions)
- ⁴ ICRC News release 10 December 2015
- ⁵ www.echr.coe.int/Documents (full text)
https://en.wikipedia.org/wiki/European_Convention_on_Human_Rights (article and comment)
- ⁶ BBC Panorama 11 January 2016. Also Guardian article 14 January 2016

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