

Innocenti Working Paper

**CHILD VICTIMS OF TORTURE AND
CRUEL, INHUMAN OR DEGRADING
TREATMENT**

Dan O'Donnell and Norberto Liwski
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Correspondence should be addressed to:

UNICEF Innocenti Research Centre
Piazza SS. Annunziata, 12
50122 Florence, Italy
Tel: (+39) 055 20 330
Fax: (+39) 055 2033 220
Email: florence@unicef.org
www.unicef-irc.org

Children and Transitional Justice Working Paper Series

The Children and Transitional Justice Working Paper Series is intended to generate dialogue and consensus, and to better inform children's protection and participation in ongoing or planned transitional justice processes in diverse country situations. Based on experience, the papers document and identify challenges, dilemmas and questions for further debate and formulate recommendations to better protect the rights of children involved in transitional justice processes.

The research conducted has created broad interest and visibility, helping establish a child rights-based approach to transitional justice that addresses advocacy, policy and programme concerns within UNICEF and among partners. Key areas of focus include:

- International legal framework and child rights
- Children and truth commissions
- Local processes of accountability and reconciliation
- Transitional justice and institutional reform.

The identification of topics and authors in this Working Paper Series was undertaken in the context of strategic partnerships with the Human Rights Program at Harvard Law School, and the International Center for Transitional Justice (ICTJ). The review of the Series was guided by a peer review oversight panel, chaired by Jaap Doek. A network of practitioners, academics, legal experts and child rights advocates participated in the peer review. The Series was initiated and overseen by Saudamini Siegrist, with the support of Ann Linnarsson.

An Expert Discussion on Children and Transitional Justice was convened by UNICEF Innocenti Research Centre (IRC) in June 2008 to provide comments to individual authors and to assess the range and coverage of the Series. A subsequent conference on Children and Transitional Justice was jointly convened by the Human Rights Program at Harvard Law School and IRC in April 2009 in Cambridge, MA USA.

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Titles in this series, with authors' affiliations, are:

Children and Transitional Justice Working Paper Series 2010

- No. 7: Children and the Commission for Reception, Truth and Reconciliation in Timor Leste. Megan Hirst, International Criminal Court, Victims' Participation and Reparation Section; Ann Linnarsson, UNICEF, IRC.
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- No. 10: Children, Education and Reconciliation. Alan Smith, University of Ulster.
- No. 11: Child Victims of Torture and Cruel, Inhumane or Degrading Treatment. Dan O'Donnell, Independent Consultant; Norberto Liwski, Ministry of Social Development, Argentina.
- No. 12: Genetic Tracing, Disappeared Children and Justice. Michele Harvey-Blankenship, Department of Pediatrics, University of Alberta; Phuong N. Pham, Human Rights Center,

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- No. 17: Transitional Justice and Youth Formerly Associated with Armed Forces and Armed Groups. Theresa Betancourt and A'Nova Ettien, François-Xavier Bagnoud Center for Health and Human Rights.

Other papers produced by the project have been published in *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (UNICEF and Harvard Law School, 2010), and are available on the UNICEF IRC website.

- Chapter 1: *Child Rights and Transitional Justice*. Saudamini Siegrist, UNICEF IRC.
- Chapter 2: Basic Assumptions of Transitional Justice and Children. Alison Smith, No Peace Without Justice.
- Chapter 3: International Criminal Justice and Child Protection. Cecile Aptel, ICTJ.
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- Chapter 5: Child Participation in the Sierra Leonean Truth and Reconciliation Commission. Philip Cook and Cheryl Heykoop, International Institute for Child Rights and Development, University of Victoria.
- Chapter 6: Children and the Liberian Truth and Reconciliation Commission. Theo Sowa, Independent Consultant.
- Chapter 7: Accountability and Reconciliation in Northern Uganda.
- Part I: Accountability for Sexual and Gender-Based Crimes by the Lord's Resistance Army. Khristopher Carlson and Dyan Mazurana, Feinstein International Center, Tufts University.
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- Chapter 8: Disappeared Children, Genetic Tracing and Justice. Michele Harvey-Blankenship, Department of Pediatrics, University of Alberta; Rachel Shigane, Human Rights Center, University of California, Berkeley.
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Child Victims of Torture and Cruel, Inhuman or Degrading Treatment

Dan O'Donnell^a and Norberto Liwski^b

^a Dan O'Donnell, JD, danodonnell03@yahoo.com

^b Norberto Liwski, MD, norbertoliwski@infovia.com.ar

Summary: This paper addresses the legal framework and medical and psychological impacts of torture on children. Part One, Legal Framework, begins by showing the three characteristics that legally distinguish torture from child abuse, by definition:

- Torture is committed by an agent of the state or someone acting with the encouragement or acquiescence of the state.
- Torture is committed for the purpose of obtaining information or a confession; to intimidate, coerce or punish the immediate victim or a third person; or as part of discrimination.
- Torture must cause severe pain or suffering.

Because of these differences, torture should be treated differently to child abuse, in particular with regard to law enforcement. The fact that torture is committed by a representative of the state justifies a stronger response. That it involves *severe* pain or suffering is another reason that the response must be proportionate.

International law prohibits both torture and 'cruel, inhuman or degrading treatment', although the distinction between them is not clearly defined. When the victim is a child, his or her greater vulnerability must be taken into account in determining whether the acts inflicted constitute torture or cruel, inhuman or degrading treatment, according to jurisprudence of international courts and other bodies.

The obligations of states regarding torture are different from those regarding child abuse. Under international law suspected torturers *must* be prosecuted, and if they are convicted, the sentence must reflect the gravity of the crime. In contrast, prosecution is not always the most appropriate response to child abuse, especially when it takes place in the home. Most states have accepted an obligation to cooperate with one another in investigating and prosecuting torture, and to prosecute any torturer found in their territory, regardless of where the crime took place. No similar obligation exists with regard to child abuse.

The torture of children occurs in different contexts, including police operations against children seen as a threat to public order or safety; children confined in prisons or detention facilities; and children seen as linked to subversive groups, including the children of militants

States have special obligations under international humanitarian law when torture or inhuman treatment are committed during armed conflict or foreign occupation. They must search for and extradite or prosecute persons alleged to have committed such "grave breaches" of humanitarian law. Individuals also may be prosecuted before the International Criminal Court for torture or cruel or degrading treatment committed during armed conflict.

The obligation to bring torturers to justice in order to prevent impunity must be reconciled with the right of child victims to psychological recovery and the principle that the best interests of the child must be a primary concern in all decisions and proceedings that affect children. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes can help reconcile these concerns. They provide that victims should be treated in a caring and sensitive manner that takes

into account their personal situation and needs, and respects their physical, mental and moral integrity; that interviews and examinations should be conducted by trained professionals; and that all interactions should be conducted in a child-sensitive manner in a suitable environment.

Part Two of the working paper addresses the medical and psychological impacts. States have an inescapable responsibility not only to prevent torture and punish torturers but also to assist the victims. These duties have special implications for health professionals. Yet the torture of children has low visibility and recognition among health workers.

Methods of torture range from the most brutally traditional to complex, sophisticated modern methods. Some do not cause perceptible physical injuries, and some are intended to cause psychological harm. The method used, however, is of limited relevance to diagnosis and identification of appropriate strategies for recovery. It is necessary to analyse the damage caused by the torture holistically, from a physical-psychosocial viewpoint and in relation to the processes of growth, development, maturing and social integration, or 'building citizenship'.

It is an unfortunate fact that health workers may also be involved in torture. States must lay down strict rules and standards to prevent and deter torture. Civil society, including professional associations, must establish codes of conduct that reinforce the seriousness of involvement in acts of torture against children and to ensure appropriate training for professionals to ensure preventive intervention, assistance and rehabilitation, in accordance with the needs and best interests of the child.

The 1999 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) establishes invaluable guidelines for the documentation and investigation of alleged cases of torture and ill-treatment, as well as ethical standards for health professionals.

Keywords: children, torture, transitional justice

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PART ONE: LEGAL FRAMEWORK

1. INTRODUCTION

Article 37(a) of the Convention on the Rights of the Child (CRC) provides that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” Article 19.1 recognizes the obligation of States to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

It may not be self-evident why the CRC should contain separate provisions on violence against children and on the torture and ill-treatment of children.¹ Indeed, those responsible for implementing the Convention or evaluating its implementation sometimes fail to distinguish between child abuse and the torture of children.² In fact there are legal distinctions between the concepts contained in these two provisions of the CRC, distinctions based largely on basic concepts of international human rights law. This working paper explores these distinctions and the distinctions between them and other related legal concepts and analyses their medical, social, ethical and political implications and ramifications.

While children must be protected from all forms of violence and abuse, it is important not to lose sight of the distinction between the different forms of violence – especially torture and child abuse – because these distinctions have significant implications for prevention, treatment of victims and law enforcement. Although children can be both victims and perpetrators of torture, ill-treatment and abuse, we focus exclusively on their role as victims.

The first section of Part One considers the distinction between torture and child abuse in international human rights law. This is followed by comparison of these concepts with related ones, in particular cruel, inhuman or degrading treatment; cruel, inhuman or degrading punishment; and the right to dignity and humane treatment. Reference is also made to two consequences of the distinction between torture and other forms of ill-treatment: the status of the prohibition of torture as a peremptory rule of international law, and its status as a crime under international law.

The second section of Part One summarizes international jurisprudence and doctrine concerning the distinction between torture and cruel, inhuman or degrading treatment, including judgments of the European Court of Human Rights, the Human Rights Committee

¹ The term ‘ill-treatment’ is used as shorthand for cruel, inhuman and degrading treatment. See e.g. the Committee Against Torture’s General Comment No. 2, CRC/C/GC/2/CPR.1/Rev.4 (advance unedited version), para. 3

² In reporting on implementation of art. 37 (a) of the CRC, some States describe efforts against child abuse but make no mention of efforts to prevent or repress torture by public authorities. See e.g. the second report of Niger on implementation of the CRC, CRC/C/NER/2, paras. 172-185; the second report of the Dominican Republic on implementation of the CRC, CRC/C/DOM/2, para. 347; the second report of Venezuela, CRC/C/VEN/2, paras. 172-222; the second report of Slovakia, CRC/C/SVK, paras. 173-182 and the second report of Uruguay, CRC/C/URY/2, paras. 112-124.

and the Inter-American Court of Human Rights. The third and final section of Part One summarizes the obligations of States regarding torture and other forms of ill-treatment, highlighting those that are specific to torture. The existence of obligations applying specifically to torture is, naturally, one of the reasons to distinguish it from child abuse.

2. THE DEFINITION OF TORTURE AND OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN INTERNATIONAL LAW

2.1 Three Distinctions between Torture and Child Abuse

There are three distinctions between torture and child abuse in international law. The final clause of article 19.1 of the CRC alludes to one of them: namely, that child abuse is committed by parents or persons having responsibilities vis-à-vis the victim analogous to those of a parent.³

The term ‘child abuse’ had no currency in international human rights law prior to the adoption of the CRC. Since then efforts have been made to reach agreement on its meaning. In 1999, a World Health Organization (WHO) consultation on child abuse drafted the following definition:

“Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.”⁴

The WHO website presently defines ‘maltreatment’ as a phenomenon that includes five ‘subtypes’: physical abuse, sexual abuse, emotional abuse, neglect and negligent treatment, and exploitation.⁵ This suggests that the term child abuse is meant to refer to physical, emotional and sexual abuse by parents, caretakers or other persons in a relationship of responsibility, trust or power vis-à-vis the child.

The terms ‘torture’ and ‘cruel, inhuman and degrading treatment’ are terms of art having reasonably well-defined content in international human rights law, although the definitions vary somewhat from one instrument to another.⁶ If the drafters of the Convention saw no

³ In English, the term ‘child abuse’ replaced the earlier ‘cruelty to children’ during the 20th century. The older term is still found in the legislation of some former colonies of the United Kingdom and in the Declaration on the Rights of the Child adopted by the UN General Assembly in 1959.

⁴ World Report on Violence and Health, WHO, Geneva, 2002, p. 59.

⁵ www.who.int/topics/child_abuse/en/index.html, consulted 16 January 2008.

⁶ One significant difference is that the regional treaty in force in the Americas, unlike the Convention Against Torture, does not require that torture be committed for any specific purpose. The Inter-American Convention to Prevent and Punish Torture, art. 2 provides in part “... 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.” This definition of torture also includes “methods ... 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.” Ibid.

need to define them, it was presumably because their meanings, unlike that of child abuse, were already established in international law.⁷

The most widely accepted definition of torture in international law is that contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, or CAT) adopted by the United Nations General Assembly on 10 December 1984.⁸ The central part of the definition is:

“... 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.”⁹

The definition contained in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration on Torture”) adopted by the General Assembly in 1975 contains the same elements.¹⁰ The International Criminal Tribunal for the former Yugoslavia, noting the similarities between the two, has concluded that the definition contained in CAT has become part of customary international law and can be used to interpret other international norms that prohibit torture without defining it.¹¹

As this definition indicates, for purposes of international law, acts causing mental or physical pain or suffering constitute torture only if done by a public official or with the significant involvement of a public official or other person acting in some official capacity.

The second legal distinction between torture and child abuse is that ill-treatment is not torture unless it causes severe pain or suffering. While child abuse may cause severe pain or

⁷ A draft of what later became art. 37 presented by Canada in 1986 contained the phrase, “No child shall be subject to cruel, inhuman or degrading treatment or punishment...”, with a footnote citing art. 7 of the International Covenant on Civil and Political Rights and art. 5 of the Universal Declaration of Human Rights. An informal working party formed to merge this proposal with others produced a draft article containing the language, “... States Parties shall in particular ensure that ... no child is ... subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This language was adopted and integrated into the draft Convention. Legislative History of the Convention on the Rights of the Child, Vol.II, United Nations OHCHR, Geneva, 2007, pp. 747-748. A comment presented by the Secretariat to the Technical Review meeting, convened in 1988 to ensure the compatibility and complementarity of the draft CRC with existing international standards, compared the above-cited phrase to the language of the Convention Against Torture. Ibid, p.755 During the second reading of the draft CRC in 1989, another drafting group was convened to consider the different versions still under consideration. In presenting the results of their deliberations, the representative of Portugal indicated that it had “endeavored to draw up a text consistent with the instruments adopted in this field by the United Nations...” Ibid., p. 766.

⁸ This Convention entered into force on 26 June 1987, and 146 States are Parties to it as at 21 March 2010.

⁹ Art 1.1.

¹⁰ Resolution 3452 (XXX) of 9 December 1975, art.1. “... 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.”

¹¹ Prosecutor v. Anto Furundzija, Judgment of 10 December 1998, para. 160.

suffering, that is not part of the definition. Physical or mental violence may be considered child abuse regardless of the degree of pain or injury caused. Indeed, treatment that offends a child's dignity may be considered child abuse, regardless of whether it causes pain or suffering.¹²

The third legal distinction is that, for an act to constitute torture under the universally accepted definition, it must be done for certain purposes, such as punishment, intimidation, coercion or discrimination.¹³ The motive of a person who commits child abuse is immaterial. The importance of this element has been underlined by a psychologist with extensive experience caring for torture victims:

“The intentionality of the aggressors and of the torture system lies at the heart of the symptoms of children, subjected to a deliberate enterprise of psychological destruction.”¹⁴

Ill-treatment of children thus falls into three categories: that done by parents or other persons having parental responsibility; that done by representatives of a public authority, such as a police officer; and that done by a person who is neither. The first category is covered by article 19.1 of the CRC and the second by article 37(a).¹⁵

Articles 19 and 37 may both be applicable when public servants have parental responsibility vis-à-vis children. Violent treatment of children by such persons may constitute torture if the resulting pain and suffering is severe and if the violence is used for one of the purposes mentioned above, such as punishment.¹⁶ For the most part, however, child abuse and torture are distinct violations of the human rights of children, mainly because of the presence or absence of State involvement and, to a lesser extent, of one of the purposes required for mistreatment to be considered torture.

Neither article 19 nor article 37 covers acts committed by other persons acting in a private capacity, such as a kidnapper who inflicts violence on a child in order to convince his or her parents to pay a ransom or gang members who inflict violence on a child as part of a

¹² Committee on the Rights of the Child, General Comment No.8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19; 28, para.2; and 37 inter alia), para.11 in HRI/GEN/1/REV.9 (vol.2).

¹³ This element has in effect ceased to apply in the inter-American human rights system, thanks to the addition of the phrase “or for any other purpose” to the definition in article 2 of the Inter-American Convention to Prevent and Punish Torture. Still, retention in this article of express mention of purposes such as punishment and intimidation serves as a reminder of the usual paradigm of torture. It should be noted that this Convention also recognizes a form of torture that does not necessarily involve pain or suffering, namely, “the use of methods ... intended to obliterate the personality of the victim or diminish his physical or mental capacities.” (Art.2).

¹⁴ F. Sironi, *Les Enfants Victimes de Torture et Leurs Bourreaux*, 1999, available at www.ethnopsychiatrie.net/actu/Dinan.htm, consulted 26 January 2009 [authors' translation].

¹⁵ It might also be covered by art. 38, if the torture occurs in an armed conflict or other situation (e.g. occupation) in which humanitarian law is applicable.

¹⁶ A recent General Comment by the Committee against Torture indicates that the staff of privately operated detention centres may be held responsible for torture when operation of the centres has been delegated by the State. General Comment No. 2, *infra*, para.17. The same argument might be applicable to privately operated residential facilities for children, considering that providing alternative care is a responsibility of the State under article 20 of the CRC.

membership initiation or as punishment.¹⁷ These examples reveal a possible discrepancy between the definition of child abuse employed by WHO and the scope of article 19.1 of the CRC. This possible discrepancy depends on the meaning ascribed to the word ‘power’. If any person physically or psychologically able to dominate a child is considered to be “in a relationship of power” vis-à-vis the child, then violence inflicted by this individual – kidnapper, gang member or school bully, for example – would be child abuse. Interpreting the word ‘power’ to mean authority of some kind would help preserve a useful distinction between violence that is facilitated by a special relationship between the child victim and the adult or older perpetrator and ordinary criminal activity in which the victim happens to be a child. And if the term ‘power’ is understood to mean a form of authority distinct from that entrusted to law enforcement officials, like that of parents and teachers, this would help preserve the useful distinction between child abuse and torture.

Article 39 of the CRC provides that child victims of “any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts” should be provided with physical and psychological recovery and social reintegration. It thus applies to children victims of the various forms of ill-treatment prohibited by articles 37(a), 19.1 and 39 of the Convention, as well as victims of violations of articles 33 to 36, which prohibit various forms of exploitation.

The lack of an express reference to victims of violence in article 39 is striking. Since the term ‘abuse’ is narrower than ‘violence’, the rights in article 39 do not seem to apply to children who are victims of ordinary crimes of violence.¹⁸ In this regard, it is useful to recall that the rights and obligations recognized by the CRC are minimum rights and obligations, and there are strong policy reasons for States to recognize the right of child victims of violent crime to similar assistance. Indeed, other United Nations standards on the victims of crime, applicable to children and adults alike, recommend that States provide such assistance. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, for example, provide that, “Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”¹⁹

2.2 The Meaning of ‘cruel, inhuman or degrading treatment’

Many international instruments prohibit cruel, inhuman and degrading treatment, but none define it. Article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights contain provisions substantially identical to that contained in article 37(a) of the Convention on the Rights of the Child: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁰

¹⁷ The rights of such persons are recognized by the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UNGA Res. 40/34).

¹⁸ In contrast, see articles 1 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

¹⁹ UNGA resolution 40/34 of 29 November 1985, art. 14.

²⁰ It is followed by another provision that provides, “In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

The Declaration on Torture provides, in its second article: “Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.” Article 16.1 of the Convention against Torture provides, “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Although none of these instruments contains a definition of cruel, inhuman or degrading treatment or punishment, article 16 of the Convention against Torture confirms that State involvement is an element, as it is in the definition of torture. In a recent General Comment, the Committee against Torture refers to the minimum requisite involvement as “contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”²¹ Article 16 does not require any specific purpose on the part of the perpetrator, however.

The 1974 Declaration on Torture states that, “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” The concept that torture is an aggravated form of cruel, inhuman or degrading treatment has been questioned, and the lack of any reference to this notion in the Convention against Torture might seem to raise an issue as to its validity in contemporary international human rights law. However, the Committee against Torture has recently observed that, while, “In practice, the definitional threshold between ill-treatment and torture is often not clear . . . [i]n comparison to torture, ill-treatment differs in the severity of pain and suffering...”²²

Article 16 of the Convention against Torture appears to indicate that the obligations of States regarding torture are more extensive than their obligations regarding ill-treatment.²³ The Committee against Torture has, however, cautioned against an excessively literal interpretation of this provision:

“The obligations to prevent torture and other cruel, inhuman and degrading treatment and punishment (hereinafter “ill treatment”) ... are interdependent, indivisible and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.”²⁴

²¹ General Comment No. 2, CAT/C/GC/CRP.1/Rev. 4, para. 15. (The Committee Against Torture oversees implementation of the Convention Against Torture, just as the Committee on the Rights of the Child oversees implementation of the Convention on the Rights of the Child. Unlike the CRC Committee, and like the Human Rights Committee, it also has competence to hear complaints from persons who consider themselves victims of a violation of the Covenant.)

²² General Comment No. 2, supra, para. 3 and 10.

²³ “Each State Party shall undertake to prevent ... acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, ... In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

²⁴ General Comment No. 2, supra, para.3.

2.3 The Meaning of ‘cruel, inhuman and degrading punishment’

In international human rights law the concept of punishment is generally understood to refer to a formal sanction imposed by a court or administrative authority. The term corporal punishment has broader usage, however, including punishment imposed informally within the family, schools, residential facilities for children and similar settings. Until recently, it had no currency in international human rights law.²⁵

In 2006, the Committee on the Rights of the Child adopted a General Comment on “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts.19; 28 para.2 and 37, inter alia)”. The Comment indicates that all physical punishment intended to cause pain or discomfort is degrading, and hence incompatible with the CRC.²⁶ Non-physical punishment that “belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child” is cruel and degrading, according to the Committee, and incompatible with the CRC.²⁷ No other forms of punishment are mentioned specifically by General Comment No. 8, except stoning and amputation, which “plainly violate the Convention and other international human rights standards.”²⁸

The Comment does not address cruel, inhuman or degrading treatment, nor does it analyse the distinction between treatment and punishment. It observes that “Corporal punishment and other cruel or degrading forms of punishment take place in many settings, including within the home and family, in all forms of alternative care, schools and other educational institutions and justice systems – both as a sentence of the courts and as a punishment within penal and other institutions – in situations of child labour, and in the community.”²⁹

This statement might be taken to imply that employers and other private actors are capable of violating article 37. Its meaning is ambiguous, however; it can also be read to mean that the various actors alluded to have the capacity (but not the right) to inflict corporal punishment or, in the case of justice systems and other public institutions, cruel, inhuman or degrading treatment. The reference to punishment imposed by the community can be seen as a reference to tribal or other informal, community-based justice systems recognized or tolerated by the State.

Prudence cautions against rushing to the conclusion that the Committee considers article 37 to apply not only to persons acting in some official capacity or with the consent or acquiescence of a public official, but to anyone. If the Committee wished to depart from the accepted meaning of the term “cruel, inhuman and degrading treatment or punishment” in international human rights law, it presumably would not do so without offering some

²⁵ The term is not used in the CRC, but corporal punishment is prohibited by the Beijing Rules (as a punishment for criminal activity) and by the Havana Rules (as a disciplinary measure in facilities for juvenile offenders). Rules 17.3 and 67, respectively.

²⁶ Ibid., para. 11.

²⁷ Ibid.

²⁸ Ibid., para. 29.

²⁹ Ibid., para. 12.

explanation of its decision, especially in a Comment recognizing that the provisions of the CRC on this subject ‘build on’ those of older human rights instruments.³⁰

2.4. The Right to Dignity and Humane Treatment

Article 37(c) of the CRC provides that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person”. This provision is derived from article 10.1 of the International Covenant on Civil and Political Rights, which is identical in substance. It is reinforced by article 40 of the CRC, which provides that all children coming into contact with the law enforcement system shall be treated “in a manner consistent with the promotion of the child's sense of dignity...”.

At first sight these provisions may seem superfluous. In reality, however, although the right to be treated with humanity overlaps with the prohibition of torture and cruel, inhuman and degrading treatment, there are some differences. One is, of course, that a person can be tortured whether or not he or she is deprived of liberty.³¹ A second important difference is that, when a person in custody is deprived of humane treatment, purpose or motive is immaterial.

The Human Rights Committee has developed extensive jurisprudence on this right. There is a tendency in its jurisprudence to apply a lower threshold for violations of the right of prisoners to humane treatment. In a sense, one might infer that torture is the most serious form of ill-treatment; that cruel, inhuman or degrading treatment is somewhat less serious, and that lesser forms of ill-treatment violate the right to dignity and humane treatment, if the victims are deprived of liberty. This is true only from the perspective of the consequences of ill-treatment for the victim, however; from a legal perspective, all violations of international human rights law are equally serious.³²

Moreover, the Human Rights Committee has pointed out that the right to humane treatment reflects the principle that persons deprived of liberty continue to be entitled to all basic human rights, subject only to “the restrictions that are inevitable in a closed environment,” and “may not be subject to any hardship or constraint other than that resulting from the deprivation of liberty” as such.³³ In this sense, the right to humane treatment is much broader than the prohibition of torture and ill-treatment.

One unique characteristic of the right of persons deprived of liberty to dignity and humane treatment is the effort that has been made to adopt international guidelines and standards concerning the content of this right.³⁴ One of these instruments, the United Nations Rules for

³⁰ Ibid., para. 16.

³¹ This is particularly true for psychological torture.

³² This refers to the legal responsibility of the State for violations of international human rights law; there are significant differences with regard to the legal responsibility of the individual under international criminal law, as indicated below.

³³ General Comment No. 21, 1992, para. 3 available in HRI/GEN/1/Rev.7, p. 153.

³⁴ Within the United Nations, they include the Standard Minimum Rules for the Treatment of Prisoners adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

the Protection of Juveniles Deprived of Liberty (Havana Rules), contains standards specifically concerning children deprived of liberty.³⁵ It is meant to apply to all persons under the age of 18, regardless of their legal status under national law, and applies to any deprivation of liberty, regardless of how it is conceptualized (penal sanction, protection, rehabilitation, etc.) in national law.³⁶

The Havana Rules as such are not a binding legal instrument. Many of the Rules, such as those concerning training, staffing and administration, are clearly intended as recommendations. Some, however, are so closely linked to binding international human rights norms that they may be considered emanations of such norms. This includes, in particular, Rules linked to the right to be free from torture and ill-treatment, such as Rule 67, which prohibits the use of solitary confinement, labour, deprivation of food and restrictions on contact with one's family as disciplinary measures, or Rules 50 to 52, which oblige medical personnel to report to the responsible authorities any aspect of confinement that is having adverse consequences for the physical and mental health of a child.³⁷ The Committee on the Rights of the Child has urged all Parties to the CRC to "fully implement" the Havana Rules, and many States have indicated that they accept and apply them.³⁸

2.5. The Prohibition of Torture as a Peremptory Norm

In 2007 the Committee Against Torture adopted a General Comment on article 2 of the Convention Against Torture which, inter alia, states that the prohibition of torture is a peremptory norm of international law, or *jus cogens*.³⁹

The International Criminal Tribunal for the former Yugoslavia reached the same conclusion a decade ago in the Furundzija case, adding:

"Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition ... signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."⁴⁰

Perhaps the most relevant consequence of *jus cogens* status, in practical terms, is that the prohibition of torture is legally binding on all members of the international community, regardless of whether they have ratified any of the treaties that prohibits torture. It also means that no regional agreement that diverges from the norm is valid.

adopted by General Assembly resolution 43/173 of 9 December 1988 and the Basic Principles for the Treatment of Prisoners adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in 1990 and approved by UNGA resolution 45/111 of 14 December 1990.

³⁵ Adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders held in Havana in 1990 and approved by UNGA resolution 45/113, supra.

³⁶ Rule 11(a) and 11(b) ("The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.").

³⁷ The Committee on the Rights of the Child implicitly confirmed the link between Rule 67 and Art.37(a) in General Comment No.10, 2007, para. 28(c).

³⁸ Ibid.

³⁹ Ibid., para. 1.

⁴⁰ Sentence of 10 December 1998, para. 154.

2.6. Torture as a Crime under International Law

In certain circumstances, torture is not only a human rights violation but also a crime under international law. Torture is a crime against humanity, according to the Rome Statute of the International Criminal Court (Rome Statute or the Statute), when “committed as part of a widespread or systematic attack directed against any civilian population...”.⁴¹ Torture is defined, for this purpose, as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.” The Statute does not use the term cruel, inhuman or degrading treatment as such, but does recognize as a crime against humanity, “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁴²

The Rome Statute, in contrast to the human rights instruments cited above, does not require some form of State involvement as an element of the definition of torture. This is because it is intended to apply to members of armed groups, organized movements and de facto authorities regardless of whether they are under the control of a recognized State. For purposes of interpretation of articles 19 and 37 of the Convention on the Rights of the Child, the requirement for a link between the act and a widespread or systematic attack against a civilian population, rather than a link between the perpetrator and a State, does not affect the essence of the distinction between child abuse and the torture of children.

Torture also constitutes a war crime when committed in certain circumstances. The Rome Statute recognizes torture as a war crime when the victim is a person protected by one of the 1949 Geneva Conventions or, during a “non-international conflict”, a civilian or other non-combatant.⁴³ It also recognizes inhuman treatment and, “Wilfully causing great suffering or serious injury to body or health” as war crimes when the victim is protected by one of the Geneva Conventions.⁴⁴

Certain related practices are also expressly and specifically recognized as war crimes, provided only that they violate the “laws and customs applicable in armed conflict”, including non-international conflicts.⁴⁵ These include physical mutilation, cruel treatment, “outrages upon personal dignity, in particular humiliating and degrading treatment” and rape, sexual slavery and enforced prostitution.⁴⁶

3. INTERNATIONAL JURISPRUDENCE CONCERNING TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

There is a substantial body of international jurisprudence concerning torture and cruel, inhuman or degrading treatment, some of which concerns the torture and ill-treatment of

⁴¹ Art.7.1(f).

⁴² Art.7.1(k).

⁴³ Art. 8.2(a)(ii) and 8.2(c)(i).

⁴⁴ Art. 8.2(a)(ii) and (iii). Persons protected by the Geneva Conventions include prisoners of war and the inhabitants of occupied territories.

⁴⁵ Art. 8.2(b) of the Rome Statute.

⁴⁶ Art. 8.2(b)(x), (xxi) and (xxii); Art.8.2(c)(i) and (ii) and Art.8.2(e)(vi).

children. The following cases provide some insight into the meaning of torture or cruel, inhuman and degrading treatment under international law, as well as the contexts in which they occur.⁴⁷

The European Court of Human Rights, in the landmark case *Ireland v. the United Kingdom*, concluded that certain interrogation techniques were inhuman and degrading treatment, but not torture, because “they did not occasion suffering of the particular intensity and cruelty implied by the word torture...”.⁴⁸ This jurisprudence, adopted in 1978, was based on the provision of the 1975 UN Declaration on Torture that calls torture “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” It has been criticized because it seems to attribute greater importance to the nature of the methods used than their consequences for the victim.⁴⁹ Indeed, it can be seen as lending itself to morally reprehensible distinctions between the crude methods of torture often favoured by dictatorships in developing countries and sanitized, technologically sophisticated methods preferred by democracies in industrialized countries. The Court nevertheless continues to follow this precedent, even though the 1984 Convention against Torture does not reaffirm this distinction between torture and cruel, inhuman and degrading treatment.⁵⁰

A more positive aspect of the jurisprudence of the European Court is the recognition of age as a factor to be taken into account in determining whether mistreatment should be considered torture or cruel and inhuman treatment:

“... it remains to be established in the instant case whether the “pain or suffering” inflicted ... can be defined as “severe” within the meaning of Article 1 of the United Nations Convention. The Court considers that this “severity” is... in the nature of things, relative; it 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.”⁵¹

In a recent judgement, the European Court found that the beating by two Turkish police officers of a 12-year-old boy suspected of theft violated article 3 of the CRC. The word ‘torture’ is used several times, although the issue of the severity of the beating is not expressly addressed.⁵²

⁴⁷ The fact that much of this jurisprudence comes from the Inter-American human rights system does not mean that torture is more widespread in the Americas than in other regions. A report on children and torture published by Amnesty International – noting that torture of children is more underreported than torture of adults and that the list of countries cannot be considered exhaustive – describes cases in a score of other countries, including Afghanistan, Algeria, Bangladesh, Bulgaria, China, Egypt, India, Israel, Kenya, Malawi, Morocco, Pakistan, the Russian Federation, Saudi Arabia, Sierra Leone, Sri Lanka, Sudan, Switzerland, Turkey and the United States.

⁴⁸ *Ireland v. United Kingdom*, Series A, No.25, para. 167-168. The techniques included forcing prisoners to stand in certain ‘stress’ positions, to wear hoods, exposure to noise, sleep deprivation and deprivation of food and water.

⁴⁹ See e.g. Rodley, *The Treatment of Prisoners Under International Law*, Clarendon Press, Oxford, 1987, p. 85, and the statement of Amnesty International cited therein at p. 86.

⁵⁰ Art.16 of CAT refers simply to “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” This would include ill-treatment not inflicted for one of the purposes required by the definition of torture contained in art.1.1, and therefore does not necessarily imply a lesser degree of suffering.

⁵¹ *Selmouni v. France* (25803/94) [1999] ECHR 66 (28 July 1999) (Application no. 25803/94), Judgment, para. 100.

⁵² *Okkali c. Turkey* (application no. 52067/99), Judgment of 17 October 2006, paras. 54, 64 and 66, EHRR.

The Human Rights Committee takes a different approach. Since torture and cruel, inhuman and degrading treatment are equally illegal, the Committee normally prefers to focus on whether the facts violate the prohibition of these practices without specifying whether the treatment constitutes torture as such. The Committee summarized its views on this in a General Comment adopted in 1992: “The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.”⁵³

Recalling that both physical and mental suffering may amount to torture or ill-treatment, the General Comment recognizes that the imposition of harsh educational or disciplinary measures on children can constitute torture or ill-treatment, thus recognizing that the age and vulnerability of the victim is a factor to be taken into account.⁵⁴

The jurisprudence of international tribunals confirms that psychological suffering alone can amount to torture or cruel and inhuman treatment. The leading case in the Inter-American system is the ‘street children’ case, in which the Inter-American Court found that a 16-year-old and a 17-year-old who had been abducted and killed by police officers must have known before their deaths that there was a serious risk to their lives, and that this fact alone occasioned “a situation of extreme psychological and moral suffering.”⁵⁵ The Court also concluded that the mothers of the victims were themselves victims of cruel and inhuman treatment due to the suffering caused by denial of information about the fate of their children, abandonment of the children’s remains in an exposed uninhabited area and impossibility of a timely burial in accordance with their values, traditions and beliefs, and the feeling of insecurity and impotence caused by the failure to investigate these crimes seriously and the impunity of the perpetrators.⁵⁶

Cases in which the Court has found that the psychological suffering of family members of the primary victim was so severe as to constitute torture are the exception, however. The Court more often takes an approach similar to that of the Human Rights Committee, concluding that the right to personal integrity has been violated without specifying whether the violation constitutes torture or cruel or inhuman treatment, or some other infringement of that right.⁵⁷

⁵³ General Comment No.20, The prohibition of torture and cruel, inhuman and degrading treatment and punishment, para. 4.

⁵⁴ *Ibid.*, para. 5.

⁵⁵ *Villagrán Morales et al. v. Guatemala (The ‘Street Children’ Case)*, Judgment of November 19, 1999, Series C, No. 63, para. 163.

⁵⁶ *Ibid.*, para. 173-174.

⁵⁷ Article 5 of the American Convention, unlike the analogous provisions of international instruments, not only prohibits torture and cruel, inhuman and degrading treatment and punishment, but also recognizes the underlying right to “physical, mental and moral integrity.” There are also two differences between definition of torture contained in the UN instruments cited above and that applied in the Americas: article 2 of the Inter-American Convention to Prevent and Punish Torture does not require any specific intent, and includes in the definition of torture “methods intended to obliterate the personality of the victim or diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”

Indeed, in more recent cases the Court also tends to take this approach with regard to the treatment suffered by the principal victim. This may be in part because many sentences concern cases in which the State admits responsibility for the violation, leading the Court to accept the recognition of responsibility as formulated by the State without reviewing an issue that, while it may have great symbolic weight, is technically immaterial.

Physical violence against persons in custody is another paradigmatic form of torture or ill-treatment that affects adolescents as well as adults. The case of *Servellón García and others v. Honduras*, for example, arose out of the detention of 128 persons in the course of a police operation against youth gangs.⁵⁸ Two days later, the bodies of 4 persons, including a 16-year-old and a 17-year-old, were found abandoned with signs of torture. Honduras accepted responsibility for violations of the right to life, liberty and the prohibition of torture and cruel and inhuman treatment.⁵⁹ The sentence of the Inter-American Court of Human Rights states that violations of this kind are “especially serious” when the victims are children, and it awarded higher damages for these violations than for similar violations suffered by the adult victims.⁶⁰

The victim in *Bulacio v. Argentina* was a 17-year-old student detained with 80 other young persons in the vicinity of a rock concert.⁶¹ He was beaten while in police custody and died of his injuries a week later. Argentina accepted responsibility for violating his right to life, liberty and personal integrity.⁶² Calling these violations “especially grave because the victim is a child”,⁶³ the sentence of the Inter-American Court stated:

“The way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee’s vulnerability ... especially ... when the detainee is a minor. This circumstance gives the State the obligation to exercise its function as guarantor taking all care required by the weakness, the lack of knowledge, and the defencelessness that minors naturally have under those circumstances.”⁶⁴

These cases also illustrate how violations of the physical integrity of an individual can affect family members, including children. In the *Servellón García* case the Court concluded that the daughter of one of the teenaged victims had herself suffered a violation of her “mental and moral integrity” due to the death of her father.⁶⁵ In the *Bulacio* case, the 14-year-old sister of the primary victim was awarded damages for suffering caused by his death and the impunity of those responsible for his death, although the Court did not find that she herself was a victim of cruel or inhuman treatment.⁶⁶

In another case involving the torture and summary execution of an indigenous leader by military forces, the Court concluded that his 10-year-old daughter – who was present when

⁵⁸ Judgment of September 21, 2006, Series C, No. 152.

⁵⁹ *Ibid.*, para. 60, 65.

⁶⁰ *Ibid.*, paras. 113, 182-184 and 215.

⁶¹ Judgment of September 18, 2003, Series C, No. 100.

⁶² *Ibid.*, para. 33. Reference to a violation of the right to physical integrity apparently implies that the beatings were not torture, a conclusion that may reflect the lack of evidence regarding the motives of the police.

⁶³ *Ibid.*, para. 133.

⁶⁴ *Ibid.*, para. 126.

⁶⁵ *Supra*, para. 138; *Supra*, paras. 95-104 and 162.8.

⁶⁶ *Supra*, paras. 95-104 and 162.8. *Zapata v. Colombia*, Judgment of July 4, 2007, Series C, No. 165, para. 80.

the primary victim was dragged from his home, heard the fatal shots and was present when his body was found – had suffered a violation of the right to mental and moral integrity.⁶⁷ The damages awarded to the daughter exceeded those awarded to the spouse and, in calculating the amount of the damages, the Court took into account that she was obliged to begin working at the age of 10 to help the family survive after the death of her father.⁶⁸

Detention in subhuman conditions is another paradigmatic form of cruel, inhuman or degrading treatment that affects children and adolescents as well as adults. In a recent decision, the Human Rights Committee found that the treatment of a 16-year-old aboriginal Australian while serving a sentence violated his right to humane treatment. Noting that whether the right to humane treatment has been violated “... depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim”,⁶⁹ the Committee concluded that:

“... extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his [mild mental and cognitive] disability and his status as an Aboriginal.”⁷⁰

Because this decision concerned the right of a prisoner to humane treatment, the possibility that this treatment had been intended to protect the young prisoner from contact with adult prisoners or from self-injury was immaterial.

The sentence of the Inter-American Court in a case known as “‘Children’s Rehabilitation Institute’ vs. Paraguay” concerns a series of events that occurred over a period of six years and affected hundreds of inmates under the age of 18.⁷¹ The proceedings were based on complaints of overcrowding, unsanitary conditions, poor food, lack of medicine and the use of physical violence to discipline inmates. During the proceedings three fires set by inmates killed nine of them, and one was shot trying to escape during a fire.

Citing the CRC and Havana Rules, the sentence emphasizes the right of children deprived of liberty to physical, mental, spiritual, moral, psychological and social development. It concludes that, when the victims are under the age of 18, a stricter test must be applied in determining whether mistreatment amounts to torture or cruel and inhuman treatment.⁷² The Court found that the substandard conditions endured by the inmates “inevitably affected their mental health, with adverse consequences for the psychological growth and development of their lives and mental health” and that, although not all inmates had personally suffered punishment prohibited by international standards, “the threat of those punishments was real, creating a climate of relentless tension and violence that was inimical to the inmates’ right to

⁶⁷ Zapata v. Colombia, Judgment of July 4, 2007, Series C, No. 165, para.80. Ibid., paras. 152 and 155.

⁶⁸ Ibid., paras. 152 and 155. Brough v. Australia, Communication No. 1184/2003, CCPR/C/86/D/1184/2003, 2006, para. 9.2.

⁶⁹ Brough v. Australia, Communication No. 1184/2003, CCPR/C/86/D/1184/2003, 2006, para. 9.2.

⁷⁰ Ibid., para. 9.3.

⁷¹ Judgment of September 2, 2004, Series C, No.112.

⁷² Ibid., para. 161-162.

live with dignity.”⁷³ Both situations violated the right of all the inmates detained in the facility to respect for their physical, mental and moral integrity and freedom from torture and ill-treatment.⁷⁴

In times of conflict – whether armed conflict as defined by international humanitarian law, resistance to foreign occupation, ethnic cleansing, rebellion of units belonging to the armed forces, terrorism and counter-terrorism, internal strife or new forms of conflict difficult to classify – the torture and ill-treatment of captured combatants or militants and persons suspected of supporting them affects children as well as adults.

The report of the truth commission in Peru that undertook an exhaustive study of human rights violations during the conflict involving the terrorist movement Sendero Luminoso (1980 to 2000) concluded that 7 per cent of the victims of torture whose age was known were under the age of 18.⁷⁵ While most of them were adolescents suspected of involvement in the subversive movement, some were young children tortured in order to force their parents to confess or give information to the authorities.⁷⁶ A study cited by the commission found that almost half the adolescents detained as terrorist suspects at one stage of the conflict were tortured.⁷⁷

The Commission of Experts established by the United Nations to study war crimes and human rights violations committed in Bosnia and Herzegovina, Croatia and the former Yugoslavia found that male civilians over the age of 16 were detained because they were seen as potential combatants and that “brutal torture [was] prevalent” in the camps where such prisoners were detained.⁷⁸ The Commission also documented 1,100 cases of rape and sexual assault, including 600 cases that took place in detention centres. It found that such abuse was often committed “in a way that instills terror” among female detainees and “in ways that emphasize the shame and humiliation” of the victims and concluded that it met the legal definition of torture or inhuman treatment.⁷⁹ Some victims were as young as 7 years of age, but most were between 13 and 35 years old.⁸⁰

The sentence of the Inter-American Court of Human Rights in “The massacre of Mapirepán v. Colombia” provides an example of torture committed during an armed conflict. In 1997, a rural town in an area under the control of revolutionary forces was occupied by paramilitary forces, operating with the tacit support of the armed forces of Colombia. A number of alleged

⁷³ Ibid., para. 167-168.

⁷⁴ Ibid., para. 171. It does not specify whether these conditions constituted torture or cruel, inhuman or degrading treatment or some other violation of personal integrity.

⁷⁵ Comisión de la Verdad y la Reconociliación: Informe Final, Lima, 2003, p. 600, available at www.cverdad.org.pe, consulted 16 June 2010. The total number of cases of torture and cruel, inhuman and degrading treatment registered was 6,443, of which 23% were committed by Sendero Luminoso. Other subversive movements played a smaller role in the conflict; less than 1% of the cases of torture were attributed to them.

⁷⁶ Ibid.

⁷⁷ Ibid., note 38, p. 599, citing “Perfil social y jurídico de los adolescentes infractores de la ley penal procesados por terrorismo”, CEAPAZ, Lima, 1996 (60 of 128 adolescent prisoners).

⁷⁸ S/1994/674, para. 230(i). This finding refers specifically to the ‘Republica Srpska’.

⁷⁹ Ibid., paras. 105 and 230(o), S/1994/674, Add. 2, Annex IX, para. 18(a).

⁸⁰ S/1994/674, Annex IX, para. 18(c); S/1994/674, para. 230(o).

supporters of the revolutionary force were tortured and killed during the occupation, including two brothers 15 and 16 years of age.⁸¹ Some of the survivors fled, including at least nine children, becoming displaced persons.⁸² After considering the written statements of two of the displaced children, the Court concluded that their prolonged exposure to “a climate of violence and insecurity” violated their right to mental and moral integrity.⁸³

Children also are among the victims of torture inflicted by repressive governments. Some cases are adolescents punished for their own activities or affiliations, while others are children of any age targeted because of the activities of their parents or other family members. The National Truth and Reconciliation Commission of Chile has documented cases of this kind. In one case, a politically active 17-year-old died hours after being detained as a result of “shock probably due to electricity”.⁸⁴ Another was a 16-year-old student beaten to death after being detained during a demonstration.⁸⁵

The psychological trauma that can result from the interrogation of children about family members, even in the absence of violence or express threats, is illustrated by this testimony:

“I was 13 years old and they took me to the Regiment to interrogate me and so I would tell them where my father was. I didn’t continue my studies or anything, the only thing I wanted was to die.”

Not all cases of torture or ill-treatment of children fit into these paradigms. In one case that illustrates the broad scope of this right, the Inter-American Commission concluded that requiring the wife and 13-year-old daughter of a prisoner to submit to vaginal searches before visiting him caused feelings of anxiety, humiliation and impotence and was incompatible with their right to physical, mental and moral integrity.⁸⁶ The decision concludes that while vaginal inspections of an adult might be compatible with human rights standards if absolutely necessary, ordered by a court and carried out by medical personnel, the imposition of this measure on an adolescent was “an absolutely inadequate [inappropriate] and unreasonable method.”⁸⁷

The decision of the Human Rights Committee in the case of *Llantoy Huamán v. Peru* is another example.⁸⁸ An examination of a pregnant 17-year-old revealed that she was carrying an anencephalic foetus and, on the advice of a physician, she requested an abortion.⁸⁹ The public hospital refused to perform the procedure despite the documented risk to the health of the mother and the fact that anencephaly is a fatal condition. The newborn died four days after birth, and the mother suffered severe depression. The Committee affirmed that protection from mental suffering “is particularly important in the case of minors” and found

⁸¹ Case of the ‘Mapiripán Massacre’ v. Colombia, Judgment of September 15, 2005. Series C No. 134, para. 96.49.

⁸² *Ibid.*, para. 96.64.

⁸³ *Ibid.*, para. 162-163.

⁸⁴ Informe de la Comisión Nacional de Verdad y Reconciliación (Rettig Report) Corporación Nacional de Reconciliación y Reparación, Santiago de Chile, 1996, p. 1014 available at www.ddhh.gov.cl/ddhh_rettig.html.

⁸⁵ *Ibid.*, Annex, p. 120.

⁸⁶ *X and Y v. Argentina*. Case 10.506, Report No. 38/96, 1996, para. 79.

⁸⁷ *Ibid.*, paras. 72 and 89.

⁸⁸ Communication No.1153/2003, 2005.

⁸⁹ Because of her age, the request was made on her behalf by her mother.

that the suffering inflicted on the young mother violated her right not to be subject to torture or cruel and inhuman treatment.⁹⁰

In a series of judgements adopted during the last decade, the European Court of Human Rights has found that abuse and neglect of children by their parents, including in one case sexual abuse, violates article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture as well as inhuman and degrading treatment and punishment. The responsibility of the State in such cases is not lightly presumed but is based on the detailed review of whether the circumstances should have led the responsible agency or agencies to realize that protective measures were needed.⁹¹ Some of these judgements expressly but briefly address the issue of whether the threshold for a finding of inhuman and degrading treatment had been met, concluding that the victims had suffered inhuman and degrading treatment.⁹² The issue of whether the abuse and neglect suffered might constitute torture is not addressed.

4. STATE OBLIGATIONS REGARDING TORTURE AND ILL-TREATMENT

The CRC does not expressly identify the obligations of States with regard to torture and ill-treatment, except for the obligation under article 39 to assist victims, and the Committee on the Rights of the Child has not yet adopted any commentary on the right of children to be free from torture and ill-treatment. The Committee's General Comment No. 8 concerns the right to be free from cruel, inhuman and degrading punishment, in particular corporal punishment, and General Comment No.10 contains some references to article 37(a) of the CRC. But neither of them set forth the corresponding obligations of States specifically concerning torture and ill-treatment in a comprehensive manner.

The most coherent and comprehensive statement of the obligations of States under international law with regard to torture and ill-treatment is contained, not surprisingly, in the Convention against Torture. The most basic obligation is to make torture a crime, punishable by "appropriate penalties which take into account [the] grave nature" of torture.⁹³ The Committee against Torture has commented that defining torture as a specific offence, rather than punishing acts of torture as common crimes such as assault, is a more effective means of preventing torture.⁹⁴ The CAT also prohibits expelling, returning or extraditing a person to a State where there are "substantial grounds for believing" that he or she would risk being tortured.⁹⁵

In so far as prevention is concerned, the CAT recognizes an obligation to educate and inform all law enforcement, military and medical personnel and other public officials having

⁹⁰ Ibid., para. 6.3. It also found, in para. 6.4, that the lack of proper medical and psychological care violated the right of the adolescent mother to the protection due children under article 24 of the Covenant.

⁹¹ See e.g. *E and Others v. The United Kingdom*, supra, para. 92-100, and *D.P & J.C. v. The United Kingdom* (application no. 38719/97), Judgment of 10 October 2002, paras. 110-114.

⁹² *Z and Others v. The United Kingdom*, supra, para. 74; *E and Others v. The United Kingdom*, supra, para. 89.

⁹³ Art. 4.

⁹⁴ General Comment No.2, 2007, para. 11.

⁹⁵ Art. 3.

responsibilities for persons deprived of liberty.⁹⁶ In addition, it recognizes an obligation to “keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons” deprived of liberty.⁹⁷

With regard to law enforcement, there is a duty to allow any person who alleges that she or he has been tortured or subjected to ill-treatment to make a complaint and to have the allegations examined promptly and impartially. There is also a duty to carry out a prompt and reasonable investigation of all suspected cases of torture and ill-treatment, regardless of whether or not a complaint has been made.⁹⁸

In so far as victims are concerned, article 14 of CAT recognizes, in addition to the right to “as full rehabilitation as possible”, a right to fair and adequate compensation. In contrast, the CRC recognizes the right to “physical and psychological recovery and social reintegration”, but is silent on the right to compensation.⁹⁹

As treaty provisions, these obligations apply only to the States that are Parties to the CAT. However, since the prohibition of torture is binding on all members of the international community independently of treaty obligations, one can assume that some or most of these obligations are an inherent part of the prohibition and hence obligatory for all States.

A considerable amount of doctrine and jurisprudence tends to confirm this position.¹⁰⁰ The Human Rights Committee’s most recent General Comment on torture and ill-treatment indicates a number of duties under article 7 of the Covenant. These include criminalization of torture, non-transfer of persons to States where they run a risk of torture, training of law enforcement and medical personnel and the establishment of effective mechanisms to investigate complaints of torture and ill-treatment.¹⁰¹ Other measures this Committee considers part of the obligation to prevent torture and ill-treatment include registering all interrogations of prisoners, recognizing and respecting the right of persons deprived of liberty to have contact with their families and attorneys, and barring as evidence the use of information obtained through torture or ill-treatment. Finally, the Human Rights Committee considers that granting amnesty to torturers is “generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts... and to ensure that they do not occur in the future [and] deprive[s] individuals of the right to an effective remedy...”.¹⁰²

The Committee against Torture has indicated recently that, in its view, most of the obligations recognized by the CAT, in particular those concerning prevention and the compensation of victims apply to both torture and to cruel, inhuman and degrading treatment.¹⁰³

⁹⁶ Art. 10.

⁹⁷ Art. 11.

⁹⁸ Arts. 13 and 12, respectively.

⁹⁹ Art. 39.

¹⁰⁰ Most of these measures also are recognized by the UN instruments on the rights of prisoners referred to in note 26.

¹⁰¹ General Comment No.20, 1992, paras. 9-12 and 14.

¹⁰² Ibid., para. 15.

¹⁰³ General Comment No.2, supra, para. 3-4.

CAT also establishes a series of obligations concerning international cooperation and extraterritorial jurisdiction, sometimes referred to as ‘universal jurisdiction’.¹⁰⁴ These include an obligation to give national courts jurisdiction over cases of torture that have not taken place in their territory if the victim or perpetrator is a national, as well as jurisdiction to try any torturer present in the national territory even in the absence of such links, unless the torturer is extradited to another State for trial.¹⁰⁵ Parties to the CAT also have an obligation to assist one another in the investigation of cases of torture.¹⁰⁶ In contrast to the obligations mentioned above, these seem to be treaty obligations that are not part of customary law.

5. CONCLUSIONS

The torture of children occurs in different contexts. The most common include police operations against children (usually adolescents) perceived as a threat to public order or safety, in particular offenders and children living on the street; children linked or thought to be linked to subversive groups or illegal armed groups, including the children of militants; and children (again usually adolescents) confined in prisons or facilities for offenders.

In law, certain characteristics distinguish torture from child abuse. The most significant is that torture, by definition, is committed by a representative of the State, or someone acting with the encouragement or acquiescence of the State. Another is that torture, by definition, is committed for the purpose of obtaining information or a confession, intimidation, coercion, punishment of the immediate victim or a third person, or discrimination. In addition, torture must cause severe pain or suffering. While some acts of child abuse may cause severe pain or suffering, mistreatment, having lesser consequences, also constitutes child abuse.

Because of these differences it is appropriate to treat torture differently from child abuse, in particular with regard to law enforcement. Child abuse is often committed by parents, whose motives nearly always differ from those of officials who torture. The mere fact that torture is committed by a representative of the State, or someone acting with the tolerance or acquiescence of the State, justifies a stronger response to torture. The fact that torture by definition causes severe pain or suffering is yet another reason repressive measures should be more harsh.

International law supports this position. Under international law, suspected torturers must be prosecuted, and if a torturer is convicted, the sentence must reflect the gravity of the crime. In contrast, prosecution is not always the most appropriate response to child abuse, especially

¹⁰⁴ Arts. 5 to 9. Universal jurisdiction, in the strict sense of the term, refers to the position that all States have jurisdiction to prosecute and try certain crimes, regardless of where they occur and whether a given State has any other specific link with the crime, because they are crimes against humanity. The term is also used in a broader sense to refer to the establishment, through treaties like CAT, of broad jurisdiction of all States Parties to prosecute and try crimes regardless of whether or not they have taken place in their territories, including on the grounds of mere presence of the accused in its territory. (See O’Donnell, *infra*, footnote 20 and the sources cited therein.) Treaties having similar provisions include the UN Convention Against Transnational Organized Crime and many of the UN treaties against terrorism.

¹⁰⁵ Art. 5.

¹⁰⁶ Art. 9. In international penal law such assistance is known as known as ‘mutual judicial assistance’.

when it takes place in the home. Indeed, the Committee on the Rights of the Child has observed that, “Prosecuting parents is in most cases unlikely to be in their children’s best interests.”¹⁰⁷

Children who are victims of abuse have the right to physical and psychological recovery and, if needed, social reintegration. Persons who are victims of torture also have the right to compensation, according to international law, whether they are children or adults. Given the responsibility of public institutions and authorities for torture, compensation of victims often includes official acknowledgement of the wrong done and/or public commemoration of the victims, in addition to financial compensation and rehabilitation.¹⁰⁸

The principle that torture must be prosecuted in order to prevent impunity is such a compelling imperative that most members of the international community have accepted an obligation to cooperate with one another in investigating and prosecuting this crime, and to prosecute any torturer found in their respective territories regardless of where the crime took place and the nationality of the victim and alleged perpetrator.¹⁰⁹ These obligations apply regardless of the context in which an act of torture occurs, even if it is unrelated to an armed conflict or systematic policy of repression. No similar obligations exist with regard to child abuse, or indeed, any other violent crime except war crimes, forced disappearance and crimes of international terrorism.¹¹⁰

If an act of torture has been committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator is not prosecuted in the competent national court, he or she may be prosecuted before the International Criminal Court (ICC).¹¹¹

When committed in the context of an international armed conflict or foreign occupation, torture and inhuman treatment constitute grave breaches of international humanitarian law.¹¹² All 194 States that are party to the Geneva Conventions¹¹³ have an obligation “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts”, unless they are extradited to another State for prosecution.¹¹⁴ Numerous States have gone further and

¹⁰⁷ General Comment No. 8, para.41.

¹⁰⁸ In the ‘Street Children’ case, for example, the Inter-American Court ordered Guatemala to name a school for the victims (Supra, Reparations, May 26, 2001, para. 103) and in the Servellón case, Honduras was ordered to name a street and publicly recognize responsibility for violating the rights of the victims. (Supra, paras. 215.10 and 215.11).

¹⁰⁹ There are 192 Member States of the United Nations and 145 States Parties to the Convention Against Torture. (Website of the United Nations and OHCHR, www.un.org/members/growth.shtml and www2.ohchr.org/english/bodies/ratification/9.htm, respectively, consulted 22 January 2008.)

¹¹⁰ Arts. 9 to 11 of the International Convention for the Protection from Enforced Disappearance, UNGA resolution 61/177 of 20 December 2006; for crimes of terrorism, see O’Donnell, *International treaties against terrorism and the use of terrorism during armed conflicts and by armed forces*, ICRC Review Vol.88 No.864, Cambridge University Press, 2006, pp. 854-857.

¹¹¹ Rome Statute, Art. 7.1(f). As of 17 October 2007, 105 States has accepted the jurisdiction of the ICC. (www.icc-cpi.int/asp/statesparties.html, consulted 23 January 2008).

¹¹² Common Article 50, 51, 130 and 147 of the I, II, III and IV Geneva Conventions, respectively.

¹¹³ www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_main_treaties?opendocument consulted 17 June 2010.

¹¹⁴ Common Article 49, 50, 129 and 146 of the I, II, III and IV Geneva Conventions, respectively.

adopted laws giving their courts competence to try grave breaches, including torture, committed during non-international armed conflicts.¹¹⁵

A torturer who is not prosecuted before the competent national court may be prosecuted before the ICC for acts of torture or cruel or degrading treatment that violate international humanitarian law during an international or non-international conflict.¹¹⁶ The torture or ill-treatment of children during armed conflict violates international humanitarian law whether the child victim is part of the civilian population, a captured member of an organized armed force or an ‘illegal’ or ‘unprotected’ combatant.

These arrangements for transnational enforcement of the prohibition of torture underline the relevance of recognizing the distinction between the torture of children and child abuse. Decades ago, countries that tortured often attempted to hide evidence of it, even to the extent of disposing of the victims through the infamous practice that came to be known ‘forced disappearance’. Today, some have adopted a different but no less disturbing strategy, which tacitly implies that ill-treatment falling short of torture is acceptable, at least in exceptional circumstances, in particular the struggle against terrorism.

The distinction between torture and other forms of ill-treatment has some significant consequences in international law, even though international authorities agree that it is difficult to distinguish between the two. The provisions of the Convention Against Torture concerning extraterritorial jurisdiction and mutual judicial cooperation apply to torture but not specifically and expressly to cruel, inhuman and degrading treatment. International jurisprudence recognizing the prohibition of torture as *jus cogens* is silent on the status of cruel, inhuman or degrading treatment.

The Committee against Torture has begun to struggle with the implications of the distinction between torture and ill-treatment for the diverse obligations of States under the treaty. General Comment No. 2 observes that, “The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment ... are interdependent, indivisible and interrelated”. But it makes specific reference to certain obligations (e.g. education and investigation of complaints) and not others (e.g. the establishment of sentences congruent with the gravity of the crime). This is a complex issue, and the doctrine is still evolving.

What is beyond discussion is that both torture and cruel, inhuman and degrading treatment are absolutely prohibited by international law in all circumstances and that all countries have an obligation to prevent them. Another point on which the European, Inter-American and United Nations jurisprudence agrees is that, when the victim is a child, his or her greater vulnerability must be taken into account in determining whether the acts inflicted constitute torture or cruel, inhuman or degrading treatment.

¹¹⁵ Doswald-Beck and Henckaerts, Customary International Humanitarian Law, vol. 1: Rules, ICRC/Cambridge U. Press, Cambridge, 2005, p. 553 (citing legislation of 54 countries).

¹¹⁶ Arts. 8.2(a)(ii), (iii) and (xxi) and 8.2(c)(i) and (ii) Doswald-Beck and Henckaerts, Customary International Humanitarian Law, vol.1: Rules, ICRC/Cambridge U. Press, Cambridge, 2005, p. 553 (citing legislation of 54 countries).

One final issue that deserves mention is the treatment of child victims of torture and ill-treatment in legal proceedings. Where children are concerned, every effort must be made to reconcile the obligation to bring torturers to justice with certain rights and principles recognized by the CRC. Of particular relevance are the right of children who are victims of torture to psychological recovery and the principle that the best interests of the child must be a primary concern in all decisions and proceedings affecting a child.

The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes adopted by the UN Economic and Social Council provide valuable guidance on measures that can be taken to reconcile these concerns.¹¹⁷ Guidelines 10 to 14 provide that child victims should be treated in a caring and sensitive manner that takes into account their personal situation and needs, age, gender, disability and level of maturity and respects their physical, mental and moral integrity; that each victim should be treated as an individual having individual needs, wishes and feelings; that interference with his or her private life should be limited; that interviews and examinations should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner and that all interactions should be conducted in a child-sensitive manner in a suitable environment and in a language that the child uses and understands.

The Committee on the Rights of the Child has endorsed these guidelines, of vital importance for national or international legal proceedings involving children who have been victims of torture or cruel, inhuman or degrading treatment.

¹¹⁷ Resolution 2005/20, adopted 10 August 2005.

PART TWO: MEDICAL AND PSYCHOLOGICAL IMPACTS

1. INTRODUCTION

Analysing the impact of torture on children from a psychosocial medical perspective, including the contexts of the harm and immediate and longer-term effects, requires an intersectoral and multidisciplinary process founded on human rights treaties, particularly the Convention on the Rights of the Child, as well as international humanitarian law and internationally accepted codes of medical ethics. The application of science to the protection of the rights of the child with regard to torture, especially scientific aspects of health, education and social development, has significant implications for prevention, assistance, restoration of rights and the commitment to institutional efforts to combat impunity.

The legal framework presented in Part One clearly defines the field covered by child victims of torture and cruel, inhuman or degrading treatment and the various scenarios in which this serious violation of dignity and physical and mental integrity takes place. The Study on Violence against Children, presented to the United Nations General Assembly on 29 August 2006, also illustrates how this practice is virtually universal, cutting across geography, culture and legal and institutional lines.

It is necessary to examine the various ways in which children are victims of torture, ranging from the most brutally traditional to complex, sophisticated modern methods. Methods of torture that may or may not cause perceptible physical injuries must be considered, as well as those intended to cause psychological harm. Separating or distinguishing one method from another, whether physical or mental, is often a risky way of making a proper diagnosis or finding care strategies for a genuine and effective recovery. This part of the paper therefore analyses the damage caused by torture to children and adolescents holistically, from a physical-psychosocial viewpoint and in relation to the processes of growth, development, maturing and building citizenship.

States have an inescapable responsibility to prevent and eradicate torture, to give comprehensive assistance to victims and to punish with the maximum force of the law the material and intellectual perpetrators who are directly or indirectly responsible. Torture is not only a universally recognized violation of international law and a crime against humanity but a crime of special relevance when the victim is a child or adolescent. To ensure an effective system for protecting children who are vulnerable or subject to torture or cruel, inhuman or degrading treatment, States must lay down the strictest rules and standards at all levels of their legal and administrative system, especially in ethical standards of the professional disciplines dealing with comprehensive child health care. Civil society organizations, including professional associations, must devise a broad range of measures to both encourage ethically responsible conduct and establish codes of conduct that clearly reinforce the seriousness of involvement in acts of torture against children in any circumstances, whether by action or omission. They must also ensure appropriate training for professionals to ensure preventive intervention, assistance and rehabilitation in accordance with the needs and best interests of the child.

The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), submitted to the United Nations High Commissioner for Human Rights on 9 August 1999, laid down international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body. The Istanbul Protocol takes account of the experience and efforts of professional, academic, national and international institutions and includes specific considerations on torture and children and the ethical implications of health professionals taking part in torture.

This part of the paper illustrates the profound implications of the holistic exercise of their human rights enshrined in the CRC and other international human rights treaties for the comprehensive protection of children at risk of torture or victims of torture. Finally, it suggests a number of conclusions and recommendations on the medical and psychosocial approach to prevention and eradication of child torture, as well as assistance to its victims.

2. ANALYSIS OF CAUSES, DAMAGE AND REPARATORY STRATEGIES

The Convention on the Rights of the Child requires revision of domestic law to ensure full compliance with international standards, including the prohibition of violence against the child. Article 3.3 states that “the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

Legislation must therefore lay down precise rules for protection against violence. Standards concerning children institutionalized or deprived of liberty must, for example:

- Prohibit expressly any inhuman or degrading treatment, including corporal punishment as a means of discipline or habitual practice;
- Require specific policies to avoid any form of violence between children in institutions;
- Establish clear and well-publicized procedures to help children seek confidential advice and enable them to make allegations to a body with independent powers to investigate, make recommendations or adopt appropriate measures.
- Ensure access to lawyers or independent representatives able to advise such children or act on their behalf, including, where necessary, special measures for the youngest children and children with disabilities.¹¹⁸

These are specialized functions that require appropriate training and interdisciplinary cooperation.

Apart from the rights of the child to health and appropriate services, two other articles of the Convention are worth recalling. Article 39, as indicated above, recognizes the obligation to provide victims with the means of recovery and specifies that, “Such recovery and

¹¹⁸ Uniform Rules on equal opportunities for disabled persons, art. 9.4.

reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.” Article 25 guarantees the right to a periodic review of care and treatment: “States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.”

The responsibility of State institutions towards victims of torture and cruel or inhuman treatment acquires a very special significance and specific characteristics when children are tortured. Torture is a traumatic interruption of the process of psychosocial maturing and social integration. In different parts of the world, in different cultural, political and economic conditions, with or without social or armed conflicts, one fact must be recognized: the vulnerability of children is intimately related to the degree of protection provided by the family and daily exposure to an environment of social exclusion and violence. Certain circumstances – living on the street; being a victim of trafficking, commercial sexual exploitation or other forms of economic exploitation; being accused of a violation of criminal law – are some of the predominant types of vulnerability to traumatic contact with State officials, persons acting on their behalf or other accomplices in the crime of torture. These conditions – along with being press-ganged into military forces, displacement as a result of armed conflict and migration, especially unaccompanied migration – represent the broad spectrum of situations that force children to pursue their complex struggle for survival in a no-man’s-land between the deprivation of rights and the threat of torture.

In these scenarios, children must build an identity, relationships and values under the suspicious gaze of broad sectors of society and State institutions. This leads them to adopt social roles that lead to confirming the mistrust and contempt that they generally perceive from their precarious position. What are the implications for the most sensitive components of a child’s development, when the role of the State is inverted and it dramatically abandons its position as a protector of rights to become a dehumanized aggressor of children’s psychophysical integrity and personal dignity? Are children able to withstand the extreme brutality inflicted on their bodies and minds by torture, even adopting an attitude of defiance, which allows them to physically survive their excruciating ordeal? It is difficult to imagine that they might recover confidence in the role of State institutions as the guardian of rights. The effects may be devastating.

This is illustrated by the case of D.B. in Argentina in the context of the State terrorism that held sway under the military dictatorship. In 1976, when he was four years old, unidentified State officials entered his home in an aggressive and violent fashion, brutally overpowered his mother and, as D.B. watched, placed a hood on his father and carried him off with severe violence, while threatening his mother. That was the last time he saw his father. Some time later this child was in a programme of assistance to victims, and the professionals responsible for his health care noticed that the prolonged post-traumatic stress had led to the unusual premature greying of his hair. Psychotherapeutic assessment identified the sinister event he experienced and the need to remain silent due to threats received as the critical cause of his extreme mental suffering and post-traumatic stress. Confirmation that the perpetrators of the crimes were representatives of the State led to a profound emotional breakdown and progressive deterioration of his social integration. His life, despite tireless efforts to provide

socio-educative therapy and care, became markedly marginal, with alcohol and drug consumption progressively reducing his abilities and capacities. When the responsibility of the State was finally confirmed and a compensation scheme was set up for the relatives of victims of enforced disappearance, he was unable to acknowledge the compensation as a process of reparation. Shortly afterwards he died in a traffic accident, which experts considered to be suicide.

This case illustrates the psychological damage and suffering caused to the child, even though he appeared to be no more than a passive spectator of the violence inflicted on his family. The prolonged and permanent crime of enforced disappearance suffered by his father created a social and psychological block that prevented him from participating in the process of recovery. Similarly, the confirmation, many years later, of the State's direct responsibility for perpetrating the crime had such an impact that it fostered self-destructive behaviour and a strong tendency to break the law. While some characteristics of this case are unique, in general it illustrates the signs and symptoms of trauma that all child victims of torture experience to differing degrees.

Torture occurs in different contexts and affects children in all stages of childhood: infancy, early childhood and adolescence. However, the medical-psychosocial analysis cannot be confined to a linear or schematic view, nor reduced to a mere categorization of victims by age group. A broader view is needed, encompassing recognition of the victims' individual characteristics and their social and family contexts, the background of their traumatic experience and the appropriateness and suitability of the programmes providing them with comprehensive care.

In this respect, a valuable contribution to the analysis comes from studies conducted by Dr. Silvia Amati in her psychotherapy practice in Geneva on the care of persons tortured in their countries of origin and their family group:

“Torture attacks those points of the person that sustain the rest, their name, family, body, etc.; the aim is for the person to lapse into a state of ambiguity. Ambiguity can be a non-conflictual, compromise position. A child has to accept what is; the first context is not discussed; the child relies on his parents and shifts all uncertainty onto them, which restores his or her feeling of security and belonging. It is a return. A part of the child is undefined, uncertain and ambiguous, and this situation must be absorbed by the context in which the child finds him or herself.

The persons in whom the child places this responsibility may or may not accept it; a mother may agree to take on this role, but may also be abusive and take advantage of the other's dependence. This destroys the mechanisms of security and belonging that the child needs. In torture relationships, the child sees the torturer as the only person in whom he or she can place this responsibility. When terror is generalized, all the persons in whom the child might place this responsibility are eliminated, increasing his ambiguity and uncertainty, which may leave him at the mercy of the torturer's will.”¹¹⁹

¹¹⁹ Democratización y Protección de la Dignidad Humana, CODESEDH, Buenos Aires, 1999, pp. 77-79.

The clinical and psychological symptoms of torture change with the passage of time. If the subject does not receive immediate psychological care, the effects of torture are likely to be associated with lifestyle and family conditions that complicate the picture.

In patients who receive early care, caregivers observe acute symptoms associated with the traumatic experience. These include severe anxiety, sleep disorders, paranoid experiences, feelings of loss, self-devaluation, reduced intellectual performance (memory, concentration), irritability and the recurrence of overwhelming anxiety at the memory of the torture. When the emotional suffering is prolonged, one generally observes a loss of interest in life that is expressed as an impairment of emotional and family relationships and difficulties with social and interpersonal behaviour. Everything points to this type of disturbance being linked to the difficulty of sharing and communicating the experience, a difficulty that grows with the passage of time, since an inhibition to talk about what happened develops gradually, with a concomitant blockage of the emotions.

The family group of the child or adolescent torture victim is affected from the very moment in which torture is experienced. It is often the case that several family members are tortured or threatened with torture at the same time. In these cases the family's emotional ties are affected, the feelings of loyalty are upset by feelings of protection and any conflicts existing before the torture are likely to be seriously aggravated. The most frequent problems observed in various social and cultural circumstances include internalization of the events, reproduction of the aggression suffered in intra-family ties and prolonged silence.

In the field of social paediatrics, the first studies have been reported relating to child and adolescent victims of institutional violence and violence in the contexts of a state of emergency and systematic violations of human rights. From this medical perspective it can be said that the extreme anxiety experienced by the child sooner or later, in diverse circumstances including perceptions of threat or violence, forms a set of symptoms that can be described as post-traumatic stress. While there is extensive literature giving accounts of the psychophysical and social suffering and the consequent damage, few studies make a proper epidemiological examination of the phenomenon of torture in children and adolescents. Reparative and restorative treatment tends to be limited to periods close to the traumatic event.

By drawing attention to these two aspects we aim to raise the profile of the problem and at the same time promote institutional and professional behaviour, and even cultural models, more committed to preventing and eradicating torture and cruel, inhuman and degrading treatment of children.

In addition to the effects and repercussions of torture in any stage of life, the damage to the child's dignity and psychophysical integrity has a very special significance when it occurs in stages of growth and development. The complete absence of institutional safeguards that prevent and stop this aberrant practice obliges the child to confront a force that is aggressive and arbitrary. It is also beyond the control of protection mechanisms the State is obliged to maintain by its own laws as well as by international human rights laws and, in particular, the Convention on the Rights of the Child. When the situation or experience of suffering torture or cruel, inhuman or degrading treatment is perceived as normal – or even accepted as part of

the routine operation of systems of detention, imprisonment, enforced recruitment or other extreme forms of violence directly involving State officials or with their acquiescence – then a society reaches the apogee of a process that destroys the link between social integration and the full exercise of rights.

An eloquent example occurred in a regional seminar in Latin America during preparation of the Study on Violence against Children in 2005. A group of adolescents speaking with international expert Professor Paulo S. Pinheiro described how the local police routinely treated them in their working-class neighbourhood, mostly on account of their physical appearance – which included earrings, tattoos and long hair. When taken to the police station they were subjected to beatings, electric shocks, submergence in water, mock executions and other cruel practices. Later, with no judicial procedure, they were freed and threatened with more of the same if they reported what had happened. When Professor Pinheiro referred to their treatment as torture, the adolescents were surprised to realize that it was a serious violation of their rights and a crime against humanity. As a result of this experience a local programme was set up to prevent and eradicate torture, including strategies for providing assistance with rehabilitation and restoration of rights. Social organizations, churches and even public bodies supported the initiative.

The Istanbul Protocol examines the characteristics, effects and scope of child torture from a universal perspective. Its salient points include:

- Torture can harm a child directly or indirectly. The harm may arise from the child having been tortured or detained, from its parents or family members being tortured or from having witnessed torture or violence. When people around the child are tortured the impact on the child is inevitable, even if indirect, as torture affects the victims' whole family and community.
- When assessing a child suspected of having been tortured or having witnessed torture, the clinic should ensure that the child has the support of people caring for him/her and feels safe during the assessment. To that end it may be necessary for the father, mother or other trusted person to be present at the assessment. The clinic should take into account that children often express their thoughts or emotions regarding the trauma not verbally but through their behaviour. The extent to which children can verbalize their thoughts and feelings depends on their age, level of development and other factors, such as the family dynamic, personality traits and cultural norms.
- A child's reactions to torture depend on his or her age, level of development and cognitive skills. The younger the child, the greater the influence of the carers' reactions and attitudes immediately after the event on his/her experience and understanding of the traumatic event. For children aged three or under who have experienced or witnessed torture, their entourage plays a crucial protective and reassuring role. The reactions of very young children to traumatic experiences normally include a component of hyper-excitement, with anxiety, sleep disorders, irritability, excessive startle reflex and avoidance. Over age three, children often tend to withdraw and refuse to speak directly about their traumatic experiences. The child's capacity for verbal expression improves as he or she develops. A clear

improvement takes place at the concrete-operative phase (8-9 years), when the child is capable of giving an accurate chronology of events. During this phase the concrete-operative and spatio-temporal skills develop. These new skills are still fragile, and the child cannot always construct a coherent narrative until the formal operative phase begins (age 12). Adolescence is a period of turbulent development. The effects of torture can vary greatly. The experience of torture can cause profound personality changes in adolescents resulting in antisocial behaviour. On the other hand, the effects of torture on adolescents may be similar to those observed on younger children.

- Children may exhibit symptoms of post-traumatic stress disorder. The symptoms may be similar to those observed in adults, but the clinic will have to rely mainly on observing the child's behaviour rather than on verbal expression. For example, the child may show symptoms of reliving experiences, which are manifested in monotonous and repetitive games representing aspects of the traumatic event, visual memories of the events (with or without play), repeated questions or statements about the traumatic event, and nightmares. Such children may lose urinary control, appear socially withdrawn, repress their emotions, change their attitudes about themselves and others and feel they have no future. Other ramifications may include hyper-excitation and night terror, problems getting to sleep, sleep disorders, excessive startle reflex, irritability and serious attention and concentration disorders. Fear and aggressive behaviour that did not manifest before the traumatic event may appear as aggression towards friends, adults or animals, fear of the dark, fear of being alone in the bathroom and phobias. The child may exhibit inappropriate sexual behaviour for his or her age and certain somatic reactions. Symptoms of anxiety may also appear, such as exaggerated fear of strangers, separation anxiety, panic, agitation, tantrums and uncontrolled weeping. Eating disorders may appear.
- The family plays an important dynamic role in the persistence of the child's symptoms. To assure family cohesion and overcome dysfunction family members must recover their different roles. Certain family members, often children, may be assigned the role of patients and develop serious disorders. The child may be overprotected or important facts about the trauma may be concealed from him or her. In other cases the child may be given a parental role and be expected to look after the parents. Where the child has not been a direct victim of torture but has been affected only indirectly, adults often tend to underestimate the consequences on the child's psyche and development. When the child's loved ones have been persecuted, raped and tortured or the child has witnessed serious traumas or torture, the child may conceive dysfunctional ideas such as being responsible for the harm or for carrying the parents' burden. In the long term, ideas of this kind can give rise to problems of guilt, loyalty conflicts, disorders of personal development and maturing into independence.

3. THE ETHICAL COMMITMENT OF HEALTH PROFESSIONALS

The role of medical staff, psychologists and other health professionals in the various contexts in which children undergo the cruel and painful experience of torture, including prevention and assistance to victims, requires special emphasis.

Allegations of torture by children often reveal the direct or indirect involvement of health professionals, by action or omission. Whether these complaints are made in judicial fora or in the court of public opinion, the mild social and legal reaction to professionals whose complicity has been reported is worrying.

Human rights organizations such as Amnesty International and Defence for Children International have often pointed to the presence of physicians in interrogations under torture, in order to monitor and observe these cruel proceedings. A number of reports describe how the presence of physicians in torture chambers increases the perversity of the physical and mental assault and also provides the criminal conduct of the perpetrators with a legitimacy and near-protection due precisely to the 'scientific' veneer given by the presence of these professionals. Doctors who participate in torture have clearly repudiated Hippocratic principles and often end up taking roles in medical research linked to torture.

Even physicians and psychologists brought in as experts to examine torture victims often take a superficial and even a negligent attitude towards the specific skills required to interview a child or adolescent recounting the experience of torture. The child's words may be ignored and consequently not taken into account in the assessment of the medical and psychological study. On other occasions detailed medical and psychological examinations are considered unnecessary, which has the legal effect of opening the door to impunity for possible crimes against humanity. Children and adolescents undergoing these experiences not only reject the professionals involved in such events described, but end up feeling even more confused, unprotected and defenceless.

On the other hand, when the behaviour of the professional is objectively and clearly meant to protect and defend the rights and psycho-physical integrity of child victims, child victims find the necessary support to develop their resilience and recover their rights.

Against this background it is essential to disseminate as widely as possible new practices by health professionals, offering conceptual and methodological frameworks that correctly combine up-to-date scientific knowledge, strictly ethical professional conduct and a real and effective commitment to the human rights of children. Regarding this aspect of protecting children against torture, it is instructive to highlight the ideas of Ambassador Jaap A. Walkate who, as President of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture in the Office of the United Nations High Commissioner for Human Rights said in his keynote speech of 3 April 1997:

“The application of measures, such as torture or corporal punishment, often implies the cooperation of medical personnel, physicians, or paramedical staff. Begin with flagrant cases of torture in which medical personnel have been involved: sometimes by devising methods of torture that do not leave visible scars on the victim, sometimes by

preventing torturers to go too far and to lose a valuable detainee who still should disclose more information, sometimes by reviving victims to prepare them for another round of beatings.

Such conduct is not only illegal and punishable, but also has been declared a “gross contravention of medical ethics” by the UN General Assembly in 1982. On that occasion ethical principles were approved for medical experts, applicable to health personnel, especially doctors, for protecting detainees from torture.¹²⁰ These principles were drafted on the basis of the preparatory work carried out by the World Health Organization and the World Medical Association. In 1975, the World Medical Association approved the Declaration of Tokyo, which is the most far-reaching declaration on torture produced by the medical profession.”¹²¹

We should highlight the contributions of the Istanbul Protocol regarding the participation of health professionals in torture when it says that “[p]articipation in torture” includes evaluating an individual’s capacity to withstand ill-treatment; being present at, supervising or inflicting maltreatment; resuscitating individuals for the purposes of further maltreatment or providing medical treatment immediately before, during or after torture on the instructions of those likely to be responsible for it; providing professional knowledge or individuals’ personal health information to torturers; intentionally neglecting evidence and falsifying reports”.

The United Nations principles also incorporate one of the fundamental rules of health care ethics by emphasizing that the only ethical relationship between prisoners and health professionals is one designed to evaluate, protect and improve prisoners’ health. The Committee on the Rights of the Child has made repeated statements in this respect. For instance in General Comment No. 10, “Children’s rights in juvenile justice” (2007), it states: “The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”

The same observation analyses the breadth and depth of the concept of dignity set out in article 40 of the CRC and defines four essential aspects of protection of the best interests of the child:

- Treatment that is consistent with the child’s sense of dignity and worth;
- Treatment that reinforces the child’s respect for human rights;
- Treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society;
- Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.

¹²⁰ Principle 2, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 37/194 of 18 December 1982.

¹²¹ Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975, available at www.wma.net/en/30publications/10policies/c18/index.html, consulted 17 June 2010.

In the concluding observations of 2 June 2006 the Committee expressed its view on the second periodic report of Kenya:

“The Committee notes that, despite a clear prohibition in the legislation, reports of torture, cruel, inhuman and degrading treatment indicate that it still occurs. The Committee is concerned at the excessive use of force and shooting at children in Kisumu in October 2005 and is further concerned at reports indicating that rapes of girls by law-enforcement agents have not been investigated. The Committee also regrets the lack of comprehensive measures to address the causes and effects of torture, cruel, inhuman and degrading treatment.

The Committee urges the State party to:

- Review its legislation and ensure its effective implementation in order to provide children with better protection against torture and ill-treatment;
- Investigate and prosecute all cases of torture and ill-treatment of children, ensuring that the abused child is not victimized in legal proceedings and that the child’s privacy is protected;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Continue its efforts to train professionals working with and for children, including teachers, law-enforcement officials, social workers, judges, magistrates and health personnel in the identification, reporting and management of cases of ill-treatment.”

At its forty-second session, in the concluding observations of the initial report on Turkmenistan, the Committee on the Rights of the Child also stated:

“The Committee is deeply concerned at the information that torture and ill-treatment of detainees, including children, is widespread, especially at the moment of apprehension and during pre-trial detention, and used both to extract confessions or information and as an additional punishment after the confession.

The Committee recommends that the State party:

- Investigate thoroughly all allegations of torture and ill-treatment, in particular within the juvenile justice administration by public officials;
- Strengthen measures to encourage reporting of instances of torture and ill-treatment and ensure that perpetrators are rapidly brought to justice;
- Provide the victims of such abuses with physical and psychological recovery and social reintegration and compensation and protect them from stigma and re-victimization;
- Undertake systematic training programmes and awareness-raising campaigns at the national and local levels, addressed to all professionals working with and for children, in particular teachers, judges, parliamentarians, law-enforcement officials, government administration, local authorities, personnel working in relevant institutions, health personnel, including psychologists and social workers, on prevention and protection against torture and other forms of ill-treatment.”

4. RECOMMENDATIONS

- Up-to-date strategies for preventing torture and cruel, inhuman or degrading treatment of children or adolescents should be devised, with special emphasis on the involvement of health professionals.
- Medical and psychosocial criteria to assess the effects of torture, especially in terms of welfare and restoration of rights in the short, medium and long term, should be reviewed.
- Awareness should be raised and capacities developed among the personnel of health systems caring for children and adolescents, especially those linked to institutions where frequent use of violence against children and adolescents is acknowledged.
- Epidemiological studies based on the territorial, cultural, ethnic and social diversity of child victims should be promoted.
- Good practices in prevention of torture and the contribution of psychosocial medicine should be identified and disseminated.
- Good practices for assistance to victims by health personnel in a variety of socio-cultural contexts should be identified and disseminated.
- Risk factors relating to torture should be identified and disseminated, taking account of the diversity of national circumstances and their respective legal systems.
- The trial and punishment of perpetrators of various levels of torture in general and of children in particular should be promoted. This is not only an act of justice and a barrier against impunity, but also represents a valuable component in the psychosocial reparatory process for child victims and the subsequent restoration of their rights.

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