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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE
QUESTIONS OF TORTURE AND DETENTION**

Torture and other cruel, inhuman or degrading treatment

**Report of the Special Rapporteur on the question
of torture, Manfred Nowak**

Summary

The Special Rapporteur on torture, Manfred Nowak, submits his first report to the Commission. Section I summarizes the activities of the Special Rapporteur in 2005, with a particular focus on the period since the submission of his interim report to the General Assembly. In section II, the Special Rapporteur discusses the methods of work related to country visits, particularly the terms of reference for fact-finding missions. He examines the implications of these conditions, specifically with respect to visiting places of detention. According to the Special Rapporteur, the terms of reference are fundamental, common-sense considerations that are essential to ensure an objective, impartial and independent assessment of torture and ill-treatment during country visits. Section III contains a report on recent activities and developments related to diplomatic assurances. The Special Rapporteur draws attention to the importance of maintaining the focus and remaining vigilant on practices such as the use of diplomatic assurances, which attempt to erode the absolute prohibition on torture in the context of counter-terrorism measures. He reiterates that diplomatic assurances are not legally binding and undermine existing obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States. Section IV examines the distinction between torture and cruel, inhuman or degrading treatment or punishment. He concludes that the distinction relates primarily to the question of personal liberty. Outside a situation where one person is under the total control of another - i.e. where a person is rendered powerless - the proportionality principle is a precondition for assessing the scope of application of the prohibition of cruel, inhuman or degrading treatment or punishment. In all other cases, and in particular in situations of interrogation, no proportionality test may be applied and the prohibition of torture and cruel, inhuman or degrading treatment or punishment is equally as absolute as the prohibition of torture.

The summary of communications sent by the Special Rapporteur from 1 December 2004 to 15 December 2005 and the replies received thereto from Governments by 31 December 2005, as well as a number of country-specific observations, are found in addendum 1 to the report. The summary of the information provided by Governments and non-governmental organizations on the implementation of the Special Rapporteur's recommendations following country visits is found in addendum 2. Addendums 3 to 6 are the reports on the country visits to Georgia, Mongolia, Nepal and China, respectively. Document E/CN.4/2006/120 contains the joint report prepared with the Special Rapporteurs on the right of everyone to the highest attainable standard of physical and mental health, the independence of judges and lawyers, and freedom of religion or belief, and the Chairperson of the Working Group on Arbitrary Detention concerning the human rights situation of detainees held at the United States of America Naval Base at Guantánamo Bay, Cuba.

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Introduction

1. The Special Rapporteur on the question of torture, Manfred Nowak, who was appointed on 1 December 2004, hereby submits his first report to the Commission on Human Rights, in accordance with resolution 2005/39.
2. Section I summarizes the activities of the Special Rapporteur in 2005, with a particular focus on the period since the submission of his interim report to the General Assembly (A/60/316). In section II, the Special Rapporteur discusses the methods of work related to country visits, and section III contains a report on recent developments related to diplomatic assurances. Section IV examines the distinction between torture and cruel, inhuman or degrading treatment or punishment.
3. The summary of communications sent by the Special Rapporteur from 1 December 2004 to 15 December 2005, and the replies received thereto from Governments by 31 December 2005, as well as a number of country-specific observations, are found in addendum 1 to the report. Addendum 2 contains a summary of the information provided by Governments and non-governmental organizations on implementation of the Special Rapporteur's recommendations following country visits. Addendums 3 to 6 are the reports on the country visits to Georgia, Mongolia, Nepal and China, respectively. Document E/CN.4/2006/120 contains the joint report prepared with the Special Rapporteurs on the right of everyone to the highest attainable standard of physical and mental health, the independence of judges and lawyers, and freedom of religion or belief, and the Chairperson of the Working Group on Arbitrary Detention concerning the human rights situation of detainees held at the United States of America Naval Base at Guantánamo Bay, Cuba.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

4. The Special Rapporteur draws the attention of the Commission to his first report to the General Assembly (*ibid.*, paras. 12-17), in which he described his activities in 2005 since the submission of the report of his predecessor to the sixty-first session of the Commission on Human Rights.
5. The Special Rapporteur would like to inform the Commission about the activities he has undertaken since his appointment on 1 December 2004. Regarding country visits, the Special Rapporteur recalls that in the first half of 2005, he undertook visits to Georgia, including the territories of Abkhazia and South Ossetia, in February and to Mongolia in June. In Georgia, he concluded that torture and ill-treatment by law enforcement officials still exists, and that conditions of detention are, in general, poor. At the same time, he welcomed a series of positive developments since the Rose Revolution of November 2003 aimed at eradicating torture, and expressed his appreciation to the Government for having complied with many of his recommendations, including ratifying the Optional Protocol to the Convention against Torture in June 2005. In Mongolia, the Special Rapporteur concluded that torture persists, particularly in police stations and pretrial detention facilities. He expressed concern at the secrecy surrounding the application of the death penalty and the cruel treatment of prisoners on death row. Similarly, the conditions of prisoners serving 30-year terms in isolation amounted to inhuman treatment. At the same time, he was encouraged by the activities of the National Human Rights Commission, in particular its critical public inquiry into torture allegations.

From 10 to 16 September 2005 the Special Rapporteur visited Nepal, where he found the practice of torture to be systematic and practised by the police, the armed police, and the Royal Nepalese Army. These conclusions are based, inter alia, on the large number of serious allegations received, on convincing medical evidence and on surprisingly frank admissions by high police and military commanders that torture is indeed practised systematically against suspected Maoists. At the same time, he also found shocking cases of particularly cruel treatment and punishment committed by Maoist forces. From 21 November to 2 December, the Special Rapporteur visited China where he concluded that the practice of torture, though on the decline, still remains widespread in the country. He was particularly concerned about the continuing practice of forced re-education of persons with dissident or non-conformist opinions, aimed at changing their personality and breaking their will, both in special re-education through labour camps, regular prisons, and even in pretrial detention facilities. Such practices, in the opinion of the Special Rapporteur, constitute a systematic form of inhuman and degrading treatment and are incompatible with a modern society based on a culture of human rights, democracy and the rule of law. The findings, conclusions and recommendations of these visits can be found in the addenda to this report.

6. Concerning the joint request made in June 2004 for an invitation to visit the United States Naval Base at Guantánamo Bay, on 27 October 2005, the Government finally responded with an invitation to only three of the five experts of the Commission on Human Rights entrusted with a joint investigation, namely the Special Rapporteur on the question of torture, the Special Rapporteur on freedom of religion or belief, and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention. Moreover, the Government limited the visit to one day and explicitly excluded private interviews or visits with detainees. On 31 October, the experts agreed to the short duration of the visit and the limitation on the number of mandate-holders invited, and decided to visit the base on 6 December 2005. However, they could not accept the exclusion of private interviews with detainees, which, in the view of the experts, would not only contravene the terms of reference for fact-finding missions by special procedures, but would also undermine the purpose of making an objective and fair assessment of the situation of the detainees. On 18 November 2005, the experts reported that the Government did not accept this precondition for a visit, and therefore the mission envisaged for 6 December, unfortunately had to be cancelled. As indicated above, a joint report on the applicability of international human rights law to detention in Guantánamo, as well as the situation of human rights of the detainees, based on factual information gathered by various means, including from interviews with former detainees, is before the Commission.

7. The Special Rapporteur reports that in view of the previous invitations extended by the Governments of Paraguay and Bolivia, in addition to the positive indications received from the Governments of the Russian Federation (an invitation was first requested in 2000), Côte d'Ivoire (2005) and Togo (2005), he hopes to realize the visits to those countries in the near future. He regrets that despite long-standing requests, invitations have not been received from the Governments of Algeria (1997), Egypt (1996), India (1993), Indonesia (1993), Israel (2002), Tunisia (1998) and Turkmenistan (2003). In May 2005, the Special Rapporteur requested invitations from the Governments of Belarus, Equatorial Guinea, Eritrea, Ethiopia, the Islamic Republic of Iran, Nigeria, Sri Lanka, the Syrian Arab Republic and Zimbabwe. In December 2005, the Special Rapporteur requested invitations from Afghanistan, Iraq, Jordan, the Libyan Arab Jamahiriya, Saudi Arabia and Yemen.

8. During his first year in office, the Special Rapporteur issued press statements concerning: the situation of Guantánamo Bay detainees following the fourth anniversary of the establishment of the detention centres (4 February 2005); the situation following the declaration of a state of emergency in Nepal (8 February 2005); allegations of human rights violations by the authorities of Uzbekistan in connection with the violent events in Andijan (23 June 2005); the lack of an invitation by the Government of the United States of America to visit Guantánamo Bay on the first anniversary of the request by the independent experts of the Commission on Human Rights (23 June 2005); the campaign by the Government of Zimbabwe of forced evictions of informal traders and persons living in informal settlements (24 June 2005); the reported denial of medical treatment to an imprisoned journalist in the Islamic Republic of Iran (18 July 2005); diplomatic assurances not being an adequate safeguard for deportees (23 August 2005); questions about the trial of terrorism suspects in Andijan, Uzbekistan, jointly with the Special Rapporteurs on extrajudicial, summary or arbitrary executions, the independence of judges and lawyers, and the promotion and protection of human rights and fundamental freedoms while countering terrorism (26 October 2005); the detention of the former President of Chad, Hissein Habré, and calling upon the Government of Senegal to extradite him expeditiously to Belgium (18 November 2005); an appeal to the German authorities to initiate a criminal investigation and prosecute for crimes of torture Mr. Zokirjon Almatov, Minister of Internal Affairs of Uzbekistan, who was in Germany receiving medical treatment (16 December 2005).

9. On 13 October 2005, the Special Rapporteur participated in an inter-agency meeting on the follow-up to the Andijan trials organized by the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights to brief other international organizations on the ongoing trials and to brainstorm on a common response and follow-up.

10. On 24 October 2005, he was invited to London to meet with the Home Secretary of the United Kingdom, concerning the issue of diplomatic assurances (see paragraph 27 below).

11. On 26 October 2005, the Special Rapporteur presented his first report to the General Assembly. In his statement, he addressed continuing occurrences of the practice of corporal punishment, such as amputation, stoning, flogging and beating, surveyed the jurisprudence of international and regional human rights mechanisms, and concluded that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Maintaining the focus on the absolute prohibition of torture in the context of counter-terrorism measures, the Special Rapporteur discussed the principle of non-refoulement and the use of diplomatic assurances in light of recent decisions of courts and international human rights mechanisms. In the opinion of the Special Rapporteur, diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment, and shall not be resorted to by States.

12. On 5 November 2005, on the occasion of the twentieth anniversary of the International Rehabilitation Council for Torture Victims (IRCT), the Special Rapporteur participated in a panel discussion organized by IRCT in Copenhagen, entitled, "Torture in the Twenty-First Century", where he addressed the threats posed to the prohibition of torture by practices such as diplomatic assurances and secret places of detention.

13. On 7 November 2005, the Special Rapporteur attended a meeting of the Terrorist Prevention Branch, Division of Treaty Affairs, United Nations Office on Drugs and Crime, Vienna. He presented an overview of the mandate, and the participants discussed issues of common interest and explored possible areas for future cooperation.
14. On 10 November 2005, the Special Rapporteur was received by the European Committee for the Prevention of Torture (CPT) in Strasbourg, France. Views were exchanged in relation to the prohibition of torture in the context of counter-terrorism measures, particularly with respect to diplomatic assurances and secret places of detention. Promoting ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and exploring mutual cooperation and coordination, such as in relation to preparation and follow-up to country visits, was also discussed. On the same day, the Special Rapporteur met with the European Commissioner for Human Rights. The Special Rapporteur also met with the Secretariat of the Parliamentary Assembly's Committee of Human Rights and Legal Affairs, Council of Europe. He was informed that in reaction to his request for a Council of Europe investigation into alleged secret places of detention in Europe of the United States' Central Intelligence Agency, the Committee called upon the Council's Secretary-General to investigate these allegations. The Special Rapporteur welcomes the appointment of an investigator and the launch of an investigation on 21 November 2005; he also welcomes the fact that the Secretary-General of the Council of Europe made use of his powers under article 52 of the European Convention on Human Rights (ECHR) to request all Council of Europe member States to report on the question of alleged secret CIA places of detention in Europe.
15. On 18 November 2005, in London, the Special Rapporteur, together with the Special Rapporteur on the right to health, conducted interviews with a number of former detainees in order to gather information for the joint report of the experts of the Commission on Human Rights concerning the human rights situation of detainees held at the United States Naval Base at Guantánamo Bay.
16. On 7 December 2005, the Special Rapporteur participated in a discussion on the development of guidelines for diplomatic assurances in the Group of Specialists on Human Rights and the Fight against Terrorism, Steering Committee for Human Rights, Council of Europe (see paragraph 30 below).
17. On 9 December 2005, on the eve of Human Rights Day, the Special Rapporteur, together with 32 human rights experts of the United Nations, issued a statement on the absolute prohibition against torture. The experts expressed:

“... alarm at attempts by many States to circumvent provisions of international human rights law by giving new names to old practices. Whereas international instruments stress that human rights are at the foundation of any democratic society, more and more frequently they are portrayed as an obstacle to government efforts to guarantee security. This trend is illustrated by debates on the absolute prohibition of torture: a ban that recently had seemed an undisputed cornerstone of human rights law, anchored in numerous international legal instruments, but also accepted as a principle of *jus cogens*. For this reason we would like to reaffirm that the very rationale of human rights is that they provide minimum standards that have to be respected by States at all times, in particular when new challenges arise.”

18. On 14 December 2005, the Special Rapporteur was invited by the German Institute of Human Rights, Berlin, to a meeting to discuss the Optional Protocol to the Convention against Torture, including aspects of its implementation. In attendance were representatives of the Government of Germany and the Länder.

19. On 22 December 2005, the Special Rapporteur is expected to address the OSCE Permanent Council in Vienna on cooperation among international and regional human rights mechanisms in the prevention of torture.

II. COUNTRY VISIT METHODOLOGY

20. Based on his recent experiences in carrying out country visits, the Special Rapporteur considers it important to draw the attention of the Commission to his methods of work in this regard. Successive resolutions of the Commission have approved and recognized the long-standing methods of work of the Special Rapporteur (e.g. 2001/62, para. 30; 2004/41, para. 29; 2005/39, para. 26). The Special Rapporteur recalls that a country visit can only be undertaken upon the invitation of the Government, which by itself is a statement of a country's willingness to open up to independent and objective scrutiny and a testament to its cooperation with the international community in the area of human rights. Those States that have answered requests and have extended invitations should therefore be commended.

21. However, an invitation alone is not sufficient, and acceptance by the Special Rapporteur is contingent upon an express agreement by the Government of its commitment and cooperation by assuring full compliance with his terms of reference. The aim of carrying out country visits is to see first-hand what the true practice and situation of torture and ill-treatment is: to identify gaps as well as acknowledge positive measures, to recommend ways to improve the situation, and to initiate a process of sustained constructive cooperation with the Government together with the international community and civil society in order to eradicate torture and ill-treatment. Such visits necessarily entail meetings with authorities most directly concerned with the issues, alleged victims or their families, as well as NGOs and relevant international actors.

22. To ensure that any assessment of the situation of torture and ill-treatment will be honest, credible and objective, a number of basic preconditions must be guaranteed by the Government to ensure that the Special Rapporteur can carry out his work effectively. The Special Rapporteur recalls that these conditions, or terms of reference for fact-finding missions, were adopted at the fourth meeting of independent experts of the Commission on Human Rights in May 1997 (E/CN.4/1998/45, appendix V). In particular, they include freedom of movement within the country; access to all prisons, detention centres and places of interrogation; confidential and unsupervised interviews; assurance by the Government that no persons who have been in contact with the Special Rapporteur will be subject to reprisals; and assurances that the same guarantees and facilities extended to the Special Rapporteur will be extended to his United Nations staff. These terms of reference are integral to his methods of work. The Special Rapporteur notes that similar standards for conducting visits to detention facilities have been recognized in international instruments, such as in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, article 8, and the Optional Protocol to the Convention against Torture, articles 14 and 15.

23. For the Special Rapporteur on the question of torture, it is axiomatic that freedom of inquiry in places of detention implies: unimpeded access, with or without prior notice, to any place where persons may be deprived of their liberty (e.g. police lock-up, pretrial, prison, juvenile, administrative, psychiatric or other facilities, as well as detention facilities within military installations); not being subject to arbitrary time limits for carrying out his work (e.g. visiting hours, working hours of daytime prison staff, etc.); free movement within the facility and access to any room in order to gather information, including by use of electronic means, such as photography; having access to any detainee or staff, and the possibility of conducting confidential and private interviews, unsupervised by government officials, in places either chosen by the Special Rapporteur or in cooperation with the detainee; being assisted by independent medical specialists who are qualified to document and assess injuries, in accordance with the Istanbul Protocol, as well as being assisted by independent interpreters; and being provided with copies of relevant information and documentation as requested.

24. The Special Rapporteur observes that in recent years much concern has been raised by Governments with respect to the above-mentioned terms of reference, particularly with regard to unannounced visits to places of detention. While in some cases he may indicate to the authorities in advance which facilities he intends to visit, access to all places implies that he will also conduct visits with little or no prior notice. Unannounced visits aim to ensure, to the greatest extent possible, that the Special Rapporteur can formulate a distortion-free picture of the conditions in a facility. Were he to announce in advance, in every instance, which facilities he wished to see and whom he wished to meet, there might be a risk that existing circumstances could be concealed or changed, or persons might be moved, threatened or prevented from meeting with him. This is an unfortunate reality that the Special Rapporteur faces. In fact, such incidents have even occurred where he has been delayed in entering a facility by as little as 30 minutes.

25. On occasion, in order to deny the Special Rapporteur the unimpeded access described above, it has been argued that national legislation restricts access to facilities except for a select number of enumerated individuals. However, it must be pointed out that an official visit of the United Nations Special Rapporteur, undertaken at the express invitation of a Government, is clearly an exceptional event. Therefore, one would expect that the Government would demonstrate its good faith and cooperation by facilitating the work of the Special Rapporteur to the fullest extent possible. In practical terms, this has been achieved by providing the Special Rapporteur with letters of authorization signed by the relevant ministries, as was done recently in Georgia, Mongolia and Nepal. In China, such letters of authorization could not be issued, which meant that officials of the Ministry for Foreign Affairs accompanied the Special Rapporteur throughout his mission in order to assure his unimpeded access to all places of detention.

26. In the view of the Special Rapporteur, these terms of reference are fundamental, necessary and common sense considerations. Moreover, by their nature, "common sense" methods for fact-finding cannot be subject to negotiation or selective approval by States. This was one of the reasons for the cancellation of the visit to Guantánamo Bay. Any suggestion to the contrary can only be considered as an attempt to compromise later findings. Likewise, subsequent violations of these conditions would seriously call into question the intentions behind inviting the Special Rapporteur.

27. The Special Rapporteur reiterates that the conclusion of a visit marks the beginning of a long-term process of cooperation with the Government with the common aim of eradicating torture and ill-treatment, and he reiterates his commitment to support government efforts to this end.

III. RECENT DEVELOPMENTS RELATED TO DIPLOMATIC ASSURANCES

28. In his first report to the Commission on Human Rights, the Special Rapporteur draws attention to the importance of maintaining the focus on and remaining vigilant against continuing practices that erode the absolute prohibition of torture in the context of counter-terrorism measures. In particular, he refers to his interim report to the General Assembly, in which he examined the use by States of diplomatic assurances (or otherwise referred to as promises, agreements, guarantees, contacts, memorandums of understanding, etc.) to transfer or propose to return alleged terrorist suspects to countries where they may be at risk of torture or ill-treatment. In this section, the Special Rapporteur wishes to highlight some recent activities and developments in this area.

29. During the year, the Special Rapporteur held direct discussions with Governments on the issue. On 12 May 2005, he was invited to informal consultations with officials of the Swedish Ministry for Foreign Affairs in Stockholm, concerning diplomatic assurances, particularly in relation to the *Agiza* case before the United Nations Committee against Torture. On 24 October 2005, he was invited to meet with the Home Secretary of the United Kingdom of Great Britain and Northern Ireland in response to concerns raised in relation to memorandums of understanding concluded by the Government with Jordan and the Libyan Arab Jamahiriya in the aftermath of the bombings in London on 7 July. The Special Rapporteur and the Government exchanged views and agreed to continue to maintain a dialogue on the issue. On the same day, he met informally with several members of the Joint Committee on Human Rights of the United Kingdom Parliament to discuss the practice of diplomatic assurances, the use of evidence obtained under torture, and other issues related to his mandate.

30. On 7 December 2005, under the auspices of the Council of Europe, the Special Rapporteur participated in a discussion on the development of guidelines for diplomatic assurances with the Group of Specialists on Human Rights and the Fight against Terrorism of the Steering Committee for Human Rights.

31. In his presentation the Special Rapporteur outlined his main concerns on the issue:

(a) The principle of non-refoulement (CAT, art. 3; ECHR, art. 3; International Covenant on Civil and Political Rights (ICCPR), art. 7) is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture;

(b) Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e. the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practising torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group (“Islamic fundamentalists”);

(c) It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries;

(d) Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances. Another important question in this regard is whether the authority providing such diplomatic assurances has the power to enforce them vis-à-vis its own security forces;

(e) Post-return monitoring mechanisms are no guarantee against torture - even the best monitoring mechanisms (e.g. ICRC and CPT) are not “watertight” safeguards against torture;

(f) The individual concerned has no recourse if assurances are violated;

(g) In most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice;

(h) Both States have a common interest in denying that returned persons were subjected to torture. Therefore, where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.

32. In conclusion, the Special Rapporteur stated that diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and that rather than elaborating a legal instrument on minimum standards for the use of diplomatic assurances, the Council of Europe should call on its member States to refrain from seeking and adopting such assurances with States with a proven record of torture.

33. On the occasion of Human Rights Day, 10 December 2005, the Special Rapporteur expressed his appreciation to the High Commissioner for Human Rights for designating as this year's theme “On terrorists and torturers”, and for her efforts on drawing international attention to the absolute prohibition of torture. He fully supports the statement of the High Commissioner, in which she expressed her concerns about the erosion of the prohibition of torture in the context of counter-terrorism, particularly the trend of seeking diplomatic assurances and the use of secret places of detention. The Special Rapporteur also expresses his appreciation for the statement of the Secretary-General on the occasion of Human Rights Day, in which he called upon the international community to speak out forcefully against torture in all its forms and stated, “torture can never be an instrument to fight terror, for torture is an instrument of terror”.

IV. THE DISTINCTION BETWEEN TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

34. The Special Rapporteur observes that an increasing number of Governments, in the aftermath of 11 September 2001 and other terrorist attacks, have adopted a legal position which, while acknowledging the absolute nature of the prohibition on torture, brings the absolute nature of the prohibition of cruel, inhuman or degrading treatment or punishment (CIDT) into question. In particular, it is argued that certain harsh interrogation methods falling short of torture might be justified for the purpose of extracting information aimed at preventing future terrorist acts that might kill many innocent people.

Definitions

35. Torture is defined in CAT, article 1, as acts which consist of the intentional infliction of severe pain or suffering (physical or mental), involving a public official (directly or at the instigation or consent or with the acquiescence of a public official, or another person acting in an official capacity), and for a specific purpose (i.e. extracting a confession, obtaining information, punishment, intimidation, discrimination). Acts which fall short of this definition, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise CIDT under article 16 of the Convention. Acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

36. The prohibitions against torture and CIDT are non-derogable under both ICCPR (article 7 concerning torture and CIDT and article 4 (2) on derogation during states of emergency), and CAT does not permit derogation from its provisions.

37. Certain obligations under CAT apply to torture only (above all, the obligation to criminalize acts of torture in and to apply the principle of universal jurisdiction in this regard), whereas other obligations aimed at prevention, in particular by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial ex officio investigation, and by ensuring an effective complaints mechanism, as laid down in articles 10 to 13, must be equally applied to other forms of ill-treatment as well (i.e. art. 16 (1)).

Disproportionate exercise of police powers

38. Inherent in the concept of CIDT is the disproportionate exercise of police powers. The beating of a detainee with a truncheon for the purpose of extracting a confession must be considered torture if it inflicts severe pain or suffering; the beating of a detainee with a truncheon walking to and from a cell might amount to CIDT, but the beating of demonstrators in the street with the same truncheon for the purpose of dispersing an illegal demonstration or prison riot, for example, might be justified as lawful use of force by law enforcement officials.¹ In other words, since the enforcement of the law against suspected criminals, rioters or terrorists may legitimately require the use of force, and even of lethal weapons, by the police and other security forces, only if such use of force is disproportionate in relation to the purpose to be achieved and results in pain or suffering meeting a certain threshold, will it amount to cruel or inhuman treatment or punishment. Whether the use of force is to be qualified as lawful, in terms of article 16 of CAT or article 7 of ICCPR, or excessive depends on the proportionality of

the force applied in a particular situation.² Disproportionate or excessive exercise of police powers amounts to CIDT and is always prohibited. But the principle of proportionality, which assesses the lawful use of force to fall outside the scope of CIDT, only applies in situations in which the person concerned is still in a position to use force in turn against a law enforcement official or a third person. As soon as that person ceases to be in a position to resist the use of police force, i.e. is under the control of a law enforcement official and becomes powerless, the principle of proportionality ceases to apply.

Powerlessness of the victim

39. It is the powerlessness of the victim in a given situation that makes him or her particularly vulnerable to any type of physical or mental pressure. Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation where the victim is powerless i.e. is under the total control of another person. This is usually the case with deprivation of personal liberty.³ Indeed, a thorough analysis of the *travaux préparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from CIDT may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.

40. Similarly, notwithstanding the principle of proportionality of the use of force as a determinant of CIDT, the overriding factor at the core of the prohibition of CIDT is the concept of powerlessness of the victim. In other words, as long as a person is able to resist the use by law enforcement officials of the degree of force legitimately required by the exigencies of the situation, the use of force falls outside the scope of the prohibition of CIDT. But from the moment the person concerned is under the de facto control of the police officer (e.g. *hors de combat*, otherwise unable to resist or flee a premises, is arrested and handcuffed, detained in a police van or cell, etc.), the proportionality test ceases to be applicable and the use of physical or mental coercion is no longer permitted. If such coercion results in severe pain or suffering inflicted to achieve a certain purpose, it must even be considered as torture. If interrogation methods do not reach the level of severe pain or suffering but are intended to humiliate the detainee, they are still to be considered as degrading treatment or punishment in violation of article 16 of CAT and/or article 7 of ICCPR. In addition, article 10 of ICCPR establishes a particular right to be treated in a humane and dignified manner which only applies to persons deprived of their personal liberty.

Conclusion

41. The distinction between torture and CIDT is an important one and relates primarily to the question of personal liberty. Outside a situation where one person is under the de facto control of another, the prohibition of CIDT is subject to the proportionality principle, which is a precondition for assessing its scope of application. However, if a person is detained or otherwise under the de facto control of another person, i.e. powerless, the proportionality test is no longer

applicable and the prohibition of torture and CIDT is absolute. This absolute prohibition of the use of any form of physical force or mental coercion applies, first of all, to situations of interrogation by any public official, whether working for the police forces, the military or the intelligence services.

Notes

¹ Some authors, including Herman Burgers, who chaired the working group drafting CAT in the 1980s, have argued that victims of the prohibition of torture and CIDT in the sense of articles 1 and 16 “must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment”: J.H. Burgers and H. Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), p. 149. The European Court of Human Rights, the Committee against Torture and the Inter-American Commission on Human Rights have not followed this approach. There are cases in which the excessive use of police force outside detention, by applying the proportionality test has been found to constitute CIDT: e.g. the cases of *R.L. and M.-J.D. v. France* (application No. 44568/98) concerning ill-treatment during police intervention in a dispute at a restaurant which resulted in a violation of article 3 of ECHR; see also the *Ozemajl et al.* case (CAT/C/29/D/161/2000), where the Committee against Torture found the demolition by a mob of a Roma settlement with the knowledge of the local police and without the police preventing its occurrence to be a violation of article 16 of CAT, and the *Corumbiara* case, Inter-American Commission on Human Rights No. 11556 of 11 March 2004, Report No. 32/04.

² The principle of proportionality requires first of all the legality of the use of force under domestic law, which is usually regulated in police codes. Secondly, the use of force must aim at a lawful purpose, such as effecting the lawful arrest of a person suspected of having committed an offence, preventing the escape of a person lawfully detained, defending a person from unlawful violence, self-defence, or an action lawfully taken for the purpose of dispersing a demonstration or quelling a riot or insurrection. Most of these purposes can be found explicitly in article 2 (2) of ECHR relating to the non-absolute nature of the right to life, but no similar exceptions have been adopted in relation to the right to personal integrity and dignity in article 3 of ECHR. This was perhaps a mistake. It would have been better to define the right to personal integrity and dignity in a positive manner, to provide an absolute prohibition of any form of torture (similar to the absolute prohibition of slavery and servitude in article 4 (1) of ECHR and article 8 (1) of ICCPR as opposed to the relative prohibition of forced labour) and to establish a limitation clause for the use of lawful force by law enforcement officers. Thirdly, the type of the weapons used and the intensity of the force applied must not be excessive but necessary in the particular circumstances of the case in order to achieve any of the lawful purposes outlined above. This means that the law enforcement officers must strike a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected. If a thief, for example, has been observed stealing a toothbrush in a supermarket, the use of firearms for the purpose of effecting his or her arrest must be considered as

disproportionate. But for the purpose of arresting a person suspected of having committed murder or a terrorist attack, the police may, of course, use firearms if other less intrusive methods prove ineffective. Nevertheless, the use of firearms causes serious physical injuries and severe pain and suffering. While it would definitely constitute an interference with the human right to physical integrity, as a proportional measure it would not constitute CIDT. If the police use non-excessive force for a lawful purpose, then even the deliberate infliction of severe pain or suffering simply does not reach the threshold of CIDT.

³ See, e.g., Burgers and Danelius, *op. cit.*, p. 120; C. Ingelse, *The UN Committee Against Torture: an assessment*, London, 2001, p. 211; article 7 (2) (e) of the Rome Statute of the International Criminal Court.
