

## Defining threshold between torture and inhuman or degrading treatment

### **Summary**

*“Everyone has the right to have his physical, mental, and moral integrity respected and not to be exposed to torture, inhuman or degrading treatment” – this is one of the main provisions of the international conventions, covenants or other treaties regarding human rights. Prohibition of torture is one of the fundamental rights, which cannot be derogated in any cases and should always be respected. But the definition and distinction of torture and inhumane or degrading treatment is one of the most crucial issues in the sphere of human rights law which causes major debates and discussions. Although regional and universal legal documents prohibit torture, or cruel, inhuman and degrading treatment and punishment, none of them has defined the borders between these terms: torture and inhumane or degrading treatment. In this article, I will try to generalize some ideas in regard to this issue.*

### **Annotasiya**

*“Hər kəsin fiziki, əqli və mənəvi toxunulmazlıq və işgəncəyə, qeyri-insani və alçaldıcı rəftara məruz qalmamaq hüququ vardır” – bu qayda beynəlxalq müqavilələrin, paktların və digər hüquqi sənədlərin əsas müddəalarından biridir. İşgəncənin qadağan olunması fundamental insan hüquqlarından biri olaraq heç bir halda azaldıla bilməz və hər zaman hörmət olunmalıdır. Lakin, hüquq debatlarına və müzakirələrə səbəb olan işgəncə, qeyri-insani və alçaldıcı hərəkətin ayrılıqda mənalarda yaranan qarışıqlıqlar ən ciddi məsələlərdəndir. Regional və beynəlxalq hüquqi sənədlərin işgəncə, qəddar, qeyri-insani və alçaldıcı hərəkətləri qadağan etməsinə baxmayaraq, bu anlayışlar arasındakı sərhədləri müəyyən etməmişdir. Məqalənin əsas məqsədi, bu sərhədlərin təyin edilməsinə dair müəyyən fikirləri təhlil etməkdir.*

**W**hen looking at the history, prohibition of torture first was described in article 5 of the Universal Declaration of Human Rights (“UDHR”) <sup>1</sup> as following: *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”*. Afterwards, Article 7 of International Covenant on Civil and Political Rights <sup>2</sup> dealt with this issue in a more comprehensive way compared to UDHR: *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”*.

In 1984, the first binding international document-United Nations Convention against Torture (“UNCAT”) <sup>3</sup> was adopted to mobilize anti-torture

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\*Baku State University Law School, 2<sup>nd</sup> year Master student of Department of Human Rights.

<sup>1</sup> G.A. Res. 217A, U.N. Doc. A/810 (1948)

<sup>2</sup> 999 U.N.T.S. 171 (1966)

<sup>3</sup> G. A., res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984, entered into force June 26, 1987)

efforts. And it can be said that only this convention can give a clear definition of torture:

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

Article 1 of the Convention defines torture as any act which consists of the intentional infliction of severe pain or suffering; it can be physical or mental, involving a public official, and for a specific purpose (obtaining information, punishment, intimidation, discrimination). When we read Article 1 in conjunction with Article 16, which requires States parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”, we can see that both provisions constitute that torture is an aggravated form of cruel, inhuman or degrading treatment or punishment.

*“Acts falling short of the definition in Article 1 particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise cruel or inhuman treatment under Article 16 of the Convention while acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.”<sup>4</sup>*

Pain and suffering must intentionally be inflicted to the victim in order to qualify as torture. Therefore, even if it has been recalled at one occasion that negligence is “a well-established subjective component of criminal liability”, nevertheless, for the time being, negligence is not sufficient to qualify an act as torture under international law, whereas recklessness might suffice.<sup>5</sup>

Sometimes it might be difficult to distinguish Torture and cruel, inhuman and degrading treatment. Indeed, while it might be easy to differentiate between degrading and inhuman treatment/torture, the separation between inhuman treatment and torture is much more complex. Torture is a severe form of inhuman treatment, but there is no objective element of distinction between the two categories<sup>6</sup>.

The following elements are necessary for the qualification an act as torture:

- Nature of the act
- Intention of the perpetrator
- Purpose
- Involvement of public officials or assimilated

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<sup>4</sup> Manfred Nowak and Elizabeth McArthur, The distinction between torture and cruel, inhuman or degrading treatment, *Torture*, Volume 16, No 3, 2006

<sup>5</sup> UNVFVT, Interpretation of torture in the light of the practice and jurisprudence of international bodies, 2011

<sup>6</sup> M. Nowak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p. 73

Some authors, including Herman Burgers who chaired the Working Group drafting the CAT in the 1980s, have argued that victims of the prohibition of torture and CIDT in the sense of Art. 1 and 16 CAT “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”. This interpretation would, however, exclude excessive use of police force outside detention and similar factual control from the scope of application of this important human right. The European Court of Human Rights, the Committee against Torture and the Inter American Commission on Human Rights has 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. If such use of force is disproportionate in relation to the purpose to be achieved and results in severe pain or suffering, it amounts to cruel or inhuman treatment or punishment. If such force is used in a particularly humiliating manner, it may be qualified as degrading treatment even if less severe pain or suffering is thereby inflicted.<sup>7</sup>

In contrast to the regional bodies, neither the Human Rights Committee nor the Committee against Torture makes absolute distinction between torture and other prohibited ill-treatment. They issued that the distinctions depend on the nature, purpose and severity of the treatment applied.

The different purposes that an act of ill-treatment must fulfill to be considered as torture or cruel, inhuman and degrading treatment are the following:

1. For extracting a confession; or
2. For obtaining for the victim or a third person information; or
3. For punishment; or
4. For intimidation and coercion; or
5. for discrimination<sup>8</sup>

The United Nations Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Manfred Nowak, stated that: *“a thorough analysis of the travaux préparatoires of articles 1 and 16 of the Convention 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 cruel, inhuman and degrading treatment 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.”*<sup>9</sup>

The European Court of Human Rights (“Court”) considers that, in order to fall under the provision of Article 3 of the European Convention of Human Rights (“ECHR”), an act of ill-treatment, whether it is torture, inhuman or degrading treatment or punishment, must attain a minimum level of severity. The assessment of this threshold of severity is made in regard of the specific circumstances of the case and the Court considers the following:<sup>10</sup>

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<sup>7</sup> JH Burgers and H. Danelius, the United Nations Convention against Torture. A Handbook on the Convention against Torture and Other cruel, Inhuman or Degrading Treatment of Punishment (1988), p. 149

<sup>8</sup> *Supra* note 6.

<sup>9</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN Doc. E/CN.4/2006/6, paragraph 39

<sup>10</sup> *Supra* note 5.

- duration of treatment;
- physical effects of treatment;
- mental effects of treatment; and
- sex, age and state of health of the victim.<sup>11</sup>

Article 3 of ECHR prohibits three different forms of ill-treatment: torture, cruel and inhuman treatment, and aims to preserve personal dignity. As we see, these notions are not identical. In certain respects their legal consequences vary, especially when such acts enter the area of international criminal law, such as the exercise of universal jurisdiction (“jus cogens” norms). However, the distinction does not cover the consequences in terms of the prohibition enshrined in that article. Article 3 absolutely prohibits all three forms of ill-treatment in all circumstances regardless of their severity. Similarly, international human rights law absolutely prohibits all forms of ill-treatment; this prohibition also applies in situations of emergency, such as war, the threat of war or terror etc. without any derogation. There does not exist such a situation in which torture would be prohibited but another form of ill-treatment allowed.

The European Court of Human Rights has examined many cases regarding torture and inhuman or degrading treatment or punishment. The Court has held that the use of physical force against persons deprived of their liberty, where that use of force has not been made strictly necessary by their own conduct, diminishes human dignity and should be regarded in as an infringement of the right set forth in Article 3 (the prohibition of torture, inhuman or degrading treatment or punishment). Once the Court has determined that an act falls within Article 3, it will then define whether the treatment is ‘severe’ enough to constitute torture or cruel, inhuman or degrading treatment. In several cases, the Court has found an abuse of power by law enforcement (for example, police) which constituted torture. In determining whether torture has taken place, the Court will normally take into consideration whether the treatment was for the purpose of obtaining information or a confession, punishing or intimidating a victim. Where there has not been such a purpose, the Court has decided that there has been a cruel, inhuman or degrading treatment rather than torture.

Thus, in one case (*Ireland v. UK*), the Court held that methods of interrogation using the “five techniques” (sleep deprivation, maintaining in painful positions, deprivation of food and drink, subjection to noise and hooding) caused “*if not actual bodily injury, but at least intense physical and mental suffering...and also led to physical disturbances during the interrogation*”, and therefore fall into the category of inhuman treatment. However, it did not recognize that these practices “*occasioned suffering of the particular intensity and cruelty implied by the word torture*”.<sup>12</sup>

Unlike torture, “cruel, inhuman or degrading treatment” is not defined by any international human rights’ treaties.<sup>13</sup> Those definitions are only used to express a form of punishment or treatment, which does not meet the threshold of torture, because such acts do not reach the level of severe pain or suffering. One of the requirements is that such acts have also to be committed by or at the instigation of or with the consent or acquiescence of a public official or other

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<sup>11</sup> European Court of Human Rights, *Ireland v. United Kingdom*, para. 162; see also ECHR, *Selmouni v. France* para. 160

<sup>12</sup> *Supra note 4*, p. 7

<sup>13</sup> The Human Rights Committee, General Comment 20, Art.7 of ICCPR

persons acting in an official capacity. State involvement is one of the main keys in order to talk about the existence of the torture and government carries the burden of proof in the cases regarding the detainees kept in detention places. The distinction is made in order to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering – which is classified as torture.<sup>14</sup> Despite this distinction, cruel, inhuman or degrading treatment is not permissible under any circumstances. Although the lines between torture and cruel, inhuman or degrading treatment may sometimes be unclear, the distinction between them is also crucial, because whilst cruel, inhuman and degrading treatment is prohibited officially, in most cases a State does not have the same extent of obligations to criminalize, investigate and prosecute acts of cruel, inhuman or degrading treatment that it has regarding torture.<sup>15</sup>

As mentioned above ill-treatment must attain a minimum level of severity in order to constitute cruel, inhuman or degrading treatment. However, the specific circumstances of the incident or a particular act are very important to know whether that particular act or incident constitutes torture or cruel, inhuman or degrading treatment. There exist several relevant factors, including the duration and effect of the treatment, the health, age and gender of the victim, as well as the particular treatment involved. Acts that fall under the threshold of cruel, inhuman or degrading treatment may, for our purposes, be called as ‘mistreatment’. Whilst mistreatment does not fall within the scope of CAT; the ICCPR, ECHR and AmCHR provide that those persons, who have been deprived of their liberty, should be treated as humans and with respect. Mistreatment, not amounting to cruel, inhuman and degrading treatment may be viewed as a breach of this obligation. Treatment not amounting to torture, cruel, inhuman or degrading treatment will not be dealt with in detail in this article.

Mistreatment → Cruel, inhuman or degrading treatment → Torture,  
Least severe → severe → most severe.

Whilst the definition of torture remains the same or similar in most domestic legal systems, there can be some differences in what is conceived to be ‘severe pain and suffering’ by national governments and courts. There may also be differences in the level of severity or specific factors viewed necessary for a particular act in order to amount cruel, inhuman or degrading treatment. However, international judicial bodies such as the European Court of Human Rights and UN Committee against Torture, as well as some domestic courts have developed a case law which may provide useful guidance and benchmarks as to what treatment is likely to be viewed as torture or cruel, inhuman or degrading treatment and what will fall below that level.<sup>16</sup>

In *Aksoy v. Turkey* case, the Court held that a form of treatment, known as ‘Palestinian hanging’ (a person is stripped naked, his/her arms are tied together behind his/her backs and then he/she is suspended from his/her arms) amounted to torture. The Court has held that beatings to the soles of the feet and a blow to the chest resulting in a fall and broken sternum amounted to torture.<sup>17</sup> The Human Rights Committee has considered a combination of beatings, ‘Palestinian hanging’, the act of being pushed into water until asphyxiation, a

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<sup>14</sup> See *Selmouni v France* no. 25803/94 [1999] ECHR 66, (28 July 1999) paragraph 96

<sup>15</sup> *Prisoners Abroad*, 89 – 93 Font hill Road, Torture, cruel, inhuman and degrading treatment

<sup>16</sup> *Supra note* 15

<sup>17</sup> *Salman v. Turkey*, , ECHR/21986/93/2000

treatment where a person is made to stand with legs apart and arms raised for 20 hours and psychological torture to constitute torture<sup>18</sup>. The Committee Against Torture has held that a man who was stripped naked, handcuffed to a bar, attached to the wall, beaten with a baton for an hour and subsequently denied medical attention, food or water or the possibility of using the lavatory for three days, was tortured.<sup>19</sup>

The US judicial bodies have made a clear distinction between cruel, inhuman and degrading treatment and torture. The US Department of Justice has previously suggested that the following acts would likely amount to torture: severe beatings using instruments such as iron barks, truncheons or clubs; threats of imminent deaths such as mock executions; threats of removing extremities; burning, especially burning with cigarettes; electric shocks to genitalia or threats to do so; rape or sexual assault or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and forcing the prisoner to watch the torture of others.

Both the United Nations Human Rights Committee and the Inter-American Court of Human Rights, after considering psychological torture, has decided that the threat of infliction of a serious physical injury can, in some cases, be regarded a form of "psychological torture".<sup>20</sup>

When the European Court of Human Rights decided a case brought by Ireland against the UK about the treatment of detainees in various holding centers, police offices and military barracks in Northern Ireland, the Court held that the combined use of five interrogation techniques: wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink amounted to cruel inhuman and degrading treatment but did not amount to torture, because the suffering involved by those acts did not reach the requisite level of intensity and cruelty implied by the term of torture. According to the Court's view, the distinction between torture and cruel, inhuman or degrading treatment derived principally from a difference in the intensity of the suffering inflicted.

With regard to the severity of the treatment, the assessment must – as for ill-treatment – be based on both objective criteria and those which pertain to the circumstances of the particular case. The threshold of the pain required by the ICTY definition ("severe" rather than "serious") is higher than that for cruel and inhumane treatment. The Elements of Crimes of the Rome Statute for the International Criminal Court, on the other hand, require "severe physical or mental pain or suffering" for both forms of ill-treatment. In other words, they require a higher level of pain for both forms and the only differentiation between them is the purpose of the treatment. This was indeed the compromise reached as a part of a package, even though the majority of delegations felt that the threshold of "severe" would be too high and inconsistent with the Statute. Along similar lines as the Elements of Crimes, some experts have challenged the necessity for a hierarchy of suffering between inhuman treatment and torture. For these authors, the only distinguishing element between torture and inhuman

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<sup>18</sup> Estrella v Uruguay CCPR/C/18/D/74/1980

<sup>19</sup> Dimitrijevic v Serbia and Montenegro CAT/C/35/D/172/2000

<sup>20</sup> United Nations. Human Rights Committee. Miguel Angel Estrella v. Uruguay, No. 74/1980 of March 29, 1983. Inter-American Court of Human Rights in Cantoral Benavides case, *supra*, para.102.

treatment should be the purpose of the act for “qualifying” as torture. An argument in favor of this doctrine is certainly that it is difficult to determine the threshold of intensity between serious and severe suffering. It is also somewhat absurd to think of treatment to be more severe than “inhuman’.

In this article, I try to clarify what is torture in different legal documents and case laws and what is the main distinction between torture and inhuman or degrading treatment. After all important issues that I mentioned in my article we can come to the conclusion that there is a need for further clarification of inhuman and degrading treatment, which will contribute for better differentiation between those acts and torture.

**Gülzar Atakişiyeva\***

## **Alqı-satqı müqaviləsi və qüsurlu mal. Qüsura qarşı təminat borcu**

### **Annotasiya**

*Məqalədə mülki hüququn ən mühüm müqavilələrindən olan alqı-satqı müqaviləsində qüsurlu mal vermə, qüsura qarşı təminat borclarının anlayışı verilmişdir. Alqı-satqı müqaviləsində qüsurlu mal vermə halları məişətdə tez-tez rast gəlinir və istər alıcı, istərsə də satıcı üçün müəyyən problemlər yaradır. Məqalənin giriş hissəsi alqı-satqı müqaviləsinin hüquqi təbiətindən bəhs edir, daha sonra beynəlxalq və milli qanunvericilikdə qüsurun nə olduğu və hansı hallarda qüsurlu mal vermə adlandırıldığı məqalənin məlumatlandırıcı hissəsinə təşkil edir. Məqalədə göstərilən qüsura qarşı təminat borcları verilən əşyanın müqaviləyə uyğun gəlmədiyi hallarda satıcının məsuliyyətinə müəyyən edir və alıcının mənafeyi baxımından əhəmiyyət daşıyır. Qüsurlu mal vermənin qarşısının alınması və yaranacaq problemlərin həllində məqalədə göstərilən alıcının vəzifələri, satıcının borcları zəruri əhəmiyyət daşıyır. Eyni zamanda məqalədə milli qanunvericilik üçün yeni olan "aliud" anlayışından bəhs olunub.*

### **Summary**

*The article is about defective merchandise, concept of guarantee debt against defect in the sales contract, which is one of the most important contracts of civil law. The cases of defective merchandise in the sales contract are often encountered in daily life and create some problems for both the buyer and the seller. The introductory part of the article is about the legal nature of a contract of sale, then the meaning of defect in international and national legislation, and in which cases it's called defective merchandise, are forming the informative part of the article. As shown in the article, an object, which is guaranteed with debt against a defect in cases when it breaches a contract, defines the responsibility of a seller and is important in a buyer's term of interest. In the prevention of a defective merchandise and the solution of arising problems, the obligations of a buyer and a seller's debts, which are mentioned in the article, are crucial. At the same time, the concept of "aliud", which is new for the national legislation, is mentioned in the article.*

### **Giriş**

**D**övlətlərarası ticarətdə ortaya çıxan uyğunsuzluqların ən önəmli məsələlərindən biri də malların müqaviləyə uyğun olmaması problemidir. Bununla bağlı "Əmtəələrin beynəlxalq alqı-satqısı müqavilələri" haqqında BMT Konvensiyasında (Vyana Konvensiyası) qüsurlu icra, "malların müqaviləyə uyğunsuzluğu" məsələləri dəqiqliklə tərtib olunmuşdur. Burada qüsurlu mal vermə və icranın qüsurlu olması ilə yanaşı, satıcının məsuliyyəti məsələsi də xüsusi incələnilir. Qeyd etmək lazımdır ki, qüsurlu mal vermə və satıcının məsuliyyəti və təminatı məsələsi sadəcə beynəlxalq ticarətdə deyil, həmçinin gündəlik həyatda da böyük əhəmiyyət kəsb edən məsələdir. Qüsurlu və qüsura qarşı təminat borcu öz təməlini Roma hüququndan götürmüşdür. Bu günə qədər öz aktuallığını qorumuş və hələ də

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\*Bakı Dövlət Universiteti Hüquq fakültəsi, II kurs, SABAH qrupu tələbəsi