How Do We Determine the Existence of Torture Today?

Latin American Contributions in Shaping the Legal Concept of Torture

Claudia Cárdenas Aravena

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A key question in the legal scholarship on torture consists in setting the criteria to differentiate it from other cruel, inhuman, and degrading treatment. This blog post shows in which ways the Inter-American Human Rights System can contribute to answering this difficult question. One is the idea of the need to consider both "endogenous" and "exogenous" factors in the determination of the gravity of the suffering. Another one is the understanding of torture as something linked to the attacked person's personality and capacities.

The Idea to Consider both "Endogenous" and "Exogenous" Factors

The nonspecific nature of the description of torture ("any act" whereby severe physical or mental pain or suffering is intentionally inflicted) in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) renders it open to a variety of methods of inflicting such pain and suffering, and it permits the consideration of all relevant factors in order to reach a conclusion. For example, this allows for the specific consideration of groups of individuals who have become subjects of special protection in recent decades (e.g. children and the elderly) and it also allows the adoption of a culturally sensitive approach to suffering.

When interpreting the first part of the description of torture in article 2 of the Inter-American Convention to Prevent and Punish Torture (IACPPT) which is similar to the one contained in article 1.1 of the UNCAT, the Inter-American Court of Human Rights (IACtHR) has developed the idea that, in order to ascertain the severity of suffering that was intentionally inflicted, both so-called "endogenous" and so-called "exogenous" factors must be considered. This is based on the understanding that, in order to assess the gravity of pain and suffering, it is necessary to consider not only features associated with the conduct itself (endogenous factors), but also other features (exogenous factors) such as age and ethnicity of the mistreated person, or their relationship to the torturer or to people witnessing the mistreatment. These kind of factors have been shown to influence the ability of a conduct to cause pain or suffering that might be considered grave in the given situation.[1] This development acknowledges that the cultural context is important for assessing the severity of suffering and pain, which is particularly relevant when addressing mental suffering that could be related to breaking cultural taboos. It also partly explains why assessments of great suffering may change over time as cultures evolve.[2]

The idea of considering all factors available for the determination of the gravity of the conduct precedes the work of the IACtHR. For example, judges Zekia and Fitzmaurice differentiated between "objective" and "subjective" factors in their separate opinions in the *Ireland* case before the European Court of Human Rights.[3] However, the distinction between endogenous and exogenous factors has a more specific

[1] For the first instance in which the IACtHR employed this wording see IACtHR, *Loayza Tamayo v. Peru* (Series C No. 33), 17.09.1997, para. 57. For more cases see: IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 10: Integridad Personal* (Inter-American Court of Human Rights, 2021).

[2] OHCHR, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* (Office of the High Commissioner for Human Rights, 2010), https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf, last accessed 16.10.2026, p. 8; ECtHR, *Selmouni v. France* (25803/94), 18.07.1999, para. 101; Metin Başoğlu, *Torture and Its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press, 2017), DOI: 10.1093/med/9780199374625.001.0001, p. 11.

focus: There can be objective exogenous factors such as age or an inferior position in a given social system of the mistreated person, and subjective endogenous factors such as the cruelty inherent to the mutilation of bodies with machetes. By considering both endogenous and exogenous factors, the IACtHR addresses its concern of offering equal protection to people of different backgrounds, which is critical in a region rich in cultural diversity.[4]

This idea has spread to other jurisdictions and bodies, such as the Committee Against Torture and the International Criminal Court.[5] This happens in different individual cases, and it shows a universal acceptance of the terminology and the idea behind it.

The Idea to Consider the Attacked Person's Personality and Capacities

In addition to a definition of torture that has broadly the same features as that of UNCAT, the IACPPT contains a second understanding of the concept that has not attracted much attention, although it has been in force for more than 40 years. It states: "Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".

While the provision has been largely ignored, authors from different parts of the globe have come to similar conclusions as they understand the legal concept of torture as a relational crime. For example, Bernstein understands torture as a method for the destruction of the victim's personhood, which would be tantamount to "an individual losing her standing as human for herself and for others."[6] For Daverio, "torture reveals itself as a form of action structurally directed against the victim's 'being oneself' (that is, their vital and personal identity, and their potential)" and "torture prevents the recognition of the common ontological status of the human being".[7] Similarly, and even before the IACPPT was adopted, the 1975 Report on Torture of Amnesty International stated: "there is implicit in the notion of torture the effort by the torturer, through infliction of pain, to make the victim submit, to 'break him'".[8] Another factor that has gained increasing relevance in the doctrine of torture is helplessness.[9] With all this in mind, even when considering texts such as the UNCAT and the Rome Statute as a point of reference, for their interpretation one could argue that pain and suffering are only considered torture if they can be interpreted as an attack on someone's personality and/or capacities. The IACPPT highlights this aspect in its definition, and therefore it can be used to illuminate this assessment.

If we look at the history of the provision in the IACPPT defining torture, it becomes clear that the states involved in the negotiations agreed to it without discussion. The only point highlighted by the Inter-American Judicial Committee, whic proposed the draft, was that the provision aimed to take into account new forms of torture that were developed or might be developed with new technologies: "This new element, originally included in the preliminary draft, is intended to respond to advances in modern technology which, unfortunately, in many cases serve not the well-being of human beings but rather their own destruction in what is most precious and irreplaceable: their personality and, with it, their free will".[10] The Guatemalan representative in the Committee put it this way: "At first glance, one might say that torture is directed solely against the individual, and more against their physical integrity than against anything else. And even in this sense, it is doubtful whether it is directed more against their physical integrity than

[3] ECtHR, *Case of Ireland v The United Kingdom* (5310/71), 18.01.1978.
[4] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (A/HRC/28/68/Add. 1), 05.05.2015, https://digitallibrary.un.org/record/793910?v=pdf, last accessed 16.10.2026.
[5] ICC, *Trial Judgment in the Case of the Prosecutor v. Ali Kushayb* (ICC–02/05–01/20), 06.10.2025, para. 748.
[6] J. M. Bernstein, *Torture and Dignity: An Essay on Moral Injury* (Chicago University Press, 2015), DOI: 10.7208/chicago/9780226266466.001.0001, p. 71.
[7] Margherita Daverio, *Perché la Tortura? Un'Interpretazione Filosofica* (Giappichelli, 2023), p. 146-147, 149-151.
[8] Amnesty International, *Report on Torture* (Duckworth, 2nd ed., 1975), https://www.amnesty.org/en/documents/act40/001/1975/en/, last accessed 16.10.2026, p. 34.

against their freedom – against their inner freedom to will or decide anything."[11]

Conclusions

This blog post has illustrated two distinct features of the Inter-American Human Rights System in its understanding of torture and how they have contributed and can contribute to shape and apply the concept. The idea to consider not only endogenous but also exogenous factors has already spread to other jurisdictions and international bodies, such as the UN Committee against Torture and the International Criminal Court, which have both referred to judgments of the IACtHR using this classification terminology.

The IACPPT's second definition of torture without pain and suffering, on the other hand, can be understood and highlighted as a rather early codification of the understanding of the deep nature of torture, and an early concern about risks that are now increasingly apparent and part of the discussion (e.g. cognitive warfare),[12] against the background of an overwhelming velocity, complexity, and scope of technical possibilities and the misuse of technologies. It emphasises the violation of human integrity. It could furthermore help contemporary interpreters of other legal sources, such as UNCAT and the Rome Statute, by informing the interpretation of the "great pain or suffering" standard, understanding that it is present when someone's personality is intentionally obliterated or someone's capacities are intentionally diminished. In this context, one could argue that, if the pain or suffering that is caused intentionally is so severe that it is able to destroy the victim's personality or to diminish their physical or mental capacities, then it is severe enough to be considered torture.

This would not mean applying the same standard as the IACPPT: There, torture is the application of means intended to these effects. However, it would be consistent with other definitions of torture to recognise that pain or suffering which, under normal circumstances, causes these effects is severe enough to be considered torture. This would lead to a harmonious interpretation of international law on torture. Finally, such an understanding would take into account the fact that the commitment of states to prevent and punish torture is normally intended to protect human dignity and integrity. The concept of torture travelled from the Global North to the Global South, and back again, being reflexively shaped by both. In this way, it illustrates the present stage of reflexive globalisation in the realm of the law.

[9] On helplessness as a relevant parameter to identify torture, cf. Metin Başoğlu, *Torture and Its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press, 2017), DOI: 10.1093/med/9780199374625.001.0001, p. 5, 8, 18, 30.
[10] OAS, *Comité Jurídico Interamericano: Recomendaciones e Informes 1978-1980* (Secretaría General de la Organización de los Estados Americanos, 1982), https://www.oas.org/es/sla/cji/docs/Informes_Recomendaciones_1978-1980.pdf, last accessed 16.10.2026, p. 334 f.
[11] OAS, *ibid.*, p. 354.

ABOUT THE AUTHOR

Claudia Cárdenas Aravena

Claudia Cárdenas Aravena is an Associate Professor at the Faculty of Law of Universidad de Chile (Chile) and was a Senior Fellow at the Centre for Advanced Studies Reflexive Globalisation and the Law (RefLex) at Humboldt-Universität zu Berlin between January and June 2026.

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[12] Cognitive warfare uses technology to influence, disrupt, or modify human behaviour and decision-making. On that, NATO, *Cognitive Warfare: NATO Chief Scientist Research Report*, https://www.sto.nato.int/wp-content/uploads/chief-scientist-report-cognitive-warfare-final.pdf, last accessed 16.10.2026; Bernard Claverie, *Cognitive Warfare: The New Battlefield Exploiting Our Brains*, Polytechnique Insights, 05.02.2025, https://www.polytechnique-insights.com/en/columns/geopolitics/cognitive-warfare-the-new-battlefield-exploiting-our-brains/, last accessed 16.10.2026.