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When Treatment is Torture: Protecting People with Disabilities Detained in Institutions

By Eric Rosenthal & Laurie Ahern*



A child held at an institution in Kulina, Serbia. © Disability Rights International

INTRODUCTION

Throughout the world, people with disabilities are subject to mistreatment in psychiatric hospitals, orphanages, nursing homes, and other institutions. Much of this abuse is a product of neglect and lack of care — poor, unhygienic conditions, a lack of treatment, and outmoded service systems that segregate people from society. In some circumstances, however, pain and suffering is a direct consequence of treatment practices whose stated purpose is to provide treatment, care, or protection. There is a growing recognition that pain inflicted in the name of treatment may violate international law. In some circumstances, it rises to the level of torture.

This article describes these developments and suggests challenges that lie ahead. The authors draw on insights from our work with Disability Rights International (DRI — formerly Mental Disability Rights International or MDRI), an

organization engaged for nearly twenty years in documenting, exposing, and challenging abuses against people with disabilities.

The protection of people with disabilities has been profoundly influenced, in recent years, by the adoption and widespread ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD was adopted in December 2006,¹ entered into force in May 2008,² and has now been ratified by 112 countries.³ Before the adoption of the CRPD, the European Court was often very deferential to medical justifications for treatment. In the 1993 case of *Herzegfalvy v. Austria*, for example, the ECtHR ruled that the long-term detention of a man in prolonged physical restraints did not violate the European Convention because such treatment was a form of “medical necessity.”⁴ More recent cases from the European and Inter-American human rights systems have recognized that poor conditions of confinement can constitute inhuman or degrading treatment.⁵ In the January 2012 case of *Stanev v. Bulgaria*, the ECtHR found that Mr. Stanev was improperly detained for seven years in a dilapidated facility that lacked adequate food, running water, access to toilets, privacy, or almost any form of meaningful activity.

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“To date, neither the European nor Inter-American systems have recognized these forms of treatment for people with disabilities as torture, and the ECtHR in particular remains deferential to practices with a therapeutic purpose.”

According to the ECtHR, these conditions amounted to “degrading” treatment — but not torture.⁶ To date, neither the European nor Inter-American systems have recognized these forms of treatment for people with disabilities as torture, and the ECtHR in particular remains deferential to practices with a therapeutic purpose.

A 2008 report by former UN Special Rapporteur on Torture Manfred Nowak examines the implications of the CRPD and points the way to more significant and robust protections for people with disabilities.⁷ The current UN Special Rapporteur on Torture, Juan Méndez, has implicitly supported the approach taken by Nowak in his stand against the use of solitary confinement of people with mental disabilities.⁸

The CRPD can help guide the application of existing human rights law to people with disabilities — even though it was not intended by the United Nations to create new rights under international law.⁹ Article 15 of the CRPD tracks the International Covenant on Civil and Political Rights (ICCPR) in prohibiting torture and ill-treatment, adding that governments must take action to protect persons with disabilities “on an equal basis with others.” The CRPD has not changed the definition of torture or ill-treatment, so it is essential to look to the existing legal framework.

CORE REQUIREMENTS OF INTERNATIONAL LAW

As defined by article 1 of the Convention Against Torture (CAT), torture is:

“...any act by which severe pain and 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 . . . 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.”¹⁰

For a practice to constitute torture, it must meet each of CAT’s four elements: (1) severe pain, (2) intent, (3) purpose, and (4) an act or omission of a government authority. Where a practice does not rise to the level of torture, it may still constitute ill-treatment (a term encompassing “cruel, inhuman or degrading treatment or punishment”), prohibited under article 16 of CAT.

Protections against torture and ill-treatment are linked — both prohibited under article 7 of the ICCPR and article 15 of the CRPD. These protections are absolute — allowing for no exceptions.¹¹ These rights cannot be suspended, even in times of war, political instability, or public emergency.¹² This level of protection is crucial for people with disabilities in any country that may cite the lack of resources as an excuse for inadequate treatment. The lack of resources, development, or services available to people with disabilities cannot justify torture or ill-treatment.¹³

Both torture and ill-treatment require state action — the “consent or acquiescence of a public official or other person acting in an official capacity . . .” Governments “have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”¹⁴ Former UN Special Rapporteur on Torture Manfred Nowak stated that it is the responsibility of governments to regulate health care institutions, and thus the state can be held responsible for “doctors, health professionals, and social workers, including those working in private hospitals . . .”¹⁵ Governments must “exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.”¹⁶

Another common element for torture or ill-treatment is that the pain or suffering must reach a threshold level of severity to trigger protections under international law.¹⁷ International law recognizes that the severity of suffering is subjective, however, and factors such as a person’s age, health, or disability must be taken into consideration.¹⁸

For a practice to be considered torture, it is also necessary to demonstrate elements of “intent” and “purpose.” Meeting these elements presents a challenge in a social or medical context, because service providers are assumed to be acting out of a beneficent intent with the purpose of curing, helping, or protecting individuals with disabilities.¹⁹ Treatment is a proper and legitimate goal. Acting in this manner is often thought to shield service providers from liability for torture — even if pain and suffering results. Our experience demonstrates that such assumptions are not justified or supported by international law.

THE LINK BETWEEN CAT AND CRPD

For people with disabilities in a medical or social service context, the critical language in CAT's definition of torture is that pain may not be induced to "coerce" or for a purpose "based on discrimination of any kind." This is important because people with disabilities are often subject to involuntary or coercive treatment — particularly in mental health facilities. The protection is also broadly relevant to people subject to treatment in institutions. Many countries offer care only in the segregated environment of institutions. The CRPD is now available to serve as a guide to what constitutes improper "coercion" or "discrimination" under international law.

Under the CRPD, "discrimination on the basis of disability" is an act which "has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights..."²⁰ The CRPD details ways in which government policies — even if intended to help — may discriminate against them unlawfully. This includes, for example, a protection against segregation from society by placing individuals with disabilities in institutions (such as orphanages, psychiatric facilities, or nursing homes). Article 19 of the CRPD recognizes the right to "live in the community with choices equal to others."

The CRPD also clarifies what constitutes improper coercion. One of the core principles of the CRPD is "[r]espect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons."²¹ In the health care context, care must be provided "on the basis of free and informed consent."²² The existence of a disability cannot be used to deny this right. Article 12 of the CRPD provides innovative protections to ensure that people with mental or physical disabilities enjoy "legal capacity," including the right to make legal decisions on an equal basis with others. The CRPD requires governments "to provide access by persons with disabilities to the support they may require in exercising their legal capacity."²³

LESSONS FROM DRI'S CAMPAIGN AGAINST TORTURE

DRI's campaign against torture has provided an opportunity to examine how the protection applies to people with disabilities — and to see how the CRPD's influence has helped to broaden understanding of what constitutes torture. DRI was founded in 1993 at a time when the rights of people with disabilities had been overlooked by the international human rights community. In an era before the CRPD, DRI sought to demonstrate the

importance of mainstream human rights treaties in protecting people with disabilities.

DRI's first report in 1995 challenged abusive conditions in Uruguay's psychiatric institutions as inhuman and degrading treatment.²⁴ DRI's 2000 report on Mexico brought world attention by generating unprecedented international press coverage on these issues.²⁵ After being the subject of this embarrassing attention, the government of Mexico led the effort to draft a new

UN Convention on the Rights of Persons with Disabilities.

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The first time DRI identified a practice as torture was in 2005 with the publication of *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey* (2005). The report documented "unmodified" electro-convulsive therapy (ECT). ECT is a common (if controversial) treatment for depression. Unmodified ECT entails the use of electric shock without anesthesia or muscle relaxants. According to Turkish authorities, some 10,000 people were subject to unmodified ECT in Turkey every year. Within months after the release of the report, the government terminated this practice.

DRI's report on Turkey has been its most successful challenge to torture, but a subsequent report on Serbia had the most influence on the international understanding of torture. *Torment not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities* (the Serbia Report) was published in 2007. The report documents the detention of children with disabilities in cribs, some tied down permanently in physical restraints.

The Serbia report challenges the prolonged physical restraints as torture. Even if the stated intent for using restraints is to protect the individual, any mental health professional would have to know that long-term restraints inflict severe pain. Serbian authorities claimed to be acting to protect their patients, but DRI called on the international community to reject this stated purpose as a justification. Physical restraints cause suffering well beyond social isolation or seclusion by limiting any form of movement. DRI's report cited research on the dangers of prolonged restraints: psychological trauma, physical effects of muscle atrophy, stunted growth, deformities, organ-failure, and even death.²⁶

MANFRED NOWAK'S RESPONSE: A PATH-BREAKING REPORT ON TORTURE AND DISABILITY

In December 2007, the Office of the High Commissioner for Human Rights (OHCHR) convened a meeting of experts to

examine the issue of torture and disability, less than a year after the CRPD was adopted. The Committee included members of the UN Committee Against Torture, human rights experts, and representatives of disability organizations. DRI presented the Serbia Report along with video of children held in long-term restraint and detention. The official report of this meeting stated:

Many participants agreed that the situation presented in the video constituted torture as provided in Article 1 of CAT. Further, some noted that situations like the one in the video were not exclusive to Serbian institutions and that it was important to start applying the torture protection framework fully to the treatments and conditions inflicted on persons with disabilities.²⁷

This reception of DRI's report indicates a shift among human rights thinking from the perspective represented by the European Court in *Herzcegfalvy*, which did not recognize the prolonged use of restraints as *any* human rights violation. Nowak's final report concluded that "there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment."²⁸ Nowak's report cites DRI's worldwide findings — including DRI's reports on Turkey and Serbia.²⁹

By stating that the prolonged use of restraints "may" constitute "torture or ill-treatment," Nowak avoided classifying this practice categorically. Circumstances of the case matter.³⁰ The Special Rapporteur's analysis recognizes that the stated intent of the treating professional to provide care is no defense for a practice that meets the elements of torture. "This is particularly relevant in the context of medical treatment of persons with disabilities," says the report, "where serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals."³¹ Nowak adds: "the requirement of intent in Article 1 of the CAT can be effectively implied where a person has been discriminated against on the basis of disability."

Nowak also clarifies the purpose requirement:

Whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they... aim at correcting or alleviating a disability, may constitute torture or ill-treatment if enforced or administered without the free and informed consent of the person concerned.³²

While Nowak leaves open what is a "fully justified treatment," he points to what is not: "Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person. Persons with disabilities often find themselves in such situation, for instance when they are deprived of their liberty in prisons or other places, or legal guardians."³³ Nowak makes clear that "it is often circumstances external to the individual that render them 'powerless,' such as when one's exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others."³⁴

TORTURE AT THE ROTENBERG CENTER IN MASSACHUSETTS

DRI has drawn on Nowak's report to challenge abusive practices in "situations of powerlessness" around the world, including the Judge Rotenberg Center (JRC) in the United States. JRC is perhaps unique in the world because it has developed techniques of "behavior modification" for children and adults with disabilities that include the intentional infliction of pain through electric shocks, long-term restraints, seclusion, social isolation. DRI published its findings in *Torture not Treatment: Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center* (2010; updated 2011). DRI filed its report with the Special Rapporteur Against Torture as an "urgent appeal."

JRC has vexed disability rights activists in the United States for more than three decades. The facility claims that aversive treatment is "necessary" because some people with disabilities will not respond to any other form of treatment. Time after time, US courts have upheld aversive treatment at JRC because parents claimed that their relatives had a "right" to this treatment or education under US civil rights law.

The challenge to aversive treatment as torture is in some ways easier and in some ways harder than in other contexts. The stated intent is to cause pain. Unlike a traditional mental health context, there is no need to find implied intent. On the other hand, the stated purpose of pain is to correct or alleviate the disability. DRI challenged this justification on two grounds. There are less intrusive and painful alternatives to aversive treatment. The great majority of professionals agree that this treatment is dangerous and unnecessary. DRI also called on Nowak to adopt a broader position and reject the doctrine of medical necessity. Even if pain were an effective treatment, the protection against torture must create an upper limit on the amount of pain that can be involuntarily induced on any person.

Nowak responded to DRI's urgent appeal by expressing concern to the US Department of State. During an interview on ABC News, Nowak stated that the pain inflicted on children and adults detained at the Rotenberg Center constitutes torture. "I have no doubts about it. It is inflicted in a situation where the victim is powerless.... [A] child, in the restraint chair, being subject to electric shocks, how more powerless can you be."³⁵

The US State Department has never issued a public response to Nowak. The Justice Department is still in the process of investigating the Rotenberg Center more than two years after the urgent appeal. The US National Council on Disability, the highest federal advisory body on disability, cited DRI's report calling the practice torture, and asked Massachusetts authorities to bring the practice to an end. The director of JRC, Mathew Israel, was forced to step down after he was indicted for misleading a grand jury during an inquiry into a scandal at the institution. Finally, Massachusetts's regulatory authorities have banned the use of electricity and all severe aversive treatments on any new admissions after October 30, 2011.³⁶

The new regulations do not protect people already detained at JRC. But they stem the flow of new abuses and they represent a victory for disability rights supporters in Massachusetts after

decades of effort. Coming shortly after DRI's report and condemnation by the Special Rapporteur Against Torture, the timing of the new regulations is a rare case in which an allegation of torture under international law contributed to protecting citizens in the United States.

FURTHER SUPPORT FROM SPECIAL RAPPORTEUR JUAN MÉNDEZ

When Nowak's term as Special Rapporteur concluded, he was followed by Juan Méndez. Special Rapporteur Méndez has not explicitly re-examined the issues analyzed by Nowak in the context of treatment for people with disabilities. Méndez adopted a position on the prolonged use of seclusion, however, that compliments Nowak's approach.

Méndez found that "any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment depending on the circumstances."³⁷ In the case of juveniles or people with mental disabilities, however, Méndez finds that solitary confinement of *any duration* constitutes cruel, inhuman or degrading treatment under article 16 of CAT.

In certain circumstances, solitary confinement can rise to the level of torture — such as its use for the purpose of punishment.³⁸ While the "purpose" of punishment is relevant, there are also circumstances where purpose does not explicitly figure into a situation of torture. A practice may rise to the level of article 1 torture "[w]here conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering."³⁹ This situation hinges on the severity of pain and not on the stated purpose of the authorities. Poor conditions may be caused by a lack of resources, and strict regimes may be imposed by authorities who claim to be acting for the safety or therapeutic benefit of the subject. This situation appears consistent with the

position DRI took in the case of JRC: that the protection of torture creates an upper limit of pain that can be induced by the state — whatever the stated purpose may be.

CONCLUSIONS

Manfred Nowak's report outlines the principles to guide how torture and ill-treatment can be understood to protect people with disabilities in light of the CRPD. By validating claims of torture made by DRI, Nowak has helped give specificity to those principles. In the case of prolonged restraints in Serbia, Nowak shows how intent to cause pain can be implied without specific evidence of the motivations of treating professionals. Moreover, this stated therapeutic purpose of protecting people in their care does not shield a practice from being labeled as torture.

In the Serbia and JRC cases, the powerlessness of children and adults with disabilities detained in institutions plays a role in determining that these individuals were subject to coercion. This factor allowed Nowak to call into question claims of "therapeutic purpose" in cases where severe pain and suffering had been inflicted — and thus find torture.

Article 4 of CAT requires governments to "ensure that all acts of torture are offences under criminal law." Recognizing practices as torture ensures that health authorities and service providers can no longer blame the system for its inadequacies. They face personal risk in perpetuating practices that they know to induce severe pain. The implications of this recognition are enormous for people detained in institutions throughout the world. Health, social service, and human rights authorities need to be sensitized to the fact that people detained in facilities are inherently at-risk of torture. Recognizing abuses not just as inhuman and degrading, but also as torture, will help gain the attention needed to bring these abuses to an end.

Endnotes: When Treatment is Torture: Protecting People with Disabilities Detained in Institutions

¹ United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2007 U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 [hereinafter CRPD].

² Press Release, Department of Public Information, With 20 Ratifications, Landmark Disability Treaty Set to Enter in Force on 3 May, U.N. Press Release HR/4941 (Apr. 3, 2008), available at <http://www.un.org/News/Press/docs/2008/hr4941.doc.htm>.

³ U.N. Enable, <http://www.un.org/disabilities/> (last visited February 6, 2012). As of this date, the CRPD was signed by 153 countries and ratified by 110. The Optional Protocol has been signed by 90 countries and ratified by 63. The United States signed the CRPD on July 24, 2009.

⁴ ¶ 4., App. No. 10533/83, E Ct. H.R. Sept. 24, 1993 ("[m]easures taken out of therapeutic necessity cannot be regarded as inhuman and degrading treatment.").

⁵ See Eric Rosenthal & Clarence Sundram, International Human Rights in Mental Health Legislation, 21 *New York Law School Journal of International and Comparative Law* 469, 512 (2002) (reviewing international case law on inhuman and degrading treatment). The most important case from the Inter-American Court is *Ximenes-Lopes v. Brazil*, in which the Court found a violation of the right to life as well as inhumane treatment. Mr. Ximenes-Lopes

died after he was beaten, placed in physical restraints, forcibly medicated, and left without medical supervision. 2006 Inter-Am Ct. H.R. (serc. C) No. 149 (July 4, 2006) at ¶150.

⁶ *Stanev v. Bulgaria*, ¶ 212, Application no. 36760/06, January 17, 2012.

⁷ Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, U.N. Doc. A/63/175 (Jul. 28, 2008) (by Manfred Nowak) [hereinafter Nowak Report].

⁸ Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, para. 78, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Méndez) [hereinafter Méndez Report].

⁹ See Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights*, 30 *Human Rights Quarterly* 494, 502 (describing how the convention "in stating the obvious, is also effecting change").

¹⁰ UN Convention Against Torture, art. 1(1).