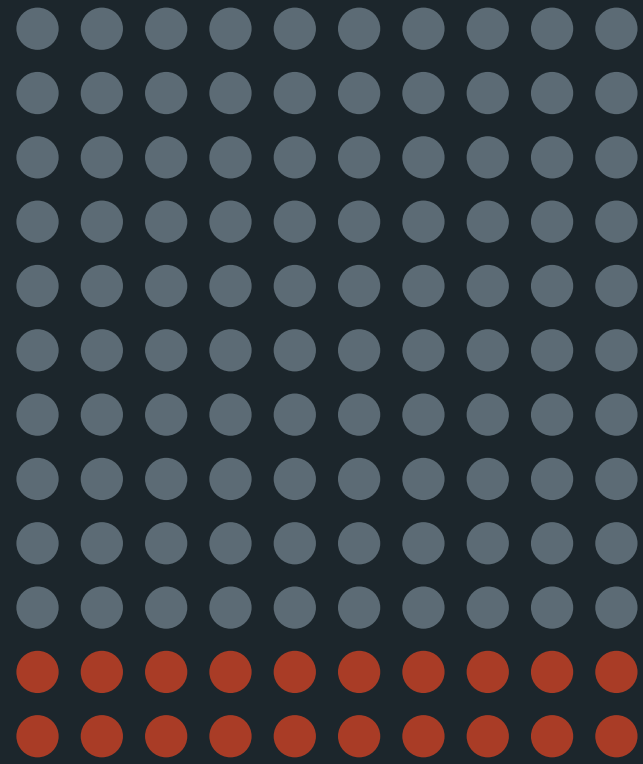
Overcrowding, Cumulative Harm and Torture

Rethinking the threshold of ill-treatment in detention



120 people in 100 places: the usual threshold of critical overcrowding

STARTING POINT

What do we mean by torture? Five criteria



1. Suffering

Severe pain or suffering, whether physical or mental.



2. Intentionality

Inflicted deliberately, or knowingly permitted to continue.



3. Purpose

Pursued for an aim such as punishment, coercion, intimidation or discrimination.



4. Public official

Inflicted by, or with the consent or acquiescence of, a public official.



5. Lawful sanctions

Suffering inherent in a lawful sanction falls outside the definition.

Where intentionality or purpose cannot be established, the conduct remains cruel, inhuman or degrading treatment. The prohibition is equally absolute.

1. Suffering



Severe pain or suffering, whether physical or mental.

IN CUSTODIAL SETTINGS

A lower threshold applies: deprivation of liberty places the person in a position of particular vulnerability.

It is lower still for children, persons with illness or disability, and mothers detained with their children.

The assessment is cumulative: concurrent deprivations of lesser gravity, or a single one sustained over time, are weighed together.

Suffering need not be physical: fear, humiliation and loss of control are themselves forms of severe suffering.

Detention must not entail suffering beyond that inherent in the deprivation of liberty.

2. Intentionality



The suffering is inflicted deliberately, or knowingly permitted.

IN CUSTODIAL SETTINGS

Intentionality is the element most often at issue in distinguishing ill-treatment from torture.

Where a purpose is established, intentionality follows.

It may also be inferred from knowledge of the harm being caused and a failure to act upon it.

Abusive regimes, or regimes that disregard the minimum standards of the CPT or the Nelson Mandela Rules, are indicative.

The absence of intentionality does not exclude cruel, inhuman or degrading treatment.

3. Purpose



The suffering serves an identifiable aim.

IN CUSTODIAL SETTINGS

- Punishment exceeding the sentence imposed by the court.
- The pursuit of submission or humiliation.
- Coercion or control exercised through physical or psychological violence.
- Discrimination on grounds such as type of offence, gender or ethnic origin, among others.

Establishing purpose involves an element of appreciation: it is inferred from how a regime operates, not from what is declared.

4 and 5. Public official and lawful sanctions



Public official, consent or acquiescence

- In custodial settings the State is present by definition: every act occurs under its authority.
- Responsibility extends to what staff do, order or tolerate.
- It extends to violence among prisoners that the authorities know of and fail to prevent.



Lawful sanctions

- The lawful sanction is the deprivation of liberty, and that alone.
- Only suffering inherent in that deprivation falls outside the definition.
- Overcrowding, sleeplessness, fear or humiliation, cannot be defended as part of a lawful penalty.

A custodial sentence removes liberty. It confers no authority to impose further suffering.

A WORD THAT ELICITS REJECTION

The word “torture” elicits an immediate psychological rejection.

On monitoring visits as a member of a National Preventive Mechanism, I have repeatedly met the same objection from prison staff: “You are more concerned with offenders than with officers.”

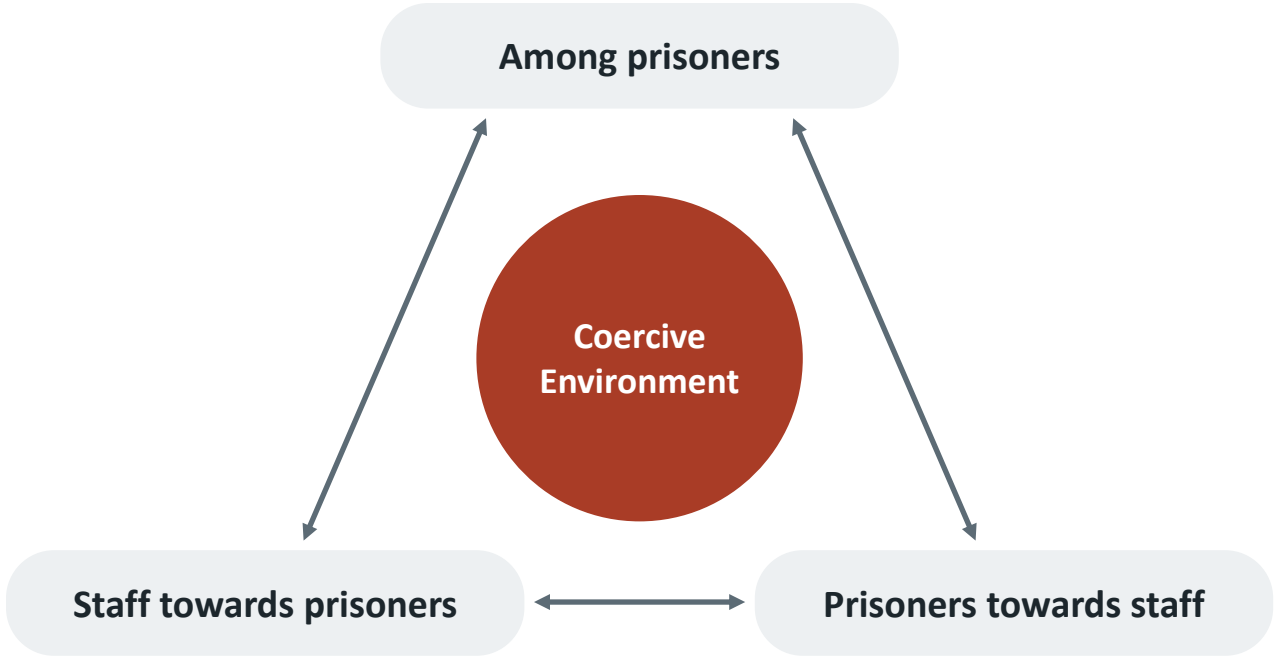
It is an understandable reaction, and it points to something real: staff also live in these conditions. Yet people in detention are in a position of particular vulnerability, and are owed additional protection.

STARTING POINT

Coercive or Torturing Environments

Certain facilities, by virtue of their intrinsic conditions, can scarcely avoid situations of ill-treatment. Architecture is only part of the problem.

To speak of torture is not to speak of officers who torture, but of institutions whose collective climate and environment foster physical and psychological violence.



All are victims of a Coercive Environment: those who are detained and those who work there.

DEFINITIONS

Three ways to define overcrowding

COUNTED

Density

Occupancy rate. Prisoners per 100 official places.
Spatial density. Square metres per person.
Social density. People sharing the cell or unit.

FUNCTIONAL

Operational capacity

More people than staff, services and infrastructure can humanely accommodate.

A prison can be overcrowded below 100% occupancy.

EXPERIENCED

Crowding

The stress felt when density means loss of control and privacy.

It depends on time locked in, predictability, and who the others are.

The link is social density. In prison research, the number of occupants was typically a stronger source of harm than space per person.

STARTING POINT

Overcrowding is not only a capacity problem

The number of places matters. The real question is what happens to people when a system runs above its capacity.

It multiplies the risk of ill-treatment, even when no single deficiency, taken alone, would seem sufficient.

Affected at the same time

Space	**Rest**	**Hygiene**
Ventilation	**Water**	**Food**
Health care	**Privacy**	**Safety**

Protection erodes too

Less access to activities, visits, individual attention, complaints, oversight and rehabilitation. More tension among prisoners and with staff.

What the Court adds to lack of space

High frequency

In half of the judgments, or in all

Confinement in the cell most of the day; no outdoor exercise (9 of 18)
No privacy, above all when using the toilet (9 of 18)
Prolonged duration (weighed in every case)

Frequent

In three to six judgments

Poor hygiene and sanitation (6)
No bed of one's own: sleeping in shifts or on the floor (5)
Vulnerability: asylum seekers, children, mental disorder (4)
Poor light and ventilation (3)
Inadequate health care (3)

Other elements

In one or two judgments

- Constant lighting and noise
- Infestation and skin disease
- Too little food or drinking water
- Cramped transport to court
- Constant transfers
- No hot water
- Children held with adults
- Forcible psychiatric treatment

In all 18 judgments the finding is inhuman or degrading treatment. In none is it torture. Counts refer to the 18 Article 3 judgments reviewed, 2002 to 2025.

From material conditions to lived experience

18

judgments of the European Court reviewed, 2002 to 2025. In each, lack of space is assessed together with other conditions of detention.

THE LEGAL ASSESSMENT WEIGHS

Personal space

Material conditions

Time confined to the cell

Duration

A COMPLEMENTARY PERSPECTIVE ADDS

The subjective experience of the person

Psychological or mental suffering

Global environment: architecture, material conditions, treatment, relationships and activities

1. The body, without touching it

THE NEED UNDER ATTACK

Basic bodily functions and contact with the surroundings

HOW AN OVERCROWDED PRISON ATTACKS IT

- Sleep in shifts or on the floor, constantly interrupted
- Heat, humidity and poor ventilation
- Noise and light at all hours
- Queues for the toilet, for water, for food
- No way of knowing or managing time

WHAT IT PRODUCES

Physical and mental exhaustion

Confusion; poorer memory and judgement

Less self-control

A world that feels more threatening

Sleep is the clearest case. Being forced below six hours of continuous, restful sleep has been proposed as degrading treatment in itself, and as more than that when prolonged.

2. Fear and loss of control

THE NEED UNDER ATTACK

Safety, predictability and a say over one's own life

HOW AN OVERCROWDED PRISON ATTACKS IT

- Too many unknown people and nowhere to withdraw
- Too few staff to protect: violence, extortion, abuse
- Arbitrary rules, lockdowns and transfers
- Waiting without information
- No decision left to take, however small

WHAT IT PRODUCES

Permanent alert

Fear that outlasts release

Helplessness and hopelessness

Exhaustion from constant vigilance

Fear teaches that the world is unsafe. Loss of control teaches helplessness. Neither needs a threat to be spoken aloud.

3. Identity and dignity

THE NEED UNDER ATTACK

To be treated, and to see oneself, as a human being

HOW AN OVERCROWDED PRISON ATTACKS IT

- Using the toilet and washing in front of others
- Dirt, smell, infestation, no clean clothes
- Being counted, moved and stored as a number
- Searches and nakedness without privacy
- No space, object or moment that is one's own

WHAT IT PRODUCES

Humiliation

Shame: a damaged image of oneself

Feeling less than human

Marks that last longer than pain

The law files humiliation under "degrading", the lowest rung. Research finds that humiliation and shame leave the deepest and most lasting marks.

4. Belonging and collective identity

THE NEED UNDER ATTACK

To belong, to be accepted and cared for, to be part of a “we”

HOW AN OVERCROWDED PRISON ATTACKS IT

- Transfers far from family; fewer, shorter visits
- No work, study or role to hold on to
- Groups already discriminated against fare worst
- Gangs and informal hierarchies as the only protection
- Years of adapting to the institution's rules

WHAT IT PRODUCES

Isolation in the middle of a crowd

Humiliation lived as a group

Broken ties with family and community

A new identity shaped by the prison

Humiliation can be collective. When a whole group is held this way, the message about its worth reaches everyone who belongs to it.

In conclusion: When can we speak of torture?

Severe or extreme overcrowding can in itself be cruel, inhuman or degrading treatment. Combined with other deprivations, and where the elements of the applicable definition are met, it can reach the threshold of torture.

Elements to weigh, not a rigid test

1. Intensity of suffering
2. Duration
3. Accumulation of deprivations
4. **Vulnerability of the person deprived of liberty**
5. Knowledge and control by the authorities
6. Intent or purpose, where the definition requires it

In detention the threshold is lower. A person deprived of liberty is in a position of special vulnerability, so less suffering is required to reach ill-treatment or torture.

Prevention looks at the whole justice system

Entries

- Criminalisation
- Arrest
- Excessive or prolonged pre-trial detention

Duration

- Length of sentences
- Procedural delays
- No effective review of the need to detain

Exits

- Parole and early release
- Review of enforcement
- Release planning

More places are not enough on their own. Capacity without staff, activities and services recreates the problem, and the CPT finds that it offers no lasting solution. The policies that fill prisons have to change.

TO CONCLUDE

Four ideas to take away

1

Not an administrative matter

Overcrowding can directly engage the absolute prohibition of ill-treatment.

2

Do not wait for torture

Not all overcrowding is torture, but action cannot depend on reaching that label.

3

Look at the person, not only the cell

Sleep, safety, control, dignity and belonging count as much as square metres.

4

The solution lies beyond the prison

Who enters, for how long, and under what conditions they can leave.

The prohibition of torture is absolute.

The next thematic report of the mandate will address practical measures and remedies to overcrowding.

Much remains to be done.

This is work in progress, and I am here to learn.

Thanks