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The Prohibition of Torture and its Implications in the European Legal Sphere

ABSTRACT: *The prohibition of torture as a human right is part of the ius cogens system of international law. Prohibition is derived from the necessity of maintaining the physical and mental integrity of persons, which is embedded in humanity itself. The following article analyses the prohibition of torture in the European human rights framework. The study analyses the universal United Nations Convention against torture, legislative framework of the Council of Europe with its European Convention on Human Rights, and framework established by the European Union, respectively.*

KEYWORDS: international human rights law, international criminal law, prohibition of torture

1. Introduction

There are remains of acts of torture found from ancient times through the Middle Ages to modern times, proving that torture has been regularly conducted throughout history. Torture was applied to a considerable extent against slaves and Christians in the Roman Empire, heretics and persons accused of witchcraft during the inquisition processes of the Catholic Church, and African slaves on the American continent. Later, medieval torture techniques became well-known in history books. Furthermore, known military conduct to gain confessions of committing treason or combating terrorism is not a secret. The issue has, therefore, been a topic of academic debate worldwide, including European and American scholars dealing with criminal and human rights law. The questions that arose

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through the debates dealt with the definition of torture, its scope, decree, and acceptance.[1]

The phenomenon of torture is observed using three different approaches. First, as a crime, in conjunction with questions of responsibility, jurisdiction, and principles of accountability. Second, in relation to the legal process, necessary evidence is obtained in trials. In such cases, torture disqualifies the evidence obtained. Additionally, regarding the procedural matter of the interpretation of torture, this notion greatly impacts cases dealing with mutual recognition and extradition issues as well as cases of asylum law. Third, it is important to distinguish between the concepts of torture, inhuman treatment, and degradation.[2]

This study aims to define some of the conceptual elements of the prohibition of torture and ill-treatment. Further, it aims to review what obligations states have in terms of fundamental rights protection against torture and ill-treatment. Therefore, this study provides an in-depth research on the international legislative framework of the prohibition of torture in relation to its nature, scope, and functions. This topic is strongly related to the protection of human rights, universally established after the Second World War (WWII). The Universal Declaration of Human Rights[3] (UDHR) is a milestone in European human rights. Through this document, states committed themselves to cooperate with the United Nations (UN) to ensure the general and effective respect of human rights and fundamental freedoms. Although the text of the UDHR per se was initially not enforceable over time, it reached the level of customary law, and today, the declaration's content is binding. However, the document was considered one of the most fundamental human rights documents, providing precedent for further binding conventions, such as the European Convention on Human Rights[4] (ECHR) or the Inter-American Convention on Human Rights.[5] Regarding the topic at hand, it is worth mentioning Article 5 of the UDHR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[6] This has a noteworthy influence on later treaties and their provisions dealing with the prohibition of torture.

The prohibition of torture, inhumanity, degrading treatment, and punishment can be found in many important international human rights law documents.

1 Langbein, 2004, p. 100.
2 Sonnevend and Bodnár, 2021, p. 41.
3 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA resolution 217 A.
4 European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, E.T.S. No. 005, entered into force 3 September 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213) and 16 (C.E.T.S. No. 214)).
5 American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978.
6 Universal Declaration of Human Rights, 1948, Art. 5.

At the UN, torture is prohibited primarily in the UDHR (Article 5), International Covenant on Civil and Political Rights[7] (ICCPR, Article 7), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and its optional protocol.

The provisions of the abovementioned treaties contain the explicit wording of the *ius cogens* rule of the prohibition of torture, which has an absolute and non-derogable character. The *ius cogens* character of the prohibition of torture was first stipulated in the Furundžija case by the International Criminal Tribunal for the former Yugoslavia.[8] As one of the most universally recognized human rights, prohibition is part of general international law, giving rise to *erga omnes* obligations. These obligations are specifically determined obligations that have states towards each other. In legal theory, the concept *erga omnes* derives from Latin, meaning 'in relation to everyone'. These rules enable international courts (the ICJ, ECtHR, and ICC) to reach further that traditional rights and duties arising from bilateral or multilateral treaties or international customs, developing international law by standards arising from natural law. These obligations, therefore, do not require the specific consent of states to be bound by the rules to which they adhere. Therefore, the prohibition of torture is a human right that must be abided by any state and other subject of international law, even though it lacks the process of signing and ratifying any treaty with such a provision.[9]

Generally, any person with limited personal freedom who is subject to surveillance by others is more vulnerable than others. Dealing with these situations is necessary because of the frequent occurrence of involuntary disappearances; that is, a person is threatened by the most severe forms of interference with his/her physical integrity. The traditional interpretation of torture reveals that the perpetrator of violent behaviour falling within the scope of ill-treatment must be a state official or person performing a public duty. Since an official or a person performing a public duty is not directly involved in the perpetration of ill-treatment in private relationships, the relationship between the state and the individual perpetrator is established by the fact that an official knew or should have known about the act but did not do anything to prevent it. The state has both preventive and repressive obligations to prevent torture and ill-treatment. Concretely, these obligations mean normative measures to ensure the prohibition of torture in the state legislature, to apply the requirements set by the law in circumstances where there is a risk of harm, and procedural measures to investigate properly and later sanction violations of the law.[10]

7 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.

8 See *Prosecutor v. Anto Furundžija*, (ICTY Case No. IT-95-17/1-T.), Trial Judgement, 10 December 1998, para. 144.

9 Nuhija and Memeti, 2013, p. 31.

10 Savnidze, 2014, p. 113.

A legislative framework was established, which should have been followed by effective enforcement measures. Although a monitoring mechanism has been established, there are gaps in effective control over proper enforcement and prevention. Many states still use torture as an interrogation or punishment technique and do not comply with the provisions of the binding documents, nor do they forget those states that are not just member states but also considered democratic and modern, like the United States, which also has cases of torturing accused persons. However, these governments often attempt to justify their opinions and actions by protecting national security. Therefore, one must assume that the implications of the prohibition of torture are insufficient, and the expansion of measures would be welcome. In the following text, I aim to provide an overview of the legislative framework for the prohibition of torture in the European regional human rights system, considering these inadequacies. The choice of case-law is based on its importance and interpretative clarity in presenting the notion of torture in relation to the analysed conventions.

The prohibition of torture and ill-treatment is a fundamental value of the international protection system for human rights and the domestic constitutional order of democratic states. The law provides a very high level of legislative protection against torture and ill-treatment at both international and national levels. However, as shown below, the requirements for the definition of torture have evolved with society. Over time, the law and its application have become stricter, and the interpretation of what constitutes torture has become more complicated. The following sections of this article will be devoted to outlining the most significant treaties and relevant case-law, which represent the framework of protection.

2. The UN Convention against torture and other cruel, inhuman or degrading treatment or punishment

According to CAT Article 1

> "Torture" means 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.[11]

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984. However, there were heavy debates during its creation based on Jean-Jacques Gautier's, a Swiss lawyer, banker, and founder of the Association for the Prevention of Torture, opinions on enhancing the text of a system that would help states adhere to the legal obligations stemming from the text, which were understood to be overly complex and controversial and were intentionally left out of the text. The implementation was left to the body of ten independent experts, known as the Committee against Torture, who ratified the text.[12] The CAT is divided into a preamble and three parts. The first is devoted to substantive law, including the definition of torture in its first article and the provision stipulating universal criminal jurisdiction over the crime of torture. The second part deals with certain implementation mechanisms. In this section, the CAT establishes the Committee against Torture under Article 17 and Article 24, which has the duty to monitor the implementation of the CAT in signatory states. The Committee overlooks not just the proper alterations of national legislation to the demands of the CAT but also the enforcement of these provisions. The Committee is formed by ten independent experts who conclude observations based on state parties' reports or *ex officio*. Members meet regularly in two sessions in Geneva: one in April or May and the other in November. The Committee receives reliable information about the ill-treatment practices of states, which may lead to confidential proceedings. However, the Committee's observations are in the form of findings, general comments, manuals, or guidelines, from which none have a binding effect.[13] Nevertheless, the Committee has the power to include its findings in its annual report to the UN General Assembly, which can result in certain actions. The third part is devoted to provisions concerning the life of a document, that is, ratification clauses, amendments, and entry into force.[14]

In accordance with the CAT, the prohibition of torture must be considered an absolute right that cannot be overridden by the protection of other rights contained in the Convention. Ill-treatment cannot be justified by exceptional circumstances, such as a state of war, the threat of war, or internal political unrest. A superior order does not exempt the perpetrator from responsibility. The

11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, U.N.T.S. 1465, entered into force 26 June 1987, Art. 1.

12 Evans and Haenni-Dale, 2004, p. 24.

13 Fact Sheet Combating Torture. No. 04 of the United Nations Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 2002, p. 11.

14 Coccia, 1990, p. 316; Derckx et al., 2013, p. 8.

provision to prevent torture is established as a legal obligation in Article 2(1) of the Convention.[15]

According to the Convention, torture is a purposeful crime; severe pain or suffering must occur as a result, and the official capacity of the person acting as a public authority is necessary. Therefore, four pillars of the definition must be fulfilled to consider certain acts of torture under the CAT. The first pillar is the nature of the act that enhances both acts as well as omissions that result in serious suffering or pain for the victim. As in international case-law, pain can also be physical or mental.[16] The second pillar represents the subjective feature; that is, the intention of the perpetrator, who must be intentionally inflicted. Negligence is consequently ruled out. The third pillar states the necessity of a purpose when an act is committed. The purpose is usually to gain a confession, obtain information, punishment, intimidation, coercion, or discrimination. However, according to Article 1 of the CAT, the list is not exhaustive; therefore, other purposes cannot be excluded. The final pillar is the involvement of public officials. Although the last pillar is regularly clear, the recognition of a third person acting in an official capacity can cause uncertainty. For example, in the *HMHI* case,[17] the Committee on Civil and Political Rights recognized a Somali clan as a non-state actor but exercised authority over a certain territory; therefore, it is a de facto authority with similar duties and obligations as a public authority. Nonetheless, the Committee added that similar situations must be investigated on a case-by-case basis. Correspondingly, an issue can occur when prohibited acts are perpetrated not by an official but with consent or acquiescence.[18]

The CAT text does not explicitly interpret what constitutes cruel, inhuman, or degrading punishment or treatment. According to the recollections of the CAT drafting committee leaders, codifiers faced two elementary issues when creating the documents. On the one hand, while the notion of torture was rather clear to define, cruel, inhuman or degrading treatment or punishment could not be defined with proportionate precision.[19] On the other hand, since the document imposes several legal obligations on state parties, which must be reflected in their criminal substantive law and procedures, they could not be assigned vague concepts such

15 Art. 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'

16 See Joined Greek Case: *Denmark v. Greece*, (ECHR Application No. 3321/67), *Norway v. Greece*, (ECHR Application No. 3322/67), *Sweden v. Greece*, (ECHR Application No. 3323/67), *Netherlands v. Greece*, (ECHR Application No. 3344/67), Report of the Sub-Commission, 5 November 1969.

17 *H.M.H.I. v. Australia*, (Complaint No. 177/2001), Decision, 1 May 2002, para. 6.4.

18 Publication of the United Nations Human Rights Office about Interpretation of Torture in the Light of the Practice and jurisprudence of International Bodies, 2011, p. 5.

19 Burgers and Danelius, 1988, p. 149.

as cruel, inhuman, or degrading treatment or punishment. This also proves that the Committee Against Torture, which supervises the implementation of the CAT, declares that the definitional difference between cruel, inhuman, or degrading treatment or punishment and torture is often unclear.[20]

The CAT refers to ethical and moral values as principles promoting dignity, humanity, and other international human rights treaties. The preamble of the CAT refers to Article 5 of the Universal Declaration on Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The preamble of the CAT stipulates that the most significant aim of the Convention is to make the struggle against torture and inhuman and degradation treatments more effective.[21]

Article 16 of the CAT provides

> undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The activation of the state's positive obligation arises when a certain level of severity of interference with the fundamental rights in question is given. Nevertheless, when it comes to the right not to be tortured, the differentiation of cases when a positive obligation of the state arises and when, on the contrary, does not arise is more complicated because not all interventions in the physical integrity, that is, cases of causing harm to health, must have criminal law relevance. A very important criterion for distinguishing between interventions is whether they are caused by a public authority or private person. The basic purpose of an effective investigation in such a case is to ensure the effective implementation of national regulations if the violation is caused by a public authority that can act only on the basis and according to the law.[22]

The work and interpretation of the Committee in its general comments and case-law aids in completing the proper understanding of the CAT. Similarly, in national courts, the prohibition of torture is regularly interpreted in the context of the non-refoulment principle. In its General Comment no. 1, the Committee

20 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 2007, 10.

21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Preamble.

22 Čentéš and Beleš, 2021, p. 4.

Against Torture stipulated that, when assessing relevant cases, the risk of torture must be considered based on evidence that goes beyond pure theory or suspicion.[23] Although the risk of torture does not have to fulfil the test of being certainly possible, it must be personal and actual. This interpretation was later broadened in the *Dadar v. Canada* case, with the aspect of foreseeable and real risk.[24] Additionally, it must be mentioned that the facts that are considered by the Committee are given by the organs of the state party concerned; however, the Committee has the right to assess this evidence and facts freely and upon the full set of circumstances in every case, as was interpreted in the NTW v. Switzerland case.[25]

Finally, we can conclude that despite the relatively decent quality of the CAT text and its worldwide ratification, the CAT[26] cannot be considered successful. The reasons are either the lack of enforcement by states, lack of UN enforcement bodies, or the fact that several states that ratified the CAT do not truly want to comply with its text and provisions. However, the regulation has fundamental importance because in the case-law of international courts, mainly ad hoc international tribunals (the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda), the starting point for defining the concept of torture was the definition of the concept provided by the CAT.[27] In the initial period of the tribunals' operation, adopting the concept without criticism was typical. However, the definitions read in later decisions testify to the fact that courts, pointing to the different natures of international humanitarian law and human rights law, are increasingly independent of the facts defined in the Convention.[28]

3. European Convention on Human Rights

Under ECHR Article 3 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[29]

The most well-established international system for protecting human rights, with its connection to the prohibition of torture, is the European human

23 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 1997, 6.

24 *Mostafa Dadar v. Canada*, (Complaint No. 258/2004), Decision, 5 December 2005, para. 4.11.

25 *N.T.W. v. Switzerland*, (Communication No. 424/2010), Decision, 6 July 2012, para. 7.3.

26 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, signatories: 83, parties: 173.

27 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*, (ICTY Case No. IT-96-21-T), Trial Judgement, 16 November 1998; *Prosecutor v. Anto Furundžija*, (ICTY Case No. IT-95-17/1-T), Trial Judgement, 10 December 1998; *Prosecutor v. Kunarac, Kovac and Vukovic*, (ICTY Case No. IT-96-23-T& IT-96-23/1-T), Trial Judgement, 22 February 2001.

28 Burchard, 2008, p. 162.

29 European Convention on Human Rights, 1950, Art. 3.

rights system. This European system for protecting human rights was created within the Council of Europe (CoE) framework, an intergovernmental organization established in 1949 by a group of Western European states committed to protecting individual freedoms, democracy, and the rule of law. The member States of the CoE adopted the ECHR in 1950, and it came into force in 1953.[30]

The ECHR establishes the prohibition of torture under Article 3, giving it the position of one of the foremost important provisions of the Convention and highlighting its importance in the framework of the CoE. The essential aspect of the prohibition is the serious nature of pain and suffering. According to the case-law, some acts constitute the facts of torture. In these cases, the conduct of the offence necessarily presupposes and includes the cause of severe pain or suffering; therefore, it is sufficient for the prosecution to prove the conduct.[31]

As seen in the jurisprudence of Central European constitutional courts, there are different approaches to interpreting and implementing this provision. One possible method is to explain the scope of Article 3 by providing an exemplificatory enumeration, which can be understood as torture, which was the approach of the constitutional court in Czech Republic. The Czech Constitutional Court has, in its judicial activity, enumerated relevant consequences that sufficiently increase the intensity of the intervention, such as police intervention, a leg injury with tissue necrosis resulting in amputation, a gunshot wound to an internal organ without permanent consequences, a double fracture of the jaw, the knocking out of three teeth, an ear injury and bruises on a larger part of the body. According to the Czech Constitutional Court, these brutalities can easily be classified as torture.[32] However, the Hungarian Constitutional Court took a different approach when implementing the definition of the ECHR. As for the Hungarian Constitutional Court, the condition for establishing torture is the behaviour towards the victim causing a great degree of suffering to the person concerned, as well as an intentional behaviour that aims to cause pain, the purpose of which is, among other things, to obtain information and intimidate the person concerned.[33]

The prohibition of torture would only remain a formal postulate without content if it did not simultaneously impose on states the obligation to establish in substantive criminal law the criminality of such actions that correspond in content to killing, torture, inhuman treatment, or punishment. Additionally, states must establish an effective legal framework for criminal proceedings to clarify these criminal acts or the obligation to apply this legal regulation of criminal proceedings in practice. However, it is not enough to adopt national laws in accordance with the text of the ECHR; contracting states are also responsible for the practical realization of guaranteed rights. The provision of the prohibition of torture

30 Buergenthal, 2001, p. 89.
31 Kovács and Sánta, 2010, p. 23.
32 Decision no. Sp. Zn. III. ÚS 2012/18, [43].
33 Decision no. 32/2014. (XI.3.) [137]; Decision no. 6/1996, (VII. 12.) [34].

implicitly gives a positive obligation to the parties to the ECHR to investigate allegations of ill-treatment.[34] Otherwise, the prohibition would be theoretical and illusory, allowing perpetrators to act with impunity. This obligation is consistent with the absolute character of prohibition. To fulfil this obligation of proper investigation, a coherent legislative framework and enforcement mechanism ensure a proper response to credible accounts of torture. If these mechanisms fail to comply with the stipulated duties for proper investigation, the state must combat sanction impunity in different ways. However, this relates to the question of how to uphold the principles of the rule of law in the state's justice system. Nevertheless, the state can somehow, as a result, also fail to fulfil this positive obligation. In these cases, the mechanisms of the European human rights system arise, specifically the human rights system of the CoE, such as the application of victims to the European Court of Human Rights (ECtHR).[35] Hence, the jurisprudence of the ECtHR is the leading example on how to enforce and sanction the prohibition on torture.

Therefore, the ECtHR's case-law is based on its interpretation of the scope and character of Article 3. The ECtHR first elaborated the concept of torture in the case of *Ireland v. the United Kingdom*, where it stipulated that for certain acts to fall under the term of torture, these require a minimum level of severity and seriousness that cannot be unjustifiable; that is, it is an aggravated form of treatment. This can be a degrading or humiliating treatment or a treatment that drives the victim to act against his will or conscience. However, the ECtHR does not explicitly clarify how minimum level threshold should be understood and applied. Nevertheless, the most important landmark in this case is the distinction between the notion of torture and the concept of inhuman or degrading treatment. The ECtHR divides the concept into two parts, deriving the difference from the intensity of the inflicted suffering. Torture is a deliberate act that requires serious and cruel suffering from the victim. When considering the distinction between the notions, the term torture must be attached to a special stigma in the treatment of severe harm.[36]

The ECtHR, in the pertinent case, has elaborated that acts as such fulfil all the requirements of Article 3. The concerned acts aimed to gain confessions, name other perpetrators, and obtain information. The acts were committed systematically while keeping in mind the aforementioned purpose; therefore, the negligence of the actors was excluded. Furthermore, the acts were perpetrated by official authorities, as the actors were officers of Northern Ireland's security forces.[37]

34 Čentéš and Beleš, 2021, p. 4.
35 Savnidze, 2014, p. 9.
36 *Ireland v. The United Kingdom*, (ECHR Application No. 5310/71), Judgement, 13 December 1977, para. 167.
37 Ibid, 166.

In this sense, the ECtHR has established that the only element that prohibits these acts from falling under the scope of torture as the absence of extreme intensity of suffering and pain. In this framework, the ECtHR also gave a wide margin of appreciation to the state concerned when it stated that the national authorities were in a better position than an international judge when deciding the scope of extreme pain and suffering. However, as is obvious, the aforementioned interpretation of the difference is narrow and unclear based on the vague wording of the ECtHR.[38] Additionally, it has to be mentioned that the case-law of the ECtHR has tried to elaborate the distinction of the concepts it has not exactly stipulated its concrete aspects. However, the ECtHR has confirmed this distinction many times, as stated in *Ireland v. the United Kingdom*, referring to the distinction already stipulated in Article 3.[39]

However, the current interpretation of the definition of torture and its aspects in the case-law of the ECtHR is very different from those applied in the early jurisprudence of the ECtHR. The current view of the prohibition has broadened and enhanced less strict and severe actions (albeit still demanding a cause of significant harm to the victim). However, many of these actions were not considered earlier torture crimes. The abovementioned short analysis of *Ireland v. the United Kingdom* presents a former interpretation that shifted the case-law of international courts over time.

The vaguely interpreted differentiation derived from the wording of a pertinent article has been subject to many significant ECtHR case-laws. This approach is divided into a vertical approach, representing three different concepts: torture, inhuman treatment, and degradation treatment. Different approaches have been presented based on the threshold of acts falling under these terms to define the elements of this study. The distinction between them is based on the severity of pain or suffering, with torture representing the most serious and degrading treatment as the least serious.[40] In *Selmouni v. France*, the ECtHR stated that the high requirements of human rights protection demand greater firmness in considering breaches of such fundamental values as integrity and the mental and physical well-being of a person.[41] Therefore, this case proves that the ECtHR should, in relation to the passage of time, reconsider its interpretation of Article 3 in previous cases when it is deemed necessary to differentiate the mentioned concepts based on the intensity of the harm caused.

Keenan v. The United Kingdom must be mentioned in connection with the issue of the concept threshold. In this case, the applicant's son, Mark Keenan, died by suicide in prison due to a failure by prison authorities, which was based on a lack of effective monitoring, psychiatric input, and treatment in conjunction

38 Cullen, 2003, p. 39.
39 *Aktaş v. Turkey*, (ECHR Application No. 24351/94), Judgement, 23 October 2003, para. 313.
40 Evans, 2002, p. 370.
41 *Selmouni v. France*, (ECHR Application No. 25803/94), Judgement, 28 July 1999, para. 101.

with the punishment of segregation. In 2001, the ECtHR explicitly stipulated that the severity of pain or suffering must be considered just one aspect of an increasingly complex matrix. Therefore, the ECtHR accepts that it is difficult to grasp the threshold when differentiating between these notions. In this sense, the ECtHR has had considerable flexibility in the application of its approach, enabling it to decide on a case-by-case basis.[42]

Finally, the interpretation of the ECtHR in the *Gäfgen* case[43] probably went straight to a broad understanding of the concept of torture and its determining aspects. The pertinent case concerned Mr Gäfgen, the kidnapper of the 11-year-old son of a German banker. He was later arrested after interrogations to obtain information on his whereabouts. Throughout the interrogation process, the police officer threatened the child with the considerable pain of gaining information and saving the child's life. The decision of the ECtHR declared that Gäfgen was a victim of inhuman treatment, as the threat was real and immediate and, therefore, may constitute mental distress and further mental consequences. The victim was in a vulnerable place where the interrogators had been abused. The police officer openly claimed that this technique was used to save the lives of the kidnapped children.[44] The ECtHR stated that the threat of physical pain is sufficient to fulfil the minimum level of severity required by Article 3, but not that required to be characterized as torture, but rather as inhuman treatment. The reasoning behind the ECtHR was based on social demands, protecting not only physical integrity but also the dignity of humans. This dignity is protected under Article 3.[45]

The *Gäfgen* case is interesting mainly for assessing the ECtHR, which includes some kind of balancing, even though Article 3 does not permit the balancing of rights. The question that it raised appeared to be about the balance between saving a child's life and protecting basic human rights arising from natural law and having *ius cogens* nature. In this matter, the ECtHR was firm and confirmed that even in extreme cases where saving the lives of innocent people was in danger, it could not justify the prohibition of ill-treatment. There were several reasons for this observation. The first reason is represented by Article 3 and 15 of the ECHR, which proves that derogation clauses do not apply to rights with peremptory character. The ECtHR, in this sense, added that not even the event of a public emergency threatening the life of a nation can serve as an exception for the prohibition of torture. Second, by protecting the proper sanctioning of the violation of Article 3, we are protecting the most fundamental values of democratic

42 *Keenan v. the United Kingdom*, (ECHR Application No. 27229/95), Judgement, 3 April 2001, para 112.

43 *Gäfgen v. Germany*, (ECHR Application No. 22978/05), Judgement, 1 June 2010.

44 The case has no happy ending, since Mr. Gafgen has suffocated the child previously of arresting him. The police officer investigating have, however, considered the child to be alive; hence, applying such methods as threat.

45 *Selmouni v. France*, (ECHR Application No. 25803/94), Judgement, 28 July 1999, para. 101. *Gäfgen v. Germany*, (ECHR Application No. 22978/05), Judgement, 1 June 2010, para.108.

societies that come together with the prohibition of torture. Finally, the decision to prohibit torture in every situation construes social demand, resulting in universal acceptance of the right in every situation. Therefore, this sends a signal to society that public authorities can, in no circumstances, justify acts of torture.[46]

As the last remark on the case, the author would like to reflect on and present certain criticisms of the wide understanding of Article 3, as presented above in the ECtHR decision. In the author's opinion, the ECtHR in the present case incorrectly dealt with the question of balancing the right to life and the prohibition of torture. The ECtHR supported its argument by considering that the threat of torture must be understood as torture itself. Nevertheless, these two notions should be considered separately for the situation at hand. First, it is not only important to investigate the negative mental consequences of such threats, but it is even more difficult to prove them. Second, the effects of detention, interrogation, and procedural measures have negative mental consequences. Of course, these measures have no purpose of gaining information or confession. However, as Article 3 explicitly mentions, the purpose of restricting persons' freedom for different reasons does not exclude these acts based on the aspect of purpose.[47] Third, the assumption that the threat of torture is worth more than the life of a nation is questionable. If the investigator, when balancing the right to life of a nation, decided that the threat of torture was worth more, he would be at least subject to criticism but probably even criminal procedure.

Furthermore, one dealing with the case-law of the ECtHR in relation to the analysis of the prohibition of torture must mention the most famous case regarding the topic, the *Soering* case (*Soering v. the United Kingdom*).[48] The case dealt with the extradition of an applicant to the United States to be judged as a crime punishable in the State of Virginia through capital punishment or imprisonment for life. However, based on an in-depth examination, the ECtHR concluded that the extradition of this person would result in a violation of Article 3. The decision was, therefore, a landmark for all future cases concerning the member states of the CoE regarding extradition.[49] Nonetheless, the question has affected far more than just criminal matters and the scope of Article 3; that is, it had a wide influence on aspects of state responsibility and human rights law in general. In most Central and Eastern European countries, a vast number of cases concerning the prohibition of torture are consequently mainly questions related to asylum law and considerations if sending the application to their home countries would be safe for them. However, the case was a landmark decision mostly known for its influence on asylum law and is, therefore, not the subject of the current article's research topic. Consequently, the author considers this issue.

46 Yiallourou, 2019.
47 The CAT in its Art. 1 also does not include exhaustive list of the element of purpose.
48 See *Soering v. the United Kingdom*, (ECHR Application No. 14038/88), Judgement, 7 July 1989.
49 Lillich, 1992, p. 128.

Lastly, worth mentioning in relation to progress regarding the scope of the notion of torture, explicitly what can be considered torture is the decision of *Aydin v. Turkey,* where, for the first time, the ECtHR recognized rape as an act that can constitute torture. In this decision, the ECtHR declared that the Act of Rape fulfilled the requirements stipulated in Article 3. The act was an especially grave form of ill-treatment, with deep mental harm to the victim lapsing for a long time; therefore, it was even more severe than physical scars from physical violence, healing quicker. The act of rape and its harm amounted to a series of terrifying and humiliating experiences, considering the circumstances under which the victim was deprived of her freedom. The Act was also implemented with a certain purpose, specifically, to gain information.[50] The decision should be considered a landmark in broadening the scope of the term torture. It is worth considering previous jurisprudence, which dismissed sanctioning rape under the term torture in similar previous cases. For example, in *Cyprus v. Turkey,* where there was sufficient evidence of mass rape by security forces, the European Commission did not consider such acts under the auspices of Article 3.[51] Naturally, the ECtHR in *Aydin v. Turkey* added that most rapes perpetrated by private individuals against another private individual cannot fall under the terms torture, lacking purpose, public authority, and deprivation of freedom in state detention.[52]

4. European Union policy

■ *4.1. Legislative framework*

The European Union (EU) expresses its commitment to human rights protection in its primary source, the Treaty on European Union[53] (TEU), under Article 2, which declares that the foundations of the EU were based on the values of human dignity, freedom, democracy, equality, rule of law, and respect for human rights.[54] The position of the article dealing with the topic of human rights protection emphasizes the importance of the issue for EU bodies. Another important document is the Charter of Fundamental Rights of the European Union,[55] also known as the Nice Charter. Since the Nice Charter has the same legal value as the Treaties of the EU (provided under Article 6 of the TEU), Article 4 prohibits torture, inhuman, or

50 *Aydin v. Turkey,* (ECHR Application No. 23178/94), Judgement, 25 September 1997, para. 83.
51 See *Cyprus v. Turkey,* (ECHR Application No. 25781/94), Judgement, 10 May 2001.
52 McGlynn, 2009, p. 2.
53 Treaty on European Union, Official Journal of the European Union no. C326/13, entered into force 26 December 2012.
54 Treaty on the European Union, 2012, Art. 2.
55 Charter of Fundamental Rights of the European Union, Official Journal of the European Union no. C364/1, entered into force 18 December 2000.

degrading treatment or punishment from binding all member states of the EU.[56] First, the author deems it necessary to appropriately mention the actions of the EU when combating torture, which is followed by an analysis of the interpretation of the prohibition of torture by the jurisprudence of the Court of Justice of the European Union (CJEU).

The EU's work in dealing with torture questions is divided into internal and external actions. Internal functions primarily concern judicial cooperation in criminal matters and rights related to asylum laws and refugee status. Judicial cooperation is a matter of harmonization and approximation of regulations concerning the prohibition of torture in member states. EU institutions may constitute rules that set up a legislative minimum for the crime of torture concerning its definition and sanctions. However, institutions impose the obligation to introduce the crime of torture into their laws as an obligation to adhere to the ECHR and CAT.[57]

Although the EU declares in its European Arrest Warrant that, in case of a serious and persistent breach by one of its member states, it permits suspension of the mechanisms of the arrest warrant, it does not explicitly permit the possibility of refusal to deliver an individual to a member state where there is serious concern that the person may be subject to ill-treatment. The refusal of delivery, according to Articles 3 and 4, is exhaustively listed as a mandatory and optional ground for the non-execution of the warrant. However, the list does not include words related to torture or other forms of ill-treatment. Nevertheless, when applying the aforementioned framework decision, it must always be read in accordance with the primary sources of the EU, which declare that fundamental legal principles and rights cannot be amended or avoided by either such a framework decision or by a decision by a judge who is applying such a framework. Therefore, when issuing a delivery of a person, both binding fundamental conventions: ECHR and Nice Charter must be abided by, which consequently means the application of Article 3 of the ECHR and Article 4 of the Nice Charter.[58]

As to Article 18 and Article 19 of the Charter, the right of asylum sets limits in situations of removal, expulsion, or extradition, as well as prohibits doing so when there is a serious risk of being subjected to the death penalty or ill-treatment. Emphasis is placed on the mechanism in member states when identifying the situation in the state to which a person would be sent. This refers to the number of criteria that aim to avoid the abuse of asylum claims to obtain protected status.

56 Art. 4 of the Charter of Fundamental Rights of the European Union reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

57 Kotzur, 2015, p. 448.

58 See Reports from the Commission on the European arrest warrant and the surrender procedures between Member States, 2005 and 2006.

However, the mechanism is affected by the Dublin II Regulation[59] and the relevant case-law of the CJEU, which will be elaborated on further.[60]

In relation to the external actions of the EU in 2001, the General Affairs Council developed the Guidelines for EU policy towards third countries on torture and other cruel, inhuman, or degrading treatment or punishment, complementary to the EU Guidelines on the death penalty of 1998.[61] These guidelines try to provide instructions to EU institutions and member states in combatting ill-treatment in third countries. In this respect, the document attempts to protect international human rights outside of the EU application sphere. The guidelines also concern the activity of working groups reporting and analysing whenever and wherever torture appears outside the borders of the EU. These groups have attempted to identify and apply possible preventive mechanisms. The objective is to apply effective measures that ensure the enforcement of the prohibition of torture, as well as victims' access to rehabilitation services and legal support. As stipulated in the document, these tools have political and financial natures. The text later did not divide the exact tools into two categories. It mentions dialogue, monitoring, assessment and reporting, demarches and statements, visits, trial observation, cooperation with multilateral bodies and mechanisms, and bilateral and multilateral cooperation, including financial support. Additionally, a related Council Regulation from 2016[62] stipulated the possibility of applying a trade block as a tool to prevent and combat ill-treatment in certain countries.[63]

■ *4.2 Case-Law of the CJEU*

The case-law of the CJEU is significant in interpreting the provisions for the prohibition of torture with regard to the policies of the EU, even though it is in line with the case-law of the ECtHR. The CJEU has declared and emphasized that all member states enjoy a rebuttable, not an absolute presumption of respect for fundamental rights. However, this assumption is rebutted by contrary evidence.[64] This applies to the delivery of asylum seekers from one member state to another.

59 See Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003.

60 Morgade-Gil, 2015, p. 437.

61 Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2019, Revision of the Guidelines.

62 See Regulation of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel inhuman or degrading treatment or punishment, 2016.

63 Picchi, 2017, p. 753.

64 See *N. S. v. Secretary of State for the Home Department* and *M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (CJEU Joined Cases C-411/10 and C- 493/10), Judgement, 21 December 2011.

Furthermore, in line with and under the influence of the ECtHR's case-law,[65] this has to be understood as prohibiting the delivery of the person to a country where there are beyond doubt problems in the asylum procedures, even if that seeker would be subject to the risk of ill-treatment. In this case, the state where the seeker is at the moment is obliged to consider the application of the person to avoid violating the applicant's human rights. Regarding the question of asylum applicants, the CJEU declared that the applicant might challenge the asylum decision only in the country of first entry into the EU, where there proved to be systemic deficiencies.[66] Furthermore, in cases of subsidiary protection, it is not necessary to prove that the person is specifically targeted in a country where proven threats to life exist, such as dictatorship regimes, countries at war, or regimes under some sort of terrorist group. Even the existence of such a threat in a country fulfils the requirement of high risk to the life of a civilian returning to that country.[67]

The right to subsidiary protection in relation to fear of ill-treatment was a concern in most cases before the CJEU. In the case of M'Bodj and Abdida in 2014, the CJEU stated that asylum seekers suffering from serious health issues could not invoke a right for asylum or subsidiary protection based on qualification directives, although one of the backgrounds for the mentioned protection was dealing with the real possibility of acts of ill-treatment in the country sent back to. However, the aforementioned cases were well supported by the argument that such protection was established to protect applicants from harm caused by humans. However, in the aforementioned cases, the applicants claimed that under the notion of ill-treatment, inadequate medical treatment also falls, which proved to be insufficient reasoning.[68]

As presented in the previous subchapter, when issuing the European Arrest Warrant, the issuing authorities must consider the circumstances of its execution. The notion of torture in relation to the aforementioned arrest warrant was interpreted in the cases of Aranyosi and Caldararu, where the CJEU elaborated on the borders of mutual trust and the duty of the executing authority to investigate due diligence. This case dealt with prison conditions in Hungary and Romania. In the judgement, the Court stipulated that the authority executing the warrant has the obligation to seek additional information, and there is a risk of violation of rights;

65 See *MSS v. Belgium and Greece*, (ECHR Application No. 30696/09), Judgement, 21 January 2011.

66 See *Shamso Abdullahi v. Bundesasylamt*, (CJEU Case C-394/12), Judgement, 10 December 2013.

67 See *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, (CJEU Case C-465/07), Judgement, 17 February 2009.

68 See *Mohamed M'Bodj v. État belge*; Case of Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, (CJEU Case C-542/13), Judgement, 18 December 2014.

it should postpone the execution. Additionally, the Court emphasized the absolute nature of the prohibition declared in Article 4 of the Charter.[69]

The CJEU, in its current case-law, has applied an interesting broadening of the protection of asylum seekers based on the non-refoulment principle in the case of *NS v. UK and Ireland* from the year 2018 concerning a national of Sri Lanka who arrived as a student to the United Kingdom in 2005. The applicant in the mentioned case claimed that he had been a member of the Liberation Tigers of Tamil Eelam and had been detained and tortured by the security forces of Sri Lanka, and there was a real risk of similar ill-treatment in the case of his return. Additionally, the applicant submitted medical evidence that he was suffering from post-traumatic stress disorder and depression based on the crimes committed against him in Sri Lanka. The claim was, therefore, supplemented by evidence that in the case of his return, he would not receive appropriate care for his illness. In the pertinent case, the CJEU ruled that a person who has, in the past, been tortured in his country of origin is eligible for the already mentioned subsidiary protection if he faces the real risk of being intentionally deprived of appropriate physical and psychological health care in the given country.[70]

5. Conclusions

At first glance, it appears that the right to life is the most significant human right that cannot be derogated from under any circumstances. However, the prohibition of torture in many aspects overrules the right to life in aspects of its nature—being non-derogable and absolute—and in aspects of its origin in natural law and human dignity. In connection with the prohibition of torture, two debatable issues have regularly emerged: the question of the proportionality between saving human life or living and obtaining a statement through coercive means to acquire the information necessary to save these lives and the question of the consent of the victim.

The right is absolute; therefore, it applies to all persons without distinction, regardless of whether they have committed or are committing any serious criminal activity and the danger they pose to the country in which they reside. The prohibition of torture and subjection to inhuman and degrading treatment and punishment is, although not explicitly, unconditionally connected with the impossibility of the state extraditing foreigners into its country of origin. The fact that this applies to all people, regardless of whether they are citizens of

69 *Pál Aranyosi and Robert Caldararu v. Generalstaatsanwaltschaft Bremen,* (CJEU Joined Cases C-404/15 and C-659/15), Judgement, 5 April 2016.

70 See *N. S. v. Secretary of State for the Home Department* and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* (CJEU Joined Cases C-411/10 and C- 493/10), Judgement, 21 December 2011.

European countries, is a breakthrough in the human rights protection system. Consequently, most cases concerning provisions prohibiting torture deal with the non-refoulment principle.

The assessment of the kind of act that constitutes a violation of the right not to be tortured and subjected to cruel, inhuman, or degrading treatment or punishment is relative and depends on all aspects of the case. Generally, the European court system (both the ECtHR and CJEU) is based on the premise that ill-treatment must reach a minimum level of severity. In asylum proceedings, proving this minimum level of severity is mainly the responsibility of the applicant or asylum seeker for international protection in the form of asylum or supplementary protection. Proving for this form of serious injustice must be aimed at proving that a specific individual is at risk, considering his and the situation's specifics, in which he is or may be located in case of a return to the country of origin. Above all, this applies to cases in which the situation in the country of origin cannot be further evaluated as a situation in which any individual may be exposed to a real threat of torture, cruel, inhuman, or degrading treatment or punishment.

European human rights treaties regulate the prohibition of torture and ill-treatment as human rights to be ensured and protected by the state, similar to the provisions of the Universal UN Convention, CAT. The documents issued by international bodies monitor compliance with human rights conventions and therefore provide guidelines for interpreting these fundamental rights, including the prohibition of torture and ill-treatment and the determination and fulfilment of the state's fundamental rights protection obligations. Today, as a result of the activities of international bodies, we have at our disposal a very rich body of European case-law on the conceptual aspects of torture and ill-treatment, the definition of perpetrators, the criteria for the classification and delimitation of behaviours falling within the scope of the prohibition, and the recognition of the state's obligations to protect fundamental rights. Of these, the European system of human rights protection, even in terms of the prohibition of torture, is the most developed and influential in the world.

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