Chapter 3

# Ill-Treatment Formulas Sensu Largo and the Jurisprudence of the ECtHR with Special Regard to Central Europe

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**Abstract**

This study is not intended to be purely descriptive; rather, it delves into the intricate standards established by the European Court of Human Rights (ECtHR) regarding the prohibition of torture and other forms of ill-treatment. These standards are well articulated and form a crucial foundation for human rights protection in Europe. In this paper, we will focus specifically on the prohibition of torture and related forms of ill-treatment as interpreted and applied in the case law of the ECtHR. Our analysis will encompass definitional challenges and will trace the significant legal advancements that have emerged from this case law, allowing us to identify areas of concern where Article 3 is being violated across various countries, along with the corresponding legal repercussions. We will begin by examining general statistics that illustrate the prevalence of Article 3 violations, followed by a detailed analysis of individual cases from Poland and Hungary that exemplify these violations. The discussion will culminate in an examination of two significant judgments related to Article 3 that address the handling of evidence in criminal proceedings. In these cases, the Court emphasises the necessity of excluding unlawfully obtained evidence, drawing on Article 3 in conjunction with Article 6 of the Convention. It is noteworthy that the standards for excluding evidence in criminal proceedings exhibit considerable variation across national legal systems and, in many instances, are not explicitly regulated. As such, the Court's guidelines serve as a vital reference point for both legal practitioners and policymakers. Finally, the discussion will conclude with insights that highlight the evolving trends in the case law of the ECtHR, particularly

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concerning Central and Eastern European countries. The interpretations and findings presented in this study carry significant implications for the ongoing struggle against torture and ill-treatment in the region.

**Keywords:** Prohibition of torture, ill-treatment, Article 3 ECHR, admissibility of evidence, violation of the ECHR

## 1. Introduction

The assessment of the Strasbourg standard under Article 3 of the ECHR in relation to selected Central European states is the focus of this study. It is, therefore, necessary to determine whether this standard remains in certain (and if so, in which) relations to the global standard and to the national standards. The first part of this analysis will define in general terms the boundaries of the Strasbourg Court set out in Article 3 of the ECHR. Then, based on selected, publicly available quantitative data, it will be verified whether there are differences in the ECtHR's claims on the prohibition of torture and other ill-treatment formulas in relation to, on the one hand, Central and Eastern European states and, on the other hand, Western European states. In order to provide an overview of the ECtHR jurisprudence in which violations of Article 3 have been set out and, at the same time, to illustrate a variety of issues that have reflected this Strasbourg standard, two countries have been selected for a closer analysis: Hungary and Poland. In the last section of the study, a further specific issue concerning the ill-treatment formulas in the framework of the admissibility of evidence in criminal proceedings has been researched. The considerations in this respect complement the findings of the second section, i.e. the quantitative analysis, and cover two judgements of the ECtHR in the cases Gäfgen v. Germany and Ćwik v. Poland. It must be emphasised that the concept of constitutive rules – rooted in the philosophy of law – is a basis for this part of the research[1].

The purpose of the detailed discussion is to indicate that the ECtHR seems to recognise a greater risk of violation, albeit already *in abstracto*, of the rights and freedoms covered by the ECHR regarding Central European countries than Western European countries. In this author's opinion, the presumption of a higher risk of violation of rights and freedoms is similar to a factual presumption based on empirical probability. As a consequence of such a presumption, it is possible to formulate a prudential hypothesis that the Strasbourg Court is prone to rule more firmly against Central European states than against Western European states – this tendency will be discussed based on the two cases in the last part of this study. Additionally, it seems that such a state of affairs might be perceived as a reflection of

1 On the concept of constitutive rules see: Janusz-Pohl, 2017.

the 'deterrence principle'[2] according to which 'deterrence measures' have to be contextually programmed.

The above-mentioned structure and scope of analysis hint at the methodology of this study, which is consequently based on a 'map and magnifying glass' mode. Therefore, most of the issues are sketched in general terms (Sections 1, 2, and 3), and only certain details – selected to illustrate a general pattern – are reviewed more closely (Section 4).

## 2. Prohibition of Torture and Other Forms of Ill-Treatment: Global Standard and Strasbourg Standard

'No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment' – although this canonical formula is historically driven, at the international level, it was codified only in the 20th century, and was subsequently

2 Ashworth, 1977, 723–735.

reproduced in many international conventions and domestic constitutions[3]. While not entering deeper into the historical grounds of this institution, it must be remembered that internationally this claim for the elimination of torture has been expressed primarily in the Universal Declaration of Human Rights (1948), and then proclaimed in 1975 by the UN Declaration against Torture, before finally being codified in the United Nations Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OJ of 2 December 1989)[4].

For this study, of core importance is the definition of torture provided by the UN convention; for now, it is the only legal definition of the term 'torture' proclaimed at the international level. Consequently, the term '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

3 Reconstructing national standard – one should observe that in the countries of Central and Eastern Europe, a prohibition on ill-treatments is expressed in all constitutions of the countries of the region. Nevertheless, the wording of this prohibition varies among them. For example: In Albania: Art. 25, Bosnia and Herzegovina: Art. II (3) (c), Bulgaria: Art. 29(1)), Croatia: "No one shall be subjected to any form of ill-treatment [...]" (Art. 23), Czech Republic: "No one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 7 para. 2 - Charter of Rights and Freedoms),Estonia: § 18; Latvia: "The State shall defend the honour and dignity of human beings. Torture or other cruel or degrading treatment of human dignity is prohibited. No one may be subjected to punishment cruel or degrading treatment of human dignity" (Art. 95), Georgia: "Torture, inhuman or cruel treatment or punishment or treatment and punishment that violates dignity or honour is prohibited" (Art. 17(2)), Macedonia: "All forms of torture are prohibited, inhuman or degrading treatment and the application of such punishments" (Art. 11, sentence 2), Romania: "No one shall be subjected to torture or any kind of punishment or inhuman or degrading treatment" (Art. 22(2)), Serbia: "No one shall be subjected to torture or inhuman or degrading treatment or punishment [...]" (Art. 25, sentence 2), Slovakia: "No one may be tortured or subjected to cruel, inhuman or degrading treatment or punishment" (Art. 16 para. 2), Slovenia: "No one shall be subjected to torture, inhuman or degrading punishment or treatment" (Art. 18(1)), Ukraine: "No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment" (Art. 28, sentence 2), Hungary: "No one shall be subjected to torture or to inhuman or degrading treatment, punishment or detention. Trafficking in human beings is prohibited." (Art. III (1)). For the full wording of the prohibition of torture in the national constitutions: see: Szmulik 2012. What must be emphasised is that the level of the protection of fundamental rights provided by the Constitution cannot be lower than the level of rights protection provided internationally in any case whatsoever, typically by the European Court of Human Rights. It is worth mentioning at this point that Protocol No. 15 to the ECHR Convention recently inserted the principle of subsidiarity into the Preamble to the ECHR. This principle imposes a shared responsibility between the States Parties and the Court as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto – see: Grzęda v. Poland [GC], 15 March 2022, no. *43572/18*.

4 Hereafter referred to as the 'UN Convention'.

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" (Article 1.1).

Researchers rightly note that while the axiological legitimacy and the 'absolute dimension' of the ban on torture nowadays does not raise any doubts, the entire prohibition encompassing not only torture but also inhumane or degrading treatments or punishments requires interpretation. It is, therefore, beyond doubt that the entire collection of behaviours falling within the scope of the prohibition of other forms of ill-treatment is hardly compatible with the essence of the punitive nature of the criminal justice and, particularly, with the use of a legally applicable system of coercive measures in criminal proceedings[5]. Without analysing the complexity of the prohibition of other forms of ill-treatment, it should be noted that the universal standard arising from Articles 1 and 15 of the UN Convention is the one which should have a limiting effect on the development of the European standard of a fair trial in terms of admission of evidence obtained as a result of all formulas of ill-treatment. In fact, the Strasbourg Court should interpret the ECHR with regard to universal standards due to the lack of a legal definition of torture in the Convention of the Council of Europe. Moreover, the ECtHR is entitled to assume a higher level of protection against ill-treatment than the one set out in the universal human rights protection system. As already mentioned, even a basic analysis of the ECtHR's judgments in terms of the state's positive obligations to ensure protection against ill-treatment leads to a conclusion that the relevant Strasbourg standard is currently more protective and, in the specific circumstances, applies directly to the acts of private individuals (see section 4) what is excluded *expressis verbis* by the cited Article 1 of the UN Convention[6].

Just to summarise, as is commonly known, the Strasbourg standard is granted by Article 3 of the ECHR[7], which states: *'No one shall be subjected to torture, inhuman or degrading treatment, or punishment'*. It is worth mentioning that the European standard is accompanied by the mechanism ensuring its implementation, namely a system of individual complaints to the ECtHR. Additionally, the European standard is supported by the mechanism based on the European Convention of 26 November 1987 for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and regarding the EU states by the Charter of Fundamental Rights that explicitly stipulates, in Article 4, the banning of ill-treatments: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*.

Given that this study is not of a descriptive nature and that the characteristic of the so-called European standard set by the ECtHR concerning the prohibition of torture and other ill-treatment formulas is well established, a deep analysis seems

5 See: Greer, 2015, 1–37; Mayerfeld, 2008, 109–128; Pattenden, 2006, 1–41; Thienel, 2006, 349–367.
6 Wąsek-Wiaderek. 2021, 343–374.
7 Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 and hereafter referred to as the 'Convention' or 'ECHR'.

to exceed the scope of this work.[8] However, selected elements will be briefly summarised. As indicated at the outset, the broad range of prohibited behaviours under Article 3 of the ECHR impacts the issue of determining the legal consequences of the ban's infringements concerning prohibited behaviours that are not acts of torture.

The initial remark when describing the ill-treatment formulas concerns the terminology. This study will operate on the notion of 'ill-treatments *sensu largo*' containing all unlawful infringements that interfere with human physical and psychological integrity[9]. In this view, ill-treatment is perceived as a consequence of an intentional act. Therefore, the ECtHR clarified that bodily injuries and physical and mental suffering experienced by an individual following an accident, which is merely the result of chance or negligent conduct, cannot be considered as the consequence of 'treatment' to which that individual has been 'subjected' within the meaning of Article 3.[10] Accordingly, the ill-treatment formulas *sensu largo* contain several forms of behaviours: torture, inhuman or degrading treatments, or inhuman or degrading punishment. It must be remembered that in order to determine whether a particular form of ill-treatment should be qualified as torture, the Court will have regard to the distinction embodied in Article 3 between torture (perceived as the qualified formula of ill-treatment) and other forms of inhuman or degrading treatment or punishment. Consequently, as can be read in the ECHR jurisprudence, the threshold of intensity must be observed. The distinction between torture, inhuman treatment or punishment, and degrading treatment or punishment derives principally from a difference in the intensity of the suffering inflicted (see section 4). Generally, it may be said that treatment is considered to be 'degrading' when it humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. What is stressed is that it may suffice that the victim is humiliated in their own eyes, even if not in the eyes of others[11].

But at the same time, in order for ill-treatment to fall within the scope of Article 3 it must attain a minimum threshold of severity, including a special stigma for deliberate inhuman treatment that causes very serious and cruel suffering. Nevertheless, Article 3 does not relate to all instances of ill-treatment[12][13]. Consequently, the assessment of that level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[14] Nonetheless, to de-

8 See: Nowicki, 2003, 98–135; Erdel & Bakirci, 2006, 207–229; Hassanová, 2023, 51–73.

9 Guide on Article 3 of the European Convention on Human Rights, First edition August 2022, available at: Guide on Article 3 - Prohibition of torture (coe.int)

10 Nicolae Virgiliu Tănase v. Romania [GC], 25 June 2019, no. 41720/13.

11 Ireland v. the United Kingdom, 18 January 1978, no. 25; Selmouni v. France [GC], 1999 no. 25803/94; Ilaşcu and Others v. Moldova and Russia [GC], 2004 no. 48787/99, ECHR 2004/VII.

12 Savran v. Denmark, [GC], 7 December 2021, no. 57467/15.

13 See: Ast, 2011, pp. 1393–1406.

14 Muršić v. Croatia [GC], 2016 no. 7334/13.

termine whether the threshold of severity has been reached, subsequent factors must be reconsidered: (a) the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3; (b) the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and (c) whether the victim is in a vulnerable situation[15]. Consequently, these three elements must reflect subjective and objective features of the alleged behaviours.

As mentioned before, in addition to the severity of the treatment, there is a purposive element, as recognised in the Universal Convention against torture, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information or a confession, inflicting punishment or intimidation. It can be observed, therefore, that the ECtHR has not ruled out that a threat of torture can also amount to torture, as the nature of torture covers both physical pain and mental suffering (see consideration in section 4). Nevertheless, in describing what the threat of torture means, it is necessary to refer to the notion of mental torture, for instance, the fear of physical torture itself. However, it should be stressed that the classification of whether a given threat of physical torture amounts to psychological torture or to inhuman or degrading treatment depends on the circumstances of a given case and cannot be based on isolated fact, so it must be decided *in concreto* (case by case).[16] The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision.

The last section of this work will inquire about the consequences of the breach of the ban on ill treatments when performing evidentiary actions in criminal trials. The perspective for this part of the research is linked with the concept of constitutive rules, i.e. the rules of validity for legal actions – a very innovative approach that could be seen as a comprehensive substitute for the exclusionary rule theory[17]. Although, as a general consideration in this part, it should be underlined that the prohibition of ill-treatments is absolute in the sense that there is no derogation of it in terms of Article 15 § 2 of the ECHR – even in the case of a public emergency threatening the life of the nation or in the most difficult circumstances, including the fight against terrorism and organised crime or influx of migrants and asylum-seekers, irrespective of the conduct of the person concerned or the nature of the

15 Khlaifia and Others v. Italy [GC], 2016, no. 16483/12.

16 See: Gäfgen v. Germany [GC], 2010 no. 22978/05; Selmouni v. France [GC], 1999, no. 25308/94; Salman v. Turkey [GC], 2000, no. 21986/93; Al Nashiri v. Poland, 24 July 2014, no. 28761/11; Petrosyan v. Azerbaijan, 4 November 2021, no. 32427/16.

17 As a first scholar on this path: Mittag, 2006, 637–645.

alleged offence committed by such a person[18]. As mentioned previously, however, there are some limits to this ban – especially when it comes to criminal justice purposes and the consequences of evidentiary actions performed with the breach of Article 3 of the ECHR in the light of the fairness of the whole procedure[19].

Additionally, the ban on ill-treatment formulas in criminal justice is associated with a very specific perception of the burden of proof in this sphere that is underlined by the guarantees-oriented bias. Following the jurisprudence of the ECtHR, the principle of *affirmanti incumbit probatio* (who alleges something must prove that allegation) is not uniformly accepted. Moreover, a strong presumption of fact is accepted. As a result, the burden of proof is reversed. When the alleged events lie wholly, or in large part, within the exclusive knowledge of the authorities (custodial situations, interrogations), strong presumptions of fact will arise in respect of i.e. injuries occurring during short-term deprivation of liberty. If the accused imputes that they were subject to ill-treatment by the criminal justice bodies, i.e. during interrogation, only a certain level of probability is required to prove that such an event occurred. Due to this interpretation, and as a result of factual presumption, the burden of proof of the legality of legal actions exercised with/against the accused is reversed upon the law enforcement authorities. The burden of proof is then on the government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim.[20]

In the jurisprudence of the ECtHR, based on this reverse burden of proof, there are more abstract obligations imposed on the states, i.e. primarily, negative obligation and two positive obligations. The former demands States to refrain from inflicting serious harm on persons within their jurisdiction.[21] The latter comprises two more detailed obligations. The state has a duty: a) to put in place a legislative and regulatory framework of protection; and b) to take operational measures to protect specific individuals against the risk of treatment contrary to that provision (under specific circumstances) and to investigate arguable claims concerning the infliction of such treatment effectively.[22] As a consequence, the prohibition of torture, inhuman or degrading treatment or punishment, inflicted or facilitated by State agents entails the duty to investigate allegations of torture, inhuman or degrading treatment or punishment. However, as mentioned before, the ECtHR jurisprudence covers the protection from torture, inhuman or degrading treatment or punishment administered

18 A. and others v. the United Kingdom [GC], 2009, no. 3455/05; Mocanu and Others v. Romania [GC], 2014, no. 10865/09; El-Masri v. the former Yugoslav Republic of Macedonia [GC], 2012, no. 39630/09; Ramirez Sanchez v. France [GC], 2006, no. 59450/00; Gäfgen v. Germany 2010, no. 22978/05; Labita, V. v. the United Kingdom [GC], 2006, no. 24888/94; Saadi v. Italy [GC], 2008, no. 37201/06.

19 Greer, 2015, pp. 1–37; Mayerfeld, 2008, 109–128; Pattenden, 2006; Hassanová, 2023, 51–73; Thienel, 2006, pp. 349–367; Ashworth, 1977, pp. 723–735; Mittag, 2006, pp. 637–645.

20 See: Salman v. Turkey [GC], 2000, no. 21986/93; Bouyid v. Belgium [GC], 2015, no. 23380/09.

21 See: Hristozo v and Others v. Bulgaria, 2012, nos. 47039/11 and 358/12.

22 See: X and Others v. Bulgaria [GC], 2 February 2021, no.22457/16.

also by non-State actors (see Section 4). States' obligations remain in line with the content of the deterrence principle. In this sense, the state's duty also includes actions oriented to the future, and consequently, the decisions of the Court are directed towards the effects designed to safeguard rights and freedoms in the future.

## 3. Central and Eastern Europe and Western Europe – Statistical Bias

The purpose of the above research is to describe the empirical tendencies of the ECtHR jurisprudence versus Central (and Eastern) European states and Western European states. The analysis is based on open data available on the website of the ECtHR. Two very insightful collections were identified. The first group covers national reports available at www.echr.coe.int (European Court of Human Rights, March 2023)[23]. These reports examine various aspects of the ECtHR jurisprudence during the whole 25-year perspective.

The second group contains the full statistical information about violations of the ECHR during the entire period of the functioning of the ECtHR (1959-2022), connected with 48 States under its jurisdiction (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Rumania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom).

Based on the first collection of data (national reports), a few elements were selected: 1) the rate of judgments against a country, 2) the rate of violation of Article 3 of the ECHR, and 3) the rate of violation of Article 6 of the ECHR and the nature of the violation under the fair trial standard. At the time of the analysis, data was available for the following Central and Eastern European countries: Albania, Armenia, Croatia, Czech Republic, Georgia, Greece, Hungary; and the following Western European countries: France, Germany, and Italy.

Regarding Hungary, in almost 94% of the judgments delivered in the described period, the Court has given judgment against the State, finding at least one violation of the Convention; over half of the findings of a violation concerned Article 6 (right to a fair trial), referring mainly to the length of the proceedings. Prohibition of torture and inhuman or degrading treatment amounted to 7.42% of all types of ECHR violations.

23 The ECHR in Facts & Figures (coe.int) The ECtHR's series of documents provides a global overview of the Court's work and the extent to which its judgments have an impact in each Member State.

In more than 80% of the judgments delivered concerning Albania, the Court has ruled against the State, finding at least one violation of the Convention. Almost half of the findings of a violation concerned Article 6 (right to a fair trial), relating mainly to the unfairness of the proceedings and failure to enforce final judicial decisions. The breaches of prohibition of torture and inhuman or degrading treatment were confirmed in 5.59% of cases.

Similarly, in about 81% of the judgments delivered by the ECtHR concerning the Czech Republic, judgments were given against the State by finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) amounted to 2.42% of the cases. Over 61% of the findings of a violation concerned Article 6. A further 13.22% concerned a violation of Article 5 (right to liberty and security).

In three-quarters of the judgments delivered concerning Georgia, the Court adjudicated against the State, finding at least one violation of the Convention. The right to a fair trial (Article 6) was jeopardised in 25.87% of the cases, and the prohibition of torture and inhuman or degrading treatment (Article 3) in 24.88%.

In almost 90% of the judgments delivered concerning Greece, the Court has given judgment against the State, finding at least one violation of the Convention, including the right to a fair trial (Article 6) in 50.32% of them and the prohibition of torture and inhuman or degrading treatment (Article 3) in 9.70% of all cases. In over 90% of the judgments delivered concerning Armenia, the Court has ruled against the State, finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) was found in 12.27%, and the right to a fair trial (Article 6) was confirmed in 23.47% of all cases. In about 80% of the judgments delivered concerning Croatia, the Court has adjudicated against the State, finding at least one violation of the Convention, including the prohibition of torture and inhuman or degrading treatment (Article 3) in 6.61% and violation of a right to a fair trial (Article 6) in 49.22% of cases.

This contrasts with the data on Western European countries. In more than 70% of the judgments delivered concerning France, the Court has ruled against the State, finding at least one violation of the Convention. Over 60% of violations found concerned Article 6 (right to a fair hearing), specifically the length or fairness of proceedings. Prohibition of torture and inhuman or degrading treatment (Article 3) was found only in 1.20% of the cases. Out of the total number of judgments concerning Germany, the Court found at least one violation of the Convention in over half of the cases and held the State responsible. About half of the violations concerned Article 6, mainly the length of proceedings, accounting for some 40% of the violations found by the Court. Prohibition of torture and inhuman or degrading treatment (Article 3) amounted to 2.31%. In more than 70% of the judgments concerning Italy, the Court has ruled against the State, finding at least one violation of the Convention, including over 60% of violations of Article 6 (right to a fair hearing), specifically the length or fairness of proceedings; violations of Article 3 (prohibition of torture and inhuman or degrading treatment) were found in 2.36% of cases.

In over 30% of the cases concerning Denmark, the Court gave a judgment against the State, finding at least one violation of the Convention. Nearly 40% of the violations concerned Article 6, and almost all of those are related to the excessive length of proceedings. Breach of prohibition of torture and inhuman or degrading treatment (Article 3) was established in 4% of cases.

In more than 62% of the judgments concerning Ireland, the Court has adjudicated against the State, finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) remained at 2.50% of ECHR convention infringements. In almost three-quarters of all its judgments concerning Finland, the Court found against the State for at least one violation of the Convention. Virtually 60% of the findings of a violation concerned Article 6 (right to a fair trial), mainly with regard to length of proceedings. The second most common violation of the Convention found by the Court concerned Article 8 (right to respect for private and family life at almost 15%). Violation of prohibition of torture and inhuman or degrading treatment (Article 3) remained at the level of 1.20%.

Referring to the second type of data titled 'Violations by Articles and States', it may be seen that during the given period of 1958-2022, violations of the prohibition of torture were established 188 times, and violations of the prohibition of other forms of ill-treatment occurred 3,135 times. The data presented in the table is automatically generated based on HUDOC, the official database of the ECtHR.[24]

Prohibition of torture was violated in cases versus Albania (1), Armenia (1), Austria (1), Azerbaijan (3), Belgium (1), Bosnia & Herzegovina (1), Bulgaria (4), France (2), Georgia (1), Italy (9), Moldova (9), Netherlands (1), North Macedonia (3), Poland (2), Romania (2), the Russian Federation (89), Slovakia (1), Sweden (1), Turkey (31) Ukraine (22), and the United Kingdom (2). However, the prohibition of another form of ill-treatment was found more often – in cases against Albania (4), Armenia (22), Austria (4), Azerbaijan (30), Belgium (29), Bosnia & Herzegovina (2), Bulgaria (91), Croatia (20), Cyprus (10), the Czech Republic (2), Denmark (1), Estonia (8), Finland (2), France (47), Georgia (30), Germany (5), Greece (125), Hungary (46), Ireland (1), Italy (36), Latvia (19), Lithuania (33), Malta (4), Moldova (114), Montenegro (4), Netherlands (10), North Macedonia (6), Poland (67), Portugal (4), Romania (380), the Russian Federation (1190), Serbia (7), Slovakia (6), Slovenia (21), Spain (1), Sweden (4), Switzerland (2), Turkey (348), Ukraine (383), and the United Kingdom (17).

Consequently, cases against the Russian Federation, Romania, Turkey, and Ukraine amounted to 2,301 cases out of a total number of 3,135 cases based on the violation of Article 3 when referring to the infringements of the prohibition of other forms of ill-treatment. When analysing the given data, it should be taken into account that the countries listed above accepted the jurisdiction of the Strasbourg Court at different periods of time, and with a certain simplification it can be considered that the Western European countries ratified the ECHR earlier than the

24 Violations by Article & by State (coe.int)

Central and Eastern European countries. Analysing the figures, it is clear that the empirical data supports the conclusion of a quantitative trend as regards violations of Article 3 of the ECHR. Based on the quantitative data, as indicated in the introduction, it should be pointed out that the Court, when adjudicating, considerably more often confirmed violations of Article 3 of the Convention in the case of Central and Eastern European States than in the case of Western European States. With a certain degree of caution, therefore, it may be concluded that this state of affairs results in a sort of presumption of a higher level of threat to the rights and freedoms protected by the ECHR when the Court rules on violations of the Convention regarding Central and Eastern European states. This could be observed as a symptom of the deterrence principle and, at the same time, as a factual presumption based on a probabilistic factor, i.e. the frequency of previous violations.[25]

## 4. Types of Cases: Poland and Hungary – Description

For a subsequent analysis two countries were selected, which were regarded as representative of Central Europe. Moreover, both countries have similar quantitative data in terms of judgment rate against the state and Article 3 violations. In the case of Poland, this amounts to two breaches of the prohibition of torture and 67 infringements of the prohibition of other forms of ill-treatment; in the case of Hungary, there were no violations of the prohibition of torture; however, in 47 cases there were breaches of other forms of ill-treatment. Accordingly, it was decided to compare the nature of the cases in which the Court had found a violation of Article 3, most often, we may add, as one of a number of other violations of the Convention. The examination of the cases allows the following areas to be selected:

1) Asylum cases, including push-back cases (Poland, Hungary);
2) Enforcement procedures – especially the condition of the imprisonment's execution (Poland, Hungary);
3) Application of preventive measures, especially detentions on remand and pretrial detentions (Poland, Hungary);
4) Punishment of life imprisonment without parole (Hungary);
5) Abortion rights (Poland);
6) Evidentiary issues (Poland, Hungary).

These six areas are further divided into two groups. The first group covers issues that concern both Hungary and Poland. The second group contains issues that concern only one of the countries. The latter area can be considered as a domestic specificity – with the exception, however, that while the issue of restrictive abortion

25 Janusz-Pohl. 2020, 37 et seq.

law has remained only a Polish domain, life imprisonment without parole has been the subject of study only in relation to Hungary, although it is also becoming a Polish focus. The Polish legislator recently introduced a similar institution into the Criminal Code.[26]

The first group of cases consists of abusive expulsions and the violation of asylum law. When it comes to Hungary, the so-called 'summary expulsions' were analysed in the case of Shahzad v. Hungary (8 July 2021, no. 12635/17). The applicant, a Pakistani national, had entered from Serbia to Hungary in 2016 with a group and had been subject to subsequent summary expulsion by the police. The Court stated the violation of Article 3 in conjunction with Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of foreigners) and Art. 13 (right to an effective remedy). The Court found, in particular, that the applicant had been subject to a 'collective' expulsion as his individual situation had not been ascertained by the authorities who had not provided genuine and effective ways to enter Hungary, and the applicant's removal had not been a result of his conduct.

Another case of the violation of Article 3 regarding asylum cases refers to the case of Ilias and Ahmed v. Hungry and the Case of R.R. and Others v. Hungary. In the former, the case of Ilias and Ahmed (21 November 2019, no. 47287/15), the applicants, two asylum-seekers from Bangladesh, had spent 23 days in a border transit zone in Hungary before being expelled to Serbia after the rejection of their asylum applications. The Court ruled that the Hungarian authorities had failed in their obligation to assess the risks that the applicants might have been barred from the asylum procedure in Serbia or been expelled from country to country and sent back to Greece, where living conditions in the refugee camps had already been found incompatible with the Convention. Moreover, the court had decided on the violation of Article 3 of the ECHR concerning the applicant's expulsion to Serbia, but at the same time, no violation of Art. 3 concerning living conditions in the transit zone had been found. Additionally, the case of R.R. and Others (2 March 2021, no. 36037/17) concerned the confinement of the applicants, a family of asylum-seekers, in the Röszke transit zone near the Serbian border in April-August 2017. In this case, violations of Article 3 in conjunction with Article 5 § 1 (right to liberty and security) and Article 5 § 4 (lawfulness of detention) were established. The Court found, in particular, that the lack of food provided to R.R. and the conditions of stay of the other applicants (a pregnant woman and children) had led to a violation of Article 3. It also found that the applicants' stay in the transit zone had amounted to a *de facto* deprivation

26 As of October 1, 2023. The court, when imposing a sentence of life imprisonment or imprisonment for a term of not less than 20 years for an act committed by the offender already after a final conviction for a crime against life and health, freedom, sexual freedom, public security, or a crime of a terrorist nature, and combining it with the prohibition of conditional release. The same is to be the case when imposing life imprisonment (para. 4 of Article 77 of the Penal Code) if the court finds that the nature and circumstances of the act and the personal characteristics of the offender indicate that their remaining at liberty will cause a permanent danger to the life, health, freedom, or sexual freedom of others. See: Hermeliński & Nita-Światłowska 2018.

of liberty and that the absence of any formal decision of the authorities and any proceedings by which the lawfulness of their detention could have been decided speedily by a court had led to violations of Article 5.

Similarly, asylum cases concerning Poland were adjudicated by the ECtHR. There is a resemblance between the case of Shahzad v. Hungary and the case of D.A. and Others v. Poland, 8 July 2021, 51246/17. The Court confirmed the violation of Article 3 as far as the applicants were being denied access to the asylum procedure and exposed to a risk of inhuman and degrading treatment and torture in Syria and that there had been violations of Article 13 in conjunction with Article 4 of Protocol No. 4 to the Convention. The Court held that it is not necessary to examine whether there had been a violation of Article 3 of the ECHR on account of the applicants' treatment by the Polish authorities during border checks. In the court's opinion, Poland had failed to fulfil its obligations under art. 34 ECHR and, moreover, continued to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to remove the applicants to Belarus – if and when they present themselves at the Polish border.

Another famous asylum seekers' case refers to MK and the Others v. Poland 23 July 2020, nos. 40503/17, 42902/17 and 43643/17. This case concerned the repeated refusal of Polish border guards on the Belarus border to admit the applicants, who had come from Chechnya and had asked for international protection. The applicants alleged that the Polish authorities had repeatedly denied them the possibility of lodging an application for international protection in breach of Article 3 of the ECHR. They also invoked Article 4 of Protocol No. 4 to the Convention, alleging that their situation had not been reviewed individually and that they were victims of a general policy that was followed by the Polish authorities with the aim of reducing the number of asylum applications registered in Poland. The applicants stated that under Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention, lodging an appeal against a decision denying someone entry into Poland did not constitute an effective remedy as it would not be examined quickly enough, would have no suspensive effect, and would not be examined by an independent body. Moreover, the applicants complained that the Polish authorities had not complied with the interim measures granted to them by the Court, in breach of Article 34 of the Convention[27].

The second collection of cases connected both with Hungary and Poland have references to the inhuman and degrading punishment in cases concerning a situation of widespread prison overcrowding. These cases present a systemic lack of protection during enforcement procedures in criminal cases.

27 A different case, but worth noting, is Liu v. Poland, 6 October 2022, no. 37610/18. The applicant complained that his extradition to China would violate Article 3 and Article 6 § 1 of the Convention as – if extradited and tried – he would be at risk of torture and inhuman and degrading treatment; moreover, he would be denied a fair trial. He also complained under Article 5 § 1 that his detention pending extradition was unreasonably long and, therefore, arbitrary.

The Hungarian example is linked with the case of Varga and Others (10 June 2015, no. 14097/12, 45135/12, 73712/12, 43001/12, 34001/13, 44055/13, 64586/13). The applicants alleged that their respective conditions of detention were or had been inhuman and degrading and that Hungarian law had provided no effective remedy to enable them to complain of the breach of their rights in this respect. The Court found that the applicants' conditions of detention amounted to degrading treatment and that they had no effective remedy to complain of that treatment. Nevertheless, the violations found in the prison overcrowding cases had originated in a general dysfunction in the Hungarian prison system, justifying the application of the pilot judgment procedure. The Court requested the Hungarian authorities to take action to resolve that issue. In the given cases, violations of Article 3 in conjunction with Article 13 (right to an effective remedy) were found.

On the other hand, in Polish cases, there were structural problems of prisoners, i.e. Orchowski v. Poland, no. 17885/04 and Sikorski v. Poland 22.10.2009 no. 17599/05, Szafrański v. Poland, 15 Dec 2015, no. 17249/12 (overcrowding in Polish prison, poor sanitary conditions). An issue of a paraplegic man suffering from severe chronic pain and detained for over two and a half years without adequate medication was adjudicated in case Kupczak v. Poland 25.01.2011 no. 2627/09 (access to medical procedures). In this collection, there are cases concerning a regime in Polish prisons for detainees who are classified as dangerous (Piechowicz v. Poland, 17 April 2012, no. 14943/07 and Horych v. Poland 17.04.2012 no. 13621/08).

Another layer of problems regarding guarantees for persons deprived of their liberty consists of structural problems in pre-trail detention in Poland[28]. An exemplary case in this group is Kuchta and Miętal v. Poland, 2 September 2021, no. 76813/16. Ill-treatment of the applicants during their arrest by police and the allegedly ineffective investigation into the circumstances surrounding the use of force against them were inquired by the ECtHR. The Court considered that the investigation was not carried out with due diligence. Against this background, given the lack of a thorough and effective investigation into the applicants' arguable claim that police officers had beaten them, the Court found that there has been a violation of Article 3. Regarding recourse to physical force during an arrest, the Court reiterated

28 The breach of Article 3 when it comes to inhuman or degrading treatment or punishment related to the short-term detention were confirmed by the Court in many cases against Poland, i.e. Kanciał v. Poland, 23 May 2019, no. 37023/13. The case concerned the applicant's allegations of police brutality during a raid by law-enforcement officers, in particular, the use of an electrical discharge weapon. The Government did not advance any additional argument that would allow the Court to establish that the applicant's conduct was of such character as to justify recourse to the considerable physical force that, judging by the relative seriousness of their injuries, must have been employed by the police. Similarly, in Dzwonkowski v. Poland, 12 April 2007, no. 46702/99. In the case of Iwańczuk v Poland, 2001, no. 15196/94, the applicant was subjected to a strip search in an inappropriate manner, such as the making of humiliating remarks by the prison guards; the courts did not act with expediency in the proceedings in which the conditions of the bail were determined and, consequently, his detention after the decision to release him was arbitrarily prolonged, and the criminal proceedings in his case exceeded a reasonable time.

that Article 3 does not prohibit the use of force for a lawful arrest. However, such force may be used only if indispensable and must not be excessive.[29] More importantly, the burden of proof in such a situation is reversed,[30] and the government must prove that the arrest was performed legally and the arrestee's rights protected under the ECHR were assured.

In a subsequent group of cases in which violations of Article 3 ECHR have been found, the ill-treatment formulas encompass inhuman or degrading punishments linked with the issue of a life sentence without parole. Cases versus Hungary fall into this category. Subsequently, examples include the case of László Magyar v. Hungary (20 May 2014) no. 73593/10. Having been found guilty of murder, armed robbery, and several other offences, László Magyar complained to the ECHR about the irreducibility of his life sentence without parole. The Court accepted that persons found guilty of a serious crime could be sentenced to imprisonment for an indefinite period where necessary to protect the population. However, the Court confirmed that Article 3 should be interpreted as requiring the reducibility of life sentences. The Court considered that this case pointed to a structural problem liable to give rise to similar applications and that Hungary should reform its life sentence review system. Consequently, violations of Article 3 and Article 6 § 1 were stated. Similarly, the court decided in the case of T.P. and A.T. (4 October 2016) no. 37871/14 and no 73986/14. The applicants were two prisoners sentenced to life imprisonment without parole. The case concerned new legislative provisions introduced in Hungary in 2015 to review life sentences. The Court deemed as overly long a waiting period of 40 years before a prisoner could begin to hope for a pardon, violating the prohibition of inhuman and degrading treatment and punishment. In this ruling, as in those discussed above, the Strasbourg Court found that life imprisonment violates the guarantee of Article 3 if the convicted person has no realistic possibility of applying for conditional early release, at the most, after serving 25 years in prison. The Strasbourg court reiterated the position that, from the perspective of the guarantee under Article 3, an act of presidential clemency is not sufficient because, due to its discretionary nature, the granting of release in such a case is not subject to any objective criteria or prerequisites depending on the convicted person's behaviour.[31]

The group of cases connected with the violation of Article 3 of the ECHR reflecting a severe abortion law are exclusively '"Polish cases'.[32] The most famous case is R.R. v. Poland, 26 May 2011, no. 27617/04.[33] As a result of the procrastination of the health professionals in providing access to genetic tests, the applicant, who was pregnant, had had to endure six weeks of painful uncertainty concerning the health of her fetus and, when she eventually obtained the results of the tests, it was

29 See: Ivan Vasilev v. Bulgaria, 12, April, 2007, no. 48130/90.

30 See also: Rehbock v. Slovenia, 28 November 2000, no. 29462/95 and Boris Kostadinov v. Bulgaria, 21 January 2016, no. 61701/11.

31 See: Hermeliński & Nita-Światłowska, 2018.

32 For comments on abortion law in Poland see: Janusz-Pohl & Kowalewska, 2023.

33 See also the case Tysiąc v. Poland, no. 5410/03.

already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion. It was held that Poland must ensure women's access to legal abortion and ensure that the exercise of this right will not be jeopardised by medical professional refusals concerning the 'conscience clause'. In this judgment, the court issued its landmark decision stating that Poland violated Article 3 in conjunction with Article 8 (the right to respect for private life). Another example highlighting doubts about the interpretation of the restrictive right to legal abortion in the Polish system is the case of P. and S. v. Poland, 2012 no. 57375/08, which concerned the difficulties encountered by a teenage girl who had become pregnant as a result of rape in obtaining access to an abortion, in particular, due to the lack of a clear legal framework, procrastination of medical staff and also as a result of harassment. It must be mentioned that already the very unliberal law on abortion has been limited by the judgment of the Constitutional Court issued in 2020[34]. Problems related to abortion rights in Poland concern the collection of cases pending before the ECtHR, including K.B. v. Poland and 3 other applications (nos. 1819/21, 3682/21, 4957/21, 6217/21), K.C. v. Poland and 3 other applications (nos. 3639/21, 4188/21, 5876/21, 6030/21). Over 1,000 similar applications concerning the threat to abortion rights have been received by the Court.

Finally, the group of cases connected with evidentiary actions and the breach of Article 3 will be discussed. This type of case was more often adjudicated versus Poland than Hungary. Even though, in respect to Hungary, there is the case of R.S. v Hungary, 2 July 2019, no. 65290/14. The applicant had been stopped in his car and had refused to take a breath sobriety test. He had been forced to give a urine sample by catheter because he had been suspected of driving under the influence of alcohol or drugs. The Court held that the authorities had subjected the applicant to grave interference with his physical and mental integrity against his will, as the measure in question had not been necessary, since a blood sample had also been taken to establish whether he had been inebriated, and as a consequence the violation of the prohibition of inhuman or degrading treatment, through the application non-proportional methods, was found by the Court.

As mentioned before, Al. Nashir v Poland, 24 July 2014, no. 28761/11 and Ćwik v. Poland, 5 November 2020, no. 31454/10 are perceived as landmark cases capturing the link between the breach of Article 3 and the evidentiary actions. It is worth noting that in the first case, applicant Al. Nashir had enabled the CIA to detain him at the Stare Kiejkuty detention facility, thereby allowing the CIA to subject him to treatment that had amounted to torture, incommunicado detention, and deprivation of any access to, or contact with his family. The court has found that during his detention in Poland, the applicant was subjected by the CIA to treatment which amounted to torture within the meaning of Article 3 and that this occurred in the course of interrogations with the use of techniques specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects.

34 OTK ZU 2021, item 4.

Furthermore, as can be seen from the transcript of the applicant's recollection of what he endured in CIA custody, as recounted at a hearing before the Combatant Status Review Tribunal, which took place in Guantánamo Bay on 14 March 2007, he confirmed before the US authorities that he had been tortured into confessing. He also stated that he had made up stories during the torture in order to stop it, and that he had been tortured for "the last five years". In the case of Ćwik v. Poland , the Strasburg Court analysed the admissibility of evidence obtained through the ill-treatment of a third party by private individuals, without the involvement or acquiescence of State actors. The Court argued that the protection against conduct proscribed under Article 3 of the ECHR is a positive obligation on the state, even when inflicted by private individuals. The case of Ćwik v. Poland will be discussed in Section 4 of this work and juxtaposed with the cornerstone case in the frame of admissibility of evidence: the case of Gäfgen v. Germany.

## 5. Case study: Gäfgen v. Germany and Ćwik v. Poland: Article 3 of the ECHR as a Source of Constitutive Rules for Evidentiary Actions – Discussion

As Lord Bingham observed in A and others v. United Kingdom [GC], 2009 no. 3455/05, § 52, torture evidence is excluded because it is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."

Regardless of the pertinence of this statement, the mere recognition of the inadmissibility of such evidence does not prejudge the question of the fairness of the entire proceedings. As a rule, the key in this regard is the response to the question of what are implications of evidence obtained in violation of Article 3 of the ECHR on the fairness of the trial. The ECtHR addressed the very same question in both cases: Gäfgen v. Germany and Ćwik v. Poland. These cases differed significantly from each other, both in terms of the facts and the rulings made. In Gäfgen v. Germany, a violation of Article 3 was committed by the trial authorities in connection with the act of interrogating the suspect. Still, the ECtHR found that this defective illegal procedural act was validated in the subsequent course of the proceedings, and the proceedings as a whole met the standard of fairness. Meanwhile, in Ćwik v. Poland, the violation of Article 3 concerned the conduct of private individuals, and took place outside of the criminal proceedings and not for its purposes. Nevertheless, in this second case, the Court found that there was a violation of the right to a fair trial. In these cases two issues are essential: a) verification of the legality (admissibility) of evidence gathered in violation of the law, and b) the impact of such evidence on the question of the fairness of the proceedings and, consequently, the outcome of the entire case.

In both cases the Court found a violation of Article 3 of the ECHR and stated that this had an effect on the legality of evidence. Consequently Article 3 of the ECHR should be challenged as a source for constitutive rules determining the validity of evidence.

As mentioned before, the first attempt in legal sciences to use the concept of constitutive rules for the interpretation of Article 3 of the ECHR was made in the example of the case of Gäfgen v. Germany, and M. Mittag has performed an in-depth study in this regard. This author has operated on the basic version of the constitutive rules concept by Searle. His conclusions have shown the potential of the concept but also its certain shortcomings. Meanwhile, in the last 20 years, especially from 1996 onwards, the idea of constitutive rules has been interpreted by Polish scholars. However, the purpose of this interpretation was to adapt the idea of constitutive rules to the demands of legal thinking. S. Czepita,[35] a Polish legal theoretician, formulated additional assumptions that enabled its application to private civil law considerations. In turn, the author of the present study has used this transformed concept for the interpretation of legal actions in the criminal proceedings.[36] These new optics enable a return to the considerations of M. Mittag. Naturally, a comprehensive presentation of this issue goes beyond the scope of this study. At the same time, in order to provide an outline of the conclusions – at least in a tentative way – it is necessary to examine the foundations of the concept of constitutive rules, briefly reporting on its evolution. What must be emphasised is a core assumption for this concept, which states that, undoubtedly, legal action is a pure example of conventional legal acts. At the same time, criminal procedure should be perceived as a sequence of legal actions. Consequently, the constitutive rules should be attributed to each legal action in this sequence.

Let us put the spotlight on the core acknowledgements.[37] It should be remembered that Searle's approach refers to the conception of performative utterances developed by Austin, specifically to locutionary, illocutionary and perlocutionary acts.[38] An illocutionary act is an intentional act performed by an individual uttering a performative sentence (locutionary act), the purpose of which is to create a new state of affairs unattainable in any other way.[39] Legal actions are an example of illocutionary acts. In the general theory of law, legal actions are also denominated as formalised conventional acts (actions). It means the set of specific rules attached to the given types of legal action could be distinguished.[40] These rules are divided by scholars into two groups: 1. a) constitutive rules and b) regulative rules (i.e. Searle); or 2. a) rules of conventionalisation and b) rules of formalisation (i.e. Czepita).

35 Cf. Czepita, 2016, pp. 138–139; Czepita, 1996, p. 146 *et seq*.
36 Janusz-Pohl, 2017a, pp. 23–24. and the literature referred therein; Janusz-Pohl, 2017b.
37 Description based on Janusz-Pohl, 2017a, pp. 23–24. and the literature referred therein; Janusz-Pohl, 2017b.
38 Austin, 1962, p. 311 *et seq*.
39 For more see: Janusz-Pohl, 2017a, 25.
40 See Janusz-Pohl 2017a, 26 *et seq*.; Janusz-Pohl 2017b.

Searle relied on performative utterances (i.e. illocutionary acts, distinguished by Austin), formulating an independent conception of constitutive and regulative rules. This conception distinguishes speech acts as uttering (muscle movements), propositional, and illocutionary acts. Its crux is the distinction of the so-called elementary illocutionary act.[41] Searle stressed that: "In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by getting the hearer to recognise his [sic] intention to produce that effect".[42] Furthermore, component acts can be distinguished in any act, not only intentional. A component of a given act is held to mean an act, the performance of which is a necessary albeit insufficient condition of performing a given act. A component of a given act is renowned based on another theoretical conception as the material substrate of a conventional act. In Searle's conception, it is crucial to observe that illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules.[43] As regards the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, constitutive rules not merely regulate but, above all, create or define new forms of actions (conventional forms); therefore, they create new beings, also in terms of legal beings. Searle introduced a pattern of the constitutive rule. The pattern ran as follows: X counts as Y in the context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules on the example of the rules of etiquette, finding that their observation did not undermine the existence of specific acts but determined their form.[44]

It should be noted that Searle's concept was drafted in very general terms without going into detail about all the complexities. At the same time, Searle has inspired many scholars to follow up his steps, one of who was the Polish legal philosopher Stanisław Czepita[45]. The latter has developed the concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules. Both types have been divided into two other groups: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules)

41 Searle, 1967; Searle, 1987.

42 Searle, 1967, p. 45.

43 This constructed foundation for the interpretation in: Mittag, 2006, pp. 637–645.

44 Searle, 1967, p. 36. Disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary acts. It inspired scholars to search for such conventional act rules, the breaking of which would not undermine the validity (existence) of a given act. In this sense, it appears that regulative rules inspired Czepita to distinguish the rules of formalisation of conventional acts and devise a related mechanism of formalisation. See: Janusz-Pohl, 2017a, p. 25 *et seq*.

45 Cf. Czepita, pp. 2016, 138–139; Czepita, 1996, p. 146 *et seq*.

and effectively (formalisation rules).[46] Consequential rules, therefore, show the consequences of the infringements of constitutive rules or the infringements of formalisation rules. Through this approach, the author of the present study has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc* and non-futility (in case of breach of formalisation rules).[47] Besides, it can be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, or the so-called *lex imperfectae*. It means that any legal consequence is not connected with the breach of formalisation rules of this type.

Therefore, it could be asked, what is the main contribution of this concept to legal science? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes – does not cause any negative legal consequences. This concept also has two other important features relevant to the interpretation of legal actions: it allows imposing the sanctions of nullity and non-existence (in the legal sense) when it comes to legal systems that do not provide statutory sanction of nullity. This is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity of an act performed in violation of a constitutive rule, even when such a sanction does not exist at the level of statutory regulation. By all means, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope of this discussion. This issue has been tackled by other studies[48]. It should be pointed out that constitutive rules, as rules of validity, refer to what (in the background of this concept) is called the material substrate for a given conventional action (legal action): the 'primary constitutive rules'. In addition, constitutive rules concern the existence of the competence of individuals to perform a legal action of a given type; in some cases, these rules may have the status of temporal rules. For further consideration, the two types of constitutive rules, i.e. rules on the material substrate and rules on the competence to perform a conventional act (legal action) of a given type, are pivotal.

Referring to the first type of constitutive rules, the initial assumption states that for any conventional act of a given individual (even though the conventional act may be attributed to many individuals when it comes to collective actions), a necessary condition to perform a given conventional act is performing a specific behaviour. This behaviour is called the 'material substrate' for the given conventional action[49].

46 Effectiveness is understood in a specific way and is linked with the typical purpose (result) for the given legal action. So, from this perspective, effective legal action is a valid action performed under formalisation rules for the given type, and its effect is described by law.

47 This approach is given by Janusz-Pohl, 2017b.

48 Ibidem.

49 Cf. Czepita, 2016, pp. 138–139; Czepita, 1996, p. 146 *et seq*.

It should be remembered that the material substrate, in Searle's initial conception, is denominated as an elementary act. Moreover, material substrates of conventional acts may vary (different behaviours, i.e. expression of knowledge and expression of intent, should be distinguished). In the present case, the material substrates consisting of the expression of knowledge are of core importance. In both cases (Gafgen and Ćwik), the alleged pieces of evidence were in some connection with the defendant's expression of knowledge.

Yet, it is worth recalling that, following the findings of the concept of conventional acts in law applied as an instrument for interpreting the criminal process, it is established that the subject performing a conventional action must carry out the material substrate of this act in a conscious manner. Exogenous coercive factors must not limit the will of such a subject. In previous research, the author of the present study established that the consciousness of the person performing the legal action in criminal proceedings must extend to the execution of the behaviour (being the material substrate of the given action). At the same time, its (the behaviour's) freedom means that the person's will, unfettered by any exogenous factors, necessarily prompts it.[50] It can also be mentioned that the impact of the use of deception has already been discussed.[51]

Assumptions on how to perceive the material substrate for a conventional act directly correspond with the ill-treatment *sensu largo* formulas. After all, it is not difficult to see that, regardless of whether the legal system employs the sanction of nullity, the performance of a legal act, including an act of interrogation in violation of Article 3, and therefore in violation of freedom of expression, is perceived as invalid (null and void). However, as indicated earlier, the criminal process represents nothing more than 'a certain sequence' from the point of view of this concept; the nullity of a legal act from this perspective is seen as an empty chain of this sequence. Subsequently, it is necessary to assess how this empty cell affects the entire process and, as a consequence, the (final) judgment that was passed (outcome of the process). In previous studies, it had been established that, as a principle, constitutive rules for legal (procedural) actions do not assume the automatism that can be observed in the case of constitutive rules for games (e.g., chess games). In the case of the latter, after all, a violation of a constitutive rule, thereby making an invalid move, nullifies the entire game. The issue of constitutive rules linked to the material substrate for a legal act will be relevant to the analysis of the Gäfgen v. Germany case.

The second type of constitutive rule relevant for further discussion is one that determines the competence (power, entitlement) of a given entity to perform a certain legal action. In light of the concept being discussed, the existence of such competence in the given legal system is a condition for the validity of the legal action.

50 See Janusz-Pohl, 2017a, p. 70.

51 Janusz-Pohl, 2017a, p. 80 *et seq*. and the literature referred therein. Although such practices are incorrect, it seems that their application in Polish law does not allow to invalidate in an unambiguous way the defendant's deceptive statement of intent.

Previous studies have shown that the issue of establishing competence (entitlement) is, however, very complex; for example, in the case of enforcement authorities in criminal proceedings, the competence does not always address specific actions but has the status of general competence, which is covert by *ex officio* principle and takes all investigative actions necessary to determine whether a crime has been committed. Meanwhile, in the case of private players, the performance of a legal (procedural) act generally requires an individualised competence (to file an appeal, take evidence, and attend a hearing). When analysing the entitlement to perform an act, it is also necessary to consider the assumption that a valid and effective procedural act can only be performed in a criminal trial, so that it cannot be performed outside the criminal proceedings. This finding will be relevant to the Ćwik v. Poland case analysis.

In an attempt to relate the indicated assumptions to the two cases examined by the ECtHR, the analysis will begin with the case of Gäfgen v. Germany. To briefly highlighting the facts: on 27 September 2002, Magnus Gäfgen (G.), a student in Frankfurt am Main, lured Jakob von Metzler (J.) into his flat, killed the eleven-year-old boy, and hid his dead body. Subsequently, he extorted the parents for a ransom. When G. picked up the ransom, he was under police surveillance. G. indicated that two kidnappers held the boy hidden in a hut by a lake. Concerned about the life of J., D., deputy chief of the Frankfurt police, ordered E., an officer, to threaten G. with considerable physical pain and, if necessary, to subject him to such pain to make him reveal the boy´s whereabouts. Because of E.'s threat, G. disclosed the whereabouts of J.'s corpse.

The applicant, in this case, alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of the boy J. constituted torture prohibited by Article 3. He further alleged that his right to a fair trial as guaranteed by Article 6, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence obtained in violation of Article 3 had been admitted at his criminal trial.

In assessing the treatment to which the applicant was subjected, the Court noted that it was uncontested between the parties that during the interrogation that morning, the applicant was threatened with intolerable pain by detective Officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. Indeed, this was established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant and the criminal proceedings against the police officers. Furthermore, it is clear both from D.'s note for the police file and from the Regional Court's finding in the criminal proceedings against D. that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent. Having regard to the relevant factors, the Court reiterated

that according to its own case-law, a threat of torture could amount to torture. In particular, the fear of physical torture may itself constitute mental torture. However, the Court considered that the method of interrogation to which the applicant was subjected in the circumstances of this case amounted to inhuman treatment but that it did not reach the level of cruelty required to attain the threshold of torture. In the case, treatment was considered to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering. The Chamber considered that Detective Officer E. had threatened the applicant on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence, causing considerable pain to make him disclose J.'s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond reasonable doubt.

Moreover, the Court concluded that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, the whole trial must be considered fair. The Court stated that a criminal trial's fairness is only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings. In this case, the conviction was based exclusively on the new, full confession by the defendant. The Court, therefore, held that the causal link between the threat of torture and the conviction had been broken, as the breach of Article 3 in the investigation proceedings had no bearing on the applicant's confession at the trial, and the trial as a whole was fair in terms of Article 6. At the beginning of the proceeding, G. confessed voluntarily that he had murdered J., and the court instructed him on his rights. The judgment was primarily based on this confession. The impugned items of real evidence were only used to test their veracity. The ECHR concluded: "It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant´s conviction and sentence in respect of the impugned real evidence." A single 'unfair' procedural act is able to make the whole trial unfair but does not do so necessarily. The unfairness of the trial is not a matter of necessity or causation, but of an assessment of the trial as a whole.

Interpreting the Gäfgen case in accordance with the concept of constitutive rules, it can, therefore, be recognised that the ECtHR confirmed the constitutive nature of the interrogation rule, which has its source in the wording of Article 3 of the ECHR. It should be further noted that even if there had not been any legal source for this rule (as Article 3 is), such a constitutive rule would be adopted based on a general assumption for this concept in relation to the material substrate for a conventional act (the primary constitutive rule). This is due to the fact that for a given behaviour to be considered a material substrate its performance must be conscious and voluntary and therefore unfettered by external factors of a coercive nature. At the same time,

the interrogation of a suspect as a procedural act performed in violation of the indicated rule must be qualified as void. In addition, such qualification obtains under the applied concept regardless of whether the legal system in question operates the sanction of nullity *ex-lege*. In the case under discussion, this sanction arises due to the violation of a constitutive rule (primary rule) concerning the substantive substrate of a conventional act (interrogation act). However, as indicated previously, the nullity of such an action is only an empty chain in the sequence, and it depends on the assessment of its impact on the judgment handed down as to whether the entire process is considered defective. In conclusion, it should therefore be considered that in the Gäfgen case, the ECtHR applied an interpretation that coincides with the concept of constitutive rules. In the Court's perception, the nullity of evidence did not impact the validity and, in this sense, fairness of the trial.

Meanwhile, the second case, Ćwik v. Poland, differed significantly from the case of Gäfgen v. Germany (no. 22978/05, ECHR 2010). In contrast to Gäfgen, in the Ćwik case the violence had been used by private individuals and not towards the applicant but a third person outside of the criminal trial. Therefore, in this judgment the Court held that the sanction of nullity relating to one piece of evidence extends to the entire proceedings.

In the case of Ćwik v. Poland, the domestic court determined the facts of the case, inter alia, on the basis of a recorded 'interrogation' of K.G. who, together with the applicant (Ćwik), participated in the unlawful practice of smuggling cocaine from the USA to Poland. Both K.G. and the applicant (Ćwik) came into conflict with other members of the organised group. Consequently, K.G. was abducted and tortured by the other members of the group. During the 'private interrogation', K.G. disclosed information on the location of the smuggled cocaine and cash. K.G. was later released from the abductors by the police, who also entered into possession of the recording of the 'private interrogation'. What was crucial was that the recording was then used as a piece of evidence in the criminal proceedings against the applicant (Ćwik), who refused to give explanations during the trial and pleaded not guilty. In its judgment in Ćwik v. Poland, the Court pointed out that the prohibition outlined in Article 3 of the ECHR had previously been referred in the case law not only to public officials but also to private individuals. Particularly in cases concerning extradition or expulsion, the Court has examined whether transferring a person to another jurisdiction may expose him or her to a real risk of maltreatment by private persons. But it was only in the case of Ćwik v. Poland that the Court linked the prohibition expressed in Article 3 to the behaviours of individuals in connection to evidentiary proceedings.

The question before the Court, which had not arisen before, was whether information obtained from a third party as a result of ill-treatment inflicted by private individuals, even where there had been no evidence of involvement or acquiescence of State actors, should be excluded as pieces of evidence in criminal procedure. The Court said that the admission of evidence obtained from a third party due to ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment, should be excluded. In

the judgment, the Court emphasised that the protection against conduct proscribed under Article 3 of the ECHR is the state's positive obligation also when inflicted by private individuals. This assertion was supported by reference to multiple rulings on the state's positive obligations, including procedural ones, arising from Article 3 of the ECHR[52].

To sum up: in the Court's view, the very admission of the impugned transcript into evidence in the criminal proceedings against the applicant rendered the proceedings as a whole unfair, in breach of Article 6 para. 1 of the ECHR.

In the context of the case law under discussion, a question arises of whether the use of evidence obtained outside criminal proceedings (prior to their instigating) by private individuals as a result of ill-treatment may be perceived as the establishment by the state of a legal framework for tolerating the collection of evidence by private individuals in violation of Article 3 of the ECHR, and therefore for tolerating such conduct in general. In the Ćwik case, evidence (recording of statements) was produced outside the criminal proceedings, before its initiation and, more importantly, for other purposes. As Wąsek-Wiaderek rightly observed, it had been secured in the course of lawful action of the Police (search), and its use in the criminal trial could not in any way reduce K.G.'s protection against torture or inhuman treatment.[53]

Applying the assumptions of the concept of constitutive rules to the case of Ćwik v. Poland, it can be observed that 'private interrogation' was not a legal action in the trial, and from this perspective, the use of ill-treatment methods must be observed separately as a criminal offence of the individual. From the perspective of the criminal process, therefore, private interrogation cannot be qualified from the angle of validity (nullity) of legal action, and so is excluded from the point of view of a violation of a constitutive rule. Nor is there any question of private actors' competence (legitimacy) to conduct interrogations. This 'private interrogation' (impacted by the violation of Article 3) in the legal sphere can only be assessed as another crime and consequently concerns the question of whether evidence in a criminal trial can be derived from a separate crime. In addition, it may be pointed out that the issue here is only the content of statements made under ill-treatment, not any material evidence obtained as a result of this private interrogation. Therefore, only a possible exclusionary rule in the framework of the statements' content comes into play. It should be mentioned that the question of the admissibility of such evidence is most often the subject of national regulations within the framework of the issue of evidentiary bans. The Polish system does not provide for an exclusion rule concerning evidence derived from a separate crime (not connected to the ongoing proceeding and not for the purposes of such proceedings) – the 'fruits of a poisonous tree' concept. Therefore, in the analysed case, there were no grounds for excluding this evidence as inadmissible in criminal proceedings conducted in Poland.

52 For more see: Wąsek-Wiaderek, 2021, pp. 343–374.
53 Ibidem.

From the perspective of the concept of constitutive rules, the assumption can be made that in the absence of clear indications of statutory sanctions of invalidity of proceedings *ex lege*, the assessment of evidence derived from a crime in the plane of its reliability is still permissible, especially taking into account the circumstances of the case and the incriminating nature of this evidence for the accused. Meanwhile, as indicated at the outset, the Court reiterated that the use in criminal proceedings of evidence obtained as a result of a person's treatment in violation of Article 3 – irrespective of whether that treatment is classified as torture, inhuman or degrading treatment – made the proceedings as a whole automatically unfair, in violation of Article 6. This is irrespective of the evidence's probative value and whether its use was decisive in securing the defendant's conviction. Yet applying the constitutive rules concept argues in favour of a less automatic rule of weighing the relevance of criminal evidence to the factual findings that form the basis of the decision in a case. Given this state of affairs, the court's stance should be critically assessed. Additionally, it can be observed that, in the case against Poland, a Central European country, the Court invoked a strong version of the deterrence principle by extending the effects of a violation of Article 3 ECHR to the extra-procedural actions of private individuals. The standpoint presented by the Court cannot be justified by appealing to the concept of constitutive rules and, in this sense, is methodologically incoherent with the approach expounded in the Gäfgen ruling. As lacking methodological justification, it also appears to be a weak argument for the protection of rights and freedoms covered by the ECHR.

## 6. Conclusions

The considerations presented in this study dealt with selected issues related to the interpretation of Article 3 of the ECHR. General issues concerning the directions of the ECtHR's interpretation of Article 3 were highlighted with a focus on its quantitative aspects and a more substantive analysis of cases against Poland and Hungary. The last part critically reviewed two cases of similar gravity in which the Court referred Article 3 to evidentiary proceedings.

This study seeks to bring out the perspective of Central Europe, noting that the Court has grounds for the adoption of probabilistically oriented factual presumption based, on the one hand, on frequency and intensity of the ECHR's violations and, on the other hand, on the level of guarantees of the law enforcement process in Central Europe. The analysed statistical data gave rise to the development of a cautious research hypothesis as to the general perception of the level of guarantees-bias of criminal proceedings in Central Europe. A certain proxy for these optics is made apparent by the analysis of the Gäfgen and Ćwik cases, in which the court showed a great deal of scepticism about the standards of fairness in the functioning of Polish

courts, tightening the paradigm for the elimination of evidence obtained under ill-treatment conditions and its influence for the evaluation of the whole procedure in question. The case study was presented with the background of the concept of constitutive rules. This is significant insofar as this concept enables the discovery of the very nature of legal actions, i.e its conventionality. In this sense, the concept of constitutive rules in conjunction with the whole idea of conventionality must be undeniably seen as an integrated and coherent approach (as it has been totally and scientifically proven). In turn, the inquiries presented in this study led to the conclusion that the Court used this concept intuitively in the Gäfgen case. Simultaneously, the Court did not apply it in the Ćwik case. Consequently, such optics have undermined the legitimacy of the decision made in the latter case, deeming it too far-reaching. By all means, the analysis presented here does not contain any hard conclusions, but only outlines some hypotheses that require follow-up research.

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