

# Prohibition of Torture

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## ABSTRACT

This chapter examines the prohibition of torture and other forms of ill-treatment as a foundational norm of international human rights law. The text interprets the ban on torture within its *jus cogens* character and *erga omnes* obligations, emphasising that it is non-derogable and applicable irrespective of treaty consent. The analysis clarifies the conceptual contours of torture and its differentiation from inhuman and degrading treatment, highlighting the interpretive space created by treaty language and the resulting central role of judicial and quasi-judicial bodies. The subchapters proceed through the main normative and institutional frameworks.

## KEYWORDS

prohibition of torture, ill-treatment, jus cogens, inhuman treatment, degrading treatment

## 1. Introduction

There are historical records of torture dating from ancient times through the Middle Ages to the present, indicating that torture has been a frequent practice throughout history. In the Roman Empire, it was extensively used against slaves and Christians; meanwhile, during the Inquisition, it was imposed on heretics and those accused of witchcraft, as well as on African slaves in America. Historical accounts of medieval torture methods have become well-known. Furthermore, it is no secret that military practices are employed to extract confessions of treason or counter-terrorism. Torture was for centuries not considered illegal or immoral.<sup>1</sup>

In the last century, with the help of various movements fighting for human rights, the international community has made remarkable progress towards the elimination of torture. The prohibition of torture or other ill-treatment has been incorporated into the text of several international and regional treaties dealing with human rights. The prohibition of torture was clearly included among rights having the character of

1 Ryals, Conrad and Moore, 2010, p. 460.

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*jus cogens*, which is generally recognised and legally anchored that this right is fundamental. It is considered so fundamental that it has the character of a law of general validity *erga omnes*, which must be applicable in all situations to all persons, even without the consent of an international entity or the existence of an international treaty.<sup>2</sup> Consequently, several issues have sparked worldwide academic discussions regarding the topic, particularly among European and American scholars focusing on criminal and human rights law. These debates have raised questions regarding the definition of torture, its extent, legal standing, and societal acceptance.<sup>3</sup>

Torture is a term used in professional circles to generally describe the act of causing physical, mental pain or suffering to a person, for some purpose. However, the detailed meaning of this term from the point of view of legally binding conventions of international law is generally unclear. A very restrictive understanding of the term could thus create gaps in the law, which could have disastrous consequences in terms of the importance of the values (right to life, bodily integrity, etc.) that the prohibition of torture protects. The looser and more vague text of the articles of international treaties prohibiting torture thus gives scope for application to lawyers and especially judges.<sup>4</sup>

The phenomenon of torture can be analysed through three distinct lenses. The first approach is related to the criminal law. Torture is viewed as a crime tied to issues of accountability, legal jurisdiction, and principles of responsibility. Second, the notion is perceived through procedural law, where, in the context of legal proceedings, any evidence obtained through torture is rendered inadmissible. Third, the interpretation of torture is mentioned regularly in migration and refugee related matters, where it plays a significant role in cases concerning mutual recognition, extradition, and asylum law. Nonetheless, in all matters, it is necessary to differentiate between torture, inhumane treatment, and degrading treatment.<sup>5</sup>

The following text seeks to clarify some conceptual elements surrounding the prohibition of torture and ill-treatment. It also examines the obligations that states have in terms of safeguarding fundamental rights against such abuses. Therefore, it provides a comprehensive analysis of the international legislative framework regarding the prohibition of torture, focusing on its characteristics, scope, and role. This subject is closely linked to the protection of human rights – a principle established globally following World War II. The Universal Declaration of Human Rights (UDHR)<sup>6</sup> represents a significant milestone in European human rights history. Through this document, states pledged to work with the United Nations (UN) to promote and uphold human rights and fundamental freedoms effectively. Although the UDHR was initially

2 Joint statement on the United Nations International Day in Support of Victims of Torture. 26/06/2018.

3 Langbein, 2004, p. 100.

4 Lattmann, 1990, pp. 133–149.

5 Sonnevend and Bodnár, 2021, p. 41.

6 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA resolution 217 A.

not legally enforceable, it has since gained customary law status, and its principles are now binding. The UDHR is regarded as one of the most critical documents regarding human rights and has paved the way for subsequent binding agreements, such as the European Convention on Human Rights<sup>7</sup> (ECHR) and the Inter-American Convention on Human Rights.<sup>8</sup> Notably, Article 5 of the UDHR states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,’<sup>9</sup> which has significantly influenced later treaties addressing torture prohibition.

Many important international human rights treaties articulate the prohibition of torture, inhumanity, degrading treatment, and punishment. At the UN, this prohibition is primarily articulated in the UDHR (Article 5), the International Covenant on Civil and Political Rights<sup>10</sup> (ICCPR, Article 7)<sup>11</sup>, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) along with its optional protocol. Firstly, the chapter will be analysing the interpretation of the prohibition stemming from these documents. Subsequently will be the text devoted to the research of regional human rights, focusing primarily on the European regional framework set by the European Convention on Human Rights.

The aforementioned treaties explicitly state the *ius cogens* rule against torture, which is absolute and non-derogable. The *ius cogens* character of the torture prohibition was first established in the Furundžija case by the International Criminal Tribunal for the former Yugoslavia.<sup>12</sup> Recognised as one of the most universally acknowledged human rights, this prohibition is part of general international law and creates *erga omnes* obligations. These obligations denote specific duties states owe to each other. In legal terms, *erga omnes* is a Latin phrase meaning “towards everyone”. These rules enable international courts (the ICJ, ECtHR, and ICC) to extend beyond traditional rights and duties derived from bilateral or multilateral treaties or international customs, thereby advancing international law through natural law standards. Thus, the prohibition of torture constitutes a human right that binds all states and entities under international law, regardless of any specific treaty ratification process.<sup>13</sup>

7 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)).

8 American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978.

9 Universal Declaration of Human Rights, 1948, Article 5.

10 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.

11 Article 7 of the International Covenant on Civil and Political Rights: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

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

13 Nuhija and Memeti, 2013, p. 31.

In general, individuals with restricted personal freedom and under surveillance are more susceptible to abuse. Addressing these situations is imperative due to the frequent occurrence of involuntary disappearances, where individuals face severe threats to their physical integrity. Traditionally, the concept of torture has been interpreted to suggest that the perpetrator must be a state official or someone carrying out a public duty. Since such officials may not directly engage in acts of ill-treatment in private contexts, the link between the state and the individual responsible is established if the official knew or should have known about the act and failed to intervene. States have both preventative and punitive responsibilities to avert torture and ill-treatment, which include normative measures to ensure torture prohibition is enshrined in law and procedural measures to properly investigate and penalise violations.<sup>14</sup>

The change came through progress in international humanitarian law. Considering the use of new technologies, there was a demand to amend the rules of war accordingly. Through this response to the use of improved means, the laws of war first included a prohibition of torture in their texts. The 1929 Geneva Convention, dealing with the treatment of prisoners of war, included the protection of war prisoners from torture and ill-treatment during their capture.<sup>15</sup>

Rapid change came after the second world war. It became clear for the international society that there must be powerful and swift changes when it comes to preventing vast human rights abuses. This resulted in the creation of several human rights treaties, including explicit prohibition in their texts.<sup>16</sup>

A legislative framework has been established, which should ideally be complemented by effective enforcement measures. Despite the introduction of monitoring mechanisms, significant gaps remain in oversight and enforcement. Many states continue to employ torture as a method of interrogation or punishment, disregarding binding legal obligations. This issue extends to countries regarded as democratic and modern, such as the United States, which has documented instances of torture against accused individuals. Such governments often justify their actions by citing national security concerns. Consequently, it is evident that the implications of the torture prohibition are enforced inadequately, suggesting a need for expanded measures. In the subsequent text, the author will provide an overview of the legislative framework for the prohibition of torture, taking these deficiencies into account. The selection of case law will be based on its relevance and clarity in interpreting the concept of torture within the context of the analysed conventions.

The prohibition of torture and ill-treatment constitutes a fundamental principle of the international human rights protection system and the constitutional order of democratic states. Legal frameworks provide robust protections against torture and ill-treatment at both the international and national levels. However, as will be

14 Savnidze, 2014, p. 113.

15 Bekerman, 2005, p. 747; See Rodley and Pollard, 2022.

16 Tate, 2013, p. 203.

discussed, the requirements surrounding the definition of torture have evolved alongside societal changes. Over time, legal standards and their application have become more stringent, complicating the interpretation of what constitutes torture. The following sections will outline the most significant treaties and pertinent case law that constitute the protective framework surrounding this issue.<sup>17</sup>

## **2. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee against Torture**

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.<sup>18</sup>

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the General Assembly in 1984 after extensive debate, particularly influenced by Swiss lawyer and banker Jean-Jacques Gautier, who advocated for a stronger framework to assist states in meeting their legal obligations under the Convention. These requirements were perceived as overly complicated and contentious and had been intentionally excluded from the text. The responsibility for implementing the Convention was delegated to a group of ten independent experts known as the Committee against Torture, which approved the text.<sup>19</sup>

The CAT consists of a preamble and three main parts. The first part addresses substantive law, including the definition of torture outlined in the first article and the stipulation of universal criminal jurisdiction over torture. The second part focuses on specific implementation mechanisms, establishing the Committee against Torture under Articles 17 and 24, tasked with overseeing the implementation of the CAT in ratifying states. The majority of the States in the General Assembly found it crucial that without some kind of active body the whole concept established by the Convention would be threatened. Hence, as a key aspect of the treaty, a monitoring instrument was set up to ensure that the CAT would be accepted and profoundly implemented into the legislation and further application by all State parties. The first meeting of

17 Hassanová, 2023, p. 54.

18 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, Article 1.

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

this body was held after the ratification of the CAT by the 20th State party, in 1988 in Geneva. This Committee not only ensures that national laws align with the CAT's mandates but also monitors the enforcement of those provisions. It consists of ten independent experts who review state party reports and convene regularly in two sessions each year in Geneva – one in April or May and the other in November. The Committee gathers credible information regarding states' practices of ill-treatment, which may prompt confidential proceedings.<sup>20</sup> Concretely, Article 19 stipulates that each State party has to submit to the Committee reports on the measures which were taken to undertake its obligations stemming from the CAT. Indeed, the reports have to be filed periodically. As a next step, these reports are examined. If needed, representatives of the examined party may send an inquiry to accept a representative being present during the examination. The examination may result in general comments created by the Committee. The Committee also has the power to conduct an investigation on the territory of the State personally. These procedures include gathering of information or confidential inquiry procedure by a visit. This form of the Committee's work result in a summary published in its annual report. The third method is represented by inter-state complaints. However, the Committee's right to conduct investigations or act on inter-state complaints is subject to the recognition and competences in these matters and remains optional.<sup>21</sup> Generally, the final observations manifest as findings, general comments, manuals, or guidelines, none of which are legally binding. Hence, the power of the Committee is still questionable. Nevertheless, it can include its findings in its annual report to the UN General Assembly, potentially leading to various actions. The third part of the treaty outlines the document's vitality, including ratification clauses, amendments, and its entry into force.<sup>22</sup>

Under CAT, the prohibition of torture is recognised as an absolute right, imperious to the justification of other rights outlined in the Convention. Ill-treatment cannot be justified under exceptional circumstances such as war, the threat of war, or internal unrest. This is supported by the fact that none of the human rights treaties, analysed below, allow any justification when it comes to the prohibition of torture when setting the standards in their derogation clauses. The States are thus bound to protect human dignity enshrined in the right and must not violate it under any extraordinary situation. Additionally, in Article 2(1) of the Convention, CAT established the duty to prevent torture as a legal obligation.<sup>23</sup> Hence, deriving from this understanding, as States shall be the protectors of human rights, they have the obligation to provide necessary protection from these violations. This means that the States have a responsibility to provide protection even in horizontal relations (individual

20 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.

21 Fact Sheet No. 17, The Committee against Torture. 1992, p. 3.

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

23 Article 2. (1) of the Convention Against Torture 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.'

contra individual). On the other hand, it also means that following orders from a superior does not absolve the perpetrator of accountability.<sup>24</sup>

Torture, as defined by the Convention, is characterised as a deliberate crime, resulting in severe pain or suffering, with the perpetrator requiring official authority. Therefore, four essential elements must be satisfied for actions to be classified as torture under the CAT. The first element involves the nature of the act, encompassing both actions and omissions that result in significant pain or suffering to the victim. According to international case law, this pain may be physical or mental.<sup>25</sup> The second element pertains to the subjective aspect, meaning the perpetrator must have inflicted the suffering intentionally, thereby excluding acts of negligence. The third element emphasises the necessity for a clear purpose behind the act, usually aimed at extracting a confession, gathering information, punishment, intimidation, coercion, or discrimination. However, as stated in Article 1 of CAT, this list is not exhaustive, enabling for the possibility of other intents.<sup>26</sup> The fourth and final element concerns the involvement of public officials; while this aspect is generally straightforward, recognising the role of a third party acting in an official capacity can lead to ambiguities. For instance, in the HMHI case,<sup>27</sup> the Committee on Civil and Political Rights acknowledged a Somali clan as a non-state actor exerting authority over a specific territory, thus functioning similarly to a public authority. Nonetheless, the Committee noted that such situations must be evaluated individually. Additionally, issues may arise when prohibited acts are executed not by an official but with their consent or tacit approval.<sup>28</sup>

Although it is clear that there exists a separation between these notions even from Article 16, the text of the CAT does not explicitly define what constitutes cruel, inhuman, or degrading punishment or treatment.<sup>29</sup> According to the recollections of the drafting committee leaders, the creators of the text faced two primary challenges. First, while the definition of torture was relatively clear, the concepts of cruel, inhuman, or degrading treatment or punishment were difficult to articulate with precision.<sup>30</sup> Second, since the document imposes various legal obligations on state parties that must be reflected in their criminal laws and procedures, these obligations could not rely on vague terminology like “cruel,” “inhuman,” or “degrading treatment”. This ambiguity illustrates the Committee Against Torture’s acknowledgment

24 Hambro, 1970, pp. 360–363.

25 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.

26 Centre for Justice and International Law and Association for the Prevention of Torture. *Torture in International Law: A Guide to Jurisprudence*. 2008.

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

28 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.

29 Convention Against Torture, 1987, Article 16.

30 Burgers and Danelius, 1988, p. 149.

that the distinctions between torture and cruel, inhuman, or degrading treatment or punishment are often unclear.<sup>31</sup>

CAT incorporates ethical and moral principles rooted in natural law and aimed at promoting dignity, humanity, and adherence to other international human rights treaties. The preamble references Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, emphasising that one of the Convention's primary goals is to additionally enhance the effectiveness of combating torture and inhuman or degrading treatment.<sup>32</sup>

Article 16 of CAT states that signatory states are obligated to

‘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.’

A state's positive obligation arises when a specific threshold of severity concerning interference with fundamental rights is recognised. However, determining when a positive obligation exists regarding the prohibition against torture is more complex, as not all instances of harm to physical integrity or health carry criminal implications. An important criterion for differentiation lies in whether the actions are conducted by a public authority or a private individual. The fundamental purpose of an effective investigation in such cases is to guarantee the proper implementation of national regulations, particularly when a violation is attributable to a public authority acting within its legal mandate.<sup>33</sup>

CAT explicitly stipulates the principle of non-refoulement in Article 3.<sup>34</sup> States have an obligation to not to expose individuals to the risk of torture or other form of ill-treatment by their expel or return (“refouler”) to the country of their origin. The person claiming protection has to provide substantial grounds for believing that he would be in danger. The principle has recognised by the international jurisprudence regularly and led to the widening of the scope of application by each regional human rights system.<sup>35</sup>

The Committee's work and its interpretations through general comments and case law enrich the understanding of CAT. Similarly, in national courts, the prohibition of

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

32 Convention against Torture, 1987, Preamble.

33 Čentěš and Beleš, 2021, p. 4.

34 Convention against Torture, 1987, Article 3.

35 Bantekas and Oette, L, 2020, p. 376; Katsoni, 2025, p. 8.

torture is often interpreted concerning the principle of non-refoulement. In its General Comment no. 1, the Committee Against Torture specified that risks of torture must be assessed based on evidence that exceeds mere theory or suspicion.<sup>36</sup> Although the risk does not need to meet the standard of being definitively possible, it must be both personal and actual. This interpretation was later expanded in *the Dadar v. Canada case*, emphasising foreseeability and real risk.<sup>37</sup> It should also be noted that the facts considered by the Committee are provided by the relevant state party; however, the Committee has the authority to freely evaluate this evidence based on the circumstances in each case, as indicated in the *NTW v. Switzerland case*.<sup>38</sup>

In conclusion, despite the relatively good quality of CAT and its global ratification, it cannot be deemed a success.<sup>39</sup> This is due to factors such as the lack of enforcement by states, insufficient UN enforcement bodies, or the unwillingness of certain ratifying states to comply with its provisions genuinely. Nonetheless, CAT holds fundamental significance, as its definition of torture has served as a reference point in the case law of international courts, particularly ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>40</sup> In the early periods of these tribunals, CAT's definition was often adopted without criticism. However, subsequent rulings reflect a growing independence of international courts from the definitions established in the Convention, highlighting the different natures of international humanitarian law and human rights law.<sup>41</sup>

### 3. European Convention on Human Rights

Article 3 of the ECHR states, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

The European human rights system is the most established international framework for safeguarding human rights, particularly concerning the prohibition of torture. This system was developed within the Council of Europe (CoE), an inter-governmental organisation founded in 1949 by several Western European nations dedicated to safeguarding individual freedoms, democracy, and the rule of law. In 1950, CoE member states adopted the ECHR, which took effect in 1953.<sup>42</sup> This was followed by the adoption of the European Convention for the Prevention of Torture and the creation of the European Committee for the Prevention of Torture.

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

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

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

39 Convention against Torture, 1987, signatories: 83, parties: 173.

40 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*; *Prosecutor v. Anto Furundžija*; *Prosecutor v. Kunarac, Kovac a Vukovic*.

41 Burchard, 2008, p. 162.

42 Buergethal, 2001, p. 89.

The ECHR is based on the centrality of individuals and protects numerous values such as human dignity. The roots of the right in natural law can also be seen in the travaux préparatoires of the ECHR.<sup>43</sup> The drafters, when forming Article 3, discussed that some actions that are deemed inconsistent with civilized society, incompatible with civilization, offenses against heaven and humanity, or those that are wholly evil must be abolished. Through the creation of Article 3, the drafters stipulated a clear stop to these acts by protecting the value of human dignity. Hence, the prohibition of torture was positioned as one of the most significant provisions of the Convention and underscoring its importance within the CoE's framework.<sup>44</sup> The fundamental element of this prohibition is the severe nature of pain and suffering involved. Jurisprudential precedents indicate that certain actions qualify as torture, where the offense's conduct requires the infliction of severe pain or suffering, thus enabling the prosecution to prove the conduct alone.<sup>45</sup>

As evidenced by the rulings of Central European constitutional courts, interpretations and implementations of this provision vary widely. For instance, one approach involves an illustrative enumeration of what constitutes torture, exemplified by the Czech Constitutional Court's decisions. This court has identified serious repercussions of police actions that amplify the severity of interventions – such as police action resulting in amputations, gunshot wounds, severe fractures, extensive bruising, the knocking out of three teeth, an ear injury, and bruises on a larger part of the body – deciding these acts qualify as torture.<sup>46</sup> Conversely, the Hungarian Constitutional Court emphasises that torture consists of behaviour that inflicts severe suffering on the victim, aimed at coercing information or intimidating the subject.<sup>47</sup> The Slovak Constitutional Court declared that an immanent part of every punishment is the obligation of the affected person to submit to interference with his rights, in accordance with the requirements of the penal system; this is done under circumstances that, among other things, should also express the social condemnation of the committed crime. Therefore, it is understandable that in most, if not all, cases of court-ordered punishment, the person punished may experience feelings of humiliation or mental or physical discomfort, which they may perceive as “hardship” or “suffering.” For the purposes of Article 3 of the Convention, however, it must be treatment or punishment causing mental or physical suffering that reaches a certain degree of severity in order to be qualified as torture or inhumane treatment or punishment.<sup>48</sup>

43 European Commission on Human Rights. Preparatory Work on Article 3 of the European Convention of Human Rights. DH.56, 1956.

44 Gnatovskyy, 2022, p. 297.

45 Kovács and Sánta, 2010, p. 23.

46 Czech Constitutional Court. Decision. No. Sp. Zn. III. ÚS 2012/18. [43].

47 Hungarian Constitutional Court. Decision no. 32/2014. (XI.3.) [137]; Decision no. 6/1996; (VII. 12.) [34].

48 Slovak Constitutional Court. Decision No. PL. ÚS 6/09. Overview of the Constitutional Court Decisions, 2012, p. 4.

The prohibition of torture would be a mere formal assertion without substantive meaning if it did not obligate states to codify in criminal law the illegality of actions that bear a resemblance to torture, inhumane treatment, or punishment. Furthermore, states must create a robust legal framework for criminal proceedings to address these offenses and ensure this legislation is effectively applied.<sup>49</sup> However, merely enacting legislation that aligns with the ECHR is insufficient; contracting states are also responsible for the practical implementation of these guaranteed rights. Implicitly, in the article addressing the prohibition of torture, we may find a positive obligation for ECHR parties to investigate allegations of mistreatment; failing to do so renders the prohibition theoretical and illusory, allowing offenders to act without consequence.<sup>50</sup> This obligation aligns with the absolute nature of the prohibition, requiring a well-structured legislative framework and enforcement mechanisms to reliably address credible torture claims. If these mechanisms neglect their investigative duties, states must find other ways to combat impunity. This issue also touches on the upholding of the rule of law within a state's judicial structure. Nevertheless, states may struggle to meet this positive obligation, resulting in the activation of the European human rights system, specifically the CoE's human rights mechanisms; thus allowing victims to apply their claim in the European Court of Human Rights (ECtHR). Consequently, the ECtHR's jurisprudence serves as a primary reference for enforcing and penalising the prohibition against torture. The case law of the Court interprets the prohibition according to the current view and understanding of the Member states; however, vice versa, it also influences the interpretation on domestic levels. The interpretation of the rights from the common-consensus perspective was confirmed in several judgments of the Court, which stipulated that the emergence of a common approach by the majority of Member States of the ECHR can contribute to the evolution of the framework at hand.<sup>51</sup>

Therefore, the ECtHR's case law is rooted in its interpretation of Article 3's scope and significance. The Court first detailed the concept of torture in the case of *Ireland v. the United Kingdom*, indicating that for any act to qualify as torture, it must meet a minimum standard of severity that cannot be deemed unjustifiable; this indicates a more severe form of treatment. Such treatment may constitute degrading or humiliating actions or actions that coerce the victim against their will or conscience. However, the ECtHR does not clearly define how this minimum threshold should be interpreted or applied.<sup>52</sup> Nonetheless, the critical takeaway from the pertinent Ireland case is that there exists a differentiation between torture and inhuman or degrading treatment, with the ECtHR framing this distinction based on the intensity of suffering inflicted.

49 Guide on Article 3 of the European Convention on Human Rights, Prohibition of torture, 2025, p. 6.

50 Čentěš and Beleš, 2021, p. 4.

51 See *Dudgeon v United Kingdom*, N. 7525/76. 1981; *Bayatyan v. Armenia*. N. 23459/03, 2011.

52 Savnidze. 2014. p. 9.

Torture is characterised as a purposeful act causing significant and cruel agony to the victim.<sup>53</sup>

In the relevant case, the ECtHR has determined that actions categorised as such fulfil all of Article 3's requirements, with the intent of extracting confessions, identifying other offenders, and gathering information. These actions were executed systematically with a clear purpose, thus excluding negligence on the part of the perpetrators. Moreover, these acts were carried out by officials from Northern Ireland's security forces.<sup>54</sup>

In this context, the ECtHR has asserted that the only aspect preventing these actions from being classified as torture is the lack of extreme intensity in pain and suffering. The Court has afforded national authorities a wide margin of appreciation, arguing that they are better positioned than international judges to ascertain what constitutes extreme pain and suffering. Nevertheless, this interpretation is narrow and lacks clarity due to the ambiguous language used by the ECtHR.<sup>55</sup> It should be noted that while the Court has made efforts to articulate the distinction, it has not precisely defined its specific aspects. However, the ECtHR has repeatedly reaffirmed this distinction, referencing previous conclusions in *Ireland v. the United Kingdom*.<sup>56</sup>

The contemporary understanding of torture and its aspects in ECtHR case law diverges significantly from earlier interpretations. The current perspective on the prohibition has expanded, encompassing actions that seem as less severe while still recognising the requirement for significant victim harm. Many actions previously overlooked as torture have been elevated through this evolving lens. The earlier interpretation exemplified in *Ireland v. the United Kingdom* illustrates how the case law of international courts has evolved over time. Some claim that these changes in the legal practice are based on the changes present in the sensitivity of the society. Socio-cultural sensitivity shifted by understanding some punishments as too harsh demanding sensible and legitimate punishments. We may likely derive the creation of the alternative sanctions in the criminal procedural law likewise from these aspects.<sup>57</sup>

The vaguely interpreted distinctions arising from the phrasing of pertinent legal articles have been the subject of numerous significant ECtHR rulings. This interpretation is structured vertically, representing three distinct concepts: torture, inhuman treatment, and degrading treatment. Varying approaches have emerged based on the thresholds defining these terms. The differentiation relies on the severity of pain or suffering, with torture indicative of the most severe conduct, whereas degrading treatment represents the least severe.<sup>58</sup> In the *Selmouni v. France* case, the ECtHR remarked

53 *Ireland v The United Kingdom*, (ECHR Application no. 5310/71), Judgement, 13 December 1977, para. 167.

54 *Ibid.*, 166.

55 Cullen, 2003, p. 39.

56 *Atkas v. Turkey*, 313.

57 See Silverman, 2001.

58 Evans, 2002, p. 370.

that the high standards for human rights protection necessitate a more stringent approach to violations concerning fundamental values such as physical and mental well-being.<sup>59</sup> Thus, this case illustrates that the ECtHR should, with the passage of time, reassess its previous interpretations of Article 3 and differentiate these concepts according to the intensity of the resulting harm.

The case of *Keenan v. The United Kingdom* is notable regarding threshold concepts. In this instance, Mark Keenan, the applicant's son, died by suicide in prison due to the negligence of the prison authorities, which stemmed from inadequate monitoring and psychiatric care amidst segregation. In 2001, the ECtHR stated that the severity of pain or suffering constituted only one factor within a complex framework. This acknowledgment points to the inherent difficulty in establishing thresholds across these concepts, allowing the Court significant leeway to assess cases individually.<sup>60</sup>

Lastly, the ECtHR's interpretation in the *Gäfgen* case likely contributes to the broader conception of torture and its determinant factors.<sup>61</sup> This case involved Mr. Gäfgen, who kidnapped the 11-year-old son of a German banker and was later apprehended after police interrogation aimed at uncovering the child's location. During the interrogation, an officer threatened the child with considerable pain to elicit information and potentially save the child's life. Sadly, the interrogation had no point, since Mr. Gäfgen has suffocated the child prior to his arrest. The police officer investigating, however, considered the child to be alive; hence, utilised such methods as a threat. The ECtHR ruled that Gäfgen experienced inhumane treatment, given the immediacy and authenticity of the threat from the policeman, leading to mental distress and possible long-term mental impacts. The victim was in a precarious situation, suffering abuse from interrogators who positioned their methods as life-saving. The ECtHR determined that the threat of physical pain met the minimum severity required by Article 3; however, it did not qualify as torture but as inhuman treatment. The rationale underscored the need to protect not only physical integrity but also human dignity as laid out in Article 3.<sup>62</sup>

The *Gäfgen* case raises pertinent considerations regarding the ECtHR's balancing act, despite Article 3 forbidding such a balancing of rights. The case prompted a dialogue on the tension between preserving a child's life and upholding basic human rights grounded in natural law and peremptory norms. The ECtHR firmly asserted that even in extreme circumstances where innocent lives are at stake, the prohibition on ill-treatment cannot be compromised. Several justifications support this stance: Article 3's and Article 15's provisions affirm that derogation clauses do not apply to absolute rights. The ECtHR reiterated that even during national emergencies, the prohibition of torture cannot be overridden. Secondly, safeguarding against violations of Article 3 protects the foundational principles of democratic societies in tandem with

59 *Selmouni v France*, (ECHR Application no. 25803/94), Judgement, 28 July 1999, para. 101.

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

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

62 *Selmouni v. France*, (ECHR Application no. 25803/94), Judgement, 28 July 1999, para. 101.

the torture prohibition. Finally, an unwavering stance against torture reflects societal consensus, emphasising its absolute rejection by public authorities.<sup>63</sup>

One of the most crucial questions that have come to the fore already in the Gäfgen case is the issue of admissibility of the evidence that was obtained by ill-treatment. The Court found that there must be a distinction of the real evidence (physical objects as a body or a weapon) and the evidence gathered by coercive methods. In the pertinent case, the Court even contemplated that excluding all evidence obtained by the breach of Article 3 may be an appropriate redress.<sup>64</sup> Later on, in case of *Ćwik v Poland* the ECtHR reaffirmed this position. The case went even further, as it contemplated the admissibility of a video that was used as evidence during Polish investigation. The video was presenting the defendant as being a victim of coercive interrogation perpetrated and filmed by a drug cartel member. ECtHR declared that although the application raised issues under Article 6 of the Convention, the principle stemming in Article 3 must be highly relevant when examining the issue.<sup>65</sup> Additionally, the admission of this evidence would, apart from breaching Article 3, render a trial unfair. In the *Ćwik* case, the Court declared that this applies not only where the victim of the treatment was also the defendant against whom the resulting evidence would be used, but also where the evidence would be used against third parties.<sup>66</sup> Through this decision, the jurisprudence reinforced the absolute nature of the prohibition by clearly banning all evidence obtained through torture or ill-treatment. Through this, the ECtHR attempts not only to prevent authorities from manipulating the trial but also to eliminate any temptation to use coercive methods.<sup>67</sup>

In concluding remarks about the Gäfgen case, the author offers certain critiques of the ECtHR's broad interpretation of Article 3. The author contends that the Court mistakenly addressed the issue of weighing the right to life against the prohibition of torture in this instance. The ECtHR maintained that the threat of torture should be construed as torture itself; however, these notions must be evaluated separately concerning the given context. Firstly, while exploring the mental repercussions of such threats is vital, proving them is inherently challenging. Secondly, various negative mental consequences arise from detention, interrogation, and procedural tactics, none of which pursue confessions or information. However, as Article 3 specifies, the rationale for depriving individuals of liberty does not absolve these actions from scrutiny.<sup>68</sup> Lastly, the assumption asserting that the threat of torture outweighs national survival merits reconsideration. If an investigator suggests that the threat of torture carries greater worth than the life of a nation, they will likely face scrutiny and possibly even criminal accountability.

63 Yiallourou, 2019.

64 *Gäfgen v. Germany*, (ECHR Application no. 22978/05) Judgement, 1 June 2010, para 173–178.

65 *Ćwik v. Poland*, (ECHR Application no. 31454/10) Judgement, 5 November 2020, para 59–65.

66 *Ibid*, para 77.

67 See Thienel, 2006.

68 The Convention against Torture in its Article 1 also does not include exhaustive list of the element of purpose.

Additionally, scrutinising the ECtHR's case law concerning the prohibition of torture necessitates mentioning a pivotal case presenting a close relationship with torture and death penalty: case of *Soering v. the United Kingdom*.<sup>69</sup> The *Soering* case is primarily recognised for its effect on asylum law. This case involved the extradition of an applicant to the United States, where they faced charges potentially leading to capital punishment or life imprisonment in Virginia. However, following thorough analysis, the ECtHR determined that such extradition would violate Article 3. This ruling set a significant precedent for future cases concerning CoE member states and extradition policies.<sup>70</sup> Beyond criminal matters and Article 3's scope, this case broadly influenced state responsibility and human rights law. The principle which was established in the *Soering* case is rooted in the understanding, that States have the duty to prohibit actions of torture on their territories as well as abstain from facilitating these activities abroad. In many Central and Eastern European nations, numerous cases related to the torture prohibition often intersect with asylum law, mainly considering the safety of returning applicants to their home countries.<sup>71</sup>

Finally, the ECtHR's determination in *Aydin v. Turkey* marked a notable advancement in defining torture, as it recognised rape as an act that can be classified as torture for the first time. In this ruling, the ECtHR remarked that rape constituted especially severe ill-treatment with lasting psychological trauma that exceeded and outlasted physical injuries. The act of rape is characterised by a series of horrifyingly humiliating experiences, particularly given the context of the victim's deprivation of liberty. The act was also committed with specific intent, particularly to elicit information.<sup>72</sup> This decision is essential in broadening the definition of torture. It underscores how previous rulings often disregarded rape as a form of torture, as demonstrated by *Cyprus v. Turkey*, where evidence of mass rape by security forces was not acknowledged under Article 3.<sup>73</sup> The ECtHR noted in the *Aydin v. Turkey* case that most instances of rape by private individuals against others do not typically meet the criteria for torture, lacking the requisite intent, involvement of public authority, or the condition of detention.<sup>74</sup>

### ***3.1. European Convention for the Prevention of Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment***

1989 marked a significant step in the combat against torture, when the European Convention for the Prevention of Torture (ECPT) created an innovative framework requiring state parties to establish national preventive mechanisms, including an instrument – an international body – that has a mandate to conclude visits in the

69 *Soering v. the United Kingdom*, (ECHR Application no. 14038/88) Judgement, 7 July 1989.

70 Lillich, 1992, p. 128.

71 Jackson, 2016. p. 830; See *Z.A. and Others v Russia* (ECHR Application no. 61411/15), Judgment, 28 March 2017.

72 *Aydin v. Turkey*, (ECHR Application no. 23178/94) Judgement, 25 September 1997, para. 83.

73 See *Cyprus v. Turkey*, (ECHR Application no. 25781/94) Judgement, 10 May 2001.

74 McGlynn, 2009, p. 2.

jurisdiction of the ratifying countries. The Convention created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with a duty to manage periodic visits to places of detention in each of the member states. At the time of drafting, the European Convention for the Prevention of Torture was a sole project establishing a world-wide treaty-based mechanism aiming to control and regularly observe the domestic application of the human rights obligations. Hence, with the optional protocol to the CAT convention in 2006, the Committee Against Torture became the second body responsible for internal checks in countries concerning the prohibition of torture.<sup>75</sup>

The first president of the Committee, Antonio Cassese claimed that: ‘The Committee has shown that by now, even the innermost recesses of state practices are open to international scrutiny. The barrier of state sovereignty has been torn down, at least in this area.’<sup>76</sup> The creation and work of the Committee is certainly one of the triggers in the noteworthy growth in the density and complexity of the ECtHR’s case law in the recent 35 years. The widening of the notions under the lens of the ECtHR have become reality, which we may observe also on the proportional growth of the numerous soft law instruments in the field. Some of these instruments, such as the European Prison Rules<sup>77</sup> or the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>78</sup> certainly have some impact on the drafting of binding agreements as well as on the work of international courts.

The Committee is composed multidisciplinary, i.e. out of people coming from various fields. The majority of the members are professionals from the legal field; however, a notable number of members are medical doctors or experts from different scientific field relevant to the investigated context. Additionally, even the legal experts are generally dealing with different fields of law – from constitutional lawyers to human rights defenders. These candidates are chosen by the member states from among their experts and then elected by the Committee of Ministers of the Council of Europe.<sup>79</sup>

The demands arising from the Convention created in each member country concern some level of national preventative mechanism, representing a remarkable force in the combat against torture. The proper application of these mechanisms is regularly checked by the Committee. Under the current framework, it has the ability to access information related to number of detainees, locations of detention, and the circumstances and conditions of the treatment of prisoners. If states fail to provide this information, the Committee may be alarmed and may critically access the facilities where persons are deprived of their liberty through *ad hoc* visits apart from periodic

75 Bicknell, 2018, p. 10.

76 Cassese, 1994, p.115.

77 Recommendation Rec 2 of the Committee of Ministers to member states on the European Prison Rules. 2006.

78 The United Nations Standard Minimum Rules for the Treatment of Prisoners. The Nelson Mandela Rules. General Assembly Resolution 70/175. Annex. Adopted 17 December 2015.

79 See Wrońska, 2016.

control. The periodicity of the controls in situ fluctuates between three and eight years. The employees have the additional liberty to interview the detainees in private and get accurate and relevant information.<sup>80</sup> The places that are visited are police stations, detention facilities, prisons, correctional institutions, along with social care homes, psychiatric hospitals, or detention for foreigners, such as migrant camps.<sup>81</sup>

According to Article 11 of the ECPT, the main principle during the work of the Committee is the principle of confidentiality. The information gathered is confidential. The only exception to this rule is the report, which can be made public should the state concerned so request. The Committee can also make public statements if the state fails to cooperate or fails to improve the circumstances as per the Committee's recommendations.<sup>82</sup> Nevertheless, we may observe that majority of reports are published and the Committee's work is presented freely.

Although the rigidity of the interpretation of what constitutes torture was shaken after the terrorist attacks in 2001 and the emergence of the "war on terror," the work of the Committee has been, since its establishment, continuous and necessary. The pressure incoming mainly from the United States of America created demands from countries to reopen the interpretation of the notion of torture. The work of the Committee is thus a part of a very complex institutional, normative, and political cast. However, there is no doubt that the mere creation of such institution, not to mention its periodic work, plays a major role in shaping and influencing the application of obligations stemming from Article 3 of the ECHR.<sup>83</sup>

#### 4. Protection provided by the European Union

The European Union (EU) underscores its commitment to human rights protection in its foundational document, the Treaty on European Union (TEU).<sup>84</sup> Article 2 of the TEU establishes that the EU is built on values such as human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, highlighting the significance of these principles for EU institutions.<sup>85</sup> Another key document is the Charter of Fundamental Rights of the European Union,<sup>86</sup> also known as the Nice Charter, which holds the same legal status as the EU Treaties, as stated in Article 6

80 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Treaty Series. N. 126. 28. September 1983. Article 20.

81 Gnatovskyy, 2022, p. 301; See *J.B. and Others v. Malta*, (ECHR Application no. 1766/23) Judgment, 22 January 2025.

82 European Convention for the Prevention of Torture, 1989, Article 11.

83 See 34th General Annual Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2024.

84 Treaty on European Union, Official Journal of the European Union no. C326/13, entered into force 26.12.2012.

85 Treaty on the European Union, 2012, Article 2.

86 Charter of Fundamental Right of the European Union, Official Journal of the European Union no. C364/1, entered into force 18.12.2000.

of the TEU. Article 4 of the Nice Charter prohibits torture and inhuman or degrading treatment or punishment, binding all EU Member States to these principles.<sup>87</sup> The author begins by discussing the EU's efforts to combat torture, followed by an analysis of how the Court of Justice of the European Union (CJEU) interprets this prohibition.

The EU's approach to addressing torture is divided into internal and external actions. Internally, the focus is on judicial cooperation in criminal matters and asylum law, including the rights of refugees. This cooperation aims to harmonise and align member states' regulations concerning the prohibition of torture. As the Justice and Home Affairs of the EU has been regularly broadening its competencies, it has an important impact on the lives of the EU citizens.<sup>88</sup> Hence, EU institutions must establish minimum legislative standards regarding the definition and punishment of torture, requiring member states to incorporate these standards into their laws, in line with obligations under the European Convention on Human Rights and the Convention against Torture.<sup>89</sup>

Despite the EU's European Arrest Warrant allowing for the suspension of the warrant in cases of serious and persistent breaches by a member state, it does not explicitly allow for refusal to extradite an individual to a member state where there is a serious risk of ill-treatment. Articles 3 and 4 of the framework decision outline mandatory and optional grounds for non-execution of the warrant; however, they do not mention torture or ill-treatment.<sup>90</sup> Nonetheless, the application of this decision must always align with the EU's primary legal sources, which assert that fundamental rights and principles cannot be altered or bypassed by either the framework decision or judicial rulings. Consequently, when executing an extradition, the ECHR and the Nice Charter, particularly Article 3 of the ECHR and Article 4 of the Nice Charter, must be adhered to.<sup>91</sup>

Regarding Articles 18 and 19 of the Charter, the right to asylum imposes restrictions on removal, expulsion, or extradition, particularly in cases where there is a serious risk of the individual facing the death penalty or ill-treatment. The focus is on the procedures in member states for assessing the conditions in the destination country. These procedures include criteria aimed at preventing the misuse of asylum claims for protected status. However, these mechanisms are also influenced by the Dublin II Regulation<sup>92</sup> and relevant CJEU case law, which will be discussed further.<sup>93</sup>

87 Article 4 of the Charter of Fundamental Right of the European Union reads as follows: '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*'

88 See Nowak, Charbord and Gil-Bazo, 2021, pp. 59–92.

89 Kotzur, 2015, p. 448.

90 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002, Article 3–4.

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

92 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.

93 Morgade-Gil, 2015, p. 437.

Externally, in 2001, the General Affairs Council established Guidelines for EU policy towards third countries on torture and other cruel, inhuman, or degrading treatment or punishment, complementing the EU's 1998 Guidelines on the death penalty.<sup>94</sup> These guidelines offer instructions to EU institutions and member states for addressing ill-treatment in non-EU countries, aiming to protect human rights internationally. The guidelines also cover the work of groups that report on and analyse instances of torture outside the EU, seeking to identify and apply preventive measures. The goal is to implement effective actions to enforce the prohibition of torture and ensure victims have access to rehabilitation services and legal support. The tools outlined in the guidelines include political and financial measures, such as dialogue, monitoring, assessment, reporting, demarches, statements, visits, trial observations, cooperation with multilateral bodies, and financial support. Additionally, a 2016 Council Regulation<sup>95</sup> allows for the possibility of trade sanctions as a tool to prevent and combat ill-treatment in specific countries.<sup>96</sup>

It is worth mentioning the Regulation from 2005 concerning trade in goods that could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment, which is the first multilateral instrument in this area. It has a binding force and, as a regulation, direct application in all Member States as well. The aim of the regulation is to somehow control the business of human rights. It presents a trade control on equipment that are regularly tools for violations.<sup>97</sup>

In practice, the attempt to avoid illicit treatment of third country nationals by EU actions stems from providing protection to asylum seekers or migrants who qualify for subsidiary protection.<sup>98</sup> The requirement is the existence of a real risk of suffering a serious harm in the country of origin. This allows for protection from torture, death penalty and execution, and other serious individual threats to life. The CJEU held that the directive enabling such protection has to be read similarly as the protection provided in the ECHR, i.e. the non-refoulement principle applies accordingly.<sup>99</sup> The case-law of the CJEU plays a crucial role in interpreting the EU's prohibition of torture, aligning closely with the case-law of the ECtHR. The CJEU has emphasised that while all member states are presumed to respect fundamental rights, this

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

95 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.

96 Picchi, 2017, p. 753.

97 2016/2134 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. 23.11.2016.

98 Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. N. 2004/38/EC.

99 Greer, Gerards, Slowe, 2018, p. 329.

presumption is rebuttable and can be overturned by contrary evidence.<sup>100</sup> This principle applies to the transfer of asylum seekers between member states, particularly when there are clear issues with asylum procedures in the receiving country. Under the influence of the ECtHR,<sup>101</sup> it is understood that a person should not be transferred to a country where they would likely face ill-treatment, requiring the current state to consider the asylum application to avoid violating human rights. The CJEU has ruled that asylum applicants may challenge the decision only in the country of first entry into the EU, especially if there are systemic deficiencies in that country.<sup>102</sup> Regarding subsidiary protection, it is not necessary to prove that an individual is specifically targeted in a country where there are known threats to life, such as in dictatorships, war zones, or regions controlled by terrorist groups. The mere existence of such threats fulfils the requirement for a high risk to life for civilians returning to that country.<sup>103</sup>

In recent case law, the CJEU has broadened provisions for the protection of asylum seekers under the mentioned principle of non-refoulement. In the 2018 case of *NS v. UK and Ireland*, involving a Sri Lankan national who claimed he had been tortured and faced the risk of further ill-treatment if he returned, the CJEU ruled that individuals who have been tortured in their home country are eligible for subsidiary protection if they face a real risk of being deliberately deprived of adequate physical and psychological healthcare upon return.<sup>104</sup>

The right to subsidiary protection due to the fear of ill-treatment was a significant issue in many other cases before the CJEU. In the 2014 cases of *M'Bodj and Abdida*, the CJEU held that asylum seekers with serious health conditions could not claim asylum or subsidiary protection under qualification directives, even though these protections were designed to prevent acts of ill-treatment in the country of return. The Court, however, clarified that this protection was intended to guard against harm caused by humans, and inadequate medical treatment alone did not meet this standard.<sup>105</sup>

As previously discussed, when issuing a European Arrest Warrant, authorities must consider the circumstances of its execution. The concept of torture in relation to the arrest warrant was explored in the cases of *Aranyosi and Caldaru*, where the CJEU addressed the limits of mutual trust and the duty of the executing authority to conduct due diligence. These cases concerned prison conditions in Hungary and Romania, which were deemed as insufficient. The Court ruled that if there is a risk of rights violations, the executing authority must seek additional information and

100 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*.

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

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

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

104 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.

105 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.

postpone the execution of the warrant. Indeed, the Court also highlighted the absolute nature of the prohibition of torture under Article 4 of the Charter.<sup>106</sup> However, other mutual recognition instruments, as the principle of mutual recognition of judicial decisions and the transfer of prisoners within and between EU member states, are also influenced by the conditions of treating individuals in vulnerable positions.<sup>107</sup>

## 5. Torture in the Framework of Other Regional Human Rights Systems

### 5.1. American Convention on Human Rights

#### Article 5. Right to Humane Treatment

- ‘1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.’

The scope of rights intended to represent the fundamental rights of the Organisation of American States was adopted in Bogotá with the acceptance of the American Declaration of the Rights and Duties of Man. This first non-binding document refers to natural law and is thus rooted in the morals and ethics of the humanity. It includes a preamble and two chapters that outline civil, political, economic, social and cultural rights, and freedoms. The Declaration prominently emphasises the principles of human equality and human dignity. It is clear that this Declaration laid the groundwork for the later American Convention on Human Rights.<sup>108</sup>

The Inter-American Commission on Human Rights has, on several occasions, emphasised the necessity of creating a universally accepted instrument in the American system in order to ensure respect for human rights in the territory of its member

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

107 Nowak, Charbord and Gil-Bazo, 2021, pp. 59–92.

108 American Declaration of the Rights and Duties of Man. Organisation of American States resolution XXX. 2. 5. 1948.

states.<sup>109</sup> In 1967 in San José, the Inter-American Commission, through its adoption of the Inter-American Charter, asserted that one of its responsibilities is to protect the rights enshrined in the Charter. This led to the American Convention on Human Rights (referred to as the “Pact of San José”), which subsequently became binding and enforceable as part of the Charter documents.<sup>110</sup>

Article 5 of the Pact of San José outlines the prohibition of torture, although referring to it as the right to humane treatment. Its first subparagraph emphasises the protection of the physical, mental, and moral integrity of every individual.<sup>111</sup> The article itself provides for an autonomous right to personal integrity. The text of the provision differentiates between the conditions of a victim’s deprivation of liberty and the concepts of torture, cruel, inhuman, or degrading punishment and treatment.<sup>112</sup> Although these terms are often viewed as interchangeable, questions arise regarding the appropriateness of categorising all these actions under one *ius cogens* right. Some distinctions are made by the jurisprudence of Inter-American Court of Human Rights, which clarify these differences in concrete situations. This case law can serve as precedent for future applications.<sup>113</sup>

The third subsection of the article states that punishment may only be imposed on individuals who have been convicted. Thus, pre-trial detention of an unconvicted person should not be seen as a punishment. Instead, detention as a procedural measure must be justified as a preventive action, based on evidence that the accused may engage in further criminal activity, influence witnesses or victims, or evade prosecution.<sup>114</sup> The subsequent subsection ties closely to this by explicitly stating that accused and detained individuals must be separated from convicted persons, leading to the understanding that their treatment should differ and be appropriate to their legal status.<sup>115</sup> Both provisions are grounded in the principle of the presumption of innocence.<sup>116</sup>

The fifth subsection focuses on the enhanced protection of minors, who require special consideration and a higher level of protection reflected in procedures that pertain to them. Their cases are to be heard before specialised tribunals and processed as swiftly as feasible. The treatment of minors during these proceedings must

109 Here we mean the 35 states of the Organisation of American States: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela, Barbados, Trinidad and Tobago; Jamaica; Grenada; Suriname; Dominica, Saint Lucia; Antigua and Barbuda, Saint Vincent and the Grenadines; The Bahamas; St. Kitts & Nevis; Canada; Belize and Guyana.

110 Considerations related to the universal ratification of the American Convention and other Inter-American human rights treaties (2014), p. 9.

111 American Convention on Human Rights, 1969, Article 5. (1).

112 Ibid. Article 5 (2).

113 Antkowiak, and Gonza, 2017, p.106.

114 American Convention on Human Rights. 1969, Article 5. (3).

115 Ibid. Article 5. (4).

116 *J. v Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment IACtHR. Ser. C. NO. 275, Nov. 27, 2013, 380.

meet additional criteria due to their age.<sup>117</sup> In all cases, the imprisonment of a child can be used only as a measure of last resort. Their deprivation must be performed as separated from adults, unless it is considered to be in the child's best interest not to do so.<sup>118</sup> However, this raises the question of whether it would also be prudent to extend heightened protections to elderly or ill individuals within human rights conventions such as the Pact of San José. Additionally, one might consider whether emphasising youth in Article 5 establishes a precedence that could undermine the significance of protections for other vulnerable groups.

The final subsection addresses the intent behind depriving a person of liberty as a form of punishment. It asserts that the primary goal of such punishment is the reform and social reintegration of the prisoner.<sup>119</sup> This provision leads to the conclusion that imprisonment should not merely serve as a punitive measure but also as a means of societal reintegration. The principle of "*punitur, quia peccatum est,*" or that punishment is justified simply because a crime has occurred, should not be the primary focus of the justice system. In relation to the prohibition of torture, this section underscores that punishment is not intended to inflict suffering on offenders but rather to transform their behaviour and reintegrate them into society. Hence, including such provisions in human rights conventions is both logical and vital. Furthermore, scholars often highlight the benefits of a restorative justice system.<sup>120</sup>

The text of the article's subsections governs various rights and principles associated with individual inviolability. The affirming language regarding physical, mental, and moral integrity is complemented by the prohibition of torture and cruel, inhuman, or degrading treatment or punishment. The right to humane treatment as articulated in the Pact of San José mirrors the principles developed by the Inter-American Commission on Human Rights. This articulation is more comprehensive than the brief statements found in Article 5 of the Universal Declaration of Human Rights<sup>121</sup> or the lengthier formulation in Article 7 of the International Covenant on Civil and Political Rights.<sup>122</sup>

However, as previously noted in this chapter, there are additional aspects of Article 5 of the Pact of San José that could raise concerns, all linked to its numerous subsections. These subsections allow for special treatments based on certain statuses, which can lead to ambiguous interpretations. Thus, considering the *ius cogens* nature of the torture prohibition, the author believes it is unnecessary and potentially

117 American Convention on Human Rights, 1969, Article 5. (5).

118 Convention on the Rights of the Child, 1989, Article 37.

119 American Convention on Human Rights, 1969, Article 5. (6).

120 Strémy, Kurilovská, and Vráblová, 2015, p. 22.

121 Universal Declaration of Human Rights. 1948. Article 5: '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*'.

122 International Covenant on Civil and Political Rights. 1996. Article 7: '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*'.

inappropriate to include detailed subsections that explicitly define the scope of this prohibition in the context of Inter-American human rights law.

#### 5.1.2. *Inter-American Convention to Prevent and Punish Torture*

The Inter-American Convention on the Prevention and Punishment of Torture, also known as the American Convention against Torture (ACAT), was adopted on December 9, 1985, and took effect in 1987. To date, it has been ratified by 18 member states of the Organisation of American States (OAS).

A primary objective of the ACAT was to establish a definition of torture within the American context, following the Commission's earlier determinations regarding the prohibition of torture as per the provisions of the Pact of San José. The Inter-American Juridical Committee was tasked with drafting the convention's text.<sup>123</sup> Although there was an intention to define the crime of torture as an international crime, all references to this term were ultimately removed from the final version of the ACAT. Hence, the definition of torture as outlined in Article 2 of the ACAT is as follows:

'For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to encompass methods used against a person that are intended to obliterate the personality of the victim or to diminish their physical or mental capacities, even if such methods do not result in physical pain or mental anguish.'<sup>124</sup>

According to the definition above, certain elements must be satisfied for an act to be categorised as torture. The key components indicate that the action must be intentional and must cause physical or mental pain or suffering. Furthermore, these acts must serve a specific purpose. The examples provided – such as criminal investigation, intimidation, punishment, preventive measures, or penalties – are illustrative and not exhaustive, as indicated by the phrase “or for any other purpose.” This allows for the inclusion of other motives behind acts of torture. Notably, the definition does not address cruel, inhuman, or degrading treatment or punishment, unlike many other conventions that tackle the prohibition of torture.

The second part of the article clarifies that physical or mental pain or suffering that results from lawful measures does not fall under the definition of torture. Thus, it can be implicitly inferred that police actions are deemed legal if they are grounded in law, officially executed, and proportionate to the intended objective. The coercive

123 Rodley, 1987. p. 49.

124 Inter-American Convention to Prevent and Punish Torture, 1985, Article 2.

measures employed by police and detention facilities are typically explicitly outlined in the national laws of the state.<sup>125</sup>

Article 10 prohibits the use of evidence obtained through acts of torture.<sup>126</sup> Compared to Article 8(3) of the Pact of San José, which refers to evidence obtained by coercion of any kind, the ACAT provides a narrower interpretation, potentially allowing for broader application.<sup>127</sup> This distinction addresses actions that might be classified as cruel, inhuman, or degrading treatment.

Additionally, further obligations are imposed directly on national criminal law, primarily requiring the alignment of criminal procedure rules for investigating torture crimes. Both torture and attempted torture must be designated as offenses subject to severe penalties.<sup>128</sup> Legal provisions should be established to govern cases where torture occurs on the territory of the respective state, when it is perpetrated by a citizen of the state, or when the victim is a citizen of the state, making it reasonable.<sup>129</sup> This is determined through territorial as well as active and passive personal jurisdiction. Moreover, the defence that an individual acted under the orders of a superior is not acceptable for acts of torture, and the individual remains accountable.<sup>130</sup> Article 8 of the convention mandates ensuring the right to an impartial investigation into torture cases. If there is a suspicion of torture, the state must initiate action *ex officio*, without waiting for a complaint from the victim.<sup>131</sup>

It is also important to note that the Inter-American system recognises the principle of non-refoulement. Article 13 of the ACAT stipulates that an individual shall not be extradited or returned to a country if there are sufficient grounds to believe that such extradition would pose a threat to their life or subject them to torture or cruel, inhuman, or degrading treatment, or lead to a special trial in the requested state. Although this provision appears to take a standard approach, its last clause raises questions due to the inclusion of ‘he will be tried by special or ad hoc courts’. The specific meaning of “special or ad hoc courts” can be clarified through case law from the Inter-American Court of Human Rights (IACHR) or the Commission. This narrowing of the non-refoulement definition in relation to the ACAT is crucial, as it could pose barriers to extradition requests if the individual were to face a legally permissible trial conducted by a special court. In this context, it raises the question of whether tribunals such as the International Criminal Tribunal for the former Yugoslavia or the International Tribunal for Rwanda would be classified as special tribunals. Consequently, further interpretation is needed to establish what qualifies as a special or ad hoc court or tribunal.<sup>132</sup>

125 Hašanová, 2019. p. 68.

126 Inter-American Convention to Prevent and Punish Torture, 1985, Article 10.

127 American Convention on Human Rights. Article 8(3).

128 Inter-American Convention to Prevent and Punish Torture, 1985, Article 6.

129 Inter-American Convention to Prevent and Punish Torture, 1985, Article 12.

130 Inter-American Convention to Prevent and Punish Torture, 1985, Article 4.

131 Inter-American Convention to Prevent and Punish Torture, 1985, Article 8.

132 Rodríguez Pinzón and Martín, 2006, p. 136

The Inter-American Court of Human Rights (IACHR) is the sole judicial body within the American human rights system, responsible for applying and interpreting the rights enshrined in the Pact of San José, as well as other human rights conventions in the Americas. Comprised of seven judges who serve in their individual capacities, the Court's jurisdiction can be categorised into contentious and advisory. While advisory jurisdiction is important, contentious jurisdiction is more relevant for a nuanced analysis of the Court's work. According to Article 61 of the Pact of San José, only the Commission and states party to the Pact can refer cases to the Court.<sup>133</sup> Currently, the Commission has submitted only those cases that have resulted in court proceedings. This contrasts significantly with the European system, where individual applicants can file cases directly with the European Court of Human Rights. However, this does not completely preclude victims and their families from participating in the IACHR's processes; they are allowed to independently submit requests, arguments, and evidence during proceedings.<sup>134</sup>

Many decisions from the IACHR demonstrate a clear influence from the jurisprudence of European courts. For example, in the *Ceaser* case, the IACHR referenced the *Celebici* case from the International Criminal Tribunal for the Former Yugoslavia, which established a definition of inhuman treatment as an intentional act or omission that objectively causes severe physical or mental suffering or significantly undermines human dignity. In this context, both the Tribunal and the IACHR have distinguished between torture and inhuman treatment. However, the Court is required to evaluate each case based on the intensity of suffering and context, considering factors such as the duration of treatment, physical, and mental repercussions, along with the victim's sex, age, and health.<sup>135</sup> In the *Ceaser* case, the victim was convicted of attempted rape and sentenced to 20 years in prison (with mandatory hard labour) and 15 lashes with a cat-o'-nine-tails.<sup>136</sup> The IACHR ruled that such punishment is prohibited and constitutes torture, further stating that corporal punishment is inherently cruel, inhuman, and degrading, rendering it incompatible with Article 5 of the Pact of San José.<sup>137</sup>

This was not the only instance where the American human rights jurisprudence cited the *Celebici* case. In the *González Pérez* case, the Commission determined that the sexual violence inflicted by security forces on three indigenous women constituted a serious violation of Articles 5 and 11 of the Pact of San José. Similar to the Tribunal's conclusions in the *Celebici* case, the Commission classified rape and other forms of sexual assault as acts of torture. Additionally, the report of the UN Special Rapporteur was referenced, highlighting research that demonstrates the mentally and physically

133 American Convention on Human Rights. Article 61. (1): 'Only the States Parties and the Commission shall have the right to submit a case to the Court.'

134 Buergenthal, Shelton and Stewarr, 1988, p. 155.

135 Inter-American Court of Human Rights. *Case of Ceasar v Trinidad and Tobago*, Judgment of March 11, 2005. No. 123. Para. 68.

136 Type of multi-tailed whip.

137 Inter-American Court of Human Rights. *Case of Ana, Beatriz and Celia González Pérez v Mexico*. Report n. 53/01. Annual Report 2000. Ibid. Para. 70.

devastating effects of sexual violence on victims. Rape was thus regarded by the Court as a method of punishment, intimidation, and humiliation.<sup>138</sup>

In the *Tibi* case, the Court found that the conditions of the victim's detention did not meet the necessary requirements to uphold the dignity of the individual deprived of their freedom. In this particular case, the detainee was held in an overcrowded facility for 45 days, where there was no adequate space for eating or sleeping comfortably, and the ventilation and lighting were substandard.<sup>139</sup> The Court also noted that even the mere threat of a real risk of torture could result in mental harm and could be considered as torture in itself.<sup>140</sup>

The *Moiwana Village* case focused on the *Moiwana* community, founded in the 19th century by the *N'djuka* people, who are descendants of enslaved individuals brought to Suriname for forced labour. Some of these slaves successfully escaped and established autonomous communities, including that of the *N'djuka* people. However, peace in the area was short-lived, as civilian uprisings led to internal armed conflict, during which these communities became targets of military operations. The military actions resulted in numerous civilian deaths and the destruction of many community structures. Consequently, many residents were forced to flee without the chance for proper traditional burials for their deceased. Upon their return, the state refused to investigate or hold those responsible for these atrocities accountable. The IACHR determined that the state's failure to investigate and sanction the perpetrators must be considered a violation of the rights of the remaining members of the community. Furthermore, it asserted that the necessity for these individuals to flee for their safety constituted a violation of Article 5 of the Pact of San José, which pertains to the right to physical and mental integrity.<sup>141</sup>

### ***5.2. African Charter on Human and Peoples' Rights***

Article 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

In the late 1960s, the Organisation of the African Unity (OAU) held discussions regarding the drafting of a common African human rights instrument, which resulted in the adoption of the African Charter on Human and Peoples' Rights (ACHPR) in 1981. The adoption of the ACHPR included the creation of a body acting on behalf of the goals of the Union regarding human rights, the Africa Commission on Human and Peoples' Rights. When the OAU was succeeded by the African Union, the organisation

138 Para. 45-54.

139 Inter-American Court of Human Rights. *Case of Tibi v Ecuador*. Judgment of September 7, 2004, No. 114, para. 152.

140 *Ibid.* para. 147.

141 Inter-American Court of Human Rights. *Case of Moiwana Village v Suriname*. Judgment of June 15, 2005. No. 124. Para. 11-101.

felt it necessary to establish a stronger judicial protection of human rights in the region by creating the African Court on Human and Peoples' Rights (ACtHPR).<sup>142</sup>

The African Commission was established in 1987 with several functions. First, its work involves collecting documents and conducting research on African problems; organising seminars and conferences and encouraging partners to present their issues and recommendations to Governments. Second, the Commission establishes principles that could solve legal problems related to human rights protection in Africa. Third, it ensures cooperation with other African or international institutions. Hence, the main aim of the Commission is to improve the African human rights framework by various peaceful means.<sup>143</sup>

The African Charter sets a prohibition on torture in Article 5. It prohibits all forms of exploitation, in which it includes the prohibition of illicit treatment from both State as well as non-state actors. The demands stemming from the provision were elaborated on more in the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as Robben Island Guidelines.<sup>144</sup> The document emphasizes that it is necessary for the States to ratify the regional and international human rights treaties, which set the framework for the prohibition itself.<sup>145</sup> The provisions also expect the Member States to promote and support cooperation with human rights mechanisms, including the African Commission.<sup>146</sup> It stipulates that there attention needs to be paid especially when the acts concern a young person or the act is gender-related.<sup>147</sup> Illicit treatment can be understood as reason for extradition, and States have to refrain from the production or trading with equipment which can be used for torturous acts.<sup>148</sup> The guideline declares the absolute nature of the prohibition by explicitly enumerating that no necessity, national emergency or public may be used as an exemption from the rule.<sup>149</sup> Additionally, the guideline n. 15 stipulates the non-refoulment principle. The document of guidelines besides establishing more precise rules was setting up a Committee for the Prevention of Torture in Africa, which was established in order to follow up on the implementation of the document's guidelines.<sup>150</sup>

As the work of the African Commission is more widely acknowledged, the basic principles and rules can be derived easily through an analysis of its methods. When analysing the Commissions' work, the African Charter establishes the legal

142 Protocol to the ACHPR on the Establishment of an ACtHPR, 1998.

143 Mute, 2020, p. 234.

144 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, Adopted by the African Commission on the 32<sup>nd</sup> Ordinary Session, 17–23 October 2002.

145 Ibid, Guideline 1.

146 Ibid, Guideline 2–3.

147 Ibid, Guideline 5.

148 Ibid, Guideline 7, 14.

149 Ibid, Guideline 13. Interestingly, the African Charter does not enhance derogation clause in its text, leaving no space for derogating from obligations stemming from the treaty.

150 See Long, and Munitngh, 2010.

background for two methods of communications – interstate communications or communications when the claim comes from an individual or an organisation. Interstate communications are based on one state presenting a belief that another state violated the African Charter. The criteria from individual claims are more complicated and are similar to those we observe in the ECtHR (applicant cannot be anonymised, application is compatible with the Charter, has valid background, the applicant exhausted local remedies etc.).<sup>151</sup>

The Commission openly acknowledges that its understanding of torture is based on Article 1 of the CAT Convention. In the communications against Nigeria, the Commission declared that both actions that cause severe physical or mental suffering and those that humiliate an individual or force him to act against his will should be considered as violations of Article 5. The practice proves that the Commission makes distinctions between forms of ill-treatment when some elements constituting torture remain unproved. In their interpretation, cruel, inhuman, or degrading treatment or punishment is to be interpreted to the widest possible extent in order to provide protection against physical or mental abuse. In the communications against Sudan or communications against Nigeria, the Commission declared that prolonged refusal of contact with family for detainees and blocking any information about their whereabouts may be understood as inhuman treatment of both the detainees and their relatives.<sup>152</sup> Further methods that were proven to be violations of Article 5 by the Commission include abusive conditions during detention – such as chaining, use of electric shocks, simulated drowning, denial of food, or denial of medical care.<sup>153</sup>

We may observe that the human rights framework in the African Commission has been established quite late in comparison to the European one. Prior to the adoption of the ACHPR, the African region used either the Universal Declaration of Human Rights or two treaties – the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Some of the scholars however claim that the used system was not effective, as Cold war politics pressured the African States to align themselves in bipolar formations of either civil and political right or economic, social and cultural rights.<sup>154</sup> Nevertheless, its effectiveness may be questioned even nowadays, as even though the African Commission has

151 African Charter, 1981, Article 56.

152 Communication nos. 48/90, 50/91, 52/91 and 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 54; also see Communication no 151/96, Civil Liberties Organisation v. Nigeria, para 27.

153 Communication nos. 48/90, 50/91, 52/91 and 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 54; also see Communication no 151/96, Civil Liberties Organisation v. Nigeria, para 27.

154 See Mutua, *The African Human Rights System: A Critical Evaluation*. In *Humna Development Occasional Papers*. Human Development Report Office. UNDP.

developed over years by creating several protocols, its work results in reports and recommendations.<sup>155</sup>

### **5.3. Arab Charter on Human Rights**

As there are obvious reasons stemming from the (in)effectivity of the Arab human rights system, it is not necessary to perform an in-depth analysis of the prohibition of torture in the framework at hand. However, we may present Article 13 a):

‘The State parties shall protect every person in their territory from physical or psychological torture, or from cruel, inhuman, degrading treatment. [The State parties] shall take effective measures to prevent such acts; performing or participating in them shall be considered a crime punished by law.’

## **6. Conclusion**

Ultimately, we can derive four elements setting up the notion of torture from the international treaties analysed. The first element is that the act is certainly an *intentional* conduct. Second, the consequences of such behaviour cause severe suffering, either physical or mental. Third, in terms of international law, there is always an involvement of a public authority; nonetheless, this involvement may be direct or indirect. The last and fourth element is the element of purpose, as the act has to be perpetrated with a reason.

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

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

155 African Charter, 1981, Article 46 and Rules of Procedure of the African Commission, Article 80.

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. As we may observe, the same is not fully true for other regional systems of human rights.

The notion of the prohibition, enhanced variety of ambiguities resulting in debates concerning the applicability issues. The scholarly discussion related to the interpretation of torture were intensively present mainly after 11 September 2001 terrorist attacks in the USA. The campaign of the “war on terror” enhanced the right of public authorities to perform surveillance of acts inside their jurisdiction. One may ask, what are the practical limits of the state authorities to oversee any act of a private person? Additionally, lawyers, politicians, and even society as a whole were openly discussing the possibility of using coercive interrogation techniques.<sup>156</sup> The discussion opened the topic of a “reasonable” torture in certain extraordinary situations. These gained the name “*ticking bomb* situations,” where torture would not be seen as generally forbidden. The reasoning for these acts rested upon the hypothesis, that since it is necessary, some level of illicit treatment is legal and accepted in order to protect the lives of people.<sup>157</sup> Indeed, the question of a non-derogatory and absolute nature in practice comes logically into the fora.

Finally, we may state that the European system is strongly influential, however not all measures can be universally applied to other regions of the world. Sadly, this is true also for the prohibition of torture, having *ius cogens* nature.

156 Alter, Time to Think About Torture, NEWSWEEK, Nov. 2001, [Online] Available at: <https://www.newsweek.com/time-think-about-torture-149445>.

157 Žižek, 2002, p. 104.

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