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# Human Rights Under Extreme Circumstances: The Prohibition of Torture in Israel

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*The strength of a country is also measured in the ability to defend human dignity.*

*(Mario Draghi)*

## Introduction

Omar Ghaneimat, a forty-five-year-old man, was arrested by in Israel the General Security Services ('GSS') in April 1997 and detained till July of that year.[1] During the detention period, he was subject to a treatment which according to the international standards fall under the scope of torture, inhuman and degrading treatment. Nevertheless, the GSS consider it as "moderate physical pressure"[2].
Mr. Ghaneimat was exposed to different form of torture such as *Shabeh* position, where he was tied to a chair, legs, and arms behind the back, hooded and playing loud music to deprive him of sleeping. During his interrogation, the GSS put him in the *qambaz* position, forcing him to squat in his toes for a long period of time and beaten when he fell until he took again the stress position. In addition to these peculiar methods, beatings and shacking caused him broken bones and injuries.
This may be seen as an insulated case, instead, is just one of the many cases which Human Rights Organization, like Human Right Watch, reported since the start of the Israel-Palestinian Conflict. Indeed, the struggle between Jewish and Palestinians in the Occupied Territories is nowadays still an open wound.
There is no need to summarize here the long and complex history of the foundation of the State of Israel. Suffice it here to mention that, as the Israeli Supreme Court in one of its most important ruling reads

> Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas—in areas of public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy.[3]

[1] YUVAL GINBAR, ROUTINETORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICES 39-40 (B'tselem 1998).
[2] (1989). Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity. Israel Law Review, 23(Issues and 3), 146-188.
[3] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

Over time, Israel has adopted a series of legislation to fight terroristic attacks which undermine the very existence of the Sate itself. The Prevention of Terrorism Ordinance[4] and the Defense Regulations[5] respectively criminalize members of terroristic organizations and the right for the Government of Israel to detained individuals considered as a security threats.
It is also fundamental to highlight that Israel allowed the General Security Services to investigate and interrogate suspects of terrorism. Indeed,

> The GSS is responsible for security matters and counter-intelligence within Israel and the occupied territories . . . . [It] apprehends and interrogates people who are believed to be involved in activities endangering the security of the state.[6]

Under the name of protection of national security, the GSS as well as the Israeli Defense Force and Israeli Police carried out indiscriminate methods of interrogations on Palestinians, often using brutal methods which constitute a direct attack to human dignity and personal integrity.
The strategy of the Israel interrogation agencies to obtain information is characterized by a systematic use of physical and psychological pressure that last days or weeks, without having possibility to access to lawyers or families. The methods implied inflict severe mental and physical suffering which go under the internationally accepted definition of torture.[7]

Given this, this analysis aims to investigate how democracies react in relation to the prohibition of torture when they are subject to emergency circumstances, such as terroristic attacks or wars. In particular, the research is aimed at evaluating the respect for human rights in extreme circumstances when a state declares itself fully committed to democratic values and rule of law.
To investigate that, the study is dedicated to the prohibition of torture, inhuman and degrading treatment at the international as well as national level and, finally, carries out an insight study of the State of Israel's response to terrorism.

The first chapter is aims to present such prohibition as absolute and non-derogable right under international law. Indeed, the prohibition of torture is protected at international as well as national level.

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[4] Justus R. Weiner, Terrorism: Israel's Legal Responses, 14 SYRACUSEJ. INT'LL. &COM. 183,189 (1987). "This Ordinance criminalizes membership in and activities supporting a terrorist organization".
[5] Ibid.
[6]STANLEY COHEN & DAPHNA GOLAN, THE INTERROGATION OF THE PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTuRE? 19 (B'tselem 1991).
[7] Human Rights Watch/Middle East. (1994). Torture and ill-treatment : Israel's interrogation of Palestinians from the Occupied Territories. Human Rights Watch.

Firstly, the study analyzes the essence of an absolute right, which cannot be overridden, restricted, or infringed regardless the circumstances.

The research study traces the development of the protection of the prohibition of torture through international legal instruments since World War II. It begins with the recognition of the right in the Universal Declaration of Human Rights('UNDHR'), which despite not causing direct obligations to the states, nevertheless, has very strong legal force as it is considered customary international law. Moreover, the research focuses on the prohibition of torture considered at the international level as jus cogens, opposing any judicial, legislative, or administrative act which authorizes it.

A more accurate definition of the prohibition of torture can be found in the International Covenant on Civil and Political Rights ('ICCPR'). The study focuses on the development of the definition of torture, which becomes more and more detailed and precise, emphasizing where it meets and differs from the definition in previous treaty, in this case dissimilarities between the UDHR definition and the ICCPR one. To determine the compliance of the ICCPR, the research examines the jurisprudence of the UN Human Rights Committee. Cases-law are deeply studied to effectively report and inform about the violation of this absolute right. To conclude, the Art.7 of the ICCPR, under which the prohibition of torture is allocated, also required obligations by the States to protect citizens from mistreatment and to display any legal tool to prevent such violations.

Finally, special emphasis is provided to the Special Rapporteur on Torture, whose main objective is to prevent and hamper the spread of the episodes where the right is violated.

The second chapter dwells with the regional system of protection of prohibition of torture, inhuman and degrading treatment. At the European level the prohibition is protected by Art.3 of the European Convention on Human Rights. Therefore, the study focuses on the strong protection of such non-derogable right through, not only the legal definition, but also the jurisprudence of the European Court of Human Rights. Indeed, no matter how difficult the circumstances are, not even in cases of ticking bomb scenario, Article 3 of the ECHR cannot be derogated, balanced, or restricted. As for the previous legal instruments, negative and positive obligations arise and are investigated.

The second area studied is on the other shore of the Atlantic. Indeed, the prohibition of torture is protected by the American Convention on Human Rights under Article 5. Following the analyses of the definition, the study also shows how the ACHR and the Inter-American Convention to Prevent and Punish Torture work jointly in establishing parameters for the classification of torture, inhuman and degrading treatment. In addition, differences in treatment are also highlighted in the jurisprudence of the Inter-American Court of Human Rights. To conclude the negative and positive obligations triggered by the Convention are analyzed.

Finally, the second chapter concludes with the examination the inviolability of the right in the African system of fundamental rights' protection. The prohibition of torture is addressed in article 5 of the African Charter, which emphasizes human dignity prohibiting any form of slavery, torture, or cruel, inhuman and degrading treatment. As for the treaties examined before, the jurisprudence of the African Commission is examined showing the difference in definition between inhuman, degrading treatment and torture. The focus is also on the prevention and reparation mechanism for the victims.

Chapter three fully examines the United Nations Convention Against Torture. Indeed, to give impetus to international and regional treaties, the United Nations envisaged a legal instrument that could have a global reach. In 1984, the Convention Against Torture was adopted by the United Nations General Assembly. It is of particular importance as it gives a comprehensive definition regarding the term torture and presents a legal differentiation from the terms cruel, inhuman, and degrading treatment. In the analysis of the definition, the various determining factors are subjected to scrutiny. For instance, among them, the three most important to determine an act as torture are intention, purpose of the perpetrator and powerlessness of the victim. The chapter focuses on the examination of the jurisprudence of the Committee against Torture by investigating cases in which there has been a violation of Art. 1 of the CAT, the correlation between torture and the principle of non-refoulment and the protection against torture for people deprived of their freedom.
The third chapter also addresses the obligations of ratifying states to prevent torture and criminalize it. These two obligations were first enlisted in two different articles, Art. 2 and Art. 4 of the CAT. The chapter concludes with an overview of the Optional Protocol, to strengthen and improve the workings of the CAT.

The fourth chapter takes into consideration the continuous struggle of Israel fighting against terrorism. It examines two turning points in the public debate on the use of torture in Israel. First, the Landau Report of 1987, which investigate the use of physical means by the General Security Services. Indeed, it sanctioned the use of moderate physical pressure when dealing with suspects of terrorism. Under the scope of the Landau Report, thousands of Palestinians have been physically and psychologically abused, falling under what it is recognized internationally as torture, inhuman and degrading treatment. Second, The Public Committee against Torture in Israel v Government of Israel et al.[8] of 1999 is scrutinized. The court, led by President Justice A. Barack, condemn the use of brutal methods implied by the GSS as illegal. The Court also deal with the most pressing question of self-

[8] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

defense as ex-ante authorization for applying physical pressure. Nevertheless, this authorization was rejected by the Court, stating that it is only available as ex-post defense to escape criminal liability. Although, it seems to be a step toward a better protection from torture, the ruling shows shortcoming which *de facto* did not arrest the prohibition of torture.

# Chapter 1: THE ABSOLUTE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

## 1. Introduction to the chapter

The concept of human rights involves consideration of what "rights" a person possesses by virtue of being "human", that is, rights that human beings have simply because they are human, independently of the infinite variety of individual characteristics and human social circumstances.[1] But what is the essence of human that give rise to certain rights?

The utilitarian approach is often reflected by the international legal texts as the Preambles to the Universal Declaration of Human Rights and the International Covenant on Civil and Political rights which affirm that recognition of the inalienable and equal dignity and rights of all people are the foundations for freedom, justice, and peace. The Covenant also adds that "these rights derive from the inherent dignity of the human person."[2]

It is possible to affirm that human dignity is one of the most important concept in international human rights law considered by all the human rights bodies and instruments.[3] Indeed, human dignity attests that all human beings have an equal and an inherent moral value or status[4] from which derive the fact that other person and institutions need to respect it. Many of the rights that are established by the international law are based on the protection of human dignity and among those, the prohibition of torture lays its foundation precisely on respect for it.

The prohibition of torture holds a special status in the international legal system. Although with different nuances, the various universal and regional treaties defend the right to physical and spiritual integrity, in an absolute and non-derogable manner. Although, the right to not to be subject to torture goes along with other principles such as the rule of law, the enjoyment of the human rights' protection at the national level, etc., the following chapter will provide an overview of the legal framework and tools established by the United Nations' system of the prohibition of torture, inhuman and degrading treatment, or punishment. -Specifically, the research will begin with the definition of the absolute right under the Universal Declaration of Human Rights, the obligations it gives rise to the countries,

[1] Cerna, C. M. (2015). Dinah Shelton, Advanced Introduction to International Human Rights Law. *Human Rights Law Review*, *15*(2),395–400. https://doi.org/10.1093/hrlr/ngv010
[2] Ibid.
[3] Shelton, D. (2013). *The Oxford Handbook of International Human Rights Law*. OUP Oxford.
[4] Shelton, D. (2014). *Advanced introduction to international human rights law*. Edward Elgar.

and finally the assessment of absolute character through the analysis of its jurisprudence. Subsequently, the analysis will illustrate how the prohibition of torture has acquired a jus cogens character in international law, then, it will explore the absolute prohibition in the International Covenant on Civil and Political Rights, displaying the differences in the definition of torture, the positive obligations and the negative ones by the states, and a deepening study of the cases to highlight the need of the absoluteness of inviolability. Finally, it will deepen the work of the Special Rapporteur on Torture as special envoy of United Nations.

## 2.The Prohibition of torture in the United Nations' system of Human Rights' protection.

### 2.1 Universal Declaration of Human Rights: a first step towards the protection of the International Human Rights

When two rights are at stake, one of the two is usually restricted. Based on the principles of proportionality, necessity, and reasonableness, it is determined whether the violation of a right or rather its restriction can be justified. However, limitations on the prohibition of torture have no place, even in times of emergencies[5]. Indeed, international treaties not only forbids torture, but also, they do not allow exceptions, as enshrined in Art.5 of Universal Declaration of Human Rights (UDHR), Art. 3 of Geneva Conventions 1949, Art. 3 in conjunction with the Art. 15 of European Convention of Human Rights (ECHR), Art.7 in conjunction with Art. 4(2) of the International Covenant on Civil and Political Rights (ICCPR) , Art.5(2) in conjunction with Art. 27(2) of the American Convention of Human Rights (ACHR) and Art.5 of the African Commission on Human and People's Rights (ACHPR).

The prohibition against torture is considered as an "absolute right." To better understand what this means,

> A right is absolute when it cannot be nullified under any circumstances, therefore it can never be justifiably broken and must be fulfilled without exception."[6]

Notably, since an absolute right cannot be overridden, restrictions automatically amount to infringement, which is illegal.

[5] Heyns C., Rueda C. and Du Plessis D., "Torture and ill treatment: The United Nations Human Rights Committee" in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.

[6] Gewirth, A. (1981). Are There Any Absolute Rights? *The Philosophical Quarterly*, *31*(122), 1. https://doi.org/10.2307/2218674

The non-relative nature of the prohibition of torture, however, did not prevent incidents that undermine human dignity. In the aftermath of World War II, the Universal Declaration of Human Rights, which is recognized by all member countries of the United Nations, provided the first step in recognizing the prohibition of torture. Art. 5 of the UDHR reads:

> No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment[7].

It is possible to consider it as the most general legislation as it does not specifically define the acts and it does not provide for enforcement mechanisms by member states due to the non-binding nature of the declaration itself. However, although not formally mandatory, the UDHR has a great moral impetus. Despite it can be argued that many of the principles enunciated are part of customary international law, they are at least general principles of law. Although not all principles can be considered customary law, the prohibition of torture is included in the list.

In *Filartiga v Pena-Irala*,[8] the Circuit Judge Kaufman stated that the prohibition of torture

> has become part of customary international law, as evidence and defined by the Universal Declaration of Human Rights.[9]

The Universal Declaration of Human Rights tends to encompass all human rights, without distinction of religion, race, culture, gender, etc.… indeed

> it enshrines a consensus on the content of internationally recognized rights owed to mankind'[10]

## 2.2 Prohibition of Torture as jus cogens

While customary international law takes time to evolve as states are not bound by legal obligation, *jus cogens* rules on human rights must simply be accepted by the international community.[11] For

[7] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html
[8] Filartiga v. Pena-Irala, 630 F.2d 876, United States Court of Appeals, Second Circuit, 30 June 1980.
[9] Smith, R. K. M. (2016). *Textbook on international human rights*. Oxford University Press.
[10] Ibid
[11] Clapham, A. The jus cogens prohibition of torture and the importance of sovereign state immunity in Marcelo Gustavo Kohen, Caflisch, L., & Institut Universitaire D'études Européennes (Genève. (2007). *Promoting justice, human rights and conflict resolution through international law = La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international : "Liber Amicorum" Lucius Caflisch*. M. Nijhoff.

example, courts have accepted the prohibition of torture as jus cogens without rigorous research for evidence of legal obligations.

Indeed, the unequivocal nature of the prohibition is enshrined in customary international law, and it is also considered as *jus cogens* in international law according to article 53 of the Vienna Convention on the Law of Treaties as follows

> For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character[12].

It is possible to deploy different jurisprudence in order to show that the prohibition of torture is considered a non-derogable right. For instance, on the other shore of the ocean, the Inter-American Court of Human Rights, in the case of Tibi v. Ecuador, reiterates the absolute condemnation of torture and classifies it as *jus cogens* stating that

> There is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of jus cogens. Prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.[13]

Moreover, President Carter in addressing to the United Nations on March 17, 1977, stated that:

> All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of the citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.[14]

The International Tribunal for the Former Yugoslavia has affirmed the prohibition of torture as jus cogens in *Prosecutor v. Furundzija*[15]. But what jus cogens norms are under the scope of human

[12]United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html
[13]Tibi v Ecuador, (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 7 September 2004.
[14] Filartiga v. Pena-Irala, 630 F.2d 876, United States Court of Appeals, Second Circuit, 30 June 1980.
[15] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.

rights? To answer this question, the International Law Commission's articles on State responsibility states

> Those peremptory norms that are clearly accepted and recognized included the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[16]

To be exhaustive, the UN Human Rights Committee consider torture and inhuman and degrading treatment as violating the jus cogens norms.

Concerning the special obligations of states, outlined by jus cogens rules under art. 40 of the ILC, the violations of the peremptory norms mean a

> gross and systematic failure by the state to fulfill its obligations[17],

and the consequences of such violations are enshrined in the art. 41 affirming that States must cooperate to put an end to the violations, no state must cooperate in maintaining or supporting the situation and finally no state should recognize as lawful such situations. This regime let be accountable all the states for allowing human rights violations by any other state. The ICL include jus cogens also the countermeasures to such violations. For example, a genocide cannot justify a counter-genocide. Moreover, in cases where there is a contrast between jus cogens norms and treaty obligations, the jus cogens norms need to be prioritized.

The Judge Cassese Antonio has stressed the method of the Swiss Tribunal Federal which has given more importance on the prohibition of torture as jus cogens than the respect for a binding obligation based on an extradition treaty.[18] In addition, under the rules of the State Responsibility, Cassese has also suggested to

> disregard or declare null and void a single treaty that is contrary to jus cogens.[19]

To conclude, it is possible to derive some specific obligations for states to bear in the judgements of the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Furundzija*[20], which have been risen in the context of violation of torture such as the right cannot be derogated by

[16] Commentary to Art.26 para.5, Report of the ILC, GAOR, supp. No. 10 ( A/56/10) P.208.
[17] ibid
[18] Clapham, A. The jus cogens prohibition of torture and the importance of sovereign state immunity in Marcelo Gustavo Kohen, Caflisch, L., & Institut Universitaire D'études Européennes (Genève. (2007). *Promoting justice, human rights and conflict resolution through international law = La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international: "Liber Amicorum" Lucius Caflisch*. M. Nijhoff.
[19] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html
[20] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.

states from the practice of customary international law or treaties; in addition, the principle serves as de-legitimizing any legislative, administrative or judicial act authorizing torture; the victim could bring a civil suit for damage in a foreign court , which would therefore be asked, inter alia, to disregard the legal value of the national authorizing act; moreover, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character, bestowed by the international community upon the prohibition of torture, is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in the territory under its jurisdiction; finally, the Tribunals mentions that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.[21]

## 2.3 The International Covenant on Civil and Political Rights

### 2.3.1 Legal Definition

A more thorough definition of the legal norm against the prohibition of torture is expressed in Art. 7 of the Covenant on Civil and Political Rights of 1966, which explicitly states

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to without his free consent to medical or scientific experimentation[22].

The compliance of the explicit prohibition in the Covenant determines that it is subject to monitoring mechanisms by the UN Human Rights Committee (HRCttee)[23]. According to Art.28

> The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.[24]

[21] Ibid para. 153-157.
[22] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[23]Heyns C., Rueda C., and Du Plessis D., "Torture and ill treatment: The United Nations Human Rights Committee" in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.

[24]UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

First, the HRCttee highlights the individual character of the right with the formulation "no one shall be" and not only as an obligation of the state. Furthermore, the term torture includes both physical and mental one. However, the scope of the right does not cover those situations where the treatment is considered degrading for socio-economic reasons. The definition includes a climax of the intensity of treatment ranging from the highest, i.e., torture, giving it a special stigma, to designating treatment and punishment from cruel to degrading. In addition to Article 5 of the UDHR, the Covenant expressly adds the prohibition of scientific or medical experiments without the consent of the individual. It was presumably given in response to the atrocities of Nazi concentration camps. However, exceptions such as mass vaccinations or emergency operations of unconscious persons were allowed.

### 2.3.2. Jurisprudence of the UN Human Rights Committee.

To analyze the differences in definition of torture and cruel, inhuman and degrading treatment under the scope of Article 7 of the Covenant, it is fundamental to examine the jurisprudence of the HRCttee.

In *Rodriguez v Uruguay*[25], the committee found a violation of Art. 7 related to torture. The applicant is Mr. Hugo Rodriguez, declaring violations of Articles 7,9,10,14,15,18, 19 of the ICCPR, asks the Human Rights Committee to focus on the violation of Art.7 and to the failure of the state to provide an effective remedy.

The applicant was arrested in June 1983. He stated that he was handcuffed, tied to a chair, and hooded for several hours. In the days following his arrest, his arms and legs were bound, and electrical cords were applied to his eyebrows, nose, and genitals. (Pìcana éléctrica). He was suspended from his arms and electric shocks were applied to his fingers. He declared these and other ill-treatments (magneto) lasted for a week. He remained in prison until December 1984. The Human Rights Committee's views on the case

> Bearing in mind that the author's allegations are substantiated, the Committee finds that the facts as submitted sustain a finding that the military regime in Uruguay violated article 7 of the Covenant.[26]

It should be noted that Art. 7 of the Covenant should be read in conjunction with Art 2 (3)

[25] HRctte 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights' Rodriguez v. Uruguay Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).
[26] Ibid

> to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity.'[27]

The Committee has clearly stated in this regard that the effective remedy has not been implemented.

To continue citing the jurisprudence of the Human Rights Committee it is useful to mention the case *Lafuente Penarrieta et al.*[28] (Bolivia) where both torture and inhuman treatment were found. The Human Rights Committee found the violation of Art. 7 of the ICCPR regarding the treatment of Walter Lafuente Penarrieta, Miguel Rodriguez Candia, Oscar Ruiz Caceres, and Julio Cesar Toro Dorado, who were arrested in 1983 and tortured and mistreated within the first 15 days of their detention. They were held incommunicado for 44 days with inhuman prison conditions and without medical assistance. The methods of torture used are very similar to those in the previous case.

The prohibition of torture, as well as degrading and inhuman treatment is vital for the respect of human dignity but

> but at the same time is most at risk of violation during situations of violence[29].

In contexts where the threat of terrorism is frequent, torture and human and degrading mistreatment could be considered as a response to the threat to national security. In *Bhandari v Nepal*[30], according to the facts presented by the petitioner, the authorities declared a state of emergency in November 2001 because of armed conflict in the country. As a result of this, the Terrorist and Disruptive Activities Ordinance

> allowed State agents, such as enforcement personnel, to arrest individuals on the basis of mere suspicion of involvement in terrorist activities, and various constitutionally granted human rights and freedoms were suspended.[31]

The applicant referred to the HRCttee for the violation of Art. 6,7,9,10, 16 of the ICCPR, along with Art. 2 (3) thereof, with respect to his missing father, Mr. Tej Bahadur Bhandari. In particular,

The Committee takes note of the author's allegations under article 7 that his father was severely ill-treated by the authorities at the moment of his arrest and while in detention; that he was held without contact with the outside world; that his enforced disappearance amounts per se to a treatment contrary

[27] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[28] HRctte 'Views of the Human Rights Committee Penarrieta, Maria Pura de Toro, Walter Lafuente Penarrieta v Bolivia' Communication No. 176/1984; U.N. Doc. CCPR/C/31/D/176/1984(1987)
[29] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, (Oxford University Press 2009)
[30] HRctte 'Views of the Human Rights Committee Bhandari v Nepal Communication No. 2031/2011 (2014)
[31]HRctte 'Views of the Human Rights Committee Bhandari v Nepal Communication No. 2031/2011 (2014)

to article 7 of the Covenant; and that the State party has failed to carry out a prompt and effective investigation. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman, or degrading treatment or punishment, in which it recommends that States parties should make provision to ban incommunicado detention. In the present case, in the absence of a satisfactory explanation from the State party, the Committee finds that the acts of torture, to which the author's father was subjected, and his incommunicado detention constitute a violation of article 7 of the Covenant.[32]

The Human Rights Committee has not provided benchmarks to consider treatment as inhuman, cruel, and degrading. Once again, however, these can be established by analyzing the rulings taken by the committee itself. In *Osbourne v Jamaica*[33] It expressed that the act of whipping constitutes cruel and inhuman treatment contrary to Art.7, which even if these do not constitute torture, is not derogable within the meaning of the above cited article of ICCPR. The Committed stated

> The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. […]. Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that by imposing a sentence of whipping with the tamarind switch, the State party has violated the author's rights under article 7.[34]

In addition to corporal punishment, incommunicado detention and enforced disappearance are considered in breach of the Covenant. In MacCallum v South Africa[35], The Human Rights Committee established that even one month of incommunicado detention was a violation of fundamental rights within the meaning of Art.7.

Moreover, from reading the rulings taken by the Human Rights Committee, it is possible to see that delay in execution is considered cruel and inhuman treatment. In Pratt and Morgan v. Jamaica[36] ,

[32] ibid
[33] HRCtte 'Views of the Human Rights Committee George Osbourne v. Jamaica, Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000).
[34] HRCtte 'Views of the Human Rights Committee George Osbourne v. Jamaica, Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000).
[35] HRctte 'Views of the Human Rights Committee McCallum v South Africa, UN Doc CCPR/C/100/D/1818/2008 (2 November 2010)
[36]HRCtte 'Views of the Human Rights Committee Pratt and Morgan v Jamaica Communication No. 210/1986 & 225/1987 U.N. Doc. CCPR/C/35/D/225/1987 (1989)

> The Committee considers that a delay of close to 10 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7.[37]

Degrading treatment is the last adjective mentioned in Art. 7 of the ICCPR. In *Conteris v. Uruguay*[38], the Committee found that certain prison practices were considered degrading because they aimed to humiliate prisoners. Indeed,

> The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant, in particular:- of article 7, because of the severe ill-treatment which Hiber Conteris suffered during the first three months of detention and the harsh and, at times, degrading conditions of his detention since then;[39]

### 2.3.3 The positive and negative obligations required by Article 7

As with the other articles, according to the Art. 2 of the ICCPR, Article 7 requires the states to respect both negative and positive obligations. Negative obligations are fundamental to the prohibition of torture because

> State must ensure that their officials do not engage in torture or ill treatment.[40]

However, making a clear distinction between negative and positive obligations seems to be a difficult task as, on the one hand, in order to act against an aggression or transgression by the agents, the state must ensure that their officials do not engage in torture or ill treatment, so essentially a negative duty, but on the other hand, the states has the positive obligation to set up the legal framework needed to prevent those illegal acts.[41] Therefore, sometimes these obligations are interwind. Recently, the Human Rights Committee has drawn attention to the positive obligations of states on precautionary measures to prevent such unlawful behavior from taking place. For example, the Concluding observations of the HR Committee of 2003 in Israel requested to the State of Israel to give detailed information on complaints about torture and ill treatment in the state. Indeed,

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[3737] ibid
[38] HRctte 'Views of the Human Rights Committee Hiber Conteris v. Uruguay, Communication No. 139/1983 (17 July 1985), U.N. Doc. Supp. No. 40 (A/40/40) at 196 (1985)
[39] Ibid.
[40] Heyns C., Rueda C. and Du Plessis D., "Torture and ill treatment: The United Nations Human Rights Committee" in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.
[41] ibid

> The State party should review its recourse to the "necessity defence" argument and provide detailed information to the Committee in its next periodic report, including detailed statistics covering the period since the examination of the initial report. It should ensure that alleged instances of ill-treatment and torture are vigorously investigated by genuinely independent mechanisms, and that those responsible for such actions are prosecuted. The State party should provide statistics from 2000 to the present day on how many complaints have been made to the Attorney-General, how many have been turned down as unsubstantiated, how many have been turned down because the defence of necessity has been applied and how many have been upheld, and with what consequences for the perpetrators.[42]

Moreover, Art. 7 regards also the excessive use of force by the State agents as expressed by the Concluding Observation given of Israel in 2004 regarding the 'excessive use of lethal force by the State party's security forces,[…] particularly in the enforcement operations against Palestinians civilians, including children.'[43] Indeed, to the State Party is required to take all the measures to avoid the use of lethal force acting according to the law, ensure an affective and impartial investigations to the incidents by the State' agents, and ensure that the responsible of those acts are prosecuted and convicted.[44]

The Committee identified several preventive duties to avert torture. Foremost among these are visits by attorneys, family members, doctors, prohibition of using information obtained through torture and registry centers and information about detainees.[45]

The Committee also considers it essential that alleged violations of Article 7 are taken seriously and investigated. Indeed, the lack of prompt, impartial and thorough investigations of gross human rights violation, such as torture, constitutes a violation of the right of an effective remedy in Art. 2(3) but also of the positive obligation to fulfill the respective right.[46] In Freemantle v Jamaica, the case is about three detainees found death and one seriously injured during a riot in prison. The Government found that the investigation carried out were meaningless because the offenders were no longer workers of the prison or retired. The Committee instead refuses these justifications and found a violation of Art. 7 and 10.[47]

[42] Concluding observations of the Human Rights Committee: Israel. 21/08/2003. CCPR/CO/78/ISR.
[43] Concluding observations of the Human Rights Committee: Israel. 21/11/2014. CCPR/C/ISR/CO/4.
[44] Ibid.
[45]UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[46] Ibid
[47] HR Committee 'Views of the Human Rights Committee Michael Freemantle v. Jamaica, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000).

The committee also reiterates that the states have the duty to protect any citizen from torture and ill-treatment, regardless of whether these acts are perpetrated by agents acting in their official capacity or by private citizens. The protection concerns both detainees who are particularly vulnerable categories of persons, as well as for example corporal punishment of teachers against children, parents against children, members of organized crime against victims. The state must, therefore, prosecute perpetrators under criminal law, and although the success of the investigation is given by the criminal law enforcement mechanism, the criminal justice system must protect and prevent these illegal acts.

For instance, according to the Committee, the female genital mutilation constitutes cruel, inhuman, and degrading treatment and lawyers and judges must ensure that these procedures are prosecuted by criminal law. In this regard

> The Committee encourages the State party to launch a systematic campaign to promote popular awareness of persistent negative attitudes towards women and to protect them against all forms of discrimination; it urges the State party to abolish practices prejudicial to women's health and to reduce maternal mortality. The Committee recommends that the State party indicate, in its next periodic report, the outcome of proposals on the matter of polygamy made by the Working Group on the National Action Plan for Senegalese Women (1996-2000). In the light of these concerns, the Committee further recommends that the State party bring its legislation, including family and inheritance laws, into conformity with articles 2(1), 3, 6, 7, 23 and 26 of the Covenant.[48]

In 1992, The UN Human Rights Committee issues the General Comment 20 which expressly deals with Art. 7. of ICCPR. These general comments are possible to be considered as the most comprehensive jurisprudence of the committee.

The General Comment 20 further elaborates on the prohibition of torture, in particular the Human Rights Committee focuses on prevention and creating an environment conducive to respect for human rights, in particular human dignity. Indeed,

> The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in

[48] U.N. GAOR Report of the Human Rights Committee (1998) Fifty-third Session Supplement No. 40 (A/53/40)

which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.[49]

Moreover, General Comment 20 gives special attention to the protection of children, pupils in educational and medical institutions.

Finally, the Committee stress the right of effective remedy, where States even in case of amnesty cannot escape from their duty to provide effective and impartial investigations on alleged violations of Art. 7, including reparations to the victims.

### 2.4 The role of the Special Rapporteur on Torture

Since its creation, the United Nations has had the primary objective of promoting and defending human rights throughout the world. With the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the UN has laid the foundations for the protection of the recognition of international human rights. However, as rights evolve with the progress of societies, the UN has over the years established other bodies to provide more scrupulous and wide-ranging protection of fundamental rights.

Therefore, the Special Rapporteurs[50] on torture was created in 1985 to examine rights related to the prohibition of torture and ill-treatment.

The Special Rapporteur's mandate was of particular importance in the early 1970s when the Convention Against Torture[51] (CAT) had not yet entered into force. Indeed, the numerous reports on torture called for a greater effort to prohibit torture and ill-treatment. The 1975 UN declaration on the protection of all Person from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment paved the way to the creation of the CAT, but unlike the latter, the Special Rapporteur on Torture is not a judicial mechanism which operates under a human right treaty. Indeed, it is tasked with promoting measures by which the States can prevent and hamper the spread of such illegal treatments.

As it is described in the Manual of Operation of Special Procedures of the Human Rights Council, the main functions of the SRT are, analyze relevant thematic and country-

[49] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992
[50] ibid
[51] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

> specific issues and situations pertaining to the prohibition of torture and other ill-treatment; advise and issue recommendation on measures that States, and other relevant stakeholders ought to take to address the problem of torture and other ill-treatment; alert the international community to specific situations and issues requiring attention, with a view to providing early warning and encouraging the prevention of troubling and escalating situations; advocate on behalf of the survivors and victims and encourage the provision of adequate redress and rehabilitation; mobilize and foster collaboration between the international community and regional and domestic actors, as well as civil society and grassroots advocates; [52]

A very important difference is that the SRT, compared to other human rights bodies, does not base its jurisdiction on the ratification by states of international treaties, but rather relies on the *ius cogens* nature of the prohibition of torture and ill-treatment and the fact that this principle is considered also customary law and therefore binding on all states. Moreover, the SRT is not tied to the UN's standard mechanisms for receiving complaints of abuse, so its flexibility allows for a faster response in case of violations and better liaison with domestic agencies. Given its nature, it works easily with both the Inter-American Commission on Human Rights and the African Commission on Human and People's Rights and complements the work of CAT and SRT.

Another key feature is that SRT does not require that the individual, whose rights cited in the Art.7 have been violated, has exhausted all domestic remedies or that the state has acknowledged the violation. Ultimately, the SRT work is based on cooperation between various international, regional, and national actors.

There are three areas in which SRT works. The first are allegations letters and urgent appeals to states.

Information is submitted to SRT by victims or legal representatives in a private manner, while the Government's response is usually made public three times a year in a Special Procedures Joint Communication Report.

In addition, the Special Rapporteur may draw his own conclusions in the Observation Report to United Nations High Commissioner for Refugees. One example is the Report of the Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment on his mission to Turkey. The mission reported by the Secretary to the Human Rights Council was from 27

[52] Manual of Operations of the Special Procedures of the Human Rights Council

November to 2 December 2016. Nils Melzer, the Special Rapporteur, after thanking the Turkish government for the opportunity to visit the country, however, clearly expressed

> The Special Rapporteur fully acknowledges the extreme volatility of the security situation prevalent in Turkey during the time of his visit, and the right and duty of the Government to take security measures to protect its citizens from acts of violence and political overthrow. However, just as much as there can be no justification for acts of terrorism and violent overthrow, there can also be no justification, under any circumstances, for acts of torture and other cruel, inhuman, or degrading treatment or punishment, or for any form of impunity for such acts.[53]

Allegations letters and urgent appeals are frequently used as sources at the level of national courts. They also serve to bring attention to critical issues, often in conjunction with the work of civil society and grassroots movements. One example was the Special Rapporteur's report on the use of electric shocks on disabled children in the Judge Rotenberg Center[54] in Massachusetts, US. The government promptly responded by restricting these methods, but the communication called for an absolute ban at the national level.

The second activity is country visits. This activity is mainly based on fact-finding missions, and they are a real magnifying glass on the violation of the prohibition of torture, inhuman and degrading treatment, because their purpose is to assess the real situation, practices and specific complaints related to the mandate. In addition to this, country visits are essential to provide an opportunity for victims to report violations and to empower the civil society of the state under consideration, as well as to help the state in the reform process to prevent these acts where there is a real need.

As the Special Rapporteur can only act in the country with the agreement of the government. In fact, the state ensures

> free and unrestricted access to all places of deprivation of liberty, including the ability to conduct interviews with detainees, torture victims, and their families without governmental presence, and to meet freely with government authorities at all levels and civil society representatives.[55]

[53] Reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Observation on communications to Government and replies received: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/362
[54] Pilkington, E. (2012, June 2). *UN calls for investigation of US school's shock treatments of autistic children*. The Guardian. https://www.theguardian.com/society/2012/jun/02/un-investigation-shock-treatments-autism
[55] Manual of Operations of the Special Procedures of the Human Rights Council, adopted in June 2008 at the 15th Annual Meeting of Special Procedures.

This requires full cooperation and the implicit willingness of the state to put itself under the international spotlight to carry out reforms to prevent violations. It is important to underline that country visits should only be carried out under the terms of the Office of the United Nations High Commissioner for Human Rights. For this reason, for example, the SRT Juan Mendez[56] declined an invitation to Guantanamo Bay because he was prohibited from interrogating detainees privately and was denied access to certain parts of the prison camp.[57]

The most delicate task is to interview detainees during the Special Rapporteur's visits to detention facilities. In fact, the detainees must first be identified for the role of the SRT to be carried out correctly. After that, the interview must be performed in perfect confidentiality and privacy and that there will be no future reprisals against the detainees. Furthermore, the visits are not only used to test the veracity of the complaints by the violated individuals but also to support the state in activating mechanisms to combat and prevent torture. In fact, the SRT's recommendations have resulted in increased reforms to criminal codes, the addition of countries to ratify OPCAT[58] and the establishment of preventive measures.

The third main activity of SRT is the thematic reports that are submitted annually to the Human Rights Council and the General Assembly. These reports deal with the global trends of the selected topic, try to provide conclusions and methods of prevention. The writing of these reports is done with the help of experts in the field and the SRT to give a solid knowledge base to the state in question.

The SRT's remit has changed over time, widening its spheres of research and action. In fact, while it was initially focused on assessing the state of human rights in detention facilities only, it now also includes the positive obligations of the state to prevent and remedy such violations. These obligations do not only refer to state authorities but also to private individuals towards victims, or in situations where the use of excessive force against demonstrators could be condemned as mistreatment.

In addition, issues such as domestic violence, female genital mutilation and medical violence have been added to the SRTs' jurisdiction. The Special Rapporteur on torture also covers social issues. For example, the process of voluntary termination of pregnancy is often accompanied by a feeling of humiliation suffered by the woman. Humiliation is the very basis of degrading treatment.

[56] The UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment between November 2010 and October 31, 2016. *OHCHR | Juan Mendez, former Special rapporteur (2010-2016).* (n.d.). OHCHR, https://www.ohchr.org/en/special-procedures/sr-torture/juan-mendez-former-special-rapporteur-2010-2016
[57]The Guardian, *Prisons* (11 March 2015) AFP in Geneva, *UN Torture Expert Refused Access to Guantánamo Bay and US Federal*.
[58] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199

Furthermore, the role of SRT focuses on the revision of the UN Standard Minimum Rules for the Treatment of Prisoners[59] or the so-called Nelson Mandela Rules or the elaboration of the Universal Protocol for Interviews, which was positively received by various stakeholders and led to the creation of a committee to oversee the development of these regulations.

Although the work of the Special Rapporteur on torture appears to be difficult due to budget cuts by the UN, it remains an effective method for both victims and the state to combat such illegal practices that undermine human dignity.

## 3. Conclusion

There are numerous international mechanisms to uphold the prohibition of torture and other ill-treatment. These mechanisms stem from the work of the United Nations as well as international or regional institutions. The inviolability is also protected by the jus cogens norms to which every state is bound.

Explicit prohibition is also accompanied by the promotion of other rights such as the right to liberty, fair trial guarantees, and effective remedies. Human rights bodies established by treaties or international organizations work to provide anti-torture mechanisms through various processes.

The previous chapter highlighted the various international bodies to further study the procedures against torture, inhuman and degrading treatment or punishment. The research has explained the absoluteness of the prohibition of torture as fundamental rights of the human being, that must be respected even under the most serious circumstances. Therefore, the chapter has taken into consideration the three main mechanisms for the prohibition of torture, the UNDHR, the UN Human Rights Committee and the Special Rapporteur on Torture. Moreover, space has be given to the prohibition of torture as jus cogens right. All the treaties and bodies have been described with the same structure, starting with the definition of torture, the obligations by the states and finally the jurisprudence to provide evidence for the need of anti-torture bodies.

Although these mechanisms provide an effective legal framework, nevertheless, there is still much work to be done. Indeed, even if these human rights bodies work tirelessly, however shortcomings are present. Many mechanism requires individual complaint which can be difficult for the applicant due to the obstacles posed by the national institutions due to the requirement of fulfilling domestic

[59] The United Nations Standard Minimum Rules for the Treatment of Prisoners were adopted by the United Nations General Assembly on 17 December 2015. They are known as the Mandela Rules in honor of the former South African President, Nelson Mandela. Murugu M. L. Ensuring freedom from torture under the African Human rights System in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.

remedies or too strict admissibility criteria. Besides, it is difficult for non-related expert in the field to choose the best solution for the applicant. Moreover, all the human rights bodies are facing the reality of backlogs and shortage of resources, which are a deficit in terms of research and lengthy proceedings. It is possible to say that the follow-up mechanism and implementation are the best methods for providing an effective environment conducive to respect of human dignity, but the UN mechanism are not formally binding, so it is much on the hands of the national government to follow the recommendations of the anti-torture bodies[60]. Indeed, the strength of the supranational bodies is based on the protection at the regional and national level. For this reason, the analysis focused on the regional system of protection of fundamental rights, on European, American, and African ones, in order to achieve a holistic and comprehensive framework to real change.

[60] Moritz Birk and Manfred Nowak, "An overview of international Protection" in Malcom D. Evans Jens Modvig (eds), *Research Handbook on Torture* (Legal and Medical Perspective on Prohibition and Prevention Edward Elgar Publishing 2020)

# Chapter 2: THE PROHIBITION OF TORTURE IN THE REGIONAL SYSTEMS OF FUNDAMENTAL RIGHTS' PROTECTION

## 1. Introduction to the chapter

The study will delve more on the regional systems of protection of Human Rights. Three main areas will be considered: Europe, Americas, and Africa, following the same pattern as the United Nations. For the European region, the analysis will start with the different interpretation of torture, inhuman and degrading treatment. This will be followed by the illustration of the extraordinary work of the European Court of Human Rights of its jurisprudence and finally the obligations imposed upon the ECHR's ratifying countries for compliance and respect of the inviolability of torture. Consequentially, the analysis will move on the regional protection of human rights in America concluding with the most recent human rights system, the African one.

## 2. An in-depth oversight into the European system

The analysis will focus on the provisions of the European Convention on Human Rights (ECHR) and the interpretations of the related cases-law of the European Court of Human Rights (ECtHR) concluding with the positive and negative obligations triggered by the Convention on the prohibition on torture, inhuman and degrading treatment or punishment.

> The European Convention for the Protection of Human Rights and Fundamental Freedom foresees the world's most successful system of protection of human rights and one of the most advanced forms of international legal process.[1]

Indeed, it is essential to say that the Court's judgements are not only solving the cases brought before it, but mostly important the Court serves

> to elucidate, safeguard and develop the rules instituted by the Convention, thereby, contributing to the observance by the States of the engagements undertaken by them as Contracting Parties…[2]

Starting with the definition of prohibition on torture inhuman and degrading treatment, Article 3 of the European Convention on Human Rights encompasses a single sentence

[1] Janis, M. W., Kay, R. S., & Bradley, A. W. (2000). *European human rights law: text and materials*. Oxford University Press.
[2] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Firstly, it is possible to see the first difference with the ICCPR and CAT in the wording of the provision because the ECHR does not refer in a direct way to "cruelty" in treatment. This should not be seen and, it is not, that the ECHR address a protection with less force than the other treaties which include this specific word because any type of torture, inhuman or degrading treatment is considered cruel, so it does the ECHR[3].

Secondly, and the probably the most important thing of this definition, is that the provision starts with the word "No one" highlighting the absoluteness of the right and that no circumstances may arise to abrogate it. This is also confirmed by the Art. 15 of the ECHR stating that even

> in time of emergency threatening the life of the nation there cannot be derogation from Art. 3, nor the Article can be subjected to restriction, qualification or balancing with competing rights claim or interests.[4]

Taken this as a matter of fact, this statement imply that Article 3 is absolute and its application it is just a matter of scope.[5] Differently from other rights of ECHR, such as 8-11[6], the Art.3 does not respect the two-stage model of the human rights adjudication[7] meaning that first, the court decide if there has been an interference with the right and then if this interference can be justified as necessary. Nevertheless, concerning the prohibition of torture, inhuman and degrading treatment for the ECHR it must been seen if a level of threshold has been reached to fall into the scope of the Art.3. If it is achieved, then it is absolutely prohibited, so as a matter of fact, Art. 3 give a total protection for the right, at least in theory. Of course, this threshold is not identical for all the situations because

> it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[8]

To understand the absoluteness that it is enshrined in the definition, it is possible to distinguish two parameters: the applicability parameter and the specification parameter[9]of an absolute right. So,

[3] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[4] Bicknell C., "The Council of Europe and the European system" in Malcom D. Evans Jens Modvig in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.
[5] BATTJES, H. (2009). In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed. *Leiden Journal of International Law*, *22*(3), 583–621. https://doi.org/10.1017/s0922156509990100
[6] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[7] On the two-stage model of human rights adjudication, see G. van der Schyff, Limitation of Rights: A Study of the European Convention and the South African Bill of Rights (Nijmegen: Wolf Legal Publishers, 2005); Barak, Proportionality, note 3 above, at pp. 19–20.
[8]Kudła v. Poland, 30210/96, ECtHR, 26 October 2000, para. 91.
[9] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.

absolute right amounts entitlements that are non-disposable,[10] that it is reflected in the jurisprudence of ECtHR. Indeed, the Court stated

> Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances …[11]

Usually, the Court has been called to reason to the possibility to derogate the Art.3 to pursue a legitime aim, such as the protection of national security but the absoluteness of a right entails that it cannot be revoked or overtaken by external interests. But what if these external considerations are also rights? In balancing the protection of national security and fundamental rights, is the prohibition of torture still considered absolute? Is a certain degree of relativism possible to be contemplated? To answer these treacherous questions, the 'ticking bomb' scenario is often cited.

The situation is an emergency case where the police believe that the person in custody knows where the bomb is located and since the threat is imminent, the police agents do not have sufficient time to obtain information through the legal investigation process. The parameters of this scenario are quite unrealistic, because as explained by the studies of Association for Prevention of Torture[12], it is very difficult that all the requirements are fulfilled simultaneously, such as, having taken the right person, the existence of an imminent attack, and availability of information only through torture. The case below shows the competing rights at the stake as well as possible.

In *Gäfgen v Germany*[13], the appellant killed an 11-year-old boy and hid the body near a pond. The man was arrested immediately after demanding a ransom from his parents. Once at the station, the deputy police chief instructed his subordinate to threaten him with torture and to apply such treatment if he did not reveal the location of the child's whereabouts. Unfortunately, the boy was found dead, as the murderer had already killed him before being caught by the police. However, the extortionate confession under threat of torture was held by the regional court to be invalid because it was contrary to Article 3 of the European Convention on Human Rights. In 2004, the police officers involved were convicted of coercion and incitement to coercion in service.

[10] Ibid
[11] Derman v Turkey (2015) 61 EHRR 27, para 27.
[12] APT, 'Defusing the Ticking Bomb Scenario' (Association for Prevention on Torture 2007).
[13] Gäfgen v. Germany, 22978/05, European Court of Human Rights, 1 June 2010

The European Court of Human Rights judgement reiterates that the respect of Art. 3 of the ECHR represents a fundamental right of a democratic society and it explicitly make no room for derogation under art. 15 (2) even in time of emergencies that threats the life of the nation.

> In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law […], the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognizes that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.'[14]

Once the applicability parameter has been discussed, now the specification criterion needs to be analyzed in order to understand what the Art. 3 effectively entails. Indeed, the specification parameter means determining the scope of what it is unlawful. It is possible to start stating that the ECtHR has considered torture with a special stigma since the case law of *Ireland v. The United Kingdom*[15]. Indeed, for the first time the Strasbourg Court decided to distinguish between torture and inhuman and degrading treatment, while before, as in the Greek Case[16], seems that no distinction was needed because both they were considered unlawful under Art. 3.

The reasoning of the Court on the Ireland v. The United Kingdom was on the Operation Demetrius which consisted in extrajudicial measures of detention and internment of suspected terrorists[17].

The targeted people were members of the IRA and the five techniques used during interrogations were the following:

1. Wall standing (forcing detainees to remain in a stress position for hours at a time);
2. Hooding (keeping a bag over detainees' heads at all times, except during interrogation);

[14] Ibid.
[15] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.
[16] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.
[17] Ibid.

3. Subjection to continuous loud noise;
4. Deprivation of sleep;
5. Deprivation of food and drink.[18]

The court stated that

> In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment.
>
> In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.
>
> The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.
>
> Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".
>
> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.
>
> 168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3 (art. 3).[19]

To separate torture from inhuman and degrading treatment, the ECtHR uses two different parameters: the intensity of suffering and the severity of treatment. Indeed, the European Commission on Human Rights, finding evidence of torture for the first time addresses it as below

[18] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.
[19] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.

> The word ‘torture’ is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.[20]

So, the Court gave special emphasis on the purpose of perpetrating ill-treatment. Moreover, in the Court’s reasoning, the difference consisted in the intensity of the suffering that is inflicted. Therefore, it is possible to affirm that the Strasbourg Court make a quantitative analysis of ‘intensity of suffering’[21]. However, the method to quantify this suffering has not always been very clear. Indeed, if the five techniques of the case above are not considered torture because they do not show a particular intensity[22], in the case of *Aksoy v Turkey*[23] the so-called “Palestinian Hanging” of a suspect of the PKK was considered torture because was cruel and serious that cannot be considered differently[24]. In the case of *Aydin v Turkey*[25] concerning the sexual abuse and other cruel treatment of a 17-year-old girl with the purpose of extracting information must amount to torture.

The other criterion is over the assessment of the severity of the treatment that distinguish inhuman and degrading treatment (IDPT) from torture. The Court reasoned about this criterion in the *Selmouni v France*[26] case-law where the ECtHR shows is interpretative character that adjusts to the time. Indeed, it stated that the evolution of the approaching to the cases could transform IDPT to torture over time.[27]

> [H]aving regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’ … certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future.[28]

But the most important factor is that the Court in *Selmouni*[29] defined the severity as

[20] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.
[21] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[22] ibid.
[23] *Aksoy v. Turkey*, 100/1995/606/694, Council of Europe: European Court of Human Rights, 18 December 1996
[24]Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[25] *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997.
[26] Selmouni v France, 25803/94, European Court of Human Rights, 28 July 1999.
[27] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[28] Selmouni v France, 25803/94, European Court of Human Rights, 28 July 1999.
[29] ibid

> [T]his 'severity' is, like the 'minimum severity' required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc[30]

The conclusion was that the physical and mental suffering caused to the individual amount to torture. The reasons of the Court to have a clear distinction are opaque, however some relevant factors such as the long-lasting damage provoked by treatments to applicants are considered torture as in *Cestaro v Italy*[31] were the severe beating of a protester in a school and consequentially, the fractures and hospitalization amount to torture.[32]

However, taking the physical pain as the only factor inside the specification parameter, meaning the assessment of the torture only on physical damage, seems to be not appropriate when dealing with the new form of torture that the ECtHR are presented before. Indeed, in the ruling *Ireland v. United Kingdom*, according to the Judge Evrigenis,[33] the new method of torture does not necessarily imply the injuries of the body. The ECtHR should also account the methods such as threating the family members, mock execution, waterboarding that, although they do not leave traces, however, they affect the dignity and the integrity of the individual and consequentially must be considered as in breach of Art. 3 under the definition of torture. The ECtHR frequently highlights that torture is particularly wrong because of its essence, because of the wrongfulness of the concept and not based on the particular suffering inflicted.[34] Indeed, to deepen the discussion, in the ruling of *Ireland v United Kingdom*, the separate opinion of Judge Zekia[35] reiterates the fact that intensity at the base of the criterion to categorize ill-treatment as torture is too vague because it may depend on 'gradation in its intensity, in its severity an in its method adopted'[36]. He strongly advice that it is the task and responsibility of the competent judicial body to evaluate the circumstances, proof, and materials to define treatment as torture. Lastly, according to Judge Matscher[37] view, the element of intensity is just complementary because the more refined are the techniques the more acute suffering can cause even if it is not physical. The brutal methods of the former times are now old-fashioned, and torture do not always cause injuries to the body.

[30] ibid para 100.
[31] Cestaro v Italy, *6884/11*, European Court of Human Rights, 7 April 2015
[32] Natasa Mavronicola. (2021). *Torture, Inhumanity and Degradation under Article 3 of the ECHR*. Bloomsbury Publishing.
[33] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977
[34] On the relational wrongness of torture, see A Maier, 'Torture' in P Kaufmann, H Kuch, C Neuhaeuser and E Webster (eds), Humiliation, Degradation, Dehumanization: Human Dignity Violated (Springer 2010) 111–13.
[35] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977
[36] Ibid.
[37] Ibid.

Except form torture, in its jurisprudence, the ECtHR once again makes a differentiation between inhuman and degrading treatment. Although in the pivotal case of Ireland v United Kingdom, there were no differentiation in terms, in the later cases-law the Strasbourg Court distinguish the treatments on the basis of the severity.[38] This is by virtue of the fact that the degrading and the inhuman treatment do not always coexist jointly.

To understand better the distinction, it is useful to analyze the case of *Eastern African Asiatic v. United Kingdom* of 1973 in which citizens resident in Uganda and in Kenya with British passport and citizens with special protection from the British Government, were not allowed to move to UK. The Convention does not oblige United Kingdom letting enter African citizen into the British territory, but this decision would have made them stateless people. The provision has been viewed by the ECtHR as discriminatory because it was not also applied to citizens of White Countries of the Commonwealth[39] Indeed, the Court stated

> The Commission has stated above that the legislation applied in the present cases discriminated against the applicants on the grounds of their colour or race. It has also confirmed the view, which it expressed at the admissibility stage, that discrimination base on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention.[40]

Indeed, the Court defined the degrading treatment in line with the rules of customary rule of the Vienna Convention on the Law of Treaties as follow

> As a general definition of the term "degrading treatment", the applicants submit that the treatment of a person is degrading "if it lowers him in a rank, position, reputation or character, whether in his own eyes or in the eyes of other people[41]

In this case, according to the Commission, the degrading treatment derived from the application of a discriminatory law on racial basis is detrimental to human dignity, by emphasizing the negative nature of the action itself, rather than on the real consequences of the provision.[42]

[38] V. ZAGREBELSKY, R. CHENAL, L. TOMASI,(2022) Manuale dei diritti fondamentali in Europa. In *www.mulino.it*. Il Molino. https://www.mulino.it/isbn/9788815293930.

[39] ibid.
[40] Eastern African Asiatics v United Kingdom, EHRR, 14 December 1973
[41] Ibid.
[42] De Filippi, C. (n.d.). *La convenzione europea dei diritti dell'uomo e delle libertà fondamentali commentata ed annotata*. Www.libreriauniversitaria.it. Retrieved December 27, 2022, from https://www.libreriauniversitaria.it/convenzione-europea-diritti-uomo-liberta/libro/9788849508796

Another pivotal case showing degrading treatment is Kudla v Poland[43] where degrading treatment was defined as follow

> Such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them[44].

At the base of the reasoning of the ECtHR there is the respect of human dignity linked with degrading treatment. Indeed, in *Bouyid v. Belgium* [45] concerning the mistreatment of two brother's applicant in the police station the Court stated that

> In conclusion, the slap administered to each of the applicants by the police officers while they were under their control in the police station did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and had thus diminished their dignity.[46]

Degrading treatment is often cited in places of detention. Usually, case of ill-treatment in detention both amount of degrading and inhuman treatment but recently the Strasbourg Court gave more emphasis to the presence of humiliation and so to classify it as degrading one.[47] One of the most relevant case-law is Kalashnikov v Russia[48] where the detention facility was recognized by the Russian Federation inadequate to follow the European guidelines. The applicant was detained in a prison for five years that contained fourteen detainees. Because of the overfull room the detainees need to share the bed three times a day in order to sleep on a basis of eight hours per each. No toilets, no ventilation and pests. The Court found that this conditions amount to degrading treatment.[49]

The other form of treatment that is differentiated in the jurisprudence of the ECtHR is the inhuman one. Once again, the ECtHR's cases-law show the difference in concept. Indeed, according to the intensity parameter, a practice that surpass a high level of suffering threshold, but that it does not fall into the category of torture, is considered inhuman treatment. Indeed, it is defined as

[43] Kudla v Poland, 30210/96, Council of Europe: European Court of Human Rights, 26 October 2000.
[44] Ibid.
[45] Bouyid v. Belgium, 23380/09, European Court of Human Rights, 28 September 2015.
[46] Ibid.
[47] Harris, D. J., O'boyle, M., Warbrick, C., Bates, E., & Buckley, C. (2018). *Law of the European Convention on Human Rights*. Oxford Oxford University Press.
[48] *Kalashnikov v. Russia*, 47095/99, Council of Europe: European Court of Human Rights, 15 July 2002.
[49] Ibid.

it must cause either actual bodily harm or intense physical or mental suffering[50] and conversely from torture there is no need to be inflicted for a purpose to be considered as such.

Inhuman treatment takes different forms from mental suffering, physical assault to inhuman detention conditions that will be explained below.

Firstly, in the case *Soering v United Kingdom*[51] of 1989 concerned the extradition to United States of a German citizens charged with murder in the State of Virginia, the ECtHR after the examination of the case, considered it as inhuman treatment, within the meaning of the Art. 3. The considerations were based on how the penalty was applied, the detention conditions waiting for the death penalty and the disproportionate punishment comparing to the crime. Indeed, the applicant need to wait between six and seven years before the condemn was executed, and at the moment of the crime, he was 18-years old guy with mental problems, and the penalty could be served in Germany, where no death penalty is in practice.

So, the Court analyzed not only the physical consequences but more important the phycological one, in particular of the anxiety of the applicant waiting for his execution.

Moreover, physical assault enters in the category of inhuman treatment. Many cases have happened in detention or during the arrest of the police. In the case *Tomasi v France*[52] several blows were inflicted to Mr. Tomasi and they were testified by four different doctors.[53]

In cases where the injuries have been proven and carried out by police agents, it is the task of the Government to show that no force have been used or not to disproportionate force in accordance with the victim conduct, contrary to the normal rule.[54] As in the case of *Ribitsch v Austria*[55], the applicant reported numerous bruises after the release from the police custody. The State affirmed that they were caused by a car accident, but the Strasbourg Court find the explanation not convincing and sustained the definition of inhuman treatment.

[50] Kudla v Poland, 30210/96, Council of Europe: European Court of Human Rights, 26 October 2000.
[51] *Soering v. The United Kingdom*, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989.
[52] Tomasi v France, 12850/87, European Court of Human Rights, 27 August 1992.
[53] Harris, D. J., O'boyle, M., Warbrick, C., Bates, E., & Buckley, C. (2018). *Law of the European Convention on Human Rights*. Oxford Oxford University Press
[54] Ibid.
[55] *Ribitsch v. Austria*, 42/1994/489/571 , Council of Europe: European Court of Human Rights, 21 November 1995.

Cases of rapes are considered in inhuman treatment such in *Cyprus v Turkey*[56],where following the invasion of Turkey in Northern Cyprus rapes were carried out by Turkish soldiers. The practice was found by the ECtHR as in breach of Art. 3.

Violations of the Art. 3 under the definition of inhuman treatment has been found in the Greek case[57] on the assault of political detainees by the security forces in Northern Ireland.[58]

Lack of medical assistance in detention facilities that expose the detainee to prolonged pain the inhuman treatment may arise. For example, in *McGlinchey v UK*[59], the failure of the authorities in prison to provide assistance to detainee for heroin withdrawals symptoms causes her death.[60] Many cases show the lack of psychiatric cures that amount to inhuman treatment such as in *Keenan v UK*[61] were the detainees committed suicide. The Court clarify that people with illness such as physically disabled, mentally disabled, drug addicted, and elderly requires places of detention able to faces their needs and different form ordinary detention places.[62]

Moreover, several other treatments such as the anguish provoked to family members of a disappeared person, ill-treatment for being homosexual, child abuse and female genital mutilation fall into the scope of inhuman treatment.

This imply that the Contracting States ratifying the Convention have both negative and positive obligations under Art.3. The article has been mainly applied where the risk of the individual derives from a violation of States Agents or Public Authorities[63]. Indeed, imposing negative obligation is 'the absolute duty to refrain from subjecting a person to torture, or inhuman and degrading treatment or punishment'.[64] In this sense the Convention protects from the illegal acts of the State Authorities. Nevertheless, the Convention also requires positive obligations that have been developed throughout the Strasbourg Court' cases-law.

The ratifying States need to display all the necessary tools, laws, and practices to assure the respect of the rights as has been enshrined in the Section I of the Art. 1 of the ECHR. The positive obligations

[56] *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001.
[57] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.
[58] Harris, D. J., O'boyle, M., Warbrick, C., Bates, E., & Buckley, C. (2018). *Law of the European Convention on Human Rights*. Oxford Oxford University Press
[59] McGlinchey v UK, 50390/99, European Court of Human Rights, 29 April 2003
[60] Harris, D. J., O'boyle, M., Warbrick, C., Bates, E., & Buckley, C. (2018). *Law of the European Convention on Human Rights*. Oxford Oxford University Press
[61] Keenan v UK 2001, 27229/95, European Court of Human Rights, 3 April 2001.
[62] Dybeku v Albania, 41153/06, European Court of Human Rights, 18 December 2007
[63] *Pretty v. United Kingdom*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002.
[64]Palmer S. , A Wrong Turning: Article 3 ECHR and proportionality, *The Cambridge Law Journal* , Jul., 2006, Vol. 65, No. 2 (Jul., 2006), pp. 438-451, Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal, https://www.jstor.org/stable/4509209.

have a preventive and investigation character.[65] Certainly, the State must provide a framework of law that protect a person from ill-treatment by private and public agents. Through the analysis of the cases of the ECtHR is possible to see that the Convention protects from torture when it is inflicted by private individuals such as in Costello-Roberts v UK[66] where the applicant was defended against the use of corporal punishment for disciplinary scope. The Court held that the right to education is enshrined in the Art. 2, First Protocol[67], and the state cannot derogate this right making a distinction between private or public schools. Again, the Court in A v UK[68] stated that the beating of a nine-years old boy with a garden cane frequently amount to inhuman and degrading treatment that violates the Art.3. In this case, the Court also affirms that the United Kingdom has violated the article because it failed to properly protect a child by the infliction of pain that achieved the threshold of severity and intensity required by Art. 3. Moreover, the preventive nature of the obligations requires that the individual is protected by the ill-treatment that may arise by state authorities. For instance, in *Kaya v Turkey*[69] a doctor was subjected to inhuman treatment before being killed. The State knew that it may be targeted by the contra-guerrilla forces, and he could be in danger due to the fact he was helping members of PKK. The state has failed to protect adequately from the risks of ill-treatment under the Art. 3.

Deepening the analysis, positive obligations are connected to the procedural obligations of the Art. 2 of the Convention, in which the State is "

> required to investigate and prosecute cases of torture and inhuman or degrading treatment or punishment.[70].

The procedural obligations apply in cases of allegations of violations of Art. 3 by the police and by non-state actors[71], because the ultimate scope of positive obligations is to investigate when there are allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion"[72].

It is possible to affirm that an operative criminal justice system that punish the violation of physical integrity of an individual is considered a demonstration of the positive obligations displayed by the State. Of course, in order to have a violation of the Convention

[65] Harris, D. J., O'boyle, M., Warbrick, C., Bates, E., & Buckley, C. (2018). *Law of the European Convention on Human Rights*. Oxford Oxford University Press
[66] *Costello-Roberts v. The United Kingdom* , 89/1991/341/414 , Council of Europe: European Court of Human Rights, 23 February 1993
[67]UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199 Art. 2
[68] *A and Others v. United Kingdom*, Application no. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009
[69] Kaya v Turkey, 22535/93, European Court of Human Rights, 28 March 2000.
[70] *V.C. v. Slovakia*, Application no. 18968/07, Council of Europe: European Court of Human Rights, 16 June 2009,
[71]Schabas, W. (2015). *The European Convention on Human Rights : a commentary*. Oxford University Press.
[72] *M. and others v. Italy and Bulgaria*, Application no. 40020/03, Council of Europe: European Court of Human Rights, 31 July 2012

it must in the view of the Court be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3[73].

Moreover, the Court reiterates that the obligations for the State to prosecute those responsible for committing a violation of Art. 3 is to ensure that any mistreatment is not ignored, and that the victim is protected.[74] The official investigation that is required by the Art. 3 has to lead to the identification of responsible individuals, otherwise it is possible that, despite its strength, the Art.3 loses its effectiveness and leave room for violation by State Agents that should not occur.[75] The investigation need to be carried out following steps that allows to provide eyewitness, evidence and it has to be carried on by independent individuals.

### 3.The American Human rights protection's system: the role of the American Convention on Human Rights

The protection of Human Rights in the American States is provided by the Inter- American Human Rights System whose main mission is to promote the development and the safeguarding of human rights and it is rooted in the Organization of American States (OAS). At the core of the system, the American Convention on Human Rights sets forth the fundamental rights needed to be respected by the ratifying countries. Article 5 of ACHR recognizes the Prohibition of torture, cruel and degrading treatment, or Punishment.[76]

The section will analyze the Article 5, the definition and interpretation regarding the prohibition of torture, inhuman and degrading treatment, or punishment, then cases-law of the IACt.HR will be considered and, consequently, the obligations of the States established by the American Court to prohibit and prevent the violation of such right.

Article 5 of The American Convention on Human rights states that

1. Every person has the right to have his physical, mental, and moral integrity respected.

[73] Schabas, W. (2015). *The European Convention on Human Rights : a commentary*. Oxford University Press
[74] Ibid.
[75] Labita v. Italy [GC], 26772/95, § 83, European Court Huma Right 2000; Boicenco v. Moldova, no. 41088/05, § 120, 11 July 2006; Đurđevi ć v. Croatia, no. 52442/09, §§ 83 – 85, European Court Human Rights, 2011 (extracts); Suleymanov v. Russia, no. 32501/11, § 129, 22 January 2013.
[76] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived or 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 the 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 specializes tribunals, as speedily as possible, so that they me 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.[77]

Analyzing the Art. 5 of the Convention is possible to state that, at first sight, it differs from the Art. 7 of the above mentioned ICCPR and the Art. 3 of the ECHR, because it detached itself from the fact that personal integrity regards only a specific conduct, i.e., torture or degrading and inhuman treatment. Indeed, Article 5 of the American Convention highlights that "every persons have the right to physical, mental, and moral integrity respected, while its second clause establishes a prohibition on the specific conduct mentioned.[78]

It is interesting to highlight that the American Convention does not specify types of conduct that are prohibited. The treaty does not display detailed practices that can amount to torture, inhuman or degrading treatment but it leaves a room for interpretation if certain acts can endanger the physical, mental, or moral integrity of a person.

For the American Convention, there is no need to distinguish between torture, inhuman or degrading treatment or punishment since

> whatever the prohibited conduct committed, there is a State violation of the corresponding provision and there is no need to make a distinction.[79]

Frequently torture has its particular importance, and it is labelled as having a special stigma probably because it is used to obtain information.[80] Therefore, it is the use of force by State against

[77] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art.5.
[78] Medina Quiroga C., & Krupa, P. (2016). *The American Convention on Human Rights: crucial rights and their theory and practice*, Cambridge University press.
[79] Medina Quiroga C., & Krupa, P. (2016). *The American Convention on Human Rights: crucial rights and their theory and practice*, Cambridge University press.
[80] Rodley, N. S. (1987). *The Treatment of Prisoners Under International Law*. Oxford University Press.

the defenseless. Additionally, distinguishing torture can be useful for the reparations to the victims.

Comparing the definition of torture, inhuman and degrading treatment, or punishment, it is possible to analyze that the distinction in terms is not defined either in the ICCPR in its Art. 7 stating that

> The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.[81]

By contrast, the European system effectively draws a line in such conducts adding a special label to torture. The Commission of Human Rights actually conceived the conducts stating

> The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.[82]

The Inter American Court (IACtHR) has relied on this more specific definition under Art. 2 of the Inter American Torture Convention when distinguishing between torture and cruel, inhuman degrading treatment. Indeed, according to the Court, three element are essential to distinguish conducts.

The first is a deliberate or intentional act; the second severe physical or mental pain or anguish suffered from the victim and lastly must follow the aims enlisted. Although the Convention does not distinguish cruel, inhuman and degrading treatment, however the Court does this according to the intensity of suffering.

Their applications give as results a stronger protection against violation of torture, inhuman and degrading treatment, or punishment. Indeed, Art. 2 of the Inter-American Convention to Prevent and

[81] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992

[82] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.

Punish Torture offers a more precise definition of the term "torture" comparing the American Convention:

> 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 be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[83]

Addressing the same subject, the two Conventions are strictly related, and their effort is shared to address and prevent violation of such right. Indeed, the Inter-America Convention does not limit the scope of the American Convention, instead it complements it. The Art. 16 of the expressly establishes that

> [t]his Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.

Moreover, the Convention specifically addresses the perpetrator in Art. 3 of the Convention

> 1. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
>
> 2. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

It is essential to highlight that the Convention takes into consideration both the public officials and private individual and moreover, this treaty gives importance to classify torture as such, but to the perpetrator's will.[84] Finally, the Convention does not specify any specific parameter such as severity to identify torture, which therefore do not allow to distinguish between the different treatments or punishment as degrading or inhuman ones.

[83] Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67.
[84] Medina Quiroga C., & Krupa, P. (2016). *The American Convention on Human Rights: crucial rights and their theory and practice*, Cambridge University press.

Deepening the discussion, the section below analyzes the court's case law. Since the American Convention, as mentioned above, does not give a specific definition concerning the prohibited conduct, the Court needs to develop its own types through its own jurisprudence. Nevertheless, it is not a frequent exercise for the Court to distinguish torture from other treatments in the cases law nor the Court used the definition given by the Inter-America Torture Convention[85]. Nonetheless, sometimes the Court has attempted to differentiate between different conducts. Therefore, it is of utmost importance to analyze these rulings. The first case that can be taken into consideration is *Bàmaca Velazquez v. Peru*[86], in which the Court clearly defined the conduct as torture. In this case, the Court categorized the acts as

> serious acts of physical and psychological violence, caused sever anguish and intense suffering for the victim and were perpetrated over a long period, deliberately, with the purpose of obtaining information that was relevant to the army[87].

Therefore, the Court found a violation of Art. 5 of the Convention under physical and psychological torture.

Moreover, in the case of *Loayza Tamayo v. Peru*[88] the American Court follows the reasoning of the ECtHR on using the severity parameter to determine the differentiation of conducts stating that

> The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.[89]

The analysis of other cases-law, especially in Latin America, shows that long incommunicado detention, solitary confinement in a cell without natural life, total immersion in water, blows and ill-treatment and restricting visiting schedule amounts to a violation of the Art. 5(2) under cruel, inhuman or degrading treatment[90].

[85]Ibid.
[86] Bámaca Velásquez v. Peru, ,(Reparations and Costs)Inter-American Court Human Rights (IACrtHR), ,22 February 2002 paras. 156–158.
[87] Ibid.
[88] *Loayza Tamayo vs Perú*, Inter-American Court of Human Rights (IACrtHR), 1 July 2011
[89] *Loayza Tamayo vs Perú*, Inter-American Court of Human Rights (IACrtHR), 1 July 2011
[90] Medina Quiroga C., & Krupa, P. (2016). *The American Convention on Human Rights: crucial rights and their theory and practice*, Cambridge University press.

Finally, the Inter-American Court found in the case of *Mendoza et al*[91], that a disproportionate punishment such as condemn of children to life sentence is considered as in violation of the Art. 5 of the Convention.

The Inter-American Convention explicitly links human treatment with deprivation of personal liberty because the effects derived can undermine personal integrity and therefore it falls under the protection of Art. 5. It is important to highlight that all person deprived of liberty are treated with human dignity. This means that in every kind of deprivation of liberty, from imprisonment to psychiatric facilities the Art. 5 is always applicable.

Moving on the discussion, the obligations by the State to investigate and prosecute the entities or the individuals violating the prohibition of torture are under art. 5(2) of the Convention and they have been well developed by the jurisprudence of Inter-American Court. It is a duty of the State concerned to assure the punishment of such violation.

In the cases where the Court has cited the Inter- American Convention, Art. 8 applies and establish the right for the victims to have heard their cases in an impartial way and to start an investigation ex officio, inter alia the same for the American Convention procedure, and a correct criminal proceeding.

In the case of *Dos Erres* [92], the Court explicitly condemns the violation of human rights stating that

> the lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns […] constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws […] (jus cogens) and generate obligations for the States […] such as investigating and punishing those practices, in conformity with the American Convention and in this case in light of the CIPST and the Convention of Belém[93].

At the end, the Inter-American system of Human rights has different organs and tool at its own disposal that assure and guarantee the protection rights such as the one discussed. The prohibition of torture is an area well deepened by the American system and it make the difference in the lives of many people living in countries where unfortunately this right is not taken for granted. Is is important

[91] *Mendoza et. al. v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993). October 2, 1992*, Inter-American Commission on Human Rights (IACHR), 2 October 1992.
[92] Las Dos Erres Massacre v. Guatemala, (Preliminary Objection, Merits, Reparations, and Costs), Inter-American Court Human Rights, (IACrtHR), 24 November 2009, para. 140.
[93] Las Dos Erres Massacre v. Guatemala, (Preliminary Objection, Merits, Reparations, and Costs), Inter-American Court Human Rights, (IACrtHR), 24 November 2009, para. 140.

to underline that the broad definition of torture allows the Court to protect different nuances of treatment which also include rape labelling it as torture.

Nevertheless, the system is not perfect and need to be improved lacking enforcing mechanism and financial support by some American States. Furthermore, some of the countries have not ratified yet the Convention leaving the jurisdiction of the Court up to 23 out 35 OAS MS.[94]

### 4. African legal tools on defense of Human Dignity and Prohibition of Torture and inhuman, degrading treatment or punishment.

The regional African protection on human rights is based on the African Charter on Human and People's Right which was ratified on 1986 by a simple majority of the MS of the Organization of the Africa Unity (OAU). Two years later, the Protocol on African Charter on Human and People's Rights was adopted with the purpose to establish an African Court on Human and People's Right.[95] The African Charter is certainly the product of the history, and its creation comes at the time when the focus and the agenda of the international community was on protection of human rights. The Charter has a deep meaning for African Countries for different reasons and among them because it embeds the post-colonial African States struggle for economic and self-determination.

Although the Charter is very recent in its ratification, its unique and innovative. It detached from the other human rights treaties. It consists of 68 Articles comprising three types of rights: civil and political rights, economic, social, and cultural rights, and group and people's rights. The most cutting-edge provision is that it imposes duties on individual to respect and guarantee the other's individual right.

The African Charter is studded by other important treaty organs such as the African Commission on Human and People's Rights and the African Committee on the Rights and Welfare of the Child.

This section will be analyzing the normative architecture to address torture in African, the related jurisprudence of the Court and, in the end, the obligations by the states of the OAU to prevent and punish the violation and reparations to the victims.

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[94] Rodríguez- Pinzòn D., "The Prohibition of torture and cruel, inhuman or degrading treatment or punishment in the Inter-American Human Rights System: systems, methods and recent trends" in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing

[95] Journal Article, Mutua, Makau, The African Human Rights System, 2000 UNDP (United Nations Development Programme) The regional African human rights system is based on the African Charter on Human and Peoples' Rights (the African or Banjul Charter), which entered into force on October 21, 1986, upon ratification by a simple majority of member states of the Organization of African Unity (OAU). In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

Starting with the formulation of the African Charter, art. 5 states that

> Every individual shall have the right to 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 treatment shall be prohibited.[96]

Using these wording, the Charter recognizes the right to be respected and prohibits any form of slavery, torture or cruel, inhuman and degrading treatment on the basis of Human dignity. Moreover, the use of "All forms" includes state and non-state actors. It is important to say that for the African Charter even if the State is indirectly responsible for the non-state actor actions, still the State has found guilty to not preventing such violations to occur.

Analyzing Art. 5 is possible to see intertwined aspects such as the respect for dignity and the prohibition of exploitation and degradation. It goes further strengthening the prohibition of slavery and forced labor. Indeed, in the case of *Hadijatou Mani Koraou v. Niger*[97] the Court of Justice found that there is no slavery without also implying torture.

Moreover, the African Commission has interpreted human dignity as "an inherent basic right to which all human being […] are entitled without discrimination.[98].

However, likely in the American System, the Commission has not always distinguished between the term "torture" and "cruel, inhuman and degrading treatment" founding a violation of Art. 5. One of the main reason it is because firstly the Commission did not give any specifications on its cases law, but it just merely applies the provisions. For instance, in the case law, *Krishna Achuthan v. Malawi,*[99] the Court reviewing the case considered solitary confinement, lack of food and denial to medical treatment as a violation of Art. 5 not labelling it with a specific term. The definition for the Commission to distinguish various form of treatment is sometimes foggy. Indeed, the Commission stated that

> 'Cruel, inhuman or degrading punishment or treatment…refer to any act ranging from denial of contact with one's family and refusing to inform the family of where the individual is being held, to conditions of overcrowded prisons and beatings and other

[96] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),
[97] Hadijatou Mani Koraou v. Niger, App. No. ECW/CCJ/APP/08/08, ECOWAS Court of Justice, 27 October 2008.
[98] ACHPR, Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, Comm. Nos. 279/03 & 296/05, 45th Ordinary Session (27 May 2009), para. 163; Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt, Comm. No. 323/06, 10th Extraordinary Session (12 October 2013), para. 190
[99] krischna achutan (on behalf of aleke banda), v. Malawi, 64/92, 68/92, 78/92 7th ACHPR AAR Annex IX African Commission On Human And Peoples' Rights, (1993-1994)

> forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine and care'.[100]

Although the Commission did not provide a difference between the treatments, however, the cases law shows that they must reach a severity threshold. Moreover, in order to bring a claim in front of the court, also other parameter is considered such as the age, effects on mental and physical conditions, gender and state of health of the individual.[101]

The Commission jurisprudence also defines inhuman and degrading treatment as follows

> Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.[102]

Moving on with the analysis, the Commission also elaborates the prohibition of torture against people who are deprived of their liberty particularly in *Sudan*[103] case law and in *Mauritania*[104] case law. The first case is about the acts of torture of detainees with mock execution, lying in the floor and preventing them of washing. The other case instead is about alleged torture of burning cigarettes on detainees, severe beatings, treatments with acid.

The Commission found in this case the violation of the Art. 5 of the Convention stating that

> Since the acts of torture alleged have not been refuted or explained by the Government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of Article 5 of the African Charter.[105]

The Commission has also analyzed other situation where the violation of the Art. 5 occurred such as incommunicado detention, violation of human dignity, condition of detention, detention on ground of mental health, corporal punishment, refoulment, extraordinary rendition, enforced disappearance and death penalty. All of this will be discussed and deepened in the paragraph below.

Incommunicado detention is when a person has not the possibility to communicate with the external world of his/her status.

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[100] ACHPR, Institute for Human Rights and Development in Africa (on behalf of Esmalia Connateh and 13 Others) v. Angola, Comm. No. 292/2004, 43rd Ordinary Session (May 2008), para. 52
[101] ACHPR, Huri-Laws v. Nigeria, Comm. No. 225/98, 28th Ordinary Session (6 November 200), para. 4.
[102] ACHPR, International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria, Comm. Nos. 137/94, 139/94, 154/96 & 161/97, 24th
[103] ACHPR, Amnesty International and Others v. Sudan, Comm. Nos. 48/90, 50/91, 52/91 & 89/93.
[104] ACHPR, Malawi Africa Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98.
[105] ACHPR, Amnesty International and Others v. Sudan, Comm. Nos. 48/90, 50/91, 52/91 & 89/93. Para.57

In the case of *Zegveld and Ephrem*[106], the Commission has found a violation of the Art. 6, right to not to be arbitrarily detained. In its reasoning the Commission has found that incommunicado detention amount to torture and ill-treatment. Other cases analyzed by the Commission where the violation of the Art. 6 and consequentially of the Art. 5 was found. However, in other situations, the same Commission classified incommunicado detention as inhuman or degrading treatment if it consists of prolonged and solitary confinement as in the case of Egyptian Initiative for Personal Rights and *INTERIGHTS v. Egypt*.[107]

Violation on human dignity is also considered under the scope of Art. 5. For instance, electric shock, sexual assault, nudity, are in violation of the principle of respect for human dignity. It is important to notice that the word dignity is interpreted by the Commission in a very broad way, considering also the economic and social conditions of the victims. [108] Indeed, the right to housing is considered as part of human dignity. In the case of Modise[109], the applicant was stateless because the Respondent State revoke his nationality and deported South Africa which again deported him to Bophuthatswana and to Botswana. The commission has found that there is a violation of the Art. 5 because the Respondent State has denied him the nationality and deporting him many times consequentially amount to a violation of human dignity. Delving into the topic, the respect of dignity is also read in conjunction with other rights in the Charter. For instance, in Mauritania cases[110] the alleged accuses were on the slaved and displaced black Mauritanians from the Moor community. The detainees in Mauritania were also starved to death and no provided with health care or clothing which amount to the violation of Art. 5 and Art.16 right to health. [111]

Focusing the attention on detention facilities, the conditions of people deprived of their lives are also the most subjected to a violation of Art. 5. In the Commission view, there are two types of affected conditions. The physical and psychological one and the social and economic conditions.

In the case of *Media Rights Agenda v. Nigeria*[112] the applicant was chained to the floor by night and by day. For 147 days he was not allowed to take his bath and kept in solitary confinement till the day of the trial[113]. The Commission pronounce itself stating that this treatment amount to a inhuman and degrading treatment under Art. 5 of the African Charter.

[106] ACHPR, ACHPR, Zegveld and Ephrem v. Eritrea, Comm. No. 250/2002, 24th Ordinary Session (20 November 2003), para. 55.
[107] ACHPR, Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Comm. No. 334/06, para. 219
[108] ACHPR, Sudan Human Rights Organisation & COHRE v. Sudan, Comm. Nos. 279/03 & 296/05.
[109] ACHPR, John K. Modise v. Botswana, Comm. No 97/93
[110] ACHPR, Malawi African Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98.
[111] Ibid., para. 122
[112] ACHPR, Huri-Laws v. Nigeria, Comm. No. 225/98, para. 40
[113] Ibid.

In Institute for Human Rights and Development in *Africa v. Angola*,[114] the applicants were found sleeping next to the toilets facilities and the cells were used before by animals without cleaning. This for the Commission was considered as in breach of Art. 5.

Particular attention must be drawn on detention of people who are affected by mental illness. In Lunatics Detention Acts of 1917 people affected by mental disorders were labelled as lunatics and idiots. The Commission found that addressing people with mental problems in this way means denying the respect and the human dignity they deserve. Indeed, it stated that

> "In coming to this conclusion, the African Commission would like to draw inspiration from Principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care. Principle 1(2) requires that "all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person."[115]

Changing the subject to Refoulement, the Charter also prohibit returning people to a place where there might be a violation of Art. 5. Indeed, the States must comply with the norms before expelling individuals. Same violation appears also for enforced disappearances. The African Commission involving related cases cited

> enforced disappearance violates a range of human rights including, the right to security and dignity of person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, the right to humane conditions of detention, the right to a legal personality, the right to a fair trial, the right to a family life, and when the disappeared person is killed, the right to life.[116]

Last type of case-law analyzed is death penalty. Unlikely the Charter does not prohibit expressly the death penalty but just deprivation of life. In 1999, the Commission adopted a "Resolution urging states to envisage a moratorium on the death penalty" that was also recall it in 2008 to push states to refrain from implementing death penalty. In the case of Botswana[117] the Commission found, not only the death penalty as disproportionate to the crime, but also the method of the execution (hanging) inhuman and degrading.[118]

[114] ACHPR, Institute for Human Rights and Development in Africa v. Angola, Comm. No. 292/2004.
[115] ACHPR, Purohit and Moore v. The Gambia, Comm. No. 240/2001.
[116] ACHPR, J.E. Zitha and P.J.L. Zitha v. Mozambique, Comm. No. 361/08, 9th Extraordinary Session (1 April 2011), para. 81.
[117] See ACHPR, INTERIGHTS(on behalf of Mariette Sonjaleen Bosch) v. Botswana, Comm. No. 240/2001, 34th Ordinary Session (November 2003), para. 31. A more appropriate approach may have been for the Commission to consider the scope of limitations in international law on the application and use of capital punishment
[118] Ibid., para. 5.

To conclude the Commission also found that if a legal process violates the principle of the Charter, such in the case of Sudan[119], regarding the execution of 28 army officers, the basic legal norms for fair trial were not met, so the punishment was declared unlawful.

Completing the analysis on the African Human Right system on protection of prohibition of torture, the States are obliged under the Charter to investigate and prosecute the alleged violations. In Sudan, the Commission wanted to implement the standards for investigations released by the European Court on Human Rights in *Jordan v. UK*[120] but It also noticed that the continuous violation were also a demonstration of the lack of proper investigation and a very poor judicial system. The fragmented reality of the African countries it is also showed by the fact that in other situation the Commission found a correct prosecution and punishment of the alleged violations, such as in the *Zimbabwe Human Rights NGO Forum v. Zimbabwe*[121]. Of course, privileges and immunities are not compatible with the Art. 5 of the Charter, indeed the Robben Island Guidelines ensure that there is no immunity for acts of torture or ill-treatment. Indeed, the Commission states that

> [t] he granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.[122]

## 5. Conclusion

The European system is the most detailed and well-developed. Indeed, all countries of EU are also part of Council of Europe under Art. 4 and Art. 3 absolutely prohibit torture. Both work synergically to avoid such violations, indeed the Art.6 (3) of TEU states that the ECHR rights are general principle of law as well as the Art 52(3) CFR consider the rights of Art. 4 of CoE. It is not true that the detention facilities in European Union does not fall under inhuman and degrading treatment because there is still room to improve. For what concern the American system, the American Commission and the Inter American Court of Human Rights, has effectively changed people's lives in the continent. The broad definition of torture has allowed the institutions to cover a broad range of treatment and for the first time to address rape as torture. However, the system still faces some challenges because of lack of funds and political support. The African system of Human Right, although very recent, is the most cutting-edge one. The African Human Rights bodies should never stop to uphold the legal and moral task for prohibition of such violation. Attention must be given for the reparations to the victims and putting in place legal tools and law for prevention.

[119] ACHPR, Amnesty International and Others v. Sudan, Comm. Nos. 48/90, 50/91, 52/91 & 89/93, paras. 65-66.
[120] ACHPR, Sudan Human Rights Organisation and COHRE v. Sudan, Comm. Nos. 279/03 & 296/05, para. 150.
[121] ACHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Comm. No. 245/02, para 181-183.
[122] ACHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Comm. No. 245/02, para. 211.

Nevertheless, is also important to highlight points of convergence and points of detachment between the various legal systems.

Indeed, the UNDHR, although describes the prohibition of torture, however the non-binding nature of the declaration itself does not provide for enforcement mechanisms. Nevertheless, the declaration derives its strength since the principles are considered as customary internal law. Over time, the definition of the term torture, inhuman and degrading treatment became more thorough. Indeed, the ICCPR emphasizes the individual character of the right with the formulation "No one shall be". It also includes in the definition a right not to be subject to unvoluntary medical experiment, which was not present in the UDHR. Moreover, departing from the Universal Declaration, the Art.7 of the ICCPR, indeed triggers positive and negative obligations to the ratifying countries. The Special Rapporteur on Torture, despite not being a judicial body, works alongside the international community to prevent, address, and criminalize episodes of violation. Even the SRT, relies on the jus cogens nature of the prohibition of torture and it does not base its jurisdiction on ratification of treaties. The most cutting-edge system of protection of human rights is the European one. Indeed, analyzing the definition of torture according to the ECHR, is possible to the see that it starts with the term "No one," which indicates strength of the absoluteness. It is fundamental to highlight that the Art.3 of the ECHR must be read in conjunction with Art.15, where it specifically enlisted the prohibition of torture as non-derogable right, even in time of emergencies threatening national sovereignly. It also detaches from the previous treaties due to a clear distinction in torture and inhuman, degrading treatment. Indeed, torture is defined as a special stigma which is characterized as if the treatment reaches a threshold of severity, which is established according to the circumstances. To continue the discussion, the American system of protection of Human Rights foresaw the prohibition of torture without clearly distinguish among treatments. However, the IACtHR, in its jurisprudence attempted to give a clear distinction. Moreover, it is important to emphasize that in the definition, the right to have physical, mental and moral integrity respected is new comparing to the definitions of the previous treaties. To conclude, the most recent system of human rights protection is the African one, which link torture and slavery in the same article of the Charter, focusing on prevention and reparations for the victims.

After a deep analysis of the International and national system of human rights protection it possible to go further in discussing the Convention, *par excellence,* the Convention Against Torture.

# Chapter 3: THE UNITED NATIONS CONVENTION AGAINST TORTURE

## 1. Introduction to the chapter

Torture is considered a direct attack to the human personality and human dignity[1]because being tortured is a situation where a person exercises an effective control and power over another individual. The victim is placed in condition of powerlessness though brutal methods such as beatings, electrical shock, *strapado* or *Palestinian Hanging*, sexual assault, water boarding or *marino*, mock execution or amputation. The aim of these practices is always to obtain information.

Throughout history, torture has been practiced by various peoples, during the Christian era by the Romans, during the Middle Ages, continuing with the colonization period in America and Africa. With the Enlightenment era, the practice was still in vogue to achieve its apex during the totalitarian regimes[2]. After the WWII, the international community started to focus more on protection of human rights. Subsequentially, the first International Organizations were born, indeed protecting the principle of prohibition of torture as inviolable and non-derogable right.

However, although all the legal tool and the institutional framework have been displayed at the international level and at the regional level, as the ones analyzed in the previous chapter, the practice has continued to be implemented. Examples can be retrieved from the military Junta of Pinochet where cases of torture and enforced disappearance are well-documented. Referring to such cases, in 1975, the UN General Assembly adopted a Declaration called the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[3]. This declaration served as ground floor for the drafting of the Convention Against Torture.

Following this declaration, the General Assembly asked to the Commission on Human Rights to draw up a Convention Against Torture which was supposed to be binding on all ratifying countries. The International Association of Penal Law (IAPL) and the Swedish government envisaged pioneering ideas for protection of human rights. Indeed, the IAPL focus its work on the obligations of the States

[1] Evans, M. (2021). The United Nations Convention against Torture and its Optional Protocol: A Commentary by Manfred Nowak, Moritz Birk and Giuliana Monina [2nd edn, Oxford University Press, Oxford, 2019, 1306pp, ISBN: 978-0-19-884617-8, £262.50 (h/bk)]. *International and Comparative Law Quarterly*, 1–2. https://doi.org/10.1017/s0020589321000452

[2] See eg Max Bauer and Franz Helbing, *Die Tortur Geschichte der Folter im Kriminalverfahren aller Völker und Zeiten* (Aalen 1973); George Riley Scott, *A History of Torture throughout the Ages* (Luxor Press 1959); Alec Mellor, *La torture, son histoire, son abolition, sa réapparition au XXème siècle* (Maison Mame 1961); Wolfgang Schild, *Von peinlicher Frag. Die Folter als rechtliches Beweisverfahren* (Rothenburg odT 2002); Edward Peters, *Torture* (2nd expanded edn, University of Pennsylvania Press 1996). For a short overview see Manfred Nowak, 'Die UNO-Konvention gegen die Folter vom 10 Dezember 1984' (1985) 12 EuGRZ 109–116

[3] Burgers, J. H., & Danelius, H. (1988). *The United Nations Convention against torture : a handbook on the convention against torture and other cruel, inhuman or degrading treatment or punishment*. Nijhoff. Ingelse, C. (2001). *The UN Committee Against Torture : an assessment*. Kluwer Law International.

to criminalize the perpetrators and to declare torture as a crime under international law. Nevertheless, the draft was not complete because it was only addressing cruel, inhuman or degrading treatment or punishment.

The Swedish draft wanted not only to punish torture under universal jurisdiction but also following the principle of "aut dedere aut iudicare" and contained different suggestions for the prevention, monitoring and follow-up mechanisms.

Therefore, the Convention Against Torture was adopted on 10 December 1984 by the UN General Assembly.[4] In 1987, the date when the Convention entered into force, twenty States have been ratified the Convention, including the Council of Europe ones.

In 2017, an extraordinary number of countries have adopted the Convention, a total of 162. [5]

With the end of the Cold War, the working of the UN Commission on Human Right took a step forward and it was tasked with the drafting of an Optional Protocol to the Convention Against Torture in order to strength the prevention, through the possibility for the expert of the Committee, of country visits in detention facilities.

Over the disputes of national sovereignty, the Protocol was adopted with 127 States in favor by the General Assembly in 2002.[6]

The Convention Against Torture was draft having in mind the widespread violation of the prohibition of torture in Latin America. The main aim of the Convention is to reiterate the commitment to the protection of Human Rights and mostly important, the prohibition of torture.

Therefore, this chapter will be analyzing and discussing the definition of torture under the United Nations Convention against Torture, inhuman and degrading treatment from a legal point of view. The following paragraph will consider all the actors and the acts involved in the prohibition of such inviolable right. Moreover, the analysis will be focused on the jurisprudence of the CAT in order to concretely address the absolute and non-derogable right. Finally, the study will focus on two types of obligations which arise from the State ratifying the Convention: the obligations to prevent torture and the obligations to criminalize torture under national jurisdiction.

[4] GA Res 39/46 of 10 December 1984.
[5] Evans, M. (2021). The United Nations Convention against Torture and its Optional Protocol: A Commentary by Manfred Nowak, Moritz Birk and Giuliana Monina [2nd edn, Oxford University Press, Oxford, 2019, 1306pp, ISBN: 978-0-19-884617-8, £262.50 (h/bk)]. *International and Comparative Law Quarterly*, 1–2. https://doi.org/10.1017/s0020589321000452.
[6] GA Res 57/199 of 18 December 2002; see also APT, (2003), '*Position Paper on the Optional Protocol to the UN Convention against Torture: Added Value of the Optional Protocol for States Parties to the European Convention for the Prevention of Torture'* APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual.*

## 2. Legal definition of Torture

The Convention against Torture was adopted to reiterate the prohibition of the widespread practice of torture in various parts of the world. This purpose was achieved by three most important processes. The first one is the punishment of the perpetrators by means of criminal law and universal jurisdiction, the second one is the possibility for the victim to ask for reparations, and lastly the obligations for the State Parties to prosecute and prevent episodes of torture, cruel, inhuman, and degrading treatment and punishment.[7]

It is essential to point out that for the first time the Convention Against Torture gave the legal definition of the term and, moreover since most of the legal tool in the international arena does not distinguish between torture and cruel, inhuman, and degrading treatment, a legal differentiation is of utmost importance. Indeed, Article 1 of the Convention states:

> For the purposes of this Convention, 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.[8]

Therefore, the following analysis will focus on all the aspects of this definition which is the example for many jurisprudences around different legal systems.

### 2.1 Conduct

Analyzing the Art. 1 of the CAT is possible to find some main elements in the definition of torture. In the statement is used the term 'act', so what it is highlighted is the conduct of the perpetrators. However, it would be misleading to think that this definition does not comprise omissions from the States because such narrow interpretation would not follow the scope of the Convention. Indeed, as

[7] Evans, M. (2021). The United Nations Convention against Torture and its Optional Protocol: A Commentary by Manfred Nowak, Moritz Birk and Giuliana Monina [2nd edn, Oxford University Press, Oxford, 2019, 1306pp, ISBN: 978-0-19-884617-8, £262.50 (h/bk)]. *International and Comparative Law Quarterly*, 1–2. https://doi.org/10.1017/s0020589321000452

[8] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465

reported in the *Greek case*[9], which is one of the main source of inspiration for the Convention, the State has failed to provide proper food, water, clothing, medical care to the prisoners.[10] Therefore, the definition also includes acts of omission.

### 2.2 Intention

Deepening the discussion, Art.1 of the Convention requires 'intention' to classify severe pain and suffering as torture. Therefore, it is possible to find the article 1 formulated as such 'is intentionally inflicted on a person for such purposes as'. Therefore, if the intense suffering is inflicted, for instance, for medical treatment, then it does not constitute torture.

The Committee also highlights that intention has not to be seen from a subjective point of view, but that there must be objective interpretations on the motivation of the perpetrators.[11] This means that the intention must be inferred from the facts and the circumstances of each specific case, which is in line with inflicting severe pain and suffering for the purpose of Art. 1.

From the traveaux preparatoires,

> [the] perpetrator must intentionally, ie knowingly, not negligently or recklessly, inflict pain or suffering and this pain must be inflicted for one of the purposes prohibited under the Convention. This means that the perpetrator must not act with the specific intent to inflict *severe* pain and suffering.[12]

Therefore, the intention is what classify an act or an omission as torture in the Art. 1 of the CAT differentiating it from cruel, inhuman, and degrading treatment or punishment.

### 2.3 Purpose

The other essential element which is underlined in the Convention definition is purpose. Therefore, it is possible to denote that torture is considered as such only if pursue a specific aim. During the drafting of the Art. 1 the countries found difficult to establish which purpose must amount to torture. Different opinions were displayed at the table, i.e., Switzerland wanted to consider scientific experiment and non-therapeutical experiment falling under the scope of torture as well as for Portugal

[9] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.
[10] Opinion of the Commission of 5 November 1969 in the Greek Case (1969) XII Yearbook, 461.
[11] CAT/C/GC/2 (n 88) para 9.
[12] *COMBATING TORTURE -A MANUAL FOR ACTION*. (n.d.). Retrieved January 30, 2023, from https://www.amnesty.org/en/wp-content/uploads/2021/06/act400012003en.pdf

with psychiatric treatments and prolonged confinement.[13] Therefore, in the CAT is possible to find listed the purposes referred to the term torture. Among these, the common denominators are

- Extracting a confession
- Obtaining from the victim or a third person information
- Punishment
- Intimidation and coercion
- Discrimination[14]

The Committee highlighted that ratifying countries need to implement the Art. 1 in their national legislation. The Committee also denounced the Chinese legislation for restricting the purpose of torture only to extracting a confession.[15] The aims of the Art. 1 are very related to the interests of the State or non-state agents, and it is difficult not to classify an ill-treatment where severe pain and suffering is in place such as torture.

According to individual complain procedure, the Committee tend to explain which of the purposes of the Art. 1 has been followed when there is a violation of the prohibition of torture. In the case of *Patrice Gahungu v. Burundi*[16], the Committee has found the violation of Art. 1 and it explicitly concluded that the treatment was intentionally inflicted for extracting a confession. Moreover, in *EN v Burundi*[17], the Committee found that the severe beating by police officers in the police station was done to inflict a punishment, therefore it constitutes an act of torture. In both case it is possible to denote that the Committee has not taken into consideration the subjective intention of the perpetrators but the objective circumstances at the stake.[18]

To conclude, the Committee has acknowledged that comparing torture with ill-treatment, the fundamental difference is the purpose which is considered as the essential element. Therefore,

> the definition of torture does not necessarily depend on a subjectively verified purpose or intensity of the inflicted pain or suffering, but on the intentionally and purposefulness of that infliction.[19]

[13] Evans, M. (2021). The United Nations Convention against Torture and its Optional Protocol: A Commentary by Manfred Nowak, Moritz Birk and Giuliana Monina [2nd edn, Oxford University Press, Oxford, 2019, 1306pp, ISBN: 978-0-19-884617-8, £262.50 (h/bk)]. *International and Comparative Law Quarterly*, 1–2. https://doi.org/10.1017/s0020589321000452
[14] Ibid
[15] CAT, 'Concluding Observations: China (2016) UN Doc CAT/C/CHN/CO/5, para 7b.
[16] Patrice Gahungu v Burundi, No 522/2012 (n 106) para 7.2.
[17] EN v Burundi, No 578/2013 (n 106) para 7.2.
[18] CAT, A/72/178 (n 99) para 31.
[19] CAT/C/GC/2 (n 88) para 9. For *EN v Burundi*, No 578/2013 (n 106) see CAT/C/56/D/578/2013, paras 4.4, 7.2, 7.3.

### 2.4 Severity criterion

Delving the discussion, torture is an aggravated form of human right violation. Therefore, it is useful to analyze if for the United Nation the criterion of severity is essential to distinguish torture from ill treatment. In the drafting of the legal notion of torture, the consensus was on the fact that severe pain and suffering must amount to torture. During the traveaux preparatoires, different opinions were displayed on the use of the term 'severe'. For instance, US and UK, wanted to add the word 'extremely' before the adjective 'severe' in order to highlight the distinction in treatment. On the contrary, the Switzerland suggested that no severity criterion should be considered when distinguishing between torture and other form of mistreatment.[20]

These differences in opinion also reflected the diversified approach taken by the European Commission and the ECtHR in the *Greek Case*[21]. While the Commission assessed that the distinguish criteria was the purpose of ill-treatment, the ECtHR detached from this definition and, it considers the severity and the intensity of suffering as the turning point to classify an ill-treatment as torture. This can be clearly deduced by *Northern Ireland*[22] case, where the so called 'five techniques' as cruel, inhuman, and degrading treatment, not reaching the threshold of torture, as it was considered by the Commission.

Departing from this reasoning, the UN seems to follow more the approach of the Commission than that of the ECtHR. This means that for the Convention against Torture, the criterion of severity is not essential for the distinction between the aggravated form of ill-treatments and other cruel, inhuman, and degrading ones.

Consequentially, this consideration led to a new consequence. Indeed, it is possible to highlight that there is a justifiable treatment causing severe pain and suffering and non-justifiable one. So, there might be situation in which the purposeful cause of severe pain and suffering is unjustifiable and, nevertheless, according to the circumstances justifiable.[23] It is possible to illustrate some cases such as the use of force by the law enforcement during an arrest of suspected or in case of armed conflict. Each case must be seen in light of the principle of proportionality. However, if the severe pain and suffering is caused for any purpose listed in

[20] E/CN.4/1314 (n 8) paras 23, 36; see also E/CN.4/1314/Add.1 (n 22), para 2.
[21] The Greek Case, Denmark, Norway, Sweden and the Netherlands v Greece,3321/67,3322/67,3323/67,3344/67 Council of Europe, European Commission on Human Rights, 1969.
[22] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977
[23] Opinion of the Commission of 5 November 1969 in the Greek Case (1969) XII Yearbook 186

the Art. 1 of the Convention, as stated above, and non-justifiable, then the principle of proportionality is not applicable.

Therefore, the severity of suffering, despite being an essential criterion enlisted and described by the CAT, however, is not the decisive one to assess the distinction of torture from any other form of mistreatment as instead is the purpose.

### 2.5 Powerlessness

In the Convention against Torture, among the various factors that determines torture, the condition of powerlessness is taken into consideration. The perfect environment for torture is prolonged incommunicado detention in which the individual is detached from the surrounding circumstances and totally subjected to the will of the perpetrator. This situation usually is often related to a slavery situation, indeed both torture and slavery attacks directly the core of human dignity.

The UNSRT has confirmed that the meaning of the term powerlessness is "someone overpowered, in other words, has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering"[24].

The Committee has emphasized that particular attention must be paid in detention facilities where the detainees are subjected to the will and control of the guards. Indeed, as it will be analyzed in depth below, the State Parties must ensure to prevent and criminalize torture in all contexts of custody and control.[25]

Furthermore, the powerlessness condition has been found by the Committee also outside the detention facilities. In the case *of VL v Switzerland*[26], the applicants were under control of the police even though the torture was perpetrated outside the detention facilities.

So, the Convention Against Torture foresees a condition of powerlessness which is usually liked to a deprivation of liberty. However, what it is important to analyze is that the Convention does not prohibit in absolute way the intentional use of pain and suffering. Indeed, in a situation where the public official is exercising his/her function arresting a convicted criminal, then the possible infliction of pain or suffering can be justified according to the principle of

[24] CAT, 'Concluding Observations: Norway' (2012) UN Doc CAT/C/NOR/CO/6-7, para 7.
[25] A/72/178 (n 99) para 31.

[26] V.L. v. Switzerland, CAT/C/37/D/262/2005, UN Committee Against Torture (CAT), 22 January 2007

proportionality. Once the person has been arrested, the disproportionate use of force or infliction of severe pain and suffering becomes classified as torture.

Again, it is fundamental to say that for cruel, inhuman, and degrading treatment is possible to apply the principle of proportionality within the limited scope that must be achieved, as in the example above. However, according to the Convention, if the use of force is used for any purposes listed in the Art. 1, in a condition of powerlessness and any legitimate framework, then, it is considered as torture and can never be justified under the principle of proportionality. Therefore, the drafters of the Convention use the criterion of powerlessness to distinguish the cruel, inhuman and degrading treatment from torture.

### 2.6 Involvement of Public Official

Delving the discussion, according to the CAT, the severe pain and suffering is also considered torture when it 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"[27]

Originally, there was the involvement only of State actors in the 1975 Swedish Draft. Nevertheless, the Convention wanted the States to use domestic criminal law to prosecute torture, so private individuals where added.[28] Germany wanted to go further involving also the notion of non-State actors but US with UK, Morocco, and Austria wanted to remain on the State-centric opinion.

Deepening the discussion, it is possible to analyze that the Committee has criticized that this interpretation does not cover all the persons acting in their official capacity. For instance, the members of the armed forces are not considered as public officials in Honduras Criminal Code.[29] The Committee, moreover, was against the State reporting procedure of Ethiopia, where the definition of torture was much narrower than the one expressed in the Convention, indeed, only referring to the persons only acting in their official capacity.[30] Highlighting all those nuances, it follows that the Committee want to interpret the term 'public official' in a very broad and extensive sense.

[27] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465
[28] Evans, M. (2021). The United Nations Convention against Torture and its Optional Protocol: A Commentary by Manfred Nowak, Moritz Birk and Giuliana Monina [2nd edn, Oxford University Press, Oxford, 2019, 1306pp, ISBN: 978-0-19-884617-8, £262.50 (h/bk)]. *International and Comparative Law Quarterly*, 1–2. https://doi.org/10.1017/s0020589321000452
[29] CAT, 'Concluding Observations: Honduras' (2009) UN Doc CAT/C/HND/CO/1, para 8
[30] CAT, 'Concluding Observations: Ethiopia' (2011) UN Doc CAT/C/ETH/CO/1, para 9.

The Committee went further in its interpretation of the responsibilities of public officials, especially in situations where their representatives are not involved or responsible for acting of torture. In *EN v. Burundi*[31], the applicant was beaten for several hours by police officers, however, the State concerned declared that they were not following any official orders, so the acts cannot amount to torture. Nevertheless, the Committee found a violation of Art. 1 under the scope of torture because the police officers were wearing police uniforms and equipped with rifles and belt provide by the State. Indeed, the Committee states

> The complainant was placed in pretrial investigation at the premises of the Ministry of Internal Affairs in Astana at the time his injuries were incurred. Under these circumstances, the State party should be presumed liable for the harm caused to the complaint unless it provides a compelling alternative explanation.[32]

### 2.7 Other person acting in an official capacity

The Convention wanted to broaden the actors accountable for violation of Art. 1. Indeed, this was reflected in the add to the article of the sentence "other person acting in official capacity"[33]. This was proposed by Austria to respect the concerns of Germany, which declared that some of non-state actors are possible to consider as governmental authority.

This is clearly explained in the case *Elmi v Somalia*[34], where the Committee has underlined that since Somalia has passed years without a permanent government, the various groups which de facto exercises governmental functions, are held accountable in case of violation of Art. 1.

Therefore, the Committee went further criticizing various States which does not consider any other person acting in official capacity to criminalize torture. This, as expressed in Kazakhstan Concluding Observation[35] can led to a situation of impunity. Furthermore, it is also important to notice that in its Concluding Observation to Morocco, the Committee found that according to the definition of torture of the Criminal Code, it does not consider any possible explicit or tacit acquiesce or consent by law enforcement, public agents or any other individuals acting in their official capacity.[36]

[31] *EN v Burundi*, No 578/2013 (n 106) para 7.3.
[32] *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, para 9.2.
[33] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465
[34] *SS Elmi v Australia*, No 120/1998, UN Doc CAT/C/22/D/120/1998, 14 May 1999, para 6.5
[35] CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 24
[36] CAT/C/CHN/CO/4 (n 148) para 33.

### 2.8 Instigation, consent, and Acquiescence

The committee has once again deepened the interpretation of public officials, and it also included the fact that the State Parties has an obligation to prevent that

> public authorities or other persons acting in an official capacity from directly committing, instigation, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture.

Indeed, the Committee has clarified that the State is also responsible for the persons, agents, actor acting on behalf of the Sate. Indeed, in detention facilities, the Staff is under the control of the State, therefore the State is obliged to prevent aby form of violation of Art. 1 either by the public officials and by the Staff. The prohibition of instigation, consent, and acquiescence is also extended to hospitals, military facilities, schools, and every place where there might be the possibility of being subject of pain and severe suffering.[37]

The Committee also has underlined that if the acts of torture are being committed by public officials or non-state actors with the acquiesce of the State party and then it indeed, it fails to prevent, investigate, or prosecute, so it doesn't carry on its due diligence, then the State is held responsible. This especially happens in cases where the State fails to prevent rape, trafficking and domestic violence that are considered by the Convention as torture.

### 2.9 Cruel, inhuman and degrading treatment

It is fundamental to analyze the definition of cruel, inhuman, and degrading treatment. Indeed, Art. 16 of the CAT states that

> Each State Party shall 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 1, 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

[37] CAT/C/GC/2 (n 88) para 15.

shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.[38]

Analyzing the wording of this Article is possible to see that the drafters of the CAT envisaged a definition which consider the vision of the European Court of Human Rights on the Greek case than the one on the Northern Ireland Case. Indeed, it is possible to distinguish torture from cruel, inhuman, and degrading treatment basing the assessment on mainly three parameters which are fully described in the paragraph above: the purpose, the intention of the perpetrator and the powerlessness of the victim.[39]

Nevertheless, cruel, inhuman and degrading treatment is also considered as committed by instigation, consent and acquiescence which must be interpreted with the same concerns of the definition of torture in Art.1

In the jurisprudence of the Committee is possible to analyzes several cases which do not reach the threshold of torture; therefore, they fall under cruel, inhuman and degrading treatment. These cases, usually refer to poor condition of detentions, excessive use of force, domestic violence, trafficking of human beings etc.. which will be analyzed in the following paragraph.

Indeed, According to the Special Rapporteur on Torture, Manfred Novak[40], in many countries the condition of detention are so inadequate that constitutes cruel, inhuman and degrading treatment because they miss the element of intention and purpose. However, in many cases the Committee have found a violation of Art.16 of the Convention due to lack of food and water, healthcare, overcrowding facilities and poor health assistance.

One of the case which is fundamental to mention is the *Abdulrahman Kabura v Burundi*[41], where the detainees were obliged to drink water from the toilet facilities to survive. Another interesting case is *Boniface Ntikarahera v Burundi*[42] where the applicant was arrested by 20 police officers and interrogated under torture. The Committee found the conclusion that Art. 1 was violated.

[38] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465
[39] SRT (Nowak) A/HRC/13/39 (n 5) para 60; See also SRT (Nowak) 'Report of the Special Rapporteur on the Question of Torture' (2005) UN Doc E/CN.4/2006/6; see Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 NQHR 674.
[40] 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2010) UN Doc A/65/273.
[41] *Abdulrahman Kabura v Burundi*, No 549/2013, UN Doc CAT/C/59/D/549/2013, 11 November 2016, para 7.8.
[42] *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014

Moreover, according to Art.16, the Committee acknowledged that the detained, during the prison period, was in a cell with other 16 people without access to medical assistance and poor detention conditions. The absence of mechanism of monitoring also increased the possibility of prisoners of being subject to torture, therefore the Committee also found a violation of Art.16.

To continue to cite the jurisprudence of the Committee, the case of *Sergei Kirsanov V Russian Federation* [43], concerns unbearable conditions of detention. Indeed, the prisoner

> […] was held in the temporary confinement ward from 14 December 2000 to 2 April 2001 and again from 25 June 2001 to 24 July 2001, that he was not provided with bedding or toiletry items, that there was no table, toilet or sink in the cell, that showers were seldom allowed and then only with cold water, and that no walks outside the cell were allowed. The Committee also notes that the State party has disputed other allegations made by the complainant, namely that there were insects in the cell, that the light was always on, that there was no ventilation and that he was only fed once a day.[44]

However, even if the detentions conditions do not fall under the meaning of torture, the Committee found a violation of Art.16, namely cruel, inhuman and degrading treatment.

### 3. Jurisprudence of the Committee Against Torture

To ensure the compliance of the Convention by the States Parties, it is fundamental to analyze the jurisprudence of the Committee against Torture.

The Committee against Torture is one of the treaty bodies of the United Nations whose main tasks is to ensure the Compliance of the Convention against Torture by the States Parties. To be more specific, the Committee is a quasi-judicial treaty-based organ composed by ten national expert of the ratifying countries. The following paragraph will be discussing the applicability of the principle of prohibition of torture showed in different cases-law and in different contexts.

In the case Ali *Aarras v Marocco*[45], the applicant is a Belgian-Moroccan national claiming being a victim of violation of Art. 2,11, 12, 13, 15 of the Convention against Torture.

The complainant was arrest and detained in Spain due to charges of being member of a terroristic organization. He was extradited to Morocco upon the request of the authorities. The detainees claim

[43] *Sergei Kirsanov v Russian Federation*, No 478/2011 (n 48) para 11.2.
[44] Ibid
[45] *Ali Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014

that he was severe tortured under policy custody, during with he was blindfolded, mock-executed, deprived of sleep, water, food, and electroshocked. He was so seriously injured that he was unable to move or to speak.

The Committee made its conclusion based on the information given to it by the Parties. It concluded that the applicant was torture between 14 December 2010 and 23 December 2010 with the aim to obtain a confession from him. During this timeframe, the family was not informed about the location and personal information of the applicant. He had no access to a lawyer or to medical examinations.

Firstly, the Committee recalled for general duties by the State Parties under the Convention to provide guarantees to not being subject to torture in places of detention, the right to contact relatives and to being protect by lawyers.[46]

Considering all that, the Committee considered that Morocco has violated the Article 1 and Article 11 of the Convention. Furthermore, The Committee also stated that the authorities failed the obligations under Art. 12 of the Convention to investigate when alleged accuses of torture have been found.

The CAT committee also found that the complainant was sentenced only on the basis of a confession extracted under torture. Therefore, the Committee reiterated that any statement which is obtained by no formal interrogation method should not be considered admissible under judicial proceedings.

In conclusion, after analyzing all facts submitted by both Parties, the Committee reached out the conclusion that the Convention Against Torture was violated under Art.1 of the Convention.

### 3.1 Principle of Non-Refoulment

One of the most important principle enlisted and protect by the Convention is the principle of non-refoulment. Indeed, the prohibition of torture is an absolute right even if the person is at risk of being torture once is being sent to another country. Indeed, the Committee is tasked to determine in the cases law, whether expulsion, extradition or return can violate Art.1 of the Convention.

Unfortunately, the great majority of the individual complaints regard the violation of the Art. 3 of the Convention, which is the one that protect the principle of non-refoulment.[47] It is very important to highlight that the approach of the CAT on this principle is that no balance of interests can be taken into consideration. Indeed, it is considered as an absolute right, no matter the serious crimes the

[46] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2.
[47] HR(XXXVI)/WG.10/WP.8/Add.1

individual might have committed or the threat to national security which may impose. Therefore, according to the CAT, the principle of non-refoulment is not subject to limitations clause of any kind.

Art. 3 of the Convention states that

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights[48].

The principle of non-refoulment is very important in cases where national security and protection of human rights are at stake. The principle is often invoked in case of extradition, expulsions or renditions of terroristic suspects.

In *Agiza v. Sweden*[49], the complainant Mr. Ahmed Hussein Mustafa Kamil Agiza, claimed that his transfer from Sweden to Egypt constitutes a violation of Art. 3 of the Convention. Indeed, Sweden rejection of his asylum led to a CIA rendition flight.

In conclusion, the Committee assessing whether the principle of non-refoulment was violated or not it stated

> The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the

[48] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465
[49] Agiza v Sweden, No 233/2003, UN Doc CAT/C/34/D/233/2003, 20 May 2005, para 13.8.

> complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police.[50]

The Committee also reiterated that diplomatic assurance cannot be taken as a justification to avoid the applicability of the principle of non-refoulment.[51]

This case is also interesting to analyze because it shows how the Art. 3 is applied to cases of extraordinary renditions. With the term rendition, a State arrests a person and hand over to the authorities of a foreign Sate. Indeed, after the rejection of the application of asylum of Mr. Agiza in Sweden, he was handed over to agents who hooded him and bounded to be transferred on a US owned plane to Egypt where he was severely tortured. The Committee explained that although Mr. Agiza constitutes a threat to national security, because being part of a terroristic organization, the Sweden authorities were fully aware of the possibility of torture in Egypt and therefore the rendition constitutes a violation of the Art. 3 of the Convention.

The Committee criticized frequently in its concluding observation the attitude of the Sates to implement the extraordinary rendition programs, stating that

> that no one who is at any time under its control becomes the object of an "extraordinary rendition" […] ' and that 'the transfer, refoulement, detention or interrogation of persons under such circumstances is in itself a violation of the Convention'.[52]

Furthermore, the Committee also recognize the principle of non-refoulment as jus cogens. Indeed, it overcomes the obligations set out in treaties for the extradition, and the States parties must refrain to extradite an individual facing the risk of being tortured.[53]

### 3.2 Protection against torture to people deprived of their liberty

[50] *Agiza v Sweden*, No 233/2003, UN Doc CAT/C/34/D/233/2003, 20 May 2005, para 13.8.
[51] CAT/C/KEN/CO/1 (n 49) para 16.
[52] CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, para 14.

[53] C Wolfram Wouters, International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture (Intersentia 2009)

Deepening the discussion on the analysis of the cases law of the Committee against torture, the Convention gives special attention to the place of detention, where persons deprived of their liberty are more subjected to high probability of being tortured.

Therefore, Art. 11 of the CAT set out one of the most important safeguard for protection of human rights. Indeed, it requires the obligations by the States to review systematically the rules of detention and the interrogation methods. This Article is very linked with the Art. 2 , 10 and 16, in order to give a full protection of the absolute right. In order to comply with Art. 11, the States need to implement regularly and uninspected visits to detention facilities.

These inspection are also fund in the Committee jurisprudence. Indeed, in *Kabura v Burundi*[54] the Committee has found a violation of Art. 2 in conjunction with Art. 11 for failing in implementing monitoring mechanism.

The case regards a case of torture in Burundi, where after the civil war, the country fell in a period of instability. The applicant was arrested by the National Intelligence Service with the aim to obtain a confession to declare of having destabilized the ruling party. The individual was tortured for hours before he released the confession. Indeed, the Committee found a violation of the Art. 1 of the Convention stating that

> The complainant also invokes article 2 (1) of the Convention, which requires the State party to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". The Committee notes that in the present case the complainant was beaten and then detained for two months and 20 days in four different locations — the premises of the National Intelligence Service, the headquarters of the criminal investigation police, Gitega prison (over 100 km from his home) and Mpimba prison in Bujumbura — without any contact with a lawyer or doctor. While in police custody, he was beaten all over his body with electrical cables by the officer guarding him. The Committee recalls its conclusions and recommendations, in which it called on the State party to take effective legislative, administrative and judicial measures to prevent all acts of torture and all ill-treatment and to take steps, as a matter of urgency, to bring all places of detention under judicial control and to prevent its officials from making arbitrary arrests and engaging in torture.7 In the light of the

[54] Abdulrahman Kabura v Burundi No 549/2013 (n 12) para 7.8; Déogratias Niyonzima v Burundi No 514/2012 (n 12) para 8.8; Boniface Ntikarahera v Burundi No 503/2012 (n 22) para 6.6; Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela No 456/2011 (n 21) para 6.7.

> foregoing, the Committee finds a violation of article 2 (1), read in conjunction with article 1 of the Convention[55]

Similar lack of monitoring mechanisms was also found in *Colmenarez and Sanchoz v Venezuela*[56]. The complaint was done on behalf of Frascisco Dionel Guerrer Larez for violation of Art. 2, 11 and 14 of the CAT. Indeed, he was imprisoned for aggravated robbery, but he was killed, dismembered, and buried in the detention facilities.

The Committee declare that the State has failed to respect the obligations under Art.2 and Art. 11 because it did not take measures to ensure that acts of torture have been prevented. In particular,

> to protect Mr. Guerrero Larez from becoming a victim of disappearance and, by extension, from being subjected to acts of torture committed by other inmates in the Penitentiary, with the acquiescence of the prison authorities.

Therefore, due to absence of mechanism which prevent violence between the detainees and torture of prisoners under the acquiesce of the authorities, clearly the Committee found a violation of Art. 1, 2 and 11 of the Convention.

Indeed, the Committee also expresses that in detention facilities where no monitoring mechanism have been implemented there is a de facto higher probability to being subject to torture, inhuman and degrading treatment.

[55] Abdulrahman Kabura v Burundi No 549/2013 (n 12) para 7.8; Déogratias Niyonzima v Burundi No 514/2012 (n 12) para
[56] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela* No 456/2011 (n 21) para 6.7; see also *Taoufik Elaïba v Tunisia* No 551/2013 (n 21) para 7.4.

## 4. Addressing Torture to the State Parties: The Duty to Prevent and Criminalize Torture.

### 4.1 Obligations to Prevent Torture.

The Convention does not limit itself to declare a legal definition of the term torture and cruel, inhuman and degrading treatment. Indeed, in order to render the struggle against torture much more effective, the Convention has set up obligations for the State Parties to prevent and criminalize any form of violation of Art. 1. According to the drafters, Art. 2 of the Convention states

> Each State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture.
>
> An order from a superior officer or a public authority may not be invoked as a justification of torture.

The Convention, in addition to the obligations set out by specific rights such as Principle of Non-refoulment (Art. 3), Principle of providing education to law enforcement (Art. 10) Principle of reviewing condition of detention and interrogations method (Art. 11), the Art. 2 specifically requires to the State parties an obligation to prevent torture. This is done directly in correlation to personal integrity and right to fair trial.

The obligations are also monitored by the CAT Committee. According to the CAT procedures, there is a slightly difference in addressing torture from cruel, inhuman and degrading treatment. Indeed, if the Committee has found a violation related to torture, then the Article which is invoked is Art. 2, meanwhile, if the violation amounts to cruel, inhuman, and degrading treatment, usually the CAT refers to Art. 16.

The Convention has considered some measures which will be displayed below but the Committee has also highlighted that the list is not exhaustive and that the scope of the Art.2 can be broaden according to the circumstances. The first to fall under the umbrella of preventive measure is criminalization of torture.

Indeed, in order to fulfill the Obligations, the State parties must not limit themselves to ratify the Convention, but they need to transform it into national provisions. The States must address the torture under criminal law.

According to the Committee, another important obligation, is to guarantee safeguards in detention facilities and during the interrogation of detainees, where the likelihood that torture will occur is high. Among these rights, there is the access to a lawyer, to medical assistance and notification to the families.

According to the Committee, every individual must be brought before a Court during a period of 48 hours from the moment of deprivation of liberty, to challenge the validity of the decision.

The Committee also stress the point to assist the detainees in his/her own language through translation or interpretation. It also advice for an official register to record from the moment where the deprivation of liberty starts.

In the case of Ramiro Ramirez Martinez et Al v Mexico[57], The Committee found an environment, especially in preventive custody, conducive to a violation of Art. 2. Indeed, according to the detainees' reports, it led to confessions mostly likely extort through torture.

Another extraordinary preventive measure, which has been established by the Optional Protocol in 2006, is the possibility to open the detention facilities to impartial and independent bodies such as the UN sub-committee On Prevention and National Preventive Mechanism. Indeed, in this way it is possible to examine without notice the conditions of the detainees and the places where people deprived of their liberty are detained.

In countries where the OPCAT has not been ratified, the governments must give access without limit to the NGOs to the facilities to monitor them and detainees.

Among the most common preventive measure, there is the non-refoulement one, which is the prohibition to return an individual to its own country or a third country where he/she could encounter torture or cruel, inhuman, and degrading treatment. Moreover, according to the Convention, it should be guaranteed to that person all the specific legal support for the request of asylum.

To further deepen the discussion, the Committee, as well as the UNSRT, consider the gender-based violence, feminicide, rape, sexual harassment, as torture. Indeed, if the State fail to prevent such events, it is condemned for a violation of Art.2 of the CAT for acquiesce.

[57] CAT/C/NOR/CO/6-7 (n 60) para 9.

To conclude, even providing redress for the victims of torture is considered by the Committee in line with the preventive measures.

### 4.2 Obligation to Criminalize Torture

Although the duty to prevent torture is essential, however the States are also obliged to criminalize incident of torture and cruel, inhuman, and degrading treatment. According to this, Article 4 of the CAT is aimed to eliminate the impunity of the perpetrators which is one of cause of the widespread practice. Art.4 must be interpretated jointly with the definition of torture under the Convention, meaning that not only acts or torture must be punished but also instigation, incitement, acquiesce, consent any form of assent.

Moreover, according to the CAT, only prison sentences seem to be the appropriate measure to criminalize torture, indeed according to the Special Rapporteur on Torture, Manfred Nowak, the perpetrators found guilty were only punished with disciplinary sanctions or suspended prison sentenced.

The Article 4 states

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

For the drafters of the Convention, some State Parties wanted to limit the applicability of the art.4 only to the term torture. Nevertheless, according to the General Comment No. 20, the CAT states that from Art. 3 to Art. 15, all the provisions apply also to cruel, inhuman, and degrading treatment. Therefore, the CAT broaden the scope of application of the Art. 4 to all ill-treatments.

According to the definition in the Art. 1, all acts of torture need to be criminalized under national law.[58] Furthermore, omissions account to torture. Indeed, according to the general Comment no. 3, the Convention criminalize omission "as long as it is deliberately meant for inflicting for inflicting the victim with severe mental or physical suffering".[59]

[58] Amnesty International (AI),Combating Torture and Other Ill-treatment: A Manual for Action (AI 2016) 266.
[59] E/CN.4/L.1470 (n 7) para 35.

So, the Convention does not only criminalize persons who commit the acts, but all the one who are involved, meaning that all the facts regarding incitement, participation, acquiesce and instigation fall under the scope of Art. 4.

To conclude, even individuals who fail to report episodes of torture are considered accountable.

During the drafting of the Convention, States deal with the issues of treating torture as a separate offence in criminal law or include it into other pre-existent categories. Therefore, avoiding the confusion on which organ might have jurisdiction or which legal classification has to be given to violation of Art. 1, the CAT wanted to consider torture as a separate offence under criminal law. Moreover, the direct applicability of the Convention in the national system is not sufficient, indeed CAT requires take appropriate provisions must be implemented by the States, imposing therefore adequate punishment. Indeed, CAT states that including torture under national law means signify the cardinal importance of this prohibition and ensure compliance with the Convention.[60]

### 4.2.1 Punishable by appropriate penalties

In article 4 of the CAT, the sentence "punishable by appropriate penalties" was taken verbatim by the New York Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons[61] and by the International Convention Against the Taking of Hostages[62]. Indeed, it is fundamental to say that the Convention did not explicit define which are the penalties to take under criminal law at the national level, but of course, they should reflect an appropriate punishment to one of the most serious violation of human right and an aggravated attack to human dignity. This is why CAT Committee usually address torture with the heaviest punishment.

According to the practice of the Committee, penalties which do not take into account the gravity of violation of human rights in the context of torture, are often criticized.

### 4.2.2 Immunity, Excuse or Justification

The Convention consider the prohibition of torture as an absolute an non-derogable right. No exceptional circumstances, the threat of war or public emergency can be invoked as justification of the torture. The CAT went further in requiring that nether defense as necessity or superior orders might constitute an exemption to prohibition of torture.

Therefore, the Convention does not allow any immunity, justification or excuses under criminal law. Nevertheless, granting pardon to the perpetrators has been a practice found often in the view of the

[60] CAT/C/GC/2 (n 1) para 6.
[61] *Djamila Bendib v Algeria*, No 376/2009 (n 42) para 6.5.
[62] CAT/C/ARM/CO/3 (n 72) para 11;

Committee. This explicitly undermine the absolute character of the right of non being subject to torture and it strength episodes of impunity. Indeed, granting immunity, amnesty to the perpetrators is considered as a violation of the obligations by the States under Art. 1 and under Art. 4 of the Convention.

Further, CAT does not accept any justification under excuse of superior orders or the clause of necessity under criminal responsibilities. Therefore, it is important to say that providing amnesty for officials or military personnel is considered in breach of the obligations of the Stae under Art. 4.[63]

To conclude any amnesty, pardon or justification, even of members of armed forces executing an official order, are considered as a violation of the Art. 4 of the Convention.

### 5. Optional Protocol to the Convention Against Torture

Moreover, the Optional Protocol to the Convention was ratified in 2006 with the aim to strength the power and force of the CAT. Indeed, in the traveaux preparatoires, the general discussion was on to give importance to the preventive mechanism based on regular visits to places of detentions. In addition, the OPCAT also reflects the principles among states of cooperation, independence, universality and effectiveness.[64] Indeed it states,

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human

[63] CAT/C/MDG/CO1 (n 82) para 8.
[64] UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199

rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention.[65]

This article emphasized the strong connections between the CAT and the Optional Protocol aiming that all states need to ratify it in order to follow the principles enlisted.

The objectives of the OPCAT are long term one, which envisage a proactive and continuous assessment of the principle of human dignity and prevention of torture, cruel, inhuman and degrading treatment. This is the reason why it is highly recommended to the State to ratify the Protocol based on subsidiarity and complementary between national and international law.

## 6. Conclusion

Although the prohibition of torture, cruel, inhuman, and degrading treatment has been recognized by the most important international and regional human rights treaties, the Convention against Torture wanted to focus more on the struggle against it around the world. Other than declaring the absolute and inviolable principle of human dignity and, therefore, condemning any kind of torture and ill-treatment, the Convention focus itself on addressing the perpetrators to avoid situations of impunity. Indeed, it sets out obligations for the State to repair and to criminalize torture, cruel, inhuman, and degrading treatment.

This chapter has analyzed the legal definition of torture in Art.1 of the Convention. It is possible to conclude that among different factors which distinguish torture from other form of ill-treatment, three characteristics must be necessary to find a violation of the abovementioned article: the intention, the purpose of the perpetrator and the powerlessness of the victim. It is the first time that these three factors are taken jointly into consideration by a human right treaty. Moreover, it is fundamental to say that analyzing the Convention, the obligations by the States

[65] Ibid.

to criminalize episode of torture, cruel, inhuman and degrading treatment are split in different articles. Art. 2 foresees the obligations not only to prevent environments and attitudes by Sate and non-states actors conducive to torture but also it requires to punish the perpetrators and to make reparations for the victims. In the same way, It asks according to Art.16 obligations to the Sates for cruel, inhuman, and degrading treatment. The research went further in assessing the prohibition of torture, cruel, inhuman and degrading treatment through the analysis of the cases law of the Committee against Torture. Principle of Non-refoulment in Art.3, Review of Detention and Interrogation Rules Art. 11, and Cruel, inhuman and degrading punishment Art. 16 were fully described and deepened to show how the Convention was applied. To conclude an overview of the Optional Protocol was presented, which strengths the objectives and the struggle of the CAT. The Convention was presented in light of the struggle between national security and protection of human rights in Israel, which it ratified in 1991. Is the protection of national security a more pressing argument than the protection of human rights? This will be analyzed in the following chapter.

# Chapter 4: PROHIBITION OF TORTURE IN THE CONTEXT OF ISRAEL'S CONTENTIOUS STRUGGLE BETWEEN NATIONAL SECURITY AND PROTECTION OF HUMAN DIGNITY.

## 1. Introduction to the Chapter

Counterterrorism measures often places security and human rights at the stake, putting them into conflict. This happens especially when the national executive attempts to temporarily suspend its human rights obligations, or to derogate to them, when national security is threatened. Currently, democratic societies tend to balance this two right although is becoming difficult because of the increased number of human rights obligations upon Sates and the escalated threats of terroristic attacks.

Searching for a balance between national security and human rights, in particular cases, such as emergencies or war, States may derogate their obligations. Nevertheless, it is fundamental to say that not all the human rights, even in extreme circumstances, can be balanced or restricted.

Indeed, human rights protection is widely established in international as well as regional human right treaties, therefore the derogations to such rights are specifically enlisted in many legal instruments. For instance, Art. 4 of the 1966 of the International Covenant on Civil and Political Rights[1] allows the States to limit the fulfillment of certain right in case of emergency. Nevertheless, it explicitly limits the derogation of prohibition of torture under Art. 4(2) which recalls the inviolability of such right in Art.7. Another example can be the European Convention of Human Rights[2] which enlisted some rights that can be restricted. Indeed, it stated

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[3]

[1] Morris, P. S. (2020). National Security and Human Rights in International Law. Groningen Journal of International Law, 8(1), 123–149. https://doi.org/10.21827/grojil.8.1.123-149
[2] Ibid.
[3] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. See also William Thomas Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 Boston University International Law Journal 115, citing Robert Delahunty & John Yoo, 'Statehood and the Third Geneva Convention'

Nevertheless. Art. 15 of the ECHR enlists all those right that cannot be infringed, restricted or balanced out.

Art.15 reads

> even in time of emergency threatening the life of the nation there cannot be derogation from Art. 3, nor the Article can be subjected to restriction, qualification or balancing with competing rights claim or interests.[4]

Most of national legislation give specific power to the executive branch to derogate some of the rights in cases of emergencies. This however is not a usual method, and these derogations are not implemented without any restrictions or judicial review. Indeed, in fighting against terrorism States may find a justification on limitation of human rights, however some of them and, especially, the prohibition of torture, do not fall under the scope of these derogations. As highlighted in the previous chapters, the right to not be subject to torture is non-derogable and absolute, even when the national security is under threat.

This right, however, is particularly under pressure in the case of Israel. Indeed, Israel since its very creation has been subject to terroristic attacks which had undermined the Israel national sovereignty. The report of Human Rights Watch,[5] based on thirty-six Palestinians detainees interrogated between 1992 and 1994, it shows a repeating pattern of torture and ill, inhuman, and degrading treatment by the General Security Services (GSS) when interrogating suspects to obtain information or confessions. Such methods have been used since 1987 where over 100.000 Palestinians have been detained.[6] and are considered as "moderate physical pressure". According to the Government of Israel, the use of physical force is monitored to be in compliance with the CAT, nevertheless, the report shows that the use of torture and ill-treatment is systematic and not an exception. Moreover, the confession is already considered a liable proof for the Israeli law, enhancing to carry out these practices.

Humanitarian organizations and non-governmental organization such as the International Committee of the Red Cross, B'Tselem which is the Israeli Information Center for Human Rights in the Occupied Territories, the Al-HAQ namely the West Bank affiliate of the International Commission of Jurists

(2005) 46 Virginia Journal of International Law 131; HB Jacobini, 'The Right of State Existence in International Law' (1950) 30 Southwestern Social Science Quarterly 277.

[4] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Bicknell C., "The Council of Europe and the European system" in Malcom D. Evans Jens Modvig in Evans, M. D., & Jens Modvig. (2020). *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*. Edward Elgar Publishing.

[5] Aggiungi report

[6] IDF spokeswoman Captain Avital Margalit, in a July 10, 1993 telephone interview

and many others have reported the pattern of abuses and violation of the principle of prohibition of torture and human dignity.

According to the proof of the witnesses, several method were implied, such as the uncomfortable body positing, the use of a kindergarten chair or shackling to rings or pipes while standing, subjection to extreme temperature, sleep and food deprivation, psychological and physical abuse, like beating and violent shacking.

B'T selem, who interrogated Palestinians between 1988 and 1990, found that

> By formal criteria, at least, these methods, particularly when used together...fall under most accepted definitions of "torture." Even if we object to using this word, these methods are self-evidently forms of ill-treatment, abuse, or "cruel and inhuman treatment."[7]

B'Tselem is not the only entity to denounce these method implied. Indeed, similarities have been found also by Amnesty International in the occupied territories declaring that

> Amnesty International believes that the substantial evidence available indicates the existence of a clear pattern of systematic psychological and physical ill-treatment, constituting torture or other forms of cruel, inhuman, or degrading treatment, which is being inflicted on detainees during the course of interrogation.[8]

The chapter will examine two turning points in the public debate on the use of torture in Israel. Firstly the 1987 Landau Report will be examined. The report is reviewed in all its parts, underlining fundamental aspects. In particular, the sanctioned use of the moderate physical pressure and the consequences it has had in the fight against terrorism. Moreover, the chapter focused on the landmark decision of the Supreme Court of Israel in 1999, which departs from conclusions of the Landau Commission, condemning the non-authorization by the GSS to use physical means. The Court also questions the core issue of necessity defense if used as an ex- ante authorization for the use of these methods by the GSS. Although this ruling can be seen as a step forward in the respect of human rights in Israel, nevertheless, it presents limitation which de facto did not stop the use of torture, inhuman and degrading treatment.

[7] B'Tselem, The Interrogation of Palestinians during the Intifada, pp. 106-107.
[8] Imseis, A. (2001). Moderate torture on trial: critical reflections on the Israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349.

## 2. Landau Commission of Inquiry into GSS methods of Investigations.

The Landau Commission was established in 1987, after a public scandal which foresaw the GSS using physical abuse during an interrogation of an Israeli army officer charged with treason[9]. Therefore, the President of the Supreme Court of Israel appointed a judicial commission to investigate on the Method of the GSS, which was headed by Justice Moshe Landau, the former president of the Supreme Court. Indeed, the Commission was established to assess whether the activities of the GSS were lawful. The commission issued the Report called *Commission of Inquiry into the Method of Investigations of the General Security Services Regarding Hostile Terrorist Activities*[10]in October of that year.

The report deals with a very common conundrum when democracies need to counter face terroristic activities. Indeed, every democratic state is in front the

> the dilemma between the vital need to preserve the very existence of the State and its citizens, and the need to maintain its character as a law-abiding State which believes in basic moral principles.[11]

Before this report was written, according to the government of Israel overall the methods used during the interrogations were not considered as coercive.[12]

Nevertheless, the Landau Report showed a different situation where Palestinians detainees were systematically torture and ill-treated between 1971 and 1986. However, the Government of Israel did not refer to such methods as torture but as "physical pressure". Moreover, the report also highlighted that these method applied were directly given by the superiors and most important, it disclose that many agents of the GSS committed perjury when interrogated on the use of such physical pressure to extort a confession.[13] Indeed, it was found that this practice was common and systematic when the GSS officers needed to testify in the Court.

Indeed,

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[9] The Interrogation of Palestinians During the Intifada: Ill-treatment, "Moderate Physical Pressure" or Torture? (B'tselem - The Israeli Information Center for Human Rights in the Occupied Territories, Jerusalem, Israel) Mar. 1991.
[10] COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST Activities, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter Landau Commission Report], quoted in Torture and Ill-treatment: Israel's Interrogation of Palestinians from the Occupied Territories (Human Rights Watch/Middle East, New York, N.Y.), June 1994, at 50 [hereinafter Human Rights Watch]
[11] Imseis, A. (2001). Moderate torture on trial: critical reflections on the Israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349.
[12] COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITIES, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter Landau Commission Report], quoted in Torture and Ill-treatment: Israel's Interrogation of Palestinians from the Occupied Territories (Human Rights Watch/Middle East, New York, N.Y.), June 1994, at 50 [hereinafter Human Rights Watch].
[13] MELISSA PHILLIPS, TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL 25 (al-Haq 1995).

> In regard to the acts of physical pressure or psychological pressure that they [GSS interrogators] employed: in retrospect, there were cases of criminal assault, blackmail, and threats. However, it appears to us that so long as these practices did not deviate from the guidelines that existed in the service at the time of the interrogation (and generally speaking, they did not deviate from the guidelines), the interrogator who employed such measures can justly claim, on the basis of paragraph 24 (1) (a) of the Penal Code, that he was obeying the orders of his superiors, and that these orders were not clearly illegal, and that he had reason to believe that he was acting in order to extract necessary information on the terrorist activity of an organization which the suspect was suspected of belonging to.[14]

In assessing this statement, the Commission found always a justification declaring that the interrogations of Hostile terroristic Act (HTA) are completely different from the normal crimes and regarding the perjury the Commission noted that in many cases the physical pressure was essential to obtain information which had led to a criminal conviction.

Indeed, the Commission stated

> Whereas the direct goal of the GSS interrogation is to protect the very existence of society and the State against terrorist acts directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent the perpetration of terrorist acts whilst they are still at a state of incubation, by apprehending those who carried out such acts in the past - and they will surely continue to do so in the future - and those who are plotting such acts, as well as seeking out those who guide them.[15]

Furthermore, in order to escape to criminal liability, according to the Commission, the GSS can invoke the necessity defense.

Indeed, according to the Commission, the clause of necessity defense is very important which can be found in the section 22 of the Penal Law.

Indeed, it stated

> A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided

[14] The Sunday Times report, the Israeli Embassy's reply and the Times' reply to the Embassy were reprinted in the Journal of Palestine Studies 6 (Summer 1977), pp. 191- 219.
[15] (1989). Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity. Israel Law Review, 23(Issues and 3), 146-188.

> and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.[16]

Analyzing this statutory law, is possible to see that two competing rights are at the stake. On one hand, the need to respect criminal law principles and on the other hand the right to respect life or body integrity of himself or of the others.

According to the Landau Report, three are the conditions that must be fulfilled when dealing with necessity defense. The first is that the convicted person act in order to prevent to himself or to others grievous harm. The second one is that this harm cannot be avoided, and lastly that the harm caused is not disproportionate to what the situation requires. Therefore, according to the interpretation of the Commission, using the necessity defense is to act evaluating the less evil. Indeed, as the Commission stated

> the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.[17]

Indeed, declaring this statement, the State of Israel in 1987 is using the necessity defense to justify the protection of national security over the rights of a person deprived of their liberty.[18]

In the final part of the report, where the Landau Commission makes its recommendations, it is clearly stated that the proposal to recognize the activity of the GSS outside the law in order to protect the State security is highly rejected. The Commission indeed replied

> The law, which expresses the will of a free people, is the keystone for the existence of a State such as ours, which believes in values of liberty and equality.[19]

The second subject which was analyzed by the Commission is that the GSS respond to a new set of internal guidelines which would be established by the GSS themselves. Of course, this proposal was not taken into consideration.

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[16] Ibid.
[17] (1989). Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity. Israel Law Review, 23(Issues and 3), 146-188.
[18] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349.
[19] (1989). Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity. Israel Law Review, 23(Issues and 3), 146-188.

The Commission adopted a third way. It means that the GSS activities must be inserted in the framework of the rule of law.[20]

Indeed, no matter how big the terroristic threat to the State of Israel is, each authority including the GSS must abide to the rules of humanity in treating terrorists. Exceptions to this are not admissible.

Nevertheless, the Commission strongly believes that the information needed to thwart a possible threat to national sovereignty are impossible to obtain without implying means of pressure. This means that

> The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided[21]

The Commission went further. Indeed, in a classified section of the Report, there are also the guidelines for the GSS in order to establish which practices are allowed and which are not. The Commission also believes that if these rules are respected by the GSS the interrogations would not endanger the human dignity of the person deprived of their liberty and no torture and ill-treatment will occur.

The Report was approved by the Knesset in November 1987[22] and the Palestinian Intifada in the Occupied Territories, namely West Bank, Gaza Strip and East Jerusalem broke out a month later. The Israeli forces arrested and detained thousands of Palestinians on the basis of national security. Endorsing the Landau Report on the use of physical and psychological pressure, the GSS tortured Palestinians even without a connections to security reasons.[23] The Palestinians were interrogated even for participating in demonstrations, possession of banned books or expressing political opinions.[24]

The GSS and the Defense Forces went on with these practices till after the Palestinian Uprising ends in 1993. The methods described by independent organizations showed that numerous Palestinians were tortured under the name of "physical pressure", including brutal method which is very difficult to not consider as torture and violation of human dignity.

[20] Ibid
[21] MELISSA PHILLIPS, TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL 25 (al-Haq 1995).
[22] Ibid.
[23] Ibid
[24] Ibid

In 1991, the Public Committee Against Torture (hereinafter PCATI), filed a petition on the legality of the GSS interrogations method. The HCJ replied that these method are considered as internal rules of the GSS therefore must be challenged on a case to case.[25] However, there were no concrete facts on these methods and the Court dismiss the petition.[26]

Between 1991 and 1992, there is a standardization of the methods used, using a combination between stressing positions and psychological abuse, which according to the detainees were even more painful than beatings. These methods comprised ax exposure to loud music, humiliation, deprivation of access to the toilet and food.

The United Nations Committee Against Torture, stated that these rulings were against the CAT because the Committee recognized the use of physical pressure is considered torture under the Art. 1 of the Convention.[27]

Therefore, the HCJ organized a hearing to review the legality of the GSS interrogations method in 1998.[28]

## 3. The *Public Committee against Torture in Israel v Government of Israel et al.*: a step forward?

The case brought before the HCJ concerns the investigation of the General Security Services in Israel on the use of moderate physical pressure[29] on Palestinian detainees. The decision was held by the President of the Court, Justice A. Barak in 1999.

The case foresees six individual application, namely detainees held for security reasons and seven applications by PCATI, Association for Civil Rights in Israel (ACRI) and the Center for the Defense of Individual (CDI). The respondents were the Government of Israel, the GSS, including the Head, The Prime Minister, and the Minister of Defense, Justice, Police and the Prison Commander of Jerusalem.[30]

It is fundamental to highlight the Court dealt with three essential questions during the hearing:

[25] COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITy SERVICE REGARDING HOSTILE TERRORIST AcTIVrrEs, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter Landau Commission Report], quoted in Torture and Ill-treatment: Israel's Interrogation of Palestinians from the Occupied Territories (Human Rights Watch/Middle East, New York, N.Y.), June 1994,
[26] Ibid.
[27] Amnesty International Report - 1998, Israel and the Occupied Territories (London: Amnesty International, 1998) at 207.
[28] Ibid.
[29] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[30] Ibid

1. Whether the GSS investigators possess a general authority to conduct interrogations under the Israeli law.
2. If so, whether such a general authority empowers the GSS to use physical means during the interrogations.
3. Whether the authority for GSS investigators to employ physical means during the interrogations of security suspects can be anchored in the criminal defense of necessity.[31]

Indeed, the Petitioners' Argument brought before the Court was

> All the petitions raise two essential arguments. First, they submit that the GSS is never authorized to conduct interrogations. Second, they argue that the physical means employed by GSS investigators not only infringe the human dignity of the suspect undergoing interrogation, but also constitute criminal offences. These methods, argue the petitioners, are in violation of international law as they constitute "torture." As such, GSS investigators are not authorized to conduct these interrogations. Furthermore, the "necessity defense" is not relevant to the circumstances in question. In any event, the doctrine of "necessity" at most constitutes an exceptional post factum defense, exclusively confined to criminal proceedings against investigators. It cannot, however, provide GSS investigators with the authorization to conduct interrogations. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the legislature which conforms to the constitutional requirements of the Basic Law: Human Dignity and Liberty.[32]

To answer to the first question, since the State of Israel is a law-abiding State, the GSS activities would not be allowed without and statutory authorization. Nevertheless, the Court challenged this position claiming that no explicit statutory provision existed, but however it is possible to derive the authority from the Art. 2 (1) of the Criminal Procedure Statute [Testimony] which stated

> A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or

[31] Ibid.
[32] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

> police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined.[33]

Therefore, according to Justice Barak, the authority is derived from the fact that the GSS are considered as police officers according to the law.[34]

The more concerning question about the use of the physical means then was faced by the Court. Firstly, the Court stated that any interrogation exposes the detainee to a certain degree of emotional pressure and situation. Most important Justice A. Barak stated

> On the one hand, lies the desire to uncover the truth, in accord with the public interest in exposing crime and preventing it. On the other hand, is the need to protect the dignity and liberty of the individual being interrogated.[35]

This two clashing rights found a way out in what it is called as "reasonable investigation", meaning on preserving the human dignity of the suspect and the purity of the arms of the interrogation.[36]

The Court assess that a reasonable investigation is one free of torture or inhuman and degrading treatment which It clearly stated that are absolute rights protected by International Treaties of which Israel is signatory. Indeed, the State of Israel singed the Convention Against Torture in 1991. Methods which imply violation of the Convention under Art. 1 are not admissible and therefore an investigator can be criminally liable.

The Court reviewing every method of investigations of the GSS held that

> the GSS lacked the positive authority under existing Israeli law to employ those means.[37]

According to the Court, the methods used, and the purposes determine the legality of an investigation. Reviewing all the methods presented, the Court stated that the severity of the suffering was disproportioned to the aim achieved. Indeed, the Court also stated that the rules governing regular police interrogations are also applied to the GSS. Indeed, there is no statutory provision which determine more broader powers for conducting investigations by the GSS. Therefore, the same restrictions to the law enforcement should apply to the GSS.

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[33] Ibid.
[34] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349.
[35] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[36] Ibid.
[37] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Inte
rrogation Methods, 38 I.L.M. 1471, 1481 (1999)

To answer to the most pressing question, whether the necessity defense can be use by the GSS to escape criminal liability is an extremely sensitive topic which needs to be analyzed carefully.

According to the State opinion the activity of the GSS can be justified within the framework of the defense of necessity that can be found in the section 34(1) of the Penal Law. Indeed, it stated

> A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.[38]

Therefore, according to the State the necessity defense is used to prevent that more serious acts are committed to endanger human lives. To recall the Landau Report is the choice of the less evil. Indeed, the State position is

> that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means—such as shaking—in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb.[39]

Indeed, according to the State of Israel, the moral duty to defend the country allow the use of the physical pressure in order to protect national sovereignty and that acting under necessity defense, an act cannot be criminalized.

It is fundamental to say that the Court acknowledges the fact that for the Israeli law the necessity defense is recognized and already in the framework of the law. Nonetheless, the appro

priate question is not if support or not the necessity defense, but

> whether it is possible, ex ante, to establish permanent directives setting out the physical interrogation means that may be used under conditions of "necessity.[40]

The Court opinion differs from the one of the State. Indeed, since the necessity defense is already in the law system of the State of Israel, it can be used as *post facto* by a GSS convicted investigators which has used the means of physical pressure. Nevertheless, and most important, the necessity defense cannot give to the GSS the general authority to use these means *ab initio.*[41] Indeed, the general authority to use physical method during the interrogations cannot absolutely be derived from the

[38] Ibid
[39] Ibid
[40] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[41] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349

necessity defense, which can be exclusively applied to one who already committed the facts. Indeed, in the ruling, Professor Enker stated

> Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values...The defense of necessity does not define a code of primary normative behavior. Necessity is certainly not a basis for establishing a broad detailed code of behavior such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like.[42]

In other words, it is not possible to use the necessity defense as an authorization to apply physical pressure during the interrogations of suspect involved in terroristic activities. Therefore, the Torture Case established that the GSS has the power investigate but not to use such methods during the interrogations nor to use the necessity defense as a tool ab initio to escape from criminal liability.[43]

> Indeed, the authority to conduct interrogations, like any administrative power, is designed for a specific purpose, and must be exercised in conformity with the basic principles of the democratic regime.[44]

Indeed, as cleared by the Court, the necessity defense does not possess further normative value. It can be only used to escape criminal liability when an act is carried out in conditions of necessity. However, the necessity defense has not the power to allow the infringement of human rights. The Court also reflected on the fact that the Landau Commission did not sanction the use of necessity defense as an authorization to carry out that methods, but only made it available to the GSS post factum.

The Court went further, indeed, it stated that the GSS authorization to use sanctioned physical pressure must come from an enacted legislation. Therefore, neither the Government nor the Heads of the security services can establish guidelines on the use of such methods. Indeed, the authorization needs to come from a statutory provision and not from the necessity defense, otherwise the GSS are exceeding outside their competences.

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[42] A. Enker, The Use of Physical Force in Interrogations and the Necessity Defense, in Israel and International Human Rights Law: The Issue of Torture 61, 62 (1995).
[43] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349
[44] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

The conclusion of the Court is that even if democracies are fighting against harsh reality,

> The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit, and this strength allows it to overcome its difficulties.[45]

Although it seems that the Case Torture of 1999 seems put an end to the sanctioned use of torture, constituting a landmark decision toward a more democratic regime, analyzing more in deep the ruling, it is possible to see some shortcomings, particularly three. The first one is its limited scope. Indeed, one of the factor contributing to this failure is the provided methods to the Court. The classified appendix of the Landau Report, where all the methods were enlisted, was not disclosed in the hearing and it remained only in the awareness of the State. Moreover, the HCJ did not order an interim order to disclose those information. Neither the applicant nor the Sate provided a full picture of the methods implied in the interrogations. The Court only ruled on the five methods presented which were violent shaking, shabeh, frog crouch, excessive tightening of handcuffs and prolonged sleep deprivation.[46] No further investigation or explanation of methods were presented. Nevertheless, with more information the Court could have issued a ruling different because of the harsher methods which were covered.[47] In this way it is possible to say that the Court did not uncover the secrecy context in which torture and ill-treatment are carried out in secret in the Occupied Territories.

The second failure of this sentence is that the ruling was only pronounced for the GSS methods. Nevertheless, the General Security Services are not the only authorities which imply torture and ill-treatment. Indeed, the Israeli Police Force and the Israeli Defense Forces are also allowed to carry on investigations and interrogations.[48]

According to several studies[49] the non-consideration by the Court of the method used by the other two agencies is a serious mistake.

> The army [IDF] has conducted a significant percentage of the tens of thousands of interrogations that have taken place since the start of the intifada. As this report documents, a detainee is far more likely to be beaten severely if his interrogators are IDF personnel than if

[45] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[46] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349
[47] Ibid
[48] MELISSA PHILLIPS, TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL 25 (al-Haq 1995).
[49] COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITy SERVICE REGARDING HOSTILE TERRORIST AcTIVrrEs, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter Landau Commission Report], quoted in Torture and Ill-treatment: Israel's Interrogation of Palestinians from the Occupied Territories (Human Rights Watch/Middle East, New York, N.Y.), June 1994,

> they are from the GSS... Of our nineteen IDF interrogation subjects, sixteen reported being beaten, thirteen of them on the testicles . . . In contrast to the GSS, the IDF has steadfastly denied that physical pressure is ever permissible under the agency's interrogation guidelines.[50]

It is also important to say that various branch of the Israeli Police work with the GSS.[51] However, the methods of the police have not been displayed during the Torture Case.[52]

Therefore, The Court, failing to comprehend all the brutal methods and all the agencies involved in the struggle for the protection of Israeli national security, undermine the importance to fight against torture and ill-treatment and indirectly contributed to carry on these practices.[53]

Furthermore, continuing the analysis of the Torture Case[54], a third shortcoming is emphasized. Indeed, the Court only considered torture and ill-treatment during arrest and detention, but not episodes after arrest and before the interrogation.

Indeed, it is fundamental to say that according to the Israeli law is possible to be arrested without a warrant up to four days if the individual is considered a security threat. Once, the person is arrested, he is transported to special facilities where he remains for a period established by a military court or an officer.[55]

Indeed, the practice to be subject to torture or ill-treatment is often documented and denounced by Palestinians after the arrest. Indeed, it seems that these methods are implied to soften up the detained before the interrogations.[56]

Therefore, again the Court failed to properly address torture in every step from the moment of the arrest and during the detention phase which clearly ends in a failure in taking the necessity measure to protect human dignity and personal integrity.[57]

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[50] COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITy SERVICE REGARDING HOSTILE TERRORIST AcTIVrrEs, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter Landau Commission Report], quoted in Torture and Ill-treatment: Israel's Interrogation of Palestinians from the Occupied Territories (Human Rights Watch/Middle East, New York, N.Y.), June 1994,

[51] MELISSA PHILLIPS, TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL 25 (al-Haq 1995).

[52] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

[53]Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349

[54] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

[55] MELISSA PHILLIPS, TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL 25 (al-Haq 1995).

[56] Ibid

[57]Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349

Except from these three shortcomings, evaluating the ruling of the Torture Case[58], the Court did not consider that the Landau Commission allowed the use of such methods not only to individual which may constitute a threat to national security, but also to the ones who are suspect of political subversion. Therefore, as stated above, everyone who is active in political activities or demonstrations.

Delving into the assessment of the Court, the closing remarks are particularly important to be analyzed. Indeed, the Court stated

> [T]here are those who argue that Israel's security problems are too numerous, thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel," is enacted for a proper purpose, and to an extent no greater than is required.[59]

This passage is fundamental to understand the reasoning of the Court, indeed, the GSS are not allowed to carry on investigation using physical and phycological means not because such methods constitute torture but because the authorization must come from the Israeli law and a proper legislation should may be implemented which of course would be contrary to democratic regime.[60]

Moreover, the Court did not challenge the fact that these practices are contrary to any International Law, which are described by the previous chapters, the Court stated that the means of interrogation must not go beyond the appropriate scope and values of Israel.

Consequentially, analyzing the Landau Report[61]and the Torture Case[62], it is possible to state that there is no great difference. Indeed, both rulings have reviewed the legality and the use of these methods and in both cases, they refuse to rule that physical pressure constitute torture. Indeed, while the

[58] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[59] Ibid.
[60] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349
[61] (1989). Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity. Israel Law Review, 23(Issues and 3), 146-188.
[62] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

Landau Commission enlisted a series of methods which according to it fall under the scope of rule of law, the Court limit itself to leave the burden to the Israeli legislation.

Both rulings in applying these methods recall the principle of proportionality. Therefore, the spontaneous question which may arise is which are the values of Israel which may sanction the use of torture?[63]

Indeed, Israel continue to evaluate itself as a democratic and rule of law abiding state but looking at the treatment of Palestinian in the Occupied Territories, it seems far form that.

It is also true that since its very creation, the Israel state has been affected by terroristic activities to undermine its national sovereignty. Therefore, the need to protect its national security is more powerful than any different value.[64]

Therefore, a month after the Torture Case[65] decision, a draft legislation was submitted to the Parliament to authorize the GSS to use such methods during the interrogations. This is the outcome of a ruling which gave not express guidelines on which values of Israel are.[66]

Although, this legislation was never approved by the Israeli legislative branch, the fact that the Court did not prohibit the availability of necessity defense to the GSS ex poste to escape criminal liability, constitutes the escamotage that allow the pursuing of the torture during the following years.

## 4. Conclusion

This chapter has shown that several independent organizations testify that Israel intelligence services in the occupied territories engages in pattern of violence when dealing with security suspects. Indeed, using what it is consider at the international level torture, they try to extract confession and information, under the name of protection of national security. These methods foresee a combination of physical and psychological abuse used systematically on detainees. It examines two turning points in the public debate on the use of torture in Israel. The first one examined is the Landau Report of 1987. The Report issued by the Landau Commission allowed the use of moderate physical pressure that can be applicable to suspects of terrorism. The methods were also enlisted in a classified

[63] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349
[64] Ibid.
[65] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)
[66] Imseis, A. (2001). Moderate torture on trial: critical reflections on the israeli supreme court judgement concerning the legality of general security service interrogation methods. Berkeley Journal of International Law, 19(2), 328-349

Appendix. Thousands of Palestinians were tortured under the scope of moderate physical pressure. The chapter focuses also on the analyses of the GSS Torture Case of 1999. The Court issued a landmark decision for Israel democratic regime. Indeed, it detaches itself from the previous ruling. Three important questions arise before the Court, which were fully analyzed in the research. Answering to them, the Court found an authorization for the GSS to conduct investigations under the Art. 2 (1) of the Criminal Procedure Statute, however the GSS lack the authority to use such methods. Indeed, the Court reasoned on the most important question, whether the necessity defense constitute a source of authorization on the use of physical pressure, Justice A. Barack firmly contested that the necessity clause cannot constitute an ex-ante permission. Although some steps forward are achieved by the Sate of Israel, however shortcomings of the 1999 Decision have been displayed. Indeed, the struggle of Israel for its survival is not concluded yet.

Human Rights Watch issued recommendation of the State of Israel to end the pattern of torture and ill-treatment in the Occupied Territories.[67] Indeed, Israel Government should enforce the provision of the CAT under Art. 2, which foresees to take effective measure to prevent act of torture.

Indeed, Human Rights Watch gave some guidelines to reach these obligations

- Enact domestic enabling legislation that makes the Convention against Torture enforceable in Israeli courts;
- Publicly state that the provisions of the Convention apply to the conduct of all state agents in the occupied territories;
- Make public all existing guidelines relating to the use of pressure during interrogation, including the secret appendix to the Landau Commission report and subsequent modifications of it, so that their compliance with international standards and Israeli domestic law can be assessed;
- Revoke those clauses of the GSS interrogation guidelines that permit the use of physical force despite its prohibition in Israel's Penal Code;
- Review and revise the regulations and practices surrounding investigative detention so as to strengthen safeguards against abuse.[68]

These provision should be complemented by faster access to lawyers and faster judicial review of detention. Indeed, detainees should present before a judge in the next forty eight hour after the arrest, instead of days or weeks. Moreover, reasons on the arrest and promptly family information should be

[67] Human Rights Watch/Middle East. (1994). Torture and ill-treatment : Israel's interrogation of Palestinians from the Occupied Territories. Human Rights Watch.
[68] Human Rights Watch/Middle East. (1994). Torture and ill-treatment : Israel's interrogation of Palestinians from the Occupied Territories. Human Rights Watch.

implemented. Require medical personnel to actively report physical injuries. Lastly, the possibility to challenge the truthfulness of confession extorted by torture or ill-treatment.

Although these recommendations were made years ago, the Israeli judicial system is still imperfect, and repercussions are still visible now days.
Indeed, in the ruling of the Torture Case of 1999, the Israeli Supreme Court does not seem to accept the absolute character of the prohibition.

## Conclusions

According to the words of the judge A. Barak,

> If we do not protect democracies, democracies will not protect us.[1]

This statement is of particular importance, when democracies are threatened by act of terrorism and by the tools implied to fight it. Indeed, it is fundamental to be aware that the protection of democracies is an ongoing process and that it is not possible to take it for granted.

Defending human rights in difficult times, especially when national security is challenged, seems to be an extraordinary effort that all democracies should bear. Indeed, the role of the judge is to protect democracy and the constitution. In dealing with the protection of human rights, it is not possible, according to the Justice Barak, to have a sharp distinction in time of peace and in time of war. Indeed, what it is decided during the war time will last for a long time after it ended. The line is very thin. Indeed, he cited

> if we fail in our task in times of war and terror, we will not be able to carry out our task properly in times of peace and calm[2]

During period of war or terrorism democracies should act as defense or militant democracies and always to keep the democratic values.[3]

Therefore, the battle against terrorism must be within the law, indeed it is what constitute to be different from terrorists.

In the struggle between the national security and human rights, a democracy cannot override its very essence, even when the aim is considered vital for the very existence of a democratic regime. Indeed, citing the Torture Case of 1999, Justice A. Barak says

> We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and

[1] Barak, A. (2008). Human Rights in Times of Terror A Judicial Point of View. Legal Studies, 28(4), 493-505.
[2] HCJ 7052/03, Adalah v The Minister of Interior (2006) Israel Law Reports 34-35
[3] Barak, A. (2008). Human Rights in Times of Terror A Judicial Point of View. Legal Studies, 28(4), 493-505.

> recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties.[4]

The analysis of the continuous struggle between fundamental rights and the protection of national sovereignty in the various legal systems was the subject of this study.

This analysis aimed to investigate how democracies react in relation to the prohibition of torture when subjected to emergency circumstances, such as terroristic attacks or wars. In particular, the research addresses the evaluation of the respect for human rights in extreme circumstances when a state declares itself fully committed to democratic values and rule of law. In order to achieve this purpose, firstly the United Nations' system of protection of prohibition of torture has been analyzed. Consequentially, the regional systems have played an important role to strength such prohibition and in the end, the prohibition of torture in Israel has deeply been addressed.

Without going through the various legal systems analyzed in my research, I will focus more on the third chapter. Indeed, it examines two turning points in the public debate on the use of torture in Israel. The *1987 Report of the Commission of Inquiries into methods of Investigation of GSS*, which sanctioned the use of moderate physical pressure on subjects suspected of terrorism. Subsequentially, in the *Public Committee Against Torture v. State of Israel* of 1999, the Court seems to depart from its previous decision by declaring these methods illegal. It is important to emphasize, however, that although the Court condemned the use of these methods, it did not indeed achieve an absolute ban on torture, but its approach left room to use torture even after its pronouncement. Indeed, the approach of the HCJ seems to be a more balanced one between the protection of national security and fundamental rights. In the opinion of Justice A. Barak, a proper balance must be achieved by democracies to respect both rights.

Indeed, since it did not deny the availability of the ex-poste necessity defense to GSS, this was used as a ploy to continue to perpetrate such methods. Indeed, most recent episodes are still being reported.

This is the case of *Tbeish et al v Attorney General*[5]. The case concerns Firas Muhammad Tbeish di Hadb al-Fawwar, in West Bank, which has been interrogated between 2012 and 2013 by the Israeli Security Agency ('ISA') in Israel.

[4] HC 5100/94, Pub Comm Against Torture in Israel v Gov't of Israel 53(4) PD 817
[5] HCJ 9018/17 Tbeish et al v Attorney General et al 26 Novemeber 2018

According to ISA reports, the suspect had knowledge of an arms cache that would be used for an actual terrorist attack. In addition, the suspect was also connected to and released information on other Hamas activists.

Although the methods of torture have been explained in the previous chapter, the Israeli court has always avoided using the word torture. In fact, the Tbeish case led to the conclusion that the suspect was not tortured.

> In conclusion […] I am of the opinion that the said decision – according to which the Petitioner was not tortured in the course of his interrogation, and according to which the Petitioner's interrogators are entitled to the "necessity defense" that exempts them from criminal responsibility for employing "special means of interrogation" in his interrogation – does not deviate from the margin of reasonableness.[6]

After this conclusion, in the concurring opinion of the Judge Mintz, while referring to the ISA consultation that the use of 'exceptional measures' (for which read: torture) that such consultation 'does not weaken the rule that torture is prohibited except in very exceptional cases'[7]

Reading this paragraph, it is possible to highlight that the Judge using the word torture and not "moderate physical pressure' is saying that in exceptional cases torture is allowed in the Israeli law.[8]

Even if the office lawyers have tried to deny the use of this term, in 2019 torture is allowed in Israel in exceptional cases and necessity defense is used to perpetrate it without any legal consequences.

[6] HCJ 9018/17 Tbeish et al v Attorney General et al 26 Novemeber 2018
[7] Tbeish v the A-G, [concurring] Opinion of Judge David Minz HCJ 9018/17
[8] It's now (even more) official: torture is legal in Israel. (2019, March 21). OMCT. https://www.omct.org/en/resources/blog/its-now-even-more-official-torture-is-legal-in-israel

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## Executive Summary

### Introduction

Human dignity is one of the most important value recognized in the international law and by most of the human rights bodies and treaties. Indeed, human dignity attests that all human beings have an equal and an inherent moral value or status from which derive the fact that other person and institutions need to respect it.

Respect for human dignity sees its foundation in the prohibition of torture, inhuman and degrading treatment. Indeed, torture violates in all its forms the very essence of the integrity and dignity of the person. Although it appears to be a cardinal principle of international law, the prohibition of torture is particularly under pressure in cases where states find themselves in emergency situations or war. In the conundrum between protecting national security and human rights, the answer is not so obvious.

Indeed, there is a very famous saying by Cicero that quotes *'Silent enim leges inter arma'*, which means during the battle, the laws are silent. However, democratic states have strongly departed from this view, ratifying treaties so that the protection of national security, and, the fight against terrorism, take place within the legislative framework.

In the words of Judge A. Barak, President of the Supreme Court of Israel, '*the respect for the law is in fact what distinguishes democracies from the terrorist themselves'.*

Indeed, counterterrorism measures often places security and human rights at the stake, putting them into conflict. This happens especially when the national executive attempts to temporarily suspend its human rights obligations, or to derogate to them, when national security is threatened.

Nevertheless, the prohibition of torture, inhuman and degrading treatment is absolute, non-derogable right and cannot be restricted or balanced *'even in the most difficult times threating the life of the nation.'* This means that the test of proportionality between two rights, namely assessing which right can be restricted or overridden, is not applicable to the prohibition of torture, inhuman and degrading treatment.

Since its very creation the State of Israel has been subjected to an ongoing struggle for its survival. Indeed, Israel, although subjected to continuous terrorist attacks, has used questionable methods to thwart them. Acting under the justification of protecting national sovereignty, the General Security Services ('GSS') notably used 'moderate physical pressure' which is fully recognized as torture under international standards.

Many of Human Rights Organization, such as Human Rights Watch, has reported a pattern of psychological and physical abuse on suspects of terrorism in Israel.

Without recalling to the complexity of the history of Israel, it is important to note that

> *Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas—in areas of public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy*.

Starting from that, this analysis aims to investigate how democracies react in relation to the prohibition of torture when subjected to emergency circumstances, such as terroristic attacks or wars. In particular, the research is aimed at evaluating the respect for human rights in extreme circumstances when a state declares itself fully committed to democratic values and rule of law.

To investigate that, the study is dedicated to the prohibition of torture, inhuman and degrading treatment at the international as well as regional level and finally an insight study of the State of Israel's response to terrorism.

## 1 Chapter

The first chapter dwells in detail on the protection of the prohibition of torture, inhuman and degrading treatment in the international system. Starting in chronological order from WWII, the attention has been placed on the various treaties that protect the prohibition of torture at the level of the United Nations.

Therefore, the chapter has taken into consideration the three main mechanisms for the prohibition of torture, the UNDHR, the ICCPR, and the Special Rapporteur on Torture. Moreover, space has be given to the prohibition of torture as jus cogens right. All the treaties and bodies have been described with the same pattern, starting with the definition of torture, the obligations required by the states and finally the jurisprudence to provide evidence for the need of anti-torture bodies.

Starting the analysis of the UNDHR, the prohibition of torture is protected under Art.5

> *No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

The UNDHR, although describes the prohibition of torture, however the non-binding nature of the declaration itself does not provide for enforcement mechanisms. Nevertheless, the declaration derives its great moral impetus since the principles are considered as customary internal law. Indeed *'it enshrines a consensus on the content of internationally recognized rights owed to mankind'.*

The international community has also accepted the prohibition of torture as jus cogens. To determine which human rights, fall under the jus cogens norms, the International Law Commission's articles on State responsibility states

> *Those peremptory norms that are clearly accepted and recognized included the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination*.

Over time, the definition of the term torture, inhuman and degrading treatment became more thorough. Indeed, the ICCPR under Art.7 emphasizes the individual character of the right with the formulation *"No one shall be".* It also includes in the definition a right not to be subject to unvoluntary medical experiment, which was not underlined in the UDHR. It is important to say that the definition includes a climax of the intensity of treatment ranging from the highest, i.e., torture, giving it a special stigma, to designating treatment and punishment from cruel to degrading.

The HRCttee jurisprudence highlights differences in definition of torture and cruel, inhuman, and degrading treatment under the scope of Article 7 of the Covenant. While in *Lafuente Penarrieta et al.* found a clear violation of the torture, in *Osbourne v Jamaica* the Committee expressed that the act of whipping constitutes cruel and inhuman treatment contrary to Art.7, which even if these do not constitute torture, is not derogable within the meaning of the above cited article of ICCPR.

Delving the discussion, Article 7 requires the states to respect both negative and positive obligations. Indeed, on one hand, states must ensure that their officials do not employ torture or ill treatment, but on the other hand, the states has the positive obligation to set up the legal framework to prevent those unlawful acts.

Deepening the discussing, since human rights evolve with time and progress of the societies, the UN has established the Special Rapporteur on Torture to provide more scrupulous and wide-ranging protection of this fundamental right.

The role of the Rapporteur is fundamental in addressing recommendation on measures needed to be taken by the States, sensibilize the international community as well as the regional actors, encouraging them to prevent and a criminalize such violation. Indeed, the most delicate task is to interview detainees during the Special Rapporteur's visits to detention facilities. Therefore, the visits are not only used to test the veracity of the complaints by the violated individuals but also to support the state in activating mechanisms to combat and prevent torture.

**2 Chapter**

The second chapter is dedicated to the regional system of protection of fundamental rights, namely the European, American, and African one in order to achieve a holistic and comprehensive framework to effective protection.

Firstly, the focus has been directed at the European level through the ECHR which *'foresees the world's most successful system of protection of human rights and one of the most advanced forms of international legal process'.*

The definition of torture is under. Art.3 of the ECHR which needs to be read jointly with Art. 15. Indeed, the absoluteness of the right is enshrined in the use of the word 'No one' but also is confirmed form the fact that this right cannot be derogated even 'in time of emergency threatening the life of the nation'.

The ECtHR has been called to reason on whether there is the possibility to derogate Art.3 to pursue a legitimate aim, such as the protection of national security. Can a certain degree of relativism be accepted when dealing with security threats?

The Court reiterates that even in cases of 'ticking bomb scenario' Art.3 is an absolute right, therefore cannot be restricted, derogated, or overridden.

According to the interpretation the ECtHR gives to the term torture a special stigma which is characterized as if the treatment reaches a threshold of severity of suffering and the severity on the treatment, which is established according to the circumstances to distinguish from inhuman and degrading treatment. Indeed,

> *The word 'torture' is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.*

The chapter went further in analyzing the prohibition of torture in the American system of fundamental rights.

The protection of Human Rights in the American States is provided by the Inter- American Human Rights System whose main mission is to promote the development and the safeguarding of human rights and it is rooted in the Organization of American States (OAS).

Under Art.5 pf the ACHR is recognized the Prohibition of torture, cruel and degrading treatment, or Punishment.

Article 5 of the American Convention highlights that "every persons have the right to physical, mental, and moral integrity respected.

The Inter American Court (IACtHR) has relied on this more specific definition under Art. 2 of the Inter American Convention to Prevent Punish and Torture when distinguishing between torture and cruel, inhuman degrading treatment. Indeed, according to the Court, three element are essential to distinguish conducts.

The first is a deliberate or intentional act; the second severe physical or mental pain or anguish suffered from the victim and lastly must follow the aims enlisted in the Article.

Addressing the same subject, the two Conventions are strictly related, and their effort is shared to address and prevent violation of such right. Indeed, the Inter-America Convention does not limit the scope of the American Convention, instead it complements it.

Therefore, the jurisprudence of the Court has been analyzed. In *Bàmaca Velazquez v. Peru*, in which the Court clearly defined the conduct as torture. In this case, the Court categorized the acts as

> *serious acts of physical and psychological violence, caused sever anguish and intense suffering for the victim and were perpetrated over a long period, deliberately, with the purpose of obtaining information that was relevant to the army.*

Moving on the discussion, the obligations by the State to investigate and prosecute the entities or the individuals violating the prohibition of torture are under art. 5(2) of the Convention and they have been well developed by the jurisprudence of Inter-American Court. It is a duty of the State concerned to assure the punishment of such violation.

The second chapter also focuses on the protection of human dignity and integrity in the African legal system.

The regional African protection on human rights is based on the African Charter on Human and People's Right.

Starting with the formulation of the African Charter, art. 5 recognizes the right to be respected and prohibits any form of slavery, torture or cruel, inhuman and degrading treatment on the basis of human dignity. Moreover, the use of "All forms" includes state and non-state actors. It is important to say that for the African Charter even if the State is indirectly responsible for the non-state actor actions, still the State has found guilty to not preventing such violations to occur.

Although the Commission did not provide a difference between the treatments, however, the law cases show that they must reach a severity threshold.

The jurisprudence of the Commission has been examined aiming at reconstructing a pattern to distinguish between torture and inhuman and degrading treatment.

Completing the analysis on the African Human Right system on protection of prohibition of torture, the States are obliged under the Charter to investigate and prosecute the alleged violations.

**3 Chapter**

Although all the legal tool and the institutional framework have been displayed at the international level and at the regional level, as the ones analyzed in the previous chapter, the practice has continued to be implemented. Therefore, to envisage a greater protection, in 1975, the UN General Assembly adopted a Declaration called the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. This declaration served as ground floor for the drafting of the Convention Against Torture.

the Convention Against Torture was adopted on 10 December 1984 by the UN General Assembly.[9] In 1987, the date when the Convention entered into force, twenty States have been ratified the Convention, including the Council of Europe ones.

In 2017, an extraordinary number of countries have adopted the Convention, a total of 162.

It is essential to point out that for the first time the Convention Against Torture gave the legal definition of the term and, moreover since most of the legal tool in the international arena does not distinguish between torture and cruel, inhuman, and degrading treatment, a legal differentiation is of utmost importance.

Art.1 of the Convention states

> *For the purposes of this Convention, 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*

[9] GA Res 39/46 of 10 December 1984.

*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.*

Examining this article, it possible to emphasize is the conduct of the perpetrator. Indeed, the Convention classifies any act or omission conducted as for the aims enlisted as torture, inhuman and degrading treatment.

Inaddition, analyzing in detail the Art. 1 of the Convention, it is fundamental to highlight that three characteristics must be necessary to find a violation: the intention, the purpose of the perpetrator and the powerlessness of the victim. It is the first time that these three factors are taken jointly into consideration by a human right treaty.

The Committee highlights that intention has not to be seen from a subjective point of view, but that there must be objective interpretations on the motivation of the perpetrators. This means that the intention must be inferred from the facts and the circumstances of each specific case, which is in line with inflicting severe pain and suffering for the purpose of Art. 1.

The other essential element which is underlined in the Convention definition is purpose. Therefore, it is possible to denote that torture is considered as such only if pursue a specific aim.

Therefore, in the CAT is possible to find listed the purposes referred to the term torture. Among these, the common denominators are

- Extracting a confession
- Obtaining from the victim or a third person information
- Punishment
- Intimidation and coercion
- Discrimination

To conclude, among the numerous factors that determines torture, the condition of powerlessness is taken into consideration.

The UNSRT has confirmed that the meaning of the term powerlessness is *"someone overpowered, in other words, has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering."*

Moreover, the jurisprudence of the Committee Against Torture have been analyzed. Particularly the principle of non-refoulment, protection against torture to people deprived of their liberty have been studied.

The Convention does not limit itself to declare a legal definition of the term torture and cruel, inhuman, and degrading treatment. Indeed, to render the struggle against torture much more effective, the Convention has set up obligations for the State Parties to prevent and criminalize any form of violation of Art. 1.

Art. 2 of the CAT foresees the obligations not only to prevent environments and attitudes by States and non-states actors conducive to torture but also it requires to punish the perpetrators and to make reparations for the victims. In the same way, it asks according to Art.16 obligations to the Sates for cruel, inhuman, and degrading treatment.

To conclude an overview of the Optional Protocol was presented, which strengths the objectives and the struggle of the CAT.

**4 Chapter**

The prohibition of torture, inhuman and degrading treatment is, however, is particularly under pressure in the case of Israel. Indeed, Israel since its very creation has been subject to terroristic attacks which had undermined the Israel national sovereignty.

The third chapter examine two turning points in the public debate on the use of torture in Israel. Firstly *the 1987 Landau Commission of Inquiry into Methods of Investigations of the GSS* will be analyzed.

The Landau Commission was established in 1987, after a public scandal which foresaw the GSS using physical abuse during an interrogation of an Israeli army officer charged with treason[10]. Therefore, the President of the Supreme Court of Israel appointed a judicial commission to investigate on the Method of the GSS, which was headed by Justice Moshe Landau, the former president of the Supreme Court. Indeed, the Commission was established to assess whether the activities of the GSS were lawful.

In assessing the methods implied by the GSS, which were classified in a secret Appendix to the Landau Report, the Commission address at them as ‘moderate physical pressure’.

Moreover, the report also highlighted that these method applied were directly given by the superiors and most important, it disclose that many agents of the GSS committed perjury when interrogated on

[10] The Interrogation of Palestinians During the Intifada: Ill-treatment, "Moderate Physical Pressure" or Torture? (B'tselem - The Israeli Information Center for Human Rights in the Occupied Territories, Jerusalem, Israel) Mar. 1991.

the use of such physical pressure to extort a confession. Indeed, it was found that this practice was common and systematic when the GSS officers needed to testify in the Court.

The Commission noted that in many cases where the perjury was committed, the applied physical pressure was an essential element to obtain information for a criminal conviction.

Moreover, it is fundamental to say that that the clause of necessity defense is available to the GSS. The Landau Commission, indeed, specifies three parameters that must be fulfilled when dealing with it. The first is that the convicted person act in order to prevent to himself or to others grievous harm. The second one is that this harm cannot be avoided, and lastly that the harm caused is not disproportionate to what the situation requires. Therefore, according to the interpretation of the Commission, using the necessity defense is to act evaluating the less evil.

The State of Israel in 1987 is using the necessity defense to justify the protection of national security over the rights of a person deprived of their liberty.

The Commission in the last part of the Report gave its recommendations. It stated that the struggle against terrorism must be carried on within the framework of the law. In addition,

> *The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided.*

The Report approved in 1987 constitute the legal ground for the imprisonment and torture of thousands of Palestinians during the first Intifada.

In 1998, the United Nations Committee Against Torture, recognized the use of physical pressure is considered torture under the Art. 1 of the Convention.

Therefore, the HCJ organized a hearing to review the legality of the GSS interrogations method in 1998.

The second turning point in the history of the HCJ is the *Public Committee against Torture in Israel v Government of Israel et al*. ruling. The decision concerns the investigation of the General Security Services in Israel on the use of moderate physical pressure[11] on Palestinian detainees. The decision was held by the President of the Court, Justice A. Barak in 1999.

[11] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1481 (1999)

It is fundamental to highlight the Court dealt with three essential questions during the hearing:

5. Whether the GSS investigators possess a general authority to conduct interrogations under the Israeli law.
6. If so, whether such a general authority empowers the GSS to use physical means during the interrogations.
7. Whether the authority for GSS investigators to employ physical means during the interrogations of security suspects can be anchored in the criminal defense of necessity.[12]

Therefore, the sentenced retrace the fundamental answer to these peculiar question that determine the fate of Israel. Indeed, as Justice A. Barak stated

> *On the one hand, lies the desire to uncover the truth, in accord with the public interest in exposing crime and preventing it. On the other hand, is the need to protect the dignity and liberty of the individual being interrogated*

The general authority can be derived from the fact that the GSS are considered police officers under Israeli Law. Nevertheless, the Court affirmed that the GSS lack the authority to use such brutal methods. Methods which imply violation of the Convention under Art. 1 are not admissible.

To answer to the most pressing question, whether the necessity defense can be use by the GSS to escape criminal liability is a very sensitive topic which needs to be analyzed carefully.

According to the State opinion the activity of the GSS can be justified within the framework of the defense of necessity that can be found in the section 34(1) of the Penal Law.

Therefore, the use of the necessity defense is used by the GSS to avoid that more serious acts will occur to human lives.

It is fundamental to say that the Court acknowledges the fact that for the Israeli law the necessity defense is recognized and already in the law framework. Nevertheless, the most appropriate question is not to discuss on the availability of the necessity defense to the GSS, but to use it as an ex-ante authorization for the GSS activities.

The Court answered that it can be used as *post factum* by a GSS convicted investigators which has used the means of physical pressure. Nevertheless, and most important, the necessity defense cannot give to the GSS the general authority to use these means *ab initio.*

[12] Ibid.

In other words, it is not possible to use the necessity defense as an authorization to apply physical pressure during the interrogations of suspect involved in terroristic activities.

Although the Torture Case of 1999 seems to be a benchmark rulings, the chapter also shows some shortcomings. Among them, the fact that the Court did not prohibit the availability of necessity defense post factum to the GSS was used a ploy to continue to perpetrate it during the following years.

**Conclusions**

According to the words of the judge A. Barak,

> If we do not protect democracies, democracies will not protect us.

This statement is of particular importance, when democracies are threatened by act of terrorism and by the tools implied to fight it. Indeed, it is fundamental to be aware that the protection of democracies is an ongoing process and that it is not possible to take it for granted.

This research study aimed to answer to the most pressing question of modern democracies when dealing with terrorism. Indeed, in protecting the very existence of the nation, States need at the same time protect human rights. Therefore, to what extent can a democracy restrict fundamental rights when it faces emergency circumstances?

The study as highlighted that the prohibition of torture, inhuman and degrading treatment is an absolute right and therefore cannot be restricted or balanced.

After a review of the International and regional legal tools employed, the study has focused on the particular case of Israel.

In the unceasing struggle for its survival, the Court seems not to recognize the prohibition of torture as absolute right. Indeed, the approach of the HCJ seems to be more a balanced one. In the struggle for the survival, it is needed to impose some restrictions on national security and human rights. According to Justice Barak, a proper balance between the two rights signifies respect for both. This balance must be interpreted in the way that not all means are justified in democracy. Indeed,

*That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open.*

Nevertheless, although the Court condemned the use of these methods, it did not indeed achieve an absolute ban on torture, but its approach left space to use torture even after its pronouncement. Since it did not prohibit the availability of the ex-poste necessity defense to GSS, this was used to continue to perpetrate such methods. Indeed, most recent episodes are still being reported.