



## INSOLVABLE ISSUES OF INEFFECTIVE INDIVIDUAL REDRESS FOR TORTURE IN SYRIA: UNAVOIDABLE OR INEVITABLE?<sup>1</sup>

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**Abstract.** Repelled by the outrageous effects of the systematic ill-treatment of human beings during the WWII and its aftermath, the international community agreed to prohibit the use of torture in the 20th century. Yet, the absolute prohibition seems to exist only on paper. The recent examples of systematic torture in Syrian “black sites” call again the question of the efficiency of the legal framework for the redress of damage suffered by individuals due to deliberate actions of torture inflicted by state officials amidst loud political declarations of various actors of international community. Although the right to the redress may be realized through various schemes under international human rights treaties, the legal remedies seem to rather exist than live for Syrians. They are inaccessible to the victims of torturous acts due to the lack of recognition of the most relevant competences of the relevant human rights bodies by Syrian state. Unfortunately, the measures of criminal justice are ineffective or unapproachable either and it does not look like the punishable may be punished in the anytime soon.

**Keywords:** Syria; Torture, Criminal responsibility; Human rights; Committee against Torture; Human Right Committee

### Introduction

The use of secret interrogation, concentration and extermination places was a usual practice during World War II and for couple of decades after the war. G. Megargee and M. Dean catalogued some 42,500 Nazi ghettos and camps throughout Europe operating from 1933 to 1945 with the estimation that 15 million to 20 million people died or were imprisoned in the sites (Lichtblau, 2013). According to prof. Cohen the U.S. Army conducted more than 300 war-crimes trials through 1948, more than 90% involved prisoner mistreatment (Bravin, 2005). In Soviet Gulags there were more than 18 million victims during the gulags’ use over four decades (David, 2015). All the places were known for systematic use torture and other forms of ill-treatment, that was universally condemned in 1948 by the landmark Universal Declaration of Human Rights and later elaborated in 1966 International Covenant of Civil and Political Rights (hereinafter ICCPR) (ICCPR, 1966) and 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter UNCAT) (UNCAT, 1984). As L. F. Rouillard points out, the prohibition of torture is far-reaching, covered as much in the regional as in the universal human rights systems, it extends to customary law as a norm of *jus cogens*, both in matters related to international humanitarian law and international human rights law (Rouillard, 2005).

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Secret prisons, reflecting “a parallel legal system for prisoners who are denied access to communications, deprived of their due process rights, and hidden from public scrutiny” (Potter, 2015) came back loudly to the XXI century as “black sites” to host “ghost prisoners” in the “war on terrorism” after the 11 September 2001. Reinitiated by the president George W. Bush they were formally closed by former US President Barack Obama in 2009 following a worldwide condemnation of the ill treatment amounting to torture inflicted upon the prisoners held therein. Recently the unconfirmed sources declared that the US President Donald Trump may order bringing back a Central Intelligence Agency (hereinafter CIA) programme for holding terrorism suspects in secret overseas “black site” prisons (Hosenball & Landay, 2017), bringing back the discussions on the absolute nature of the prohibition of torture.

The USA “black sites” were located in Poland, Lithuania, Romania and several Asian countries. The European Court of Human Rights (hereinafter ECtHR) ruled in 2014 that Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and was exposing them to a serious risk of treatment contrary to the European Convention of Human Rights (hereinafter ECHR) (*Al Nashiri et al v. Poland*, 2014). Lithuania and Romania are currently facing the lawsuits alleging that the detainees were ill-treated in a secret detention facility allegedly located in Lithuania and run under the CIA rendition programme (*Abu Zubaydah v. Lithuania*, application no. 46454/11; *Al Nashiri v. Romania*, application no. 33234/12).

As both European countries, knowingly involved in running secret prisons, cooperate with the ECtHR in establishing the facts and it is very likely that the justice will be restored, the incidents have not brought as much attention as the recent report of Amnesty International (2017) on systematic torture in Saydnaya prison in Syria (Amnesty International, 2017). Although the fact of the use of torture in the country is not surprising, as Syrian government authorities have tortured detainees in their custody for decades, the figures are shocking. The report of Amnesty International (2017) estimates that 17,723 people died in custody across Syria between March 2011 and December 2015, equivalent to around 10 people each day or more than 300 a month (Amnesty International, 2017). As Independent International Commission of Inquiry on the Syrian Arab Republic (hereinafter Commission of Inquiry) (2016) stated in its latest report that “it is extremely rare to find an individual who has been detained by the Government who has not suffered severe torture” (Independent International Commission of Inquiry on the Syrian Arab Republic, 2016).

Gross human rights violations in Syria were reported since the late 1970s and 1980s and related to the efforts to quell opposition to Hafez al-Assad’s regime, including armed opposition by certain segments of the Muslim Brotherhood (Human Rights Watch, 2010, p. 26). Human Rights Watch (2010) reports that thousands of members of the Muslim Brotherhood, communist and other leftist parties, the Iraqi Ba`ath party, Nasserite parties, and different Palestinian groups were detained and tortured by the security forces, many of them subsequently disappeared (Human Rights Watch, 2010, p. 26). Various researchers, according to Human Rights Watch) suggest that the number of the disappeared is close to 17,000 persons (Human Rights Watch, 2010, p. 26).

The change with respect to the treatment of detainees was expected when Bashar al-Assad, the president of Syria, decided to close the Mazzeh prison in November 2000, where numerous political prisoners were held, and transfer the detainees from the notorious Tadmor prison, located in Syria’s eastern desert, to Saydnaya prison in north of Damascus, which was considered to offer better facilities (Human Rights Watch, 2010). However, it turned to be just another “kingdom of death and madness”, where according to the chilling report of Amnesty International (2017), based on testimonies of survivors of the prison, between 5,000 and 13,000 people were extra judicially executed between September 2011 and December 2015 (Amnesty International, 2017, p. 6).

The findings of numerous reports of International institutions and NGOs suggest that the Syrian government has committed multiple violations under international human rights law (Amnesty International, 2017; Independent

International Commission of Inquiry on the Syrian Arab Republic, 2016; 2013), which establishes the right of victims of torture to remedy, including justice, truth and reparation. Numerous countries condemned the horrendous humanitarian and human rights situation in Syria (Joint statement by Australia, France, Luxembourg, the Republic of Korea and the United Kingdom, 2013), however, no actions to intervene in the Syrian crisis were taken by the international community. Being a party of the ICCPR (1966) and the UNCAT (1984), Syria is legally bound by the obligations under these international treaties, as well as by relevant customary international law. However, the main question here is whether without a political will to implement the international agreements, the victims of torture have any prospects to be compensated for damage done and if justice can be restored in the moment in time.

In this article the author focuses attention at the evaluation of the facts presented by various organisations and institutions, in particular Amnesty International (2017), in the light of international rules prohibiting torture. Apart from international human rights law, in particular the ICCPR and the UNCAT, the author also looks at the issues of bringing the perpetrators of such acts to justice, which is an alternative way to provide the redress to the victims. The effectiveness of the redress in this regard is measured assessing the availability measures accessible to the victims of torture in Syria. The article does not attempt to generally evaluate the effectiveness of the international or national legal measures, as the main focus of the article is the availability of the redress for the ill-treatment incurred using established legal remedies.

### **1. Assessment of the facts in light of international rules prohibiting torture**

For the purpose of the UNCAT, the term "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (...)" (Article 1). Being universally accepted the definition provided in the UNCAT was adopted by various international human rights and criminal bodies, e.g. the Human Rights Committee (hereinafter HRC), ECtHR, International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY), which apply it with certain modification taking into account the specific regulation established in a particular international agreement governing their activities.

The first distinctive element, provided in the definition, is "severe pain or suffering, whether physical or mental". The notion of "severity" is inherently vague in the definition, as the element has both objective and subjective features. First of all, determination of threshold of level of pain and suffering requires to consider the objective severity of the harm inflicted, taking into account nature, consistency of the acts committed and other factors (Prosecutor v. Radoslav Brđanin, 2004, para. 484). Furthermore, individual impact of ill-treatment on a victim, taking into account his/her personal characteristics, is evaluated. In describing the specific nature of the subjective element one can refer to the language of ECtHR (1978, 2006), or the HRC (1989), or criminal tribunals, such as ICTY (2007), which stipulate that assessment of ill-treatment depends on the age, sex, state of health of the victim, or the physical or mental effect of treatment on a particular victim (Ireland v. the United Kingdom, 1978; Jalloh v. Germany [GC], 2006; Vuolanne v Finland, 1989, Prosecutor v. Radoslav Brđanin, 2007). In *Prosecutor v. Radoslav Brđanin* (2007) ICTY emphasized that "severe pain or suffering" was not synonymous with "extreme pain or suffering", the expression proposed by the United Kingdom during the negotiations of the Convention text thus seeking to have a more restrictive definition of torture setting more intense level of pain and suffering. The fact led the Court to conclude that, under customary international law, physical torture can include acts inflicting physical pain or suffering less severe than "extreme" pain and suffering that may be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" (Prosecutor v. Radoslav Brđanin, 2007, para. 249). In other words, physical pain may amount to the torturous even it is not accompanied by serious injury (Prosecutor v. Radoslav Brđanin, 2007, para. 251).

The jurisprudence of the criminal tribunals, consistent with the jurisprudence of human rights bodies, illustrates the practical application of this criterion. The bodies held that such ill-treatment as rape of an individual under control (*Aydin v Turkey*, 1997) and mutilation of body parts (*Prosecutor v. Kvočka et al.*, 2001, para. 144) appear by definition to meet the severity threshold of torture. Otherwise, the pain or suffering may attain the level of torture due to the use of the various combinations of ill-treatment or intensity and systematic use of particular methods. In numerous cases deciding individual claims the HRC and Committee against Torture found that various combinations or systematic use of the following acts constituted torture: beatings, application of electric shocks, the use of the "submarino", deprivation of food, water, medical care, burns, extended hanging from hand and/or leg chains, standing for great lengths of time, simulated executions, etc. (*Burgos v. Uruguay*, 1981; *Motta v. Uruguay*, 1984; *Ashurov v. Tajikistan*, 2007; *Dragan Dimitrijevic v. Serbia and Montenegro*, 2004; *Ali Ben Salem v. Tunisia*, 2007; *Ali v. Tunisia*, 2008). Prolonged incommunicado detention in an unknown location was also recognized as amounting to torture in *El-Megreisi v. Libyan Arab Jamahiriya* (1994).

International institutions report that severe ill-treatment in Syria is most common immediately upon arrest and during the first days or weeks of detention and interrogation (UN Human Rights Office of the High Commissioner, 2014, p. 2). In its latest report the Amnesty International (2017) pays attention to the following methods of ill-treatment during transportation to the prison facilities, security checks and just upon arrival to the prison: hitting or beating with the weapons or other objects such as sticks, generally while the detainee is handcuffed and often also blindfolded (Amnesty International, 2017, p. 20, 22). Less common methods of ill-treatment reported by the interviewed victims included electric shocks, burns with cigarettes, rapes (Amnesty International, 2017, p. 21). Almost every interrogation was accompanied by the use of a variety of ill-treatment methods, often in combination, for example being held in a stress position while being beaten (on the soles of the feet, being forced into a vehicle tyre, being suspended by wrists) or subjected to electric shocks, sexual violence, including rapes in front of relatives, burns with cigarettes, the pulling out of nails; being scalded with hot water, as well as being subjected to psychological torture (Amnesty International, 2017, p. 24-34).

As to the condition in detention facilities, the former detainees reported about prolonged periods of solitary confinement (in very small cells, often underground without any light, for several days, weeks or months), severe overcrowding in cells (with shift or other systems to preserve space), lack of adequate access to medical treatment, sanitation, food and water, being subjected to extreme temperatures, being held for hours or days in cells containing the bodies of deceased detainees, being regularly humiliated or being subjected to sexual harassment by the prison guards (Amnesty International, 2017, p. 35-37). Detainees held in Saydnaya prison have been subjected to an established programme of abuse. They were regularly ill-treated, through severe beatings, electric shocks, sexual violence, stress positions, denial of adequate food, water, medicine, medical care and sanitation leading to the rampant spread of infection and disease, enforced silence, even during ill-treatment sessions. Psychosis was a common consequence of many detainees resulting from the ill-treatment (Amnesty International, 2017, p. 7). These methods were often used in combination during multiple sessions over the course of months, weeks and days (Amnesty International, 2016). The medical reports and death certificates of the diseased stipulated the cause of death as heart or respiratory failure (Amnesty International, 2017, p. 7). The outcomes made by the Amnesty international generally corroborate with patterns observed by other human rights monitoring groups, including international institutions such as UN Human Rights Office of the High Commissioner (2014) and Commission of Inquiry (2013, 2014, 2015, 2016).

As has been mentioned above, the assessment of ill-treatment depends on an individual evaluation of a situation of the person. However, taking into account the content of the criterion described above, one may conclude that in most of the reported individual cases, based on interviews, the pain and suffering of particular individuals attains the level of severity required to qualify the acts as torturous due to the use of the ill-treatment techniques taken alone (e.g. rape), used systematically or in combination with other ill-treatment methods. In numerous instances the level of pain and suffering can also be described as extreme, as inflicted pain and suffering is accompanied by serious injuries and even death.

However, as M. Nowak and E. McArthur accurately points out, the severity of pain or suffering, although it constitutes an essential element of the definition of torture, is not a criterion distinguishing torture from other forms of ill treatment (Nowak & McArthur, 2008, p. 69). This position resembles the official position of UN Special Rapporteur on Torture who, after analysing the *travaux préparatoires* of Articles 1 and 16 UNCAT, as well as the practice of the Committee against Torture concluded that the decisive criteria for distinguishing torture from other forms of ill-treatment is the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2005).

The UNCAT lists the specific purposes of the infliction of severe pain and suffering, such as obtaining information or a confession, punishing for an act a victim or a third person has committed or is suspected of having committed, or intimidating or coercing a victim or a third person, or for any reason based on discrimination of any kind. There is a disagreement between the scholars if the list of the purposes is exhaustive or exemplary (more on this discussion: Valutyte & Mickevičiūtė, 2016), with some scholars, e.g. M. Nowak and E. McArthur, arguing for the strict definition reflecting international customary law (Nowak & McArthur, 2008), and others putting more weight on the wording of Article 1 UNCAT “such purposes as” as an indicator of an open interpretation of the motivation behind the ill-treatment (Association for the Prevention of Torture (APT), Centre for Justice and International Law (CEJIL), 2008, p. 13). Different human rights bodies employ different practice (Valutyte & Mickevičiūtė, 2016), therefore the qualification of the same act may vary.

Amnesty International notes that the ill-treatment in Saydnaya prison “is not used to force a detainee to “confess”, but instead as a method of punishment and degradation” (Amnesty International, 2017, p. 32). The apparent goal of the ill-treatment is to humiliate, degrade, dehumanize and to destroy any sense of dignity or hope (Amnesty International, 2017, p. 7). However, this fact is hardly relevant to the qualification of the ill-treatment during the overall period of detention as torture. As it was mentioned above, before being transferred to prisons, including Saydnaya Military prison, detainees usually spend months or even years in detention elsewhere, where the confessions, which are used by the authorities to determine sentences in “flagrantly unfair and shambolic “trials” (as described by Amnesty International, 2017, p. 12), are extracted by employing various ill-treatment methods. If taken alone the isolated period in Saydnaya prison and following the logic of the first group of scholars, in the cases where severe pain or suffering is inflicted purely sadistically it would appear to be excluded from the definition of torture. However, taken into account the scale of the severe ill-treatment in detention facilities in Syria and the knowledge of the practice at the highest governmental levels, one may conclude that the ill-treatment additionally serves as a punishment for acts allegedly committed and intimidation, the purposes indicated in the definition of torture. Thus, even accepting the restrictive view on the list of the torture purposes, the motivation should be acceptable to qualify the acts as torturous.

The definition of torture insists on active or passive involvement of a public official or other person acting in an official capacity, which “means that States are not generally responsible for acts beyond their control” (Association for the Prevention of Torture (APT), Centre for Justice and International Law (CEJIL), 2008). The situation depicted by Amnesty International (2017), other NGOs and the Commission of Inquiry (2013, 2015, 2016) leaves no doubts of fulfilment of this criterion. The fact, that the Syrian officials, particularly its intelligence and security agencies, have been directly involved in the ill-treatment is also well documented by the Commission of Inquiry, which suggests the existence of a state policy in this regard (Independent International Commission of Inquiry on the Syrian Arab Republic, 2013; 2015, p. 11; 2016, p. 15). Amnesty International (2013) reports that military commanders undertook a coordinated policy together with intelligence agencies to target civilian protesters through mass arrests and enforced disappearances in 2011 and early 2012 (Amnesty International, 2013). Detainees have been transferred to Saydnaya prison after being interrogated by the various Syrian intelligence agencies or security forces (Amnesty International, 2017, p. 15). Since 2011, executions at Saydnaya prison are carried out in secret and are known only to the directly involved guards and officials, as well as high-level Syrian officials (Amnesty International, 2017, p. 17).

To sum up, although numerous interview-based cases demonstrate the existence of torture, in each instance of an alleged crime a judicial/quasi-judicial institution will have to evaluate the circumstances surrounding individual case. Therefore it might be useful to also analyse other allegations against Syria expressed in such terms as “systematic practice of torture” or “widespread or systematic” use of torture, that, if proven, may be used for accessing the legal remedies under UNCAT or criminal law other than individual claims for compensation.

The definition of the expression “systematic practice of torture”, used in the context of rarely resorted procedure of inquiries<sup>3</sup> set in Article 20 of the UNCAT and described in more details in Chapter 2.1., was not agreed among the drafters of the UNCAT in the text. In the practice of the Committee against Torture a systematic nature of practice of torture is related to such characteristics as the number and scale of the incidents and substance. On the occasion of its first investigation under Article 20 UNCAT, the Committee defined a systematic practice of torture as the situation when “the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question” (Committee against Torture, 1993, para. 39). The Committee emphasizes that a systematic character is not necessarily related to the direct intention of a Government, “it may be the consequence of factors, which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration” (Committee against Torture, 1993, para. 39).

For torture to be described as the crime against humanity, the ill-treatment must be “widespread or systematic”. Clearly, the existence of widespread or systematic torture is only one of the elements of crime against humanity and for the purposes of criminal responsibility other elements have to be proven as well. However, determination of existence of the element is highly dependant on both, meeting the criteria of definition of torture and the related circumstances proving scale or “systematicity”. In the practice of ICTY, the widespread characteristic is related to the scale of the acts perpetrated and to the number of victims (Prosecutor v. Blaskic (Trial Chamber), 2000, para. 206). A crime may be widespread or committed on a large scale by the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude” (Prosecutor v. Kordic and Cerkez (Trial Chamber), 2001, para. 179). The element “systematic” requires an organised nature of the acts and the improbability of their random occurrence” (Prosecutor v. Naletilic and Martinovic, (Trial Chamber), 2003, para. 236). In *Blaskic* (2003) ICTY indicated four elements demonstrating systematic character: “the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; the preparation and use of significant public or private resources, whether military or other; the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan (Prosecutor v. Blaskic (Trial Chamber), 2000, para. 203). The Court emphasizes that the conditions of scale and “systematicity” are not necessarily cumulative, which means that for the acts of torture to be characterised as crimes against humanity it is sufficient that one of the conditions be met. However, in practice, as the Court itself mentions, these two criteria are often difficult to separate “since a widespread attack targeting a large number of victims generally relies on some form of planning or organization” (Prosecutor v. Blaskic (Trial Chamber), 2000, para. 206).

Torture in Syria is a pervasive practice that is routinely employed by Syrian officials for the purpose of extraction of confessions to be used in trials and for punishing for acts that the victims had allegedly committed. Significant number of credible and consistent allegations of recent and past acts of torture and ill-treatment

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<sup>3</sup> As of 28 February 2017 there were 9 completed inquiries under Article 20 of UNCAT (Turkey in 1994; Egypt in 1996; Peru in 2001; Sri Lanka in 2002; Mexico in 2003; Federal Republic of Yugoslavia (Serbia and Montenegro) in 2004; Brazil in 2008; Nepal in 2012). (*UN Human Rights Office of the High Commissioner, 2017*). P.Alston and J. Crawford notes that the reason for the very small number of concluded inquiries is inherent in problematic preconditions for inquiry initiation, as well as “stigmatizing effects of this procedure” (Bank, 2000, p. 169).

gathered by various non-governmental organizations and international institutions indicates a clear pattern of large-scale incidences of severe and even extreme pain and suffering inflicted on numerous detainees. The methods of torture is used in numerous places around the country (in its report of 2014 Commission of Inquiry (2014) provides a list of places of detention where torture were documented), various reports mention thousands of victims who died in the prisons, in which the practice of torture is used continuously. The policy is clearly authorized at the highest political level. First of all, the presumption is supported by the interviews of former guards in the prisons and other officials documented by Amnesty International (2017), secondly, there is no meanfull reaction on behalf of Syrian government to the allegations of torture made against it, the impunity with which perpetrators can commit such acts suggests the existence of a state policy in this regard. The above-mentioned facts, in author' opinion, allow to qualify the practice of torture as systematic under Article 20 of UNCAT and at least "widespread" in the context of crime against humanity. Having concluded this, the remaining question is what legal remedies are available to the victims of torturous acts and what are the chances to have the damage inflicted redressed.

## **2. Accessibility of the reparatory measures in case of acts of torture**

### **2.1. International human rights measures: existing but not living for Syrians?**

Syria is legally bound by a number of international human rights treaties, however, the fundamental question is whether the mechanisms established by the treaties are available for the victims in Syria or, in other words, to which extent Syria is obliged to afford individual protection through individual petitions or is subjected to the actions against the state initiated by other parties to the international agreement.

Syria is a party to the ICCPR since 1969 (UN Human Rights Office of the High Commissioner, 2017), however it has never subjected itself to the obligations under Optional Protocol to the ICCPR, which would enable the HRC to receive and consider communications from individuals claiming to be victims of violations of the obligations set out in the ICCPR, in particular infringement of Article 7 prohibiting torture and other acts of ill-treatment. Furthermore, another State Party to the ICCPR will not be able to initiate proceedings against Syria, as Article 41 of the ICCPR requires a special recognition on behalf of the country of the Committee's competence to deal with inter-state claims, which has never been expressly given by Syria.

Syria acceded the UNCAT in 2004 (UN Human Rights Office of the High Commissioner, 2017), however, as in the case of the ICCPR, neither individuals, nor other State Parties to the UNCAT can present communications before the Committee against Torture due to the lack of express acceptance of such a competence of the Committee on behalf of Syria. Additionally, Syria is subjected neither to regular, nor to *ad hoc* visits undertaken by independent international and national bodies to places where people are deprived of their liberty. First of all, Article 20 of the Convention allows the Committee to make an inquiry in a country upon the receipt of reliable information containing well-founded indications of torture being systematically practiced in the territory of a State Party, which, as previously shown, would be the case in Syria. However, the Committee against Torture is paralyzed in this regard as well due to the declaration made by Syrian Arab Republic back in 2004 (UN Human Rights Office of the High Commissioner, 2017), which excludes the Committee's power to initiate the inquiry, the exception allowed by the Convention itself<sup>4</sup>. Secondly, Syria is not a party to the OPCAT (UN Human Rights Office of the High Commissioner, 2017), which empowers the Subcommittee on Prevention to pay visits to the places of detention (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002).

Obviously, Syria is subjected to the scrutiny of the reporting system under Article 19(1) of the UNCAT, which as C. Ingelse observes is the only compulsory accountability mechanism under the Convention (Ingelse, 2001). The latest report submitted by Syria in 2007 (Initial report due in 2005, Syrian Arab Republic: CAT/C/SYR/1,

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<sup>4</sup> Under Article 28 paragraph 1 of the UNCAT: *Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in Article 20.*

2009) raised numerous issues regarding Syria's compliance with obligations under the Convention (Concluding observations of the Committee against Torture: CAT/C/SYR/CO/1/Add.2, 2012). Syria refused to submit a special report on the concerns claiming that it did not consider that Article 19 UNCAT would enable the Committee to request a special report (Committee against Torture, 2012, p. 2), thus denying the rarely used competence of the Committee that is both expressly provided in Article 19(1)<sup>5</sup> and recognized in the doctrine (Ingelse, 2001, p. 129).

The reports of the Committee against Torture and other institutions or organizations can be the basis for other international institutions to take the decisions on the actions within their competence. However, the international institutions either have limited or no competence to effectively solve the crisis but show willingness to do this, or have competence, however are limited in actions due to contrasting national interests. UN Human Rights Council adopted numerous resolutions condemning widespread and systematic violations of human rights, including widespread practices of torture (UN Human Rights Council, 2016; UN Human Rights Council, 2015). Numerous institutions and non-governmental organizations kept reporting about widespread torture, describing the ill-treatment as "commonly used" practice in detention centres (UN High Commissioner for Human Rights, 2011, p. 22), "systematic torture and killing of detained persons by the agents of the Syrian government" ("Caesar" Report, 2014, p. 11). The actors insisted on reaction of international community reminding of its responsibility to take protective action when an individual State fails to protect own population from international crimes (e.g. UN High Commissioner for Human Rights, 2011, p. 24). Regrettably, the reaction of the principal guardian of international peace and security, the UN Security Council, can only be described in the words of J. Gifkins as the "lowest-common denominator response" (Gifkins, 2012), as clearly no effective protective means are taken to stop the widespread and systematic violations of human rights. The inability to act, conditioned by the lack of unanimous position among permanent members, is another proof of ineffectiveness of the UN Security Council, the problem that cannot be solved for already more than a half of the century.

## **2.2. Punishable, but not punished? Availability of criminal justice measures**

Article 14 UNCAT recognizes the right to fair and adequate compensation, and requires the parties to the Convention to redress the damage suffered by the victim of an act of torture<sup>6</sup>. As M. Nowak and E. McArthur observes, despite of different terminology used by Article 14(1) UNCAT in comparison to Article 2(3) ICCPR<sup>7</sup>, Article 14 UNCAT contains a specific manifestation of the general right of victims of human rights violations to a remedy and adequate reparation, as laid down in Article 2(3) ICCPR and similar provisions in regional human rights treaties (Nowak & McArthur, 2008). The Committee against Torture considers that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case (Committee against Torture, 2007).

Unfortunately, both Article 14 UNCAT and Article 2(3) ICCPR are far from applicable in the context of Syria, as their enforceability depends directly on the ability and willingness of national public authorities to first of all investigate the crimes. In its report of 2012 the Committee against Torture notes that massive human rights

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<sup>5</sup> Article 19(1) of the UNCAT stipulates: *[t]he States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.*

<sup>6</sup> Under Article 14 of the UNCAT: *[e]ach State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.*

<sup>7</sup> Article 2(3) of the ICCPR stipulates: *[e]ach State Party to the present Covenant undertakes: (a) 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 persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.*



violations are not only immune to the “prompt, thorough and impartial investigations (...) by the Syrian authorities” but are also “allegedly conducted under the direct order from public authorities, at their instigation or with their consent or acquiescence” (Concluding observations of the Committee against Torture: CAT/C/SYR/CO/1/Add.2, 2012). It is not surprising that, as the Commission of Inquiry on Syria observes, at the present stage, investigation and prosecution by the Syrian national justice system is not a viable option to ensure accountability of authors on all sides to the conflict in Syria (Independent international commission of inquiry on the Syrian Arab Republic, 2013), as “countries immersed in or emerging from conflict rarely have the domestic capacity or resources to initiate complicated judicial proceedings for international crimes” (Human Rights Watch, 2013).

Considering that massive or systematic infliction of torture may amount to war crimes and (or) crimes against humanity (Independent international commission of inquiry on the Syrian Arab Republic, 2013, p. 1) and independent and impartial criminal prosecutions are impossible in the current political landscape in Syria, the ICC’s added value in this situation have been considered by various actors, including Commission of Inquiry on Syria (Independent international commission of inquiry on the Syrian Arab Republic, 2013, p. 126-127), the High Commissioner for Human Rights, more than fifty five UN Member States, including six members of the UN Security Council (Permanent Mission of Switzerland to the UN, 2013; Joint statement by Australia, France, Luxembourg, the Republic of Korea and the United Kingdom, 2013), various non-governmental (Human Rights Watch, 2013) and other actors. Syria has not acceded/ratified the Rome Statute, thus there are “two viable ways to start dealing with crimes committed during the internal armed conflict: if Syria accepts the ICC jurisdiction ad hoc, or the UN Security Council refers the situation to the ICC” (Valutyte & Mickevičiūtė, 2016). In both cases the ICC could exercise its jurisdiction retroactively, if Syria or the Security Council specified it when referring the situation (Independent international commission of inquiry on the Syrian Arab Republic, 2013, p. 126).

One could say, that the only feasible option for ICC jurisdiction at the moment being is a referral of the Security Council under Article 13 (b) of the Rome Statute (Rome Statute of the International Criminal Court, 1998), however, this option does seem to be a credible scenario either. In 2013 Human Rights Watch was still enthusiastic about the involvement of the UN Security Council in this process expressing hope that “blockage at the Security Council is not necessarily permanent and irreversible” (Human Rights Watch, 2013), although other actors, including Commission of Inquiry on Syria have expressed more realistic approach based on previous experience stating that “only a very limited number of cases can be dealt with by other States or the international community and that a significant “impunity gap” remains if the concerned State does not initiate national investigations and prosecutions” (Independent international commission of inquiry on the Syrian Arab Republic, 2013). As S. Adams observes, Russia and China have employed their vetoes to block draft resolution of May 2014 that would have referred the Syrian situation to the ICC (Adams, 2013), the initiative that had already been vetoes back in 2011. Numerous failures of the Security Council to reach the consensus on solution of the crisis in Syria does not give much hope that the political obstacles could be overcome any time soon and the UN Security Council uses its discretion to refer the situation to the ICC. This presumption may be well, in author’s opinion, exemplified by the recent veto of Russia against the resolution put to a vote on 28 February 2017 to impose sanctions against Syria for the use of chemical weapons by governmental forces, the fact established by International body.

As the Commission of Inquiry (2013) observes, under international law third countries also have possibility to investigate and prosecute the crimes committed in Syria asserting universal jurisdiction (Independent international commission of inquiry on the Syrian Arab Republic, 2013, p. 125). “The application of universal jurisdiction reduces the existence of “safe havens” where a person responsible for grave crimes could enjoy impunity” (Human Rights Watch, 2013), however, this approach can only ensure accountability in a very limited way, as the perpetrators are in Syria, the evidences are not present in the State that asserts jurisdiction, (Independent international commission of inquiry on the Syrian Arab Republic, 2013, p. 125), “investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime” (Human

Rights Watch, 2013). Therefore at the time being or any time soon, this option for redress and accountability does not seem viable either.

On 21 December 2016 the UN General Assembly decided to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 with the task to facilitate and expedite future criminal proceedings in national, regional or international courts or tribunals by collecting, consolidating, preserving and analysing evidences (UN General Assembly, 2016). The mechanism, approved by a vote of 105 to 15 against, with 52 abstentions, will operate under the auspices of the UN closely cooperating with the Commission of Inquiry on the Syria established by the Human Rights Council on 22 August 2011 with the task to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic (UN Human Rights Council, 2011).

It seems that at the moment the fact-finding commissions appear to be the only accessible and realistic tool for the international community to contribute to the solving of the crisis. The importance of gathering credible evidence of the crimes is undeniable, as, in the words of Human Rights Watch, “further delays in beginning investigations could lead to a number of practical problems that render justice even more difficult to achieve, (...) memories fade over time, witnesses move, disappear or pass away, and documentary or physical evidence can be lost” (Human Rights Watch, 2013). However, the establishment of another body collecting evidences neither prevents the infliction of torture acts at the moment being, nor remedies in any way the damage already inflicted upon individuals. Hopefully, the risky work of the experts and the outcomes of both mechanisms will not only serve as the background for the press releases, media articles and continuous condemnations of deplorable situation in Syria, but will soon serve as evidence in criminal proceedings, which in reality requires or the acceptance of the ICC mandate over the crimes potentially carried out within the jurisdiction of Syria, or the change of political climate in the country.

## **Conclusions**

The recent reports of NGOs', Commission of Inquiry and other international bodies demonstrate a large-scale of repetitive incidences of severe and even extreme pain and suffering inflicted on thousands of detainees in numerous places around Syria by Syrian officials or other persons acting in an official capacity. Judging from the reported cases, the ill-treatment has the potential to be qualified as torture under relevant international human rights treaties, i.e. the UNCAT and ICCPR, to which Syria is a party since 2004 and 1969 respectively. However, as the instruments require individual assessment of the case, the precise determination of the form of ill-treatment would depend on the assessment of the circumstances surrounding individual situation, which is not possible at the moment in time due to the lack of recognition of the competence of the Committees to consider individual communications. The ill-treatment may also be qualified as systematic practice of torture under Article 20 of UNCAT, yet any intentions of the Committee against Torture to start the inquiry procedure are blocked due to express refusal by Syria to accept the competence of the Committee.

The measures of criminal justice are either ineffective or inaccessible. National criminal measures can hardly be called effective as a result of, first of all, direct control of highest-level officials over investigation, and, secondly, due to the general atmosphere of impunity, which is exemplified by numerous reported human rights violations. The ICC is not a problem-solving panacea for Syria; however, it is the only one functioning international tribunal that could restore justice in terms of establishing criminal responsibility. The court remains a highly desirable platform for current and future criminal investigations among the members of international community; however, it is hardly accessible at the moment in time due to a chronic disease of UN Security Council to prioritize national interest over international peace and security. Apart from official declarations of various states and various international institutions, no effective actions were taken thus subjecting Syrian people to continuous torturous practices without international or national legal measures being available for the redress

of damage suffered, the situation that since the beginning of the crisis in Syria seemed to a certain extent unavoidable, and now it appears inevitable.

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