
HUMAN RIGHTS AND PROHIBITION OF TORTURE, INHUMAN OR DEGRADING TREATMENT: EUROPEAN APPROACH

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Annotation. This article focuses the attention to prohibition of torture in the European region, basically, the region that is covered by the European Convention For the Protection of Human Rights and Fundamental Freedoms (hereinafter The European Convention on Human Rights, or the Convention), which was signed on 4 November 1950 in the scope of the Council of Europe. The prohibition of torture and protection of each individual from inhuman or degrading treatment or punishment (Article 3 of the Convention) is one of the most fundamental provisions in the Convention, it enshrines the basic values of democratic societies, and its interpretation must be guided by a recognition of its importance. This right is absolute and may be preserved in all and each circumstances. A wide range of treatment can be considered to breach Article 3, and it will depend on the circumstances of the case, including the effect that it has on the victim, taking into account his or her age, health and mental and physical condition. Normative international and regional instruments lay down the obligations of the states for the prohibition of torture. These instruments promote and develop the right of every person no to be subjected to torture, without discrimination or exclusion. It is for governments of the states to fulfill their obligations in both legal and political ways. The prohibition of torture is also to be found in almost all domestic legal systems. Article 3 imposes both negative and positive obligations: that is an obligation to refrain from certain action, and obligations to take positive action to secure individuals their rights and to protect them from prohibited treatment. However, the numerous cases of the European Court on Human Rights indicates, that there is no clear understanding of the content and scope of the prohibition of torture or strong will of the state governments to respect this right. Therefore the object of the research is the content of the right not to be tortured, the obligations of the states in respect of this right and possible derogations in the conditions of public safety protection, the objective of this article is to disclose the scope of the prohibition to torture foreseen in Article 3 of the European Convention on Human Rights and to discuss the possible circumstances in which a state may legitimately interfere with the exercise of this right basing its actions on protection of public safety.

Key words: human rights, protection from torture, inhuman or degrading treatment or punishment, public safety.

INTRODUCTION

Relevance of the Topic. There are quite a lot regional documents regarding protection of human right, several of them are directly dedicated to the prohibition of torture or at least focus specific emphasis on this right. The prohibition of torture is found in a number of international human rights and humanitarian treaties and is also regarded as a principle of general international law. The prohibition of torture is also considered to carry a special status in general international law, that of *jus cogens*, which is a „peremptory norm“ of general international law. As regional human right documents pay more attention and respect regarding specific cultural,

religious, moral issues in protection of human right in the particular geographic areal, it could be presumed that imposing these documents should not discontent the governments of the states and those to whom the corresponding provisions are dedicated. However the understanding of the content and application issues of the provisions of the regional documents regarding the prohibition of torture is not less complicated than those of the international legal documents. This could be explained by multicultural and multireligious environments in some regions of the world. Thus, “what it one culture taught as true and non-negotiable standards of conduct may in other cultures be understood merely as pieces of advice or recommendations”¹. But in this case it always must be taken into consideration the relativity of human rights, as a western approach to human rights has to be adapted to local reality. And “it may be that realizing certain of the values of individualism is incompatible with realizing certain values of community”².

Therefore this article focuses the attention to prohibition of torture in the European region, basically, the region that is covered by the European Convention For the Protection of Human Rights and Fundamental Freedoms (hereinafter The European Convention on Human Rights, or the Convention)³, which was signed on 4 November 1950 in the scope of the Council of Europe. Almost all of the States Party to the Convention integrated the Convention into their national legislation. Therefore the Convention is binding on domestic courts and national public authorities. It could be stated that the Convention itself is the most specific expression by the member states of the Council of Europe of their profound belief in the values of democracy and justice, and respect for the rights and fundamental freedoms of people living in the modern society⁴. The direct application of the Convention means that each individual under jurisdiction of the Party State to the Convention may invoke it in case he/she considers the corresponding rights of the individual have been violated, and the domestic courts have an obligation to apply the Convention. The interpretation of the Convention is a dynamic and evolving process making the Convention a living instrument in the implementation of human rights standards in the present day conditions.

The prohibition of torture and protection of each individual from inhuman or degrading treatment or punishment (Article 3 of the Convention) is one of the most fundamental provisions in the Convention, it enshrines the basic values of democratic societies, and its interpretation must be guided by a recognition of its importance. This right is absolute and may be preserved in

¹ Almqvist J., *Human Rights, Culture and the Rule of Law*. Oxford and Portland, 2005, p. 94.

² Griffin J., *On Human Rights*. Oxford University Press, 2008, p. 133.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).

⁴ Introduction to European Convention on Human Rights. Collected texts. Council of Europe, 1994, p. 6.

all and each circumstances. A wide range of treatment can be considered to breach Article 3, and it will depend on the circumstances of the case, including the effect that it has on the victim, taking into account his or her age, health and mental and physical condition. Normative international and regional instruments lay down the obligations of the states for the prohibition of torture. These instruments promote and develop the right of every person not to be subjected to torture, without discrimination or exclusion. It is for governments of the states to fulfill their obligations in both legal and political ways. The prohibition of torture is also to be found in almost all domestic legal systems. Article 3 imposes both negative and positive obligations: that is an obligation to refrain from certain action, and obligations to take positive action to secure individuals their rights and to protect them from prohibited treatment. However, the numerous cases of the European Court on Human Rights indicates, that there is no clear understanding of the content and scope of the prohibition of torture or strong will of the state governments to respect this right.

The Object of the Research is the content of the right not to be tortured, the obligations of the states in respect of this right and possible derogations in the conditions of public safety protection.

The Objective of this Research therefore is to disclose the scope of the prohibition to torture foreseen in Article 3 of the European Convention on Human Rights and to discuss the possible circumstances in which a state may legitimately interfere with the exercise of this right basing its actions on protection of public safety. To achieve the aim further *tasks* are settled:

1. to analyze the scope of right protected by Article 3 of the Convention on Human Rights;
2. to reveal the restrictions which may be invoked by the state;
3. to discuss the case-law practice of European Court of Human Rights (further - the Court) in respect of prohibition of torture;
4. to disclose circumstances when the state may legitimately interfere with the exercise of this right due to protection of public safety.

Methodology of the Research. In the course of reaching the objective of the research both theoretical and empirical methods of the scientific research were employed. The following research methods are used: analytical – critical and linguistic – the scope of the analyzed articles is determined and states' violations due to improper implication or understanding of international law are revealed; while using the methods of systemic analysis and document analysis the case-law practice and the doctrine of the Court has been analyzed, compared and evaluated.

1. CONTENT OF THE RIGHT NOT TO BE TORTURED

The whole international society considers torture as one of the most serious violations of human rights, as it constitutes a direct attack on the core of the human personality and its dignity⁵. As a consequence, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment constitutes one of the few human rights that are absolute under international law, and, therefore, permits no exception. Protection against torture, inhuman or degrading treatment or punishment is essential to the scheme of the Convention as a whole. Taken together with Article 2 (the right to life), it forms the essential elements of human rights protection. As such, it can never be possible to justify subjecting someone to torture or inhuman or degrading treatment or punishment – even in war or national emergency (Article 15, The European Convention on Human Rights⁶). Article 3⁷ therefore is a pure absolute right. There are no exceptions and no derogations possible under Article 15 of the Convention (also no derogations are foreseen in other international documents on human rights). It is always applicable and nobody is excluded; regardless of how criminal, dangerous or undesirable a person may be. Article 3 is the only provision of the European Convention on Human Rights not underlying any limitations, restrictions or exceptions. The need to protect against torture in international human rights law is not disputed. State officials are prohibited from inflicting, instigating or tolerating the torture or other cruel, inhuman or degrading treatment or punishment of any person.

There are also other specific treaties in the United Nations and at the Council of Europe level which protect against torture. The protection against torture is also defined in other international treaties. The Universal Declaration of Human Rights⁸ very simply and unambiguously expresses the prohibition against torture in Article 5 of the Declaration: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”. The

⁵ Crawshaw R., Cullen S., Williamson T. *Human Rights and Policing*. Boston, 2007, p. 162.

⁶ Article 15:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”

⁷ Article 3:

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

⁸ Universal Declaration of Human Rights (adopted in 10 December, 1948). GA res. 217A (III), UN Doc A/810 at 71 (1948). [accessed 2010-06-08]. <<http://www.un.org/en/documents/udhr/>>.

International Covenant on Civil and political Rights⁹ intended to give legal force to the civil and political rights expressed in the Universal Declaration of human Rights, hence Article 7 expresses the prohibition in identical terms to those of the Declaration. Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰, which came into force on 26 June 1987, defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment 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 capacity¹¹. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹² foresees possibility to protect the persons deprived of their liberty against torture and inhuman or degrading treatment or punishment by non-judicial means of a preventive character. This Convention differs from European Convention on Human Rights in that latter instrument enables individuals to challenge a State action before judicial enforcement machinery, which then responds by requiring redress if a violation is found.

By comparison with other articles in the Convention, the prohibition of torture is rather strict and is phrased in very general terms. In fact, it was difficult even to draft it, taking into consideration “defensiveness of many states over features of their own public security system”¹³. However, the brevity of the article should not belie its depth. Hence Article 3 of the European Convention on Human Rights prohibits three separate categories of treatment or punishment:

1. Torture;

⁹ International Covenant on Civil and political Rights. Signed December 16, 1996. [accessed 2009-12-14] <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=131206&p_query=International%20Covenant%20on%20Civil%20and%20Political%20Rights&p_tr2=2>.

¹⁰ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Entered into force June 26, 1987 [accessed 2009-12-14].

<http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=130080&p_query=United%20Nations%20against%20Torture&p_tr2=2>.

¹¹ Article 1: „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”. (UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

¹² European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [accessed 2009-12-14]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=50223&p_query=European%20Convention%20On%20Human%20Rights&p_tr2=2>.

¹³ Janis M.W., Kay R.S., et al.(ed.). European Human Rights Law. Text and Materials. Oxford University Press, 2008, p. 124.

2. Inhuman treatment/punishment; and
3. Degrading treatment/punishment.

Not all types of harsh treatment will fall within the scope of Article 3. To be breached the conduct must attain “minimum level of severity” (*Ireland v UK (18 January 1978)*¹⁴). Even though it can be argued that punishment *per se* has an inherent element which includes humiliation, this should not amount to degrading treatment. There is a distinction between punishment in general and punishment that is designed to be inhuman and degrading. Relevant factors will include duration of the treatment, its physical or mental effects and, in some instances, the sex, age and state of health of the victim. So far the torture is defined as:

- the infliction of severe mental or physical pain or suffering (*Ireland v UK*);
- the intentional or deliberate infliction of the pain;
- the pursuit of a specific purpose, such as gaining information, punishment or intimidation.

For example, in *Ireland v UK* at first instance it was held that the so-called five techniques practised by United Kingdom security forces in interrogating suspected IRA terrorists amounted to torture. These techniques included wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. In *Selmouni v France (28 July 1999)*¹⁵ the Court held that, as the Convention was a living instrument, treatment that may once have been considered to be inhuman or degrading, may now amount to torture. If treatment or punishment causes intense physical or mental suffering but is not severe enough to amount to torture, it will be inhuman treatment. Physical assaults can amount to inhuman treatment if sufficiently serious. In *Soering v. The United Kingdom (7 July 1989)*¹⁶, the Court held that “treatment has been held by the Court to be both “inhuman” because it was premeditated, was applied for hours at a stretch and

¹⁴ *Ireland v UK (18 January 1978)*. Over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed during the troubles in Northern Ireland. The authorities in Northern Ireland exercised from August 1971 until December 1975 a series of extrajudicial powers of arrest, detention and internment. The proceedings in this case concern the scope and the operation in practice of those measures as well as the alleged ill-treatment of persons thereby deprived of their liberty.

[accessed 2009-12-14].
<<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%22THE%20UNITED%20KINGDOM%22&sessionid=39856536&skin=hudoc-en>>.

¹⁵ *Selmouni v France (28 July 1999)* [interactive] [accessed 2009-12-14].

<<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=FRANCE&sessionid=39856536&skin=hudoc-en>>.

¹⁶ *Soering v. The United Kingdom (7 July 1989)*. The applicant, Mr Jens Soering, is a German national. He was detained in prison in England pending extradition to the United States of America to face charges of murder. The applicant was interviewed in England between 5 and 8 June 1986 by a police investigator. [interactive] [accessed 2009-12-14].

<<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=%22THE%20UNITED%20KINGDOM%22&sessionid=39856536&skin=hudoc-en>>.

“caused, if not actual bodily injury, at least intense physical and mental suffering”, and also “degrading” because it was “such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment”. In *Cruz Varas and Others v. Sweden (20 March 1991)*¹⁷, the Court held that “it is recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; 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” (par.83).

Torture as a term has its own discrete legal implication. The Court has expressed the view that the intention of the drafters of the Convention in using both the terms “torture” and “inhuman or degrading treatment” was to make a clear distinction between them¹⁸. The European Court of Human Rights, although it has identified the elements which characterise treatment or punishment as torture, has never tried to define exactly what the term means. However it has endorsed in part the definition provided in the United Nations Convention Against Torture (Article 1 of the Convention Against Torture foresees: “means any act by which torture the term, whether physical or severe pain or suffering on a intentionally inflicted mental, is 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”). The Court has stated that the distinction between torture and other types of ill-treatment is to be made on the basis of “a difference in the intensity of the suffering inflicted”. The severity, or intensity of the suffering inflicted can be gauged by reference to the factors referred to above: duration, physical and mental effects, the sex, age and state of health of the victim, the manner and method of its execution”¹⁹.

¹⁷ *Cruz Varas and Others v. Sweden (20 March 1991)*. The applicants, Chilean citizens, applied for political asylum in Sweden. [interactive] [accessed 2009-12-14]. <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=SWEDEN&sessionId=39856536&skin=hudoc-en>>.

¹⁸ Reidy, A. *The Prohibition of Torture. A guide to the implementation of Article 3 of the European Convention on Human Rights*. Human rights handbooks, No. 6. Council of Europe, 2002, p. 11.

¹⁹ *Ibid.*, p. 12.

Ill-treatment that is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading. Degrading treatment includes treatment designed to break the physical or moral resistance of the victim. Regard should be had as to whether its object is to humiliate and debase the person concerned. Although it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others. *Cruel treatment*, and *inhuman or degrading treatment* or *punishment* are also legal terms. These refer to ill-treatment that does not have to be inflicted for a specific purpose, but there does have to be an *intent* to expose individuals to the conditions which amount to or result in the ill-treatment. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Degrading treatment may involve pain or suffering less severe than for torture or cruel or inhuman treatment and will usually involve humiliation and debasement of the victim. The essential elements which constitute *ill-treatment not amounting to torture* would therefore be reduced to: intentional exposure to significant mental or physical pain or suffering; by or with the consent or acquiescence of the state authorities²⁰.

Many instances of inhuman treatment arise in the context of detention, where victims have been subjected to ill-treatment which has been severe, but not of the intensity required to qualify the treatment as torture. According the Court, degrading treatment is that which is said to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them. This has also been described as involving treatment such would lead to breaking down the physical or moral resistance of the victim, or as driving the victim to act against his will or conscience.

Therefore the key issues of Article 3 are as follows:

- the protection guaranteed by Article 3 is absolute;
- a violation can never be justified, not even in exceptional situations;
- no derogations, not even in times of war or other emergencies threatening the life of the nation;
- the Court distinguishes torture (the most severe form of ill-treatment), inhuman and degrading treatment/punishment. The distinction is made according to the purpose, the intensity and cruelty of the violence and other factors related to each individual case.

²⁰ Foley, C. *Combating Torture. A Manual for Judges and Prosecutors*. [interactive] Colchester: Human Rights Centre, University of Essex, 2003, p. 8 [accessed 2011-04-03]
< <http://www.essex.ac.uk/combatingtorturehandbook/english/index.htm>>.

2. PROBLEMATIC ISSUES ARISING IN REGARD TO PROTECTION FROM TORTURE

The unconditional terms of Article 3 mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor. Article 3 not only imposes a duty on the state not to subject a person to torture, or inhuman or degrading treatment, but also imposes some positive obligations to prevent one from suffering such treatment. The most important of these obligations is the requirement that one should not be expelled to a country where you are likely to be tortured or where there will be inadequate protection against persecution²¹. Article 3 also imposes on the state a duty to impose criminal sanctions on individuals who subject others to treatment which breaches Article 3. It may also impose a duty to protect individuals who are at a real and immediate risk of ill treatment contrary to Article 3, where the state knows or ought to know about the risk²².

Taking into consideration issues of public safety one of the most often violations of rights determined in Article 3 of the Convention is conditions of detention and degrading or inhuman treatment with prisoners. Therefore it must be stated, that the prohibition on degrading treatment does not necessarily have any bearing on the normal judicial sentence, even where the sentence passed may be severe. The Court has indicated that it would only be in exceptional circumstances that a heavy sentence would raise an issue under Article 3. Detention conditions can amount to a violation of Article 3 where their effect is to degrade the prisoner. There need not be evidence of any positive intention to humiliate or debase the prisoner. What will be examined is whether the conditions diminished the prisoner's human dignity and invoked feelings of anguish and inferiority capable of humiliating and debasing him/her and possibly breaking his/her physical or moral resistance. This was held to be the case in *Peers v Greece (19 April 2001)*²³ in which the prisoner spent almost 24 hours a day confined to his bed in a cell with

²¹ *Chahal v United Kingdom (15 November 1996)*. [interactive] [accessed 2011-04-03] <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=%22THE%20UNITED%20KINGDOM%22&sessionid=68995113&skin=hudoc-fr>>.

²² *Your Rights. The Libert Guide to Human Rights* [interactive] [accessed 2011-04-03]. <<http://www.yourrights.org.uk/yourrights/the-human-rights-act/the-convention-rights/article-3-prohibition-on-torture.html>>.

²³ *Peers v Greece (19 April 2001)*. The applicant, who had been treated for heroin addiction in the United Kingdom, was arrested at Athens Airport for drug offences. The applicant, after his conviction, he was placed in several prisons during imprisonment time. The applicant complained that the conditions of his detention in Koridallios

no ventilation and no window for at least 2 months, and had to use the toilet in the presence of another inmate. In *Kalashnikov v Russia (15 July 2002)*²⁴, the prisoner's Article 3 rights were also held to have been violated by the conditions of detention he was forced to endure for almost 5 years. In that case, his cell was severely and continuously overcrowded; he suffered sleep deprivation due to constant cell lighting and noise; the cell was poorly ventilated; other inmates were permitted to smoke in the cell; the cell was infested with pests; the toilet facilities in the cell did not provide any real privacy; he contracted several skin diseases and fungal infections during his detention which, despite treatment recurred several times; and he was occasionally detained with persons suffering from syphilis and tuberculosis. The Court found that the prisoner, Kalashnikov, underwent considerable mental suffering and had his human dignity severely diminished by all of these factors.

In case *Valašinas v. Lithuania*²⁵ the Court held Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or

Prison amounted to inhuman and degrading treatment. The Court considered that in the present case there was no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court noted that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3. The Court was of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. [interactive] [accessed 2009-12-16].
<<http://cmiskp.echr.coe.int/tkp197/view.asp?item=16&portal=hbkm&action=html&highlight=GREECE&sessionid=40241823&skin=hudoc-en>>.

²⁴ *Kalashnikov v Russia (15 July 2002)*. The Court has considered treatment to be "inhuman" because, inter alia, is was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feeling of fear, anguish and inferiority capable of humiliating and debasing them. The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. (par. 95). [interactive] [accessed 2009-12-16].
<<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=RUSSIA&sessionid=40241823&skin=hudoc-en>>.

²⁵ *Valašinas v. Lithuania (Application No. 44558/98)*, (24 July 2001). The applicant alleged, in particular, that the conditions of his detention in Pravieniškės Prison from April 1998 to April 2000 amounted to inhuman and degrading treatment in breach of Article 3 of the Convention, and that the control of his correspondence with the Convention organs by the prison authorities amounted to a violation of Articles 8 and 34 of the Convention. On 7 May 1998 the applicant had a personal visit when he was given some additional food. Afterwards he was stopped in the access zone for the usual security check to establish whether he had been given any illegal items. The chief guard, P., conducted the search, while two other officers looked on. P. told the applicant to take off his clothes. When the applicant was only in his underwear, a female prison officer, J., came into the room. P. then told the applicant to strip naked. The officer threatened him with a reprimand in case of non-compliance. The applicant submitted to the order, taking off his underwear, in the presence of Ms J. She was watching the check with the rest of the officers and was smoking. The applicant's body, including his testicles, was examined by the male officers. The officers wore no gloves, touching the applicant's sexual organs and then the food given to him by his relatives, without washing their hands. The applicant was also ordered to do sit-ups to establish whether he had concealed anything in his anus. No unauthorised item was found on him. He alleged that the purpose of the check had been to ridicule him in front of the woman. [interactive] [accessed 2009-12-16].

inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour. The Court stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity. The Court considered that, while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The Court concluded, therefore, that the search of 7 May 1998 amounted to degrading treatment within the meaning of Article 3 of the Convention.

Another possible conflict of issues of public safety and protection from torture or inhuman and degrading treatment may arise while interrogation of suspected persons. Interrogation techniques can also violate Article 3. Therefore the legal system needs to provide fundamental safeguards against ill treatment. Judges and prosecutors play a key role in safeguarding against such ill treatment. Three key safeguards include: 1) the right of detainees to have the fact of their detention notified to a third party of their choice (family, friend or consulate); 2) the right of access to a lawyer; 3) the right to a medical examination by a doctor of his or her choice. Evidence obtained through torture, inhuman or degrading treatment will be inadmissible and cannot be adduced at a trial or relied upon in any way to form the case for the prosecution. Under no circumstances can it ever be justifiable to violate Article 3 in order to obtain evidence. Evidence obtained in breach of Article 3 will be unreliable. In case *Gäfgen v. Germany* (30 June 2008)²⁶ the Court stated that “a mere threat of conduct prohibited by Article 3, provided it is

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=LITHUANIA&sessionid=40241823&skin=hudoc-en>.

²⁶ *Gäfgen v. Germany* (30 June 2008). In this case a boy was kidnaped by several persons. Parents of the boy were instructed that only if the kidnapers received one million Euros and managed to leave the country would the child's parents see their son again. The applicant then drove to a pond at a private property and hid J.'s corpse under a jetty at the pond. One of the kidnapers was secretly observed by the police and, subsequently, arrested. Detective officer E., acting on the orders of the deputy chief of the Frankfurt police, D., told the applicant that he would suffer considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him into a cell with two huge black people who would sexually abuse him. The officer also hit him once on the chest with his hand and shook him so that his head hit the wall on one occasion. For fear of being exposed to the measures he was threatened with, the applicant disclosed the precise whereabouts of the child after a short time. In a note for the police file, the deputy chief of the Frankfurt police, D., stated that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the

sufficiently real and immediate, may be in conflict with that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment.”

Some elements of inhuman or degrading treatment may be found even in the primary procedural actions of the law enforcement officials, for example, such as search of premises. The example could be presented outside the scope of the European Convention on Human Rights, nonetheless it is important and precise. In case *Rafael Rojas Garcia et al. v. Columbia*²⁷ (case held by United Nations Human Rights Committee, legal basis - International Covenant on Civil and Political Rights) the actions of officers of Public Prosecutor’s Office were found violating Article 7 of the Covenant and found to be humiliating and degrading. The issue of this case is in techniques adopted in the process of search in order to secure information and to prevent the crime. This approach is again apparent in European Court on Human Rights decision in case *Ireland v. United Kingdom*²⁸, it refers to techniques used while interrogating detainees.

Therefore it could be stated that whatever the reasons of state officers for using the techniques of search, interrogation, obtaining information, etc., it can never be justified if the action of torture, inhuman or degrading treatment are made. Also it must be stated, that in addition to the judicial authorities themselves not to engage in any prohibited behaviour, such as in the imposition of an illegal punishment, there is an overriding obligation for the judicial authorities to investigate allegations of violations of Article 3. As violations of this article are serious breaches of core and fundamental human rights guarantees, the investigations into allegations must themselves be of a high standard – they must be thorough, effective and capable of leading to the identification of any perpetrators and their punishment²⁹.

applicant to be questioned by police officer E. under the threat of pain which would not cause any injuries. According to the note, the applicant’s questioning was exclusively aimed at saving the child’s life rather than furthering the criminal proceedings concerning the kidnapping. [interactive] [accessed 2009-12-16]. <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=GERMANY&sessionid=40241823&skin=hudoc-en>>.

²⁷ Rafael Rojas Garcia et al. V. Columbia (Human Rights Committee, views adopted 3 April 2001). In this case a group of armed men from the Public Prosecutor’s Office, wearing civilian clothes, forcibly entered the applicant’s house through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the applicant’s family, including small children. In the course of search, one of the officials fired a gunshot. Crawshaw R., Cullen S., Williamson T. Human Rights and Policing. Boston, 2007, p. 181.

²⁸ Ireland v. United Kingdom (18 January 1978). [interactive] [accessed 2009-12-14]. <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%22THE%20UNITED%20KINGDOM%22&sessionid=39856536&skin=hudoc-en>>.

²⁹ Reidy, A. The Prohibition of Torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6. Council of Europe, 2002, p. 39.

CONCLUSIONS

Protection against torture, inhuman or degrading treatment or punishment taken together with the right to life, forms the essential elements of human rights protection. It can never be possible to justify subjecting someone to torture or inhuman or degrading treatment of punishment – even in war or national emergency. Not all types of harsh treatment will fall within the scope of Article 3. To be breached the conduct must attain minimum level of severity. The Court distinguishes torture (the most severe form of ill-treatment), inhuman and degrading treatment/punishment. The distinction is made according to the purpose, the intensity and cruelty of the violence and other factors related to each individual case. If treatment or punishment causes intense physical or mental suffering but is not severe enough to amount to torture, it will be inhuman treatment. Degrading treatment includes treatment designed to break the physical or moral resistance of the victim. The Court case-law practice formed the concept that in order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. The most important issues arising while performing activities securing public safety in respect to protection from torture inhuman or degrading treatment or punishment are interrogation of suspects, imprisonment conditions of detention and degrading or inhuman treatment with prisoners, safety of detained people. The Court during its numerous cases has formed a very precise practice in this regard. It is recognized that there are undeniable difficulties inherent in the fight against crime, particularly with regard to organised crime and terrorism, in respect with the prohibition of torture. The standard which the Court adopts in assessing evidence of violations of Article 3 is “beyond reasonable doubt”. When domestic authorities are charged with investigating alleged incidents of torture, or inhuman treatment, the burden of proof will normally depend on whether the investigation is within the criminal sphere or in a civil context. However, there are aspects of the burden of proof which domestic authorities must also apply within their investigations, if they are to comply with the requirements of Article 3. For example, the Court has made it clear that where an individual is taken into police custody in good health but is found to be injured at the time of release, the burden is on the authorities to provide a plausible explanation as to the causing of the injury³⁰.

³⁰ Tomasi v. France (27 August 1992). [interactive] [accessed 2011-04-03] <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=FRANCE&sessionid=68995113&skin=hudoc-fi>>; Ribitsch v. Austria (4 December 1995) [interactive] [accessed 2011-04-03] <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=AUSTRIA&sessionid=>

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ŽMOGAUS TEISĖS IR KANKINAMO, NEŽMONIŠKO AR ŽEMINANČIO ELGESIO DRAUDIMAS: EUROPOS PERSPEKTYVA

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Santrauka

Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija, pasirašyta 1950 m., tapo itin svarbiu žmogaus teisių apsaugos mechanizmu visose Europos Tarybos šalyse narėse. Šiame straipsnyje dėmesys sutelkiamas kankinamo, nežmoniško ir žiauraus elgesio draudimui. Kankinimo draudimas yra viena iš svarbiausių fundamentaliųjų žmogaus teisių, kuri indikuoja pagrindines visuomenės demokratines vertybes, todėl jos interpretacijos ir įgyvendinimas turi būti vykdomas atsižvelgiant į visus įmanomus šios teisės aspektus. Daug tarptautinių ir regioninių teisinių instrumentų tiesiogiai kalba apie draudimą kankinti ar žeminti asmenį, Europos lygmenyje vienas iš svarbiausių dokumentų, ginančių šią teisę, yra Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija (jos 3 straipsnis). Šiame dokumente numatyta, jog kankinimų draudimas yra absoliutus ir jo turi būti paisoma visose ir bet kurioje situacijoje nepaisant jokių aplinkybių. Valstybės institucijos ir pareigūnai negali pažeisti šios teisės ar kitaip ją paneigti. Valstybei nustatyti pozityvūs bei negatyvūs įpareigojimai šios teisės atžvilgiu: tai yra, įpareigojimas susilaikyti nuo veiksmų, galinčių pažeisti šią teisę; įpareigojimas imtis veiksmų siekiant užkirsti kelią galimiems šios teisės pažeidimams; įpareigojimas užtikrinti, kad asmenys gautų visą galimą valstybės paramą bei politinius ir teisinius instrumentus tiriant jų atžvilgiu padarytus šios teisės pažeidimus. Esama daug veiksmų, kurie gali būti traktuojami kaip teisės nebūti kankinamam pažeidimai. Įvairiose situacijose, vertinant, ar elgesys asmens atžvilgiu buvo žeminantis, nežmoniškas ir kankinamas, yra vertinama aukos amžius, lytis, fizinė ir psichinė sveikata. Teisė nebūti kankinamam Europos žmogaus teisių konvencijoje išreikšta gana abstrakčiai, todėl ypatingą svarbą įgauna Europos žmogaus teisių teismo praktika aiškinant šios teisės turinį ir apimtį bei nurodant galimus teisės apribojimo aspektus.

Didelis tokių bylų skaičius Europos žmogaus teisių teisme liudija, jog šios teisės turinys ir apsaugos ribos nėra iki galo suvoktos valstybių ir jų pareigūnų. Todėl šio straipsnio objektas yra kankinimo draudimo turinio ir ribų analizė, taip pat valstybių įsipareigojimų apimtis šios teisės atžvilgiu visuomenės saugumo kontekste. Straipsnio tikslas yra atskleisti teisės nebūti kankinamam bei nepatirti žeminančio, nežmoniško elgesio turinį, valstybės įpareigojimų įgyvendinant šią teisę apimtį ir ribas bei galimus šios teisės apribojimus. Straipsnyje siekiama aptarti atvejus, kai valstybei leidžiama riboti šios teisės įgyvendinimą, todėl yra analizuojama Europos žmogaus teisių teismo praktika.

Reikšminiai žodžiai: žmogaus teisės, kankinimo uždraudimas, nežmoniškas ar žeminantis orumą elgesys ir bausmė, visuomenės saugumas.

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