

BAN OF TORTURES AS A METHOD OF ACTING AGAINST VIOLENCE DIRECTED TOWARDS SUBJECTS WHICH ARE PARTICULARLY VULNERABLE

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Summary. The “Ban of Tortures as a Method of Acting Against Violence Directed towards Subjects which are Particularly Vulnerable” article covers the issue of freedom from tortures and the issue of inhuman or humiliating treatment. The need to provide the humans with specific legal protection from the attacks on their lives, health, freedom, integrity and dignity made the international community aware that the aforesaid values shall be legally protected. The documents from the field of human rights, referring to the prohibition of tortures, along with the case law of the international courts issued within that scope show that freedom of tortures is considered to be a *jus cogens* norm – a norm which is an absolute, in case of which no departure is permissible. The present article takes a look at the subjects which are sensitive and remain vulnerable to being subjected to violence: persons who were detained and are held in custody, women, foreign nationals and children.

Key words: ban on tortures, prohibition of tortures, inhuman treatment, humiliating treatment

INTRODUCTION

Considering the experiences gathered during the World War II, the international community has focused its attention on protection of humans from any type of cruel or inhuman treatment. The need to provide the human beings with a specific legal protection from the attacks on their lives, health, freedom, integrity and dignity made the international community aware that the aforesaid values shall be legally protected. Introduction of the problem area of tortures and other forms of inhuman treatment onto the forum of the international community and initiation of a search for legal solutions which would properly protect the human beings from such acts were a result of the fact that “inhuman treatment”, “tortures” or “cruelty” form a set of terms which can be perceived in historical categories¹.

Within the human rights documents, the ban of tortures has been articulated for the first time in history in the Article 5 of the Universal Declaration of

¹ J. Skupiński, *Zakaz stosowania tortur lub innego niehumanego traktowania* [Prohibition of Torture or other Inhumane Treatment], [In:] *Prawa człowieka* [Human Rights]. *Model prawny* [Legal model], Eds. R. Wieruszewski, Wrocław – Warszawa – Kraków 1991, pp. 217.

Human Rights. Next, the issue was codified within the universal and regional treaties of general character: Article 7 of the International Covenant on Civil (personal) and Political Rights², Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as ECHR)³, 5 § 1 and 2 of the American Convention on Human Rights⁴. The International Covenant on Civil (personal) and Political Rights has its scope defined in a wider dimension, as compared to the European Convention, in the light of the rules adopted by the Tribunal of Nuremberg, as the said document also includes a prohibition of scientific or medical experiments, conducted without a freely expressed informed consent of the concerned Party.

Freedom from tortures is also being covered by specialized treaties, including, in particular, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984⁵, European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment of 1987⁶, along with the 1985 Inter-American Convention to Prevent and Punish Torture⁷.

A variety of regional instruments referring to the protection of human rights focus on the form of this prohibition, as the core of the issue refers to the state in which ban on such practices becomes a fundamental value for the democratic societies, hence the increased ranking of the norm, up to the *jus cogens* level⁸.

The ban on tortures and inhuman treatment contained in the article 3 of the ECHR takes on a concise and short form. This law was substantially enriched by numerous and differentiated examples contained in the case law maintained by the European Court of Human Rights⁹. What is more, judiciary control yielded by the ECtHR is, within this domain, amplified by a non-judicial mechanism of preventive nature¹⁰.

Prohibition of tortures, introduced within the Article 3, does not contain any exceptions or limitations resulting from the public policy, nor does it include derogation in case of war or dangers threatening the life of the nation (Ar-

² General Comment No. 20 of 1992.

³ Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4th 1950, further amended with Protocols No. 3, 5 and 8 and complemented with Protocol No. 2 (hereinafter referred to as ECHR), Dz.U. [Journal of Laws] No. 61, item 284.

⁴ Inter-American Court of Human Rights confirmed this frequently, within its field of practice.

⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on December 3rd 1984, came into force on June 26th 1987, Dz.U. [Journal of Laws] 1989, No. 63, item 378 with the appendix.

⁶ European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment was created in Strasbourg, on November 26th 1987, Dz.U. [Journal of Laws] 1995, No. 46, item 238.

⁷ Inter-American Convention to Prevent and Punish Torture of 1985.

⁸ L. Burgogue-Larsen, *La Convention européenne des droits de l'homme*, L.G.D.J.-Montchrestien, Paris 2012, p. 39–40.

⁹ European Court of Human Rights (hereinafter referred to as: ECtHR).

¹⁰ F. Sudre, *La Convention européenne des droits de l'homme*, Paris 1990, p. 85.

ticle 15 of the ECHR)¹¹. The prohibition of tortures has an absolute character, in a sense that no interference with the sphere of freedom of tortures and inhuman or degrading treatment is legally permissible¹². Within the whole logic of its assumptions, it has been adopted as a peremptory, *jus cogens* norm, by the European Court of Human Rights¹³, after such path was opened by the International Criminal Tribunal for the former Yugoslavia¹⁴.

NORMATIVE GRADATION OF BREACHES OF THE INDIVIDUAL DIGNITY

In case of freedom of tortures and other forms of behavior which are banned within this standard, protection of integrity and dignity of the human beings is an unquestionable goal¹⁵. Within the convention, a very clear differentiation of the provisions pertaining to tortures and other forms of inhumane treatment has taken place. Thanks to the Commission and to the European Court of Human Rights, throughout the process in which the cases were examined, a field for reciprocal use of terms such as: tortures, inhuman and degrading treatment; has been defined¹⁶.

1. Definition of tortures

Definition of tortures is contained within the UN Convention on Torture and Cruel, Inhuman or Degrading Treatment¹⁷ within the article 1. The definition in question interconnects the three elements, as follows; Torture is an act through which, intentionally, the human is exposed to intense physical or psychological suffering by an officer who performs a public function, or if such suffering is imposed after a persuasion is made by such officer, for a specific purpose (punishment, intimidation, or to obtain a testimony...).

Referring to the Article 3 of the ECHR, to the term of “torture” and “inhuman and degrading treatment”, specific terminology gradating the levels of

¹¹ L. Burgorgue-Larsen, *La Convention européenne des droits de l’homme...*, p. 39.

¹² S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford 2013, p. 216–217; *Tortury* [Tortures], [in:] *Leksykon ochrony praw człowieka. 100 podstawowych pojęć* [Lexicon on Protection of the Human Rights. 100 basic terms], eds. M. Balcerzak, S. Sykuna, Warszawa 2010, p. 481.

¹³ Judgment of the ECtHR, Grand Chamber, *Al-Adsani v. The United Kingdom*, November 21st 2001.

¹⁴ International Criminal Tribunal for the Former Yugoslavia, *Procureur v. Furundzija*, December 10th 1998.

¹⁵ General Comment No. 7 of 1982: B. Gronowska, *Wolność od tortur* [Freedom from Tortures], [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona* [Human rights and protection thereof], Toruń 2010, p. 297.

¹⁶ F. Sudre, *La Convention européenne...*, p. 86.

¹⁷ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on December 3rd 1984.

violence which may be imposed on humans has been applied. Within the Article 3, no definition of torture, inhuman treatment or degrading treatment is contained, the aforesaid terms were not differentiated as well. Torture, due to its significance and the burden it entails, often overshadows the other terms, and seems to reduce the meaning of Article 3 to a form which is applicable solely in extreme cases. Meanwhile, spectrum contained in the Article 3 is much wider. When it comes to the Greek case, the European Commission indicated three constructive elements contained within the term of torture: intensity of suffering, deliberate intention, and defined goal.

ECtHR, in its *Selmouni* decision, expressly notes that the concept of “torture” constitutes a subject to an interpretation which is being constantly updated, as due to the current requirements within the matter of the human rights, acts which had been classified as “inhuman and degrading treatment” today should be classified as “torture”¹⁸.

This official definition of torture does not take into account the degrading or inhuman treatment, which are understood as an act which is more minor, in comparison with a torture. There are other forms, even though they breach the human dignity in a manner which is less spectacular, the basic human rights are more exposed in case of those forms. Thus, torture is a form of intensification of inhuman treatment, however, degrading treatment is placed alongside: this act is performed by the person who “brutally degrades an individual in front of another individual, or forces that individual to act against another individual or against one’s conscience”¹⁹.

2. Definition of Inhuman and Degrading Treatment

The European Court was forced to make an attempt at approximation of a variety of terms contained within the provision of article 3, because all of the aforesaid components constituted a subject of this provision, forming a kind of “autonomy”. Within the above defined context, the human dignity served as an interpretative parameter, required to define the framework of “degrading” treatment, which also made it possible to differentiate the other terms. Hence, the treatment is considered to be degrading when it “humiliates or submits the individual, if it presents a stance of lack of respect for the individual’s dignity, or even when demeans the individual, or evokes, in case of the person concerned, the feeling of fear, anxiety or feeling of inferiority, for the purpose to break the physical and psychological resistance”²⁰.

The humiliating treatment concept has been expanded by the Convention organs *a priori*, outside the Article 3, within a domain which has no connection

¹⁸ F. Sudre, *La Convention européenne...*, p. 87–88.

¹⁹ Judgment, *Tyler v. The United Kingdom*, April 25th 1978.

²⁰ Judgment of the ECtHR, *Hurtado v. Suisse*, Jan. 28th 1994, § 67; *Price v. The United Kingdom*, July 17th 2001.

whatsoever with execution of repressive actions. The aforesaid term has also been considered within the analysis of the discriminatory treatment occurring for racial reasons²¹, for the purpose of analyzing the corporal punishment cases in the British schools²² and in cases related to forced prostitution²³.

The intensity of suffering imposed on the victims, within a specified series of events (severity and duration of treatment, results for the victim, for the purpose of harassment), not emerging *in abstracto*, allows us to differentiate between three concepts, whereas inhuman treatment acts as the central one. ECtHR defined this term in the Judgment concerning Tyrer, issued on April 25th 1978²⁴, indicating that the concept in question shall be viewed as intended provoking of mental or physical suffering, particularly intensified, while “torture” should be reserved solely for the “intended inhuman treatment causing very severe and cruel suffering”²⁵.

The differentiation between torture, inhuman and humiliating treatment acts as a quite usable conceptual figure which has its own field of protection.

SUBJECTS PARTICULARLY VULNERABLE TO LACK OF RESPECT FOR THE HUMAN RIGHTS

The case law practice of the international organs demonstrates a myriad of situations which replicate the multi-layered profile of the human dignity. The European Court adopted an evolutionary interpretation of the Article 3 concept, tailoring the term to the standards applied within the democratic societies. The ECtHR confirms the rights of people who are deprived of freedom and held in custody²⁶. Decent (dignified) conditions include a variety of aspects of life, according to the Court’s classification. People held in custody are considered to be, by definition, placed in a situation in which they are “vulnerable”²⁷. Thus, the place where such persons stay shall be arranged and have appearance corresponding with the definition of “decent conditions”²⁸.

Bad treatment may be a ramification, the concept of which is reaching beyond the cognitive field of a willful misconduct²⁹, as the definition also includes

²¹ Como., Rapp., December 14th 1973, Patel

²² Judgment, Campbel and Cosans v. The United Kingdom, January 29th 1982.

²³ Judgment, Tremblay v. France, September 11th 2007.

²⁴ Judgment, Tyrer v. The United Kingdom, April 25th 1978; Law of The European Convention on Human Rights, eds. D.J. Harris, M. O’Boyle, C. Warbrick, Oxford 2014, p.272.

²⁵ Judgment of the ECtHR, Ireland v. The United Kingdom, January 18h 1978.

²⁶ Judgment of the ECtHR, Cambell and Fell v. The United Kingdom, June 28th 1984, Série A n° 80, § 69.

²⁷ Judgment of the ECtHR, Remlde v. France, October 16th 2008, § 83.

²⁸ Judgment of the ECtHR, Grand Chamber, Kudla v. Poland, October 26th 2000.

²⁹ Violence applied by the prison guard, in order to extract a prisoner securely from a cell. Judgment of the ECtHR, Alborreo v. France, October 20th 2011.

the results of mismanagement of the penal treatment³⁰. Thus, on the basis of the criteria adopted by the Preventive Committee Against Torture, conditions faced by the persons held in custody are being assessed, within the scope of the standards corresponding with respectful treatment of the human dignity³¹. Adoption of such direction by the Court leads to emergence of changes pertaining to the failures/infringement in the process of serving the penalty by those held in custody. This applies particularly to the contexts of overcrowded prison cells and health hazard created as a consequence. The Kalashnikov judgment³² is a clear expression of the stance taken by the European Court, with a reference to the bad conditions of stay, with which the persons held in custody need to cope. Russia is regularly being convicted for its structural deficiencies within that scope³³. Also when it comes to the case of Ukraine³⁴, the ECtHR indicated a “structural” problem, and ordered Ukraine – on the basis of article 46 – to immediately carry out important and relevant reforms of the legal system, in order to rectify the situation³⁵. The Court also expressed its concerns referring to Bulgaria, Poland, Turkey or France³⁶.

1. Persons Held in Custody

Treating the detained persons badly³⁷, interrogation techniques implemented by the British Army in the Northern Ireland³⁸, acts of brutality committed by the Police when arresting the suspects³⁹, or at the detention facilities⁴⁰ have all been interpreted as inhuman treatment. ECtHR, in numerous cases involving Turkey⁴¹, and in case of France⁴², maintained the qualification of a “torture”, referring to the bad treatment of the detained persons who were placed in arrest, by the policemen. In case of Tomasi⁴³, the ECtHR stated that any use of physical force against a person who is detained is unacceptable, and physical integrity (inviolability) shall be a subject to an absolute guarantee.

³⁰ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme*, L.G.D.J.-Montchrestien, Paris 2012, p. 40.

³¹ Judgment of the ECtHR, *Dougoz v. Greece*, March 6th 2001; *Peers v. Greece*, April 19th 2001.

³² Judgment of the ECtHR, *Kalashnikov v. Russia*, July 15th 2002.

³³ Judgment of the ECtHR, Grand Chamber, *Idalov v. Russia*, May 22nd 2012.

³⁴ Judgment of the ECtHR, *Kaverzin v. Ukraine*, May 15th 2012.

³⁵ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme...*, p. 40.

³⁶ Judgment of the ECtHR, *Payet v. France*, January 21st 2011.

³⁷ *Como*. Rapp., December 12th 1981, Reed.

³⁸ Judgment of the ECtHR, *Ireland v. United Kingdom*, January 18h 1978.

³⁹ *Cour. Klaas*, September 22nd 1993, Article 269.

⁴⁰ Judgment of the ECtHR, *Tomasi v. France*, Aug. 27th 1992.

⁴¹ Judgment of the ECtHR, *Aksoy v. Turkey*, December 18th 1996, *Aydin v. Turkey*, September 25th 1997; *Law of The European Convention on Human Rights...*, p. 239.

⁴² Judgment of the ECtHR, *Selmouni v. France*, July 28th 1999.

⁴³ Judgment, *Tomasi v. France*, Aug. 27th 1992.

Certain limitations referring to the persons held in custody are being accepted by the Court, however solely on the grounds related to safety⁴⁴. However, such limitations cannot be introduced in an automated manner. The aforesaid statement refers, *inter alia*, to systematic handcuffing⁴⁵, or body searches⁴⁶. The European Court confirms it, in its judgements, that personal body search is not illegal itself, however the organ calls upon the fact that such procedure must be seen as “required” for maintaining safety and order. Procedures of this kind should be applied “adequately to the degree of suffering or humiliation of the person held in custody, and cannot reach outside the form of legally valid treatment”⁴⁷.

The Convention in question also contains a mechanism which makes it possible for its organ to expand the meaning of Article 3 to the rights which are not expressly indicated by this regulation. The said mechanism may be applied particularly in case of two categories of persons: foreign nationals and the detained. In reality, the matter pertaining to protection of the foreign nationals, and the conditions of the detainment, is not regulated by the Convention, however, the Party nations have discretionary power within that scope. However, the Parties must, within the process of exercising that power, respect other rights guaranteed by the Convention to the Parties concerned. For example, a decision related to extradition of a foreigner cannot breach the elements of law protected by the Convention (extradition or expulsion), and within that subject, this decision is a subject to control imposed by the organs of the Convention⁴⁸.

The Rome Convention, contrary to the International Covenant on Civil and Political Rights and to the American Convention on Human Rights, does not contain specific regulations, referring to the way in which the detained persons are treated. Moreover, the “European Prison Rules” adopted by the Committee of Ministers back in 1987 have no binding character for the nations, even though these regulations are extremely detailed, as they constitute a “code” of prison arrest. The Commission has been checking whether detainment does not deprive the detained of the rights guaranteed by Article 3 of the Convention since 1962. ECtHR, in the Kudła Judgment⁴⁹, confirmed the right of every prisoner to have the imprisonment conditions, related to his being detained, provided in line with the human dignity. The European Court examines whether the conditions related to serving the sentence are objectively acceptable (for example – non-ventilated, unpainted and hot cells, no separate toilets...), whether they are a cause for breach of the human dignity, and whether they evoke a feeling of

⁴⁴ Judgment of the ECtHR, *Stasi v. France*, October 20th 2011.

⁴⁵ Judgment of the ECtHR, *Kashavelov v. Bulgaria*, Jan. 20th 2011; *Kaverzin v. Ukraine*, May 15th 2012.

⁴⁶ ECtHR, *Frérot v. France*, June 12th 2007; *Khider v. France*, July 9th 2009; *El Shennawy v. France*, January 20th 2011.

⁴⁷ Judgment of the ECtHR, *El Shennawy v. France*, § 38.

⁴⁸ F. Sudre, *La Convention européenne...*, p. 89.

⁴⁹ Judgment of the ECtHR, *Kudła v. Poland*, October 26th 2000.

despair, humiliating inferiority, or even lead to breaking of the detainee's physical and mental resistance, therefore constituting an equivalent of degrading treatment⁵⁰. Similarly, the Article 3 of the Convention may also be breached in a situation⁵¹ in which the detained person is deprived of medical care, proper for his health⁵², or if the detained person is placed within the detention room which does not comply with the requirements taking into account the old age or health status of the detained subject⁵³.

2. Specific Cases of Women and Foreigners

Besides the cases of the persons held in custody, one may also point to other persons that are particularly vulnerable – women and foreign nationals – suffering from violence of a variety of types, the forms of which is not combated sufficiently enough by the contemporary societies⁵⁴.

2.1. Specific Situation of Women

The European Convention does not contain any specific regulations referring to the women's rights. The solutions adopted within this domain by the ECtHR are not always coherent, and they are clearly conditioned by the typical nature of the criminal acts committed against women. When a third party treats the feminine body badly, the European Court does not look for any compromise. However, when it comes to the women who, in some way, restrain their bodies, the European Court becomes more wary, and makes a reference to the individual customs characteristic of each society: abortion is well known to be an issue which is troublesome (Article 2 in relation to Article 8).

The European Court, when examining the cases, does not take the feminine "specificity" into account. Rape is a hypothesis which is the most symbolic, within this complex problem domain. From the moment when the M.C. Judgment was issued⁵⁵, the Strasbourg Court assumes that a situation, in which a 14 years old minor does not exhibit resistance, in any way, in case of a rape, may be clarified with the variety of elements related to the psychological order. Therefore, the Court imposes an obligation onto the state to start criminal accusation procedure and carry out an effective investigation in case of any sexual harassment for which no express consent was given. The Yihmaz Judgment⁵⁶

⁵⁰ Judgment of the ECtHR, *Peers v. Greece*, April 19th 2001; M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2013, p. 410.

⁵¹ F. Sudre, *La Convention européenne...*, p. 91.

⁵² Judgment of the ECtHR, *Keenan v. United Kingdom*, April 3rd 2001; M. Nielaczna, *Europejski Komitet Zapobiegania Torturom. Między kontrolą a stanowczością*, Warszawa 2010, 236–237.

⁵³ Judgment of the ECtHR, *Mouisel v. France*, November 14th 2002.

⁵⁴ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme...*, p. 42.

⁵⁵ Judgment of the ECtHR, *M.C. v. Bulgaria*, December 4th 2003.

⁵⁶ Judgment of the ECtHR, *Yasgül Yihmaz v. Turkey*, February 1st 2011.

shows the way in which the Strasbourg case law treats the specific profile of the situation of the very young women, facing a forced gynecological examination.

Also, other physical breaches, unrelated to age, practices such as female genital mutilation, are combated by the international organizations which demand that practices as such are refrained from completely. Crimes of this type are a part of the sad “sexual violence” category, and they are similar to the act of torture, as it was stated by the World Health Organization, UNICEF, and by the United Nations High Commissioner for Refugees (UNHCR)⁵⁷. General Meeting of the Council of Europe also contributed to the aforesaid process, accepting the primacy of the universal rules of respect for a person over the customs and traditions, hence sexual mutilation is considered to be an inhumane and humiliating/degrading treatment, as understood by the Article 3 of the European Convention⁵⁸. Within this context, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), opened for signature on May 11th 2011, has a significant meaning⁵⁹, within that conventions, the signatories are called upon to implement measures which would penalize such practices (Article 38)⁶⁰. Thus it should be said that at the moment, the approach towards breaching the women’s physical integrity is uncompromising⁶¹.

Numerous women also have to face the trauma of domestic violence, regardless of the social and geopolitical area in which the given country is placed. The European Court, in the Opuz Judgment⁶², has convicted Turkey for its not adopting “proper measures to prevent domestic violence”, stating that violence to which the applicant and her mother were exposed (abused, for many years, by the husband of the former) must be considered to be gender motivated, and, in this case, constitutes a form of “discrimination against women”⁶³.

Not only do the criminal acts committed against women have an exclusively physical profile, as such crimes are also of psychological nature. The European Court, in the R.R. Judgment⁶⁴, took into account the severe stress, endured by a woman who remained waiting in vain, without any time frame information provided to her, for the genetic prenatal tests, the aim of which would be to verify whether the child would be born deformed. The applicant, after she was informed about such risk, received a refusal after she insisted on repeating the test, within the period in which she could legally have an abortion performed.

⁵⁷ Judgment of the ECtHR, Decision, Izevbekhal et al v. Ireland, May 17th 2011.

⁵⁸ Resolution 1247 (2001), issued on May 22nd 2001, referring to sexual mutilation of women, sections 6 and 7.

⁵⁹ Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), opened for signature on May 11th 2011, STE n° 120.

⁶⁰ L. Burgorgue-Larsen, *La Convention européenne des droits de l’homme...*, p. 43–44.

⁶¹ According to the definition used in the Istanbul Convention.

⁶² Judgment of the ECtHR, Opuz v. Turkey, June 9th 2009.

⁶³ § 200 of the Judgment.

⁶⁴ Judgment of the ECtHR, R.R. v. Poland, May 26th 2011.

She gave birth to a child suffering from severe physical deformation resulting from genetic deficiencies⁶⁵. The European Court, in a brave and risky manner, stated that the state of uncertainty, pressure, anxiety and exceptional sensitivity, which was the case for the applicant during the period, within which she was waiting for the consent to carry out the prenatal examination, were a cause for severe suffering, which constituted a breach of Article 3⁶⁶.

The European Court fights against the archaic vision of society, in which women are dominated and oppressed by legal practices and systems which see the women in the position submitted to power yielded by men.

2.2. Specific Case of Foreign Nationals

The European Convention on Human Rights does not guarantee the right to enter the territory or settle within the territory of the signatory states to the Convention. Contrary to a situation which is the case in the case of other, similar general conventions (Convention européenne des droits de l'homme in particular), the ECHR does not protect the asylum rights, it only refers to a prohibition of mass expulsion of foreigners (Art. 4, Prot. 4) and provides the foreign nationals with regulated situations, with minimum procedural protection, should they be deported (a right to defend oneself), with exclusion of cases when this is required due to protection of public policy or national security⁶⁷. ECtHR filled in this loophole, stating that the deportation method may constitute inhuman or degrading treatment, when significant premises make it possible to think that a serious risk exists that court of another country, to which the foreign national is to be deported, would allow for bad treatment, breaching the Article 3, and that the aforesaid treatment would be directly related to the actions taken by the public authority. In particular, this is applicable to the countries where serious violations of the human rights occur⁶⁸, where death penalty is still a form of punishment⁶⁹, or in case of the countries where the authorities of the country of destination do not provide relevant protection to the individual⁷⁰, or when other, purely objective factors have a decisive impact⁷¹. The right to asylum uses, in

⁶⁵ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme...*, p. 44.

⁶⁶ „It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case”. In these conditions “The Court is of the view that the applicant’s suffering reached the minimum threshold of severity under Article 3 of the Convention”, § 161, *R.R. v. Poland*.

⁶⁷ Protocol 7 to the ECHR

⁶⁸ Judgment of *Chahal v. United Kingdom*, November 15th 1996.

⁶⁹ Judgment of the ECtHR, *Soering v. The United Kingdom*, July 7th 1989; L. Garlicki, *Commentary, art. 3*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, ed. L. Garlicki, Warszawa 2010, p. 98.

⁷⁰ Judgment of the ECtHR, *HRL v. France*, April 29th 1997.

⁷¹ Judgment of the ECtHR, *D. v. The United Kingdom*, May 2nd 1997; refusal to treat a person suffering from AIDS.

this way, the complementary result which is an effect of the Court's reflection over the provisions of the European Convention⁷².

The European Court, starting from the so called "Death Row" case⁷³, assumed that deporting the foreign nationals to the third countries which still practice the death penalty as a valid form of punishment, may indirectly cause a breach of Article 3 of the Convention (in relation to Article 1). Within the case, it was noted that the convict is waiting for the release for a time which is extremely long, which is also usually referred to as the "Death Row". Thus, the European values contained in the idea of abolishing such practices were projected thanks to that decision of the ECtHR.

3. Children as a Subject to Human Rights

Dignity, as a matrix of the human rights, is serving the purpose of fundamental development of the content of the law, contained within the Article 3, and allows the Court to impose positive obligations onto the states⁷⁴. Children may be treated badly, should their parents be held in custody. Indirectly, the children also experience certain limitations, resulting from expulsion, deportation or extradition of their parents. The European Court, within the aforesaid scope, adopted a view, according to which in cases as such, a breach of Article 3 may occur. In the Popov case⁷⁵ France was punished for administrative detention of a family with a three months and three years old children, for 15 days, at the Rouen-Oissel detention center, before the said family was deported back to Kazakhstan.

Moreover, the provisions of the Article 3 also protect the children from the acts of violence committed by their relatives, while the social services are obliged to take certain steps which would prevent such acts from happening⁷⁶. In a situation in which such acts of violence occur, the state is obliged to initiate procedures, the aim of which would be to carry out a relevant investigation⁷⁷.

The drama endured by the children of the migrants seems to be a contested issue⁷⁸, in a situation when the state authorities do not take proper care of the minor from Afghanistan asking for asylum and left "unattended" on the street of Pagoni, Greece. The European Court stated that humiliating treatment could have been witnessed, due to the lack of extreme sensitivity towards the boy who did not receive state protection in the end⁷⁹.

⁷² F. Sudre, *La Convention européenne...*, p. 90.

⁷³ Judgment of the ECtHR, *Soering v. The United Kingdom*, July 7th 1989.

⁷⁴ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme...*, p. 40–41.

⁷⁵ Judgment of the ECtHR, *Popov v. France*, January 19th 2012.

⁷⁶ Judgment of the ECtHR *Z et al v. The United Kingdom*, May 10th 2001.

⁷⁷ Judgment of the ECtHR, *Assenov v. Bulgaria*, October 28th 1998.

⁷⁸ L. Burgorgue-Larsen, *La Convention européenne des droits de l'homme...*, p. 45.

⁷⁹ Judgment of the ECtHR, *Rahini v. Greece*, April 5th 2011; M.A. Nowicki, *Wokół Konwencji Europejskiej...*, p. 385.

Article 3 imposes a double-profile obligation on the Party State. The substantial obligation, above all claiming that neither physical, nor mental integrity shall be breached, but also an obligation of positive protection of any person from bad treatment, which would not be compliant with the provision of Article 3⁸⁰.

SYSTEM OF MONITORING THE COMPLIANCE WITH THE PROHIBITION OF TORTURES, INHUMAN AND DEGRADING TREATMENT

The United Nations Convention against Torture adopted on December 10th 1984, contains material regulations related to the state obligations in the four following areas: prevention, accusation and penalty of extradition or investigation, judicial protection for the victims, as well as indemnities⁸¹. Moreover, the convention also implements control which is situated alongside the act of torture. The Convention also establishes a Committee Against Torture, a body which is equipped with a wider scope of power, as compared to other monitoring organs currently existing within the UN structures: Not only is the said Committee entitled to verify the reports of the State Parties, state complaints (Article 21) and individual complaints (Article 22), as the body may also, on its own, start relevant investigations (Article 20). The said procedure of a secret investigation was also applied against Turkey. The Committee, on the basis of the conducted research and analyses, stated that a systematic torture practice took place, and indicated the usual elements, defined generality and intentional character, in at least some of the cases; the specific nature of the state's territory also was of significant importance.

The procedure in which the Committee verifies the state and individual complaints is closely related to the optional declaration referring to acceptance of this procedure. The states, signing up to the Convention, are given a chance to refuse to issue a statement of accepting the Committee's investigative competences (Article 28). This means that the international control remains fully under the jurisdiction of the state, with a decision required to be made to accept the Committee's competence, and for that reason, the practical meaning of such control remains very uncertain⁸².

The Optional Protocol complementing the UN Convention against Torture, adopted on December 18th 2002 became valid on June 23rd 2006. It complements the mechanism of control at the international and national levels through a prevention system which takes on a form of regular visits paid to the places of

⁸⁰ Judgment of the ECtHR *A v. The United Kingdom*, September 23rd 1998.

⁸¹ Komitety Traktatowe ONZ [UN Human Rights Treaty Bodies], [in:] *Leksykon ochrony praw człowieka* [Lexicon on Protection of Human Rights]..., p. 207 ; F. Sudre, *Droit européen et international des droits de l'homme*, Paris 2015, p. 495–496.

⁸² F. Sudre, *Droit européen et international...*, p. 496.

detention. Each control carried out by the Committee contains an element of originality, due to the fact that it is simultaneously international (performed by a sub-committee for prevention of tortures) and national (performed by the customary national organs which deal with such control)⁸³.

European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment introduced a preventive control mechanism which differs radically from the control procedures introduced by the 1984 UN Convention on Prohibition of Torture, where the act of torture is ranked “lower”. The convention creates a system of visits at the places of detention in the State Parties. This task has been placed with a special Committee⁸⁴ which, following a deposition involving the detainee, may issue relevant recommendations for the state. The Convention does not contain any restrictions or derogation clauses, and it is applicable both during the peacetime, as well as during the crisis circumstances. The visits may take place in any situation, without any need arising to prepare them beforehand⁸⁵.

Within the framework of the Council of Europe, judicial control of the ECtHR has been complemented with an out-of-court mechanism taking on a form of preventive inspections, introduced by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26th 1987. The Optional Protocol No. 1 to the Convention, issued on November 4th 1993, became valid on March 1st 2002, and on the basis of that document, the Committee of Ministers of the Council of Europe was authorized to call all of the member states of the Council of Europe to sign up to the Convention (Article 3). On the basis of the Convention, the European Committee for the Prevention of Torture has been established, and visits have been placed within the organ’s area of responsibility⁸⁶. The visits take place following a notification sent to the concerned nations, at any location where the detainees are held in custody, in the State Parties, without a requirement of filing in a complaint. The Committee may decide to depose any person held in custody and provide a recommendation to the given state, the purpose of which would be to reinforce the protection provided to the persons who are held in custody, from torture, and inhumane and degrading treatment⁸⁷. The prevention mechanism is of great importance for the State Parties, as the Convention does not foresee objections, nor does it provide a derogation clause, and it is applicable both during the peacetime, as well as during the war or any other public crisis. The visits may take place in any circumstances. The State Party has a right to, only in special cases,

⁸³ *Ibidem*, p. 497.

⁸⁴ S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights...*, s. 216.

⁸⁵ F. Sudre, *La Convention européenne...*, p. 92.

⁸⁶ M. Niełacznna, *Europejski Komitet Zapobiegania Torturom...*, p. 175.

⁸⁷ J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Warszawa 2011, p. 68–69.

ask the Committee to provide a visit report⁸⁸. Moreover, the Committee may also carry out periodic visits *ad hoc*, as circumstances may require, and follow-up visits may take place as well⁸⁹. The Committee is not tasked with convicting the nation breaching the ECHR Article 3. Here we are referring to adoption of recommendations which are not of obligatory profile, addressed to the State Party, in order to improve protection of the persons held in custody from tortures and inhuman and degrading treatment. The European case-law pertaining to application of Article 3 serves as a guideline within that scope. Confidentiality, on the other hand, is the base rule, thus the report of the Committee may only be published following the state's consent⁹⁰.

If the State does not cooperate with the Committee, or refuses to implement the measures, the purpose of which would be to rectify the situation in the light of the Committee's recommendation, then the said Committee may decide to issue a "public declaration" (Article 10, § 2) and to make the report public. For the first time this option was used against Turkey on December 15th 1992, following two *ad hoc* visits. The Committee was concerned about the torture-related practices, widely applied by the Police. The Committee also released, twice – in 2001 and 2003 – a public declaration addressed to the Russian Federation, pertaining to the Republic of Chechnya.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, on the occasion of publishing the annual operations report, presented the general set of "guidance principles", referring to treatment of people held in custody⁹¹. The aforesaid rules concern: conditions of stay for the persons detained and held in custody in the facilities of the Police and prisons; rights of the persons held in custody; provision of healthcare; conditions related to detaining the foreigners and extradition procedures; placing people, against their will in psychiatric hospitals; minors held in custody.

CONCLUSION

Presence and usage of tortures always was and is an incredibly acute and repugnant method of infringing the human rights. Hence, a need to provide the humans with specific legal protection from inhuman treatment or torture motivates the international community to seek legal solutions which would provide the humans with a relevant and proper protection from such acts.

The ban on tortures and inhuman treatment contained in the article 3 of the ECHR takes on a concise and short form, however, it was substantially enriched

⁸⁸ Article 9.

⁸⁹ Article 33 of the internal regulations.

⁹⁰ F. Sudre, *Droit européen et international des droits de l'homme*, Paris 2015, p. 494.

⁹¹ M. Nielaczna, *Europejski Komitet Zapobiegania Torturom...*, p. 198.

by varied and expansive case law of the European Court of Human Rights. Moreover, judicial control of the ECtHR implemented within that domain is amplified by the non-judicial, out-of-court mechanism with a preventative profile.

A variety of regional instruments referring to the protection of human rights focus on the form of this prohibition, as the core of the issue refers to the state in which ban on such practices becomes a fundamental value for the democratic societies, hence the increased ranking of the norm, up to the *jus cogens* level.⁹² The prohibition of tortures has an absolute character, in a sense that no interference with the sphere of freedom of tortures and inhuman or degrading treatment is legally permissible.

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ZAKAZ TORTUR JAKO SPOSÓB ZWALCZANIA PRZEMOCY WOBEC PODMIOTÓW SZCZEGÓLNIE NARAŻONYCH

Streszczenie. Artykuł dotyczy wolności od tortur i nieludzkiego lub poniżającego traktowania. Potrzeba zapewnienia człowiekowi szczególnej ochrony prawnej przed zamachami na jego życie, zdrowie, wolność, nietykalność i godność uświadomiła społeczność międzynarodowej, że są to dobra, które należy chronić prawnie. Dokumenty z zakresu praw człowieka dotyczące zakazu tortur i orzecznictwo międzynarodowych sądów w tym zakresie wskazują, iż wolność od tortur jest uznawana za normę *ius cogens* – normę bezwzględną od której żadne odstępstwo nie jest dopuszczalne. W artykule zwrócono uwagę na podmioty szczególnie narażone na przemoc: osoby zatrzymane, kobiety i cudzoziemcy oraz dzieci.

Słowa kluczowe: zakaz tortur, nieludzkie traktowanie, poniżające traktowanie