ALGUNAS CONSIDERACIONES SOBRE LA DELIMITACIÓN DEL ALCANCE DE LA PROHIBICIÓN DE TORTURA EN LA JURISPRUDENCIA DE LA CEDH*

THE PROHIBITION ON TORTURE IN CASES HEARD BY THE EUROPEAN COURT OF HUMAN RIGHTS – HOW FAR DOES IT REACH?

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RESUMEN: El presente trabajo tiene por objeto analizar el alcance que otorga la jurisprudencia de la Corte Europea de Derechos Humanos a la prohibición absoluta de tortura, y a los tratos inhumanos y degradantes, que subyacen a los artículos 3 y 15 de la Convención Europea de Derechos Humanos y Libertades Fundamentales. Es de observar que, si bien por lo general, la jurisprudencia de la CEDH ha sostenido el principio de prohibición absoluta de la tortura, este trabajo pretende poner de manifiesto una serie de casos en donde la CEDH ha adoptado una perspectiva más restringida de dicha prohibición. Asimismo, se tiene por fin considerar las dificultades derivadas de la definición de los términos *"tortura", "trato inhumano"* y *"trato degradante",* explorando casos en los que la CEDH ha valorado ciertos factores o circunstancias como atenuantes en la configuración de dichos términos, generando la vulneración del principio de prohibición absoluta de la tortura previsto en la Convención. Finalmente, el trabajo destaca las implicancias jurídicas derivadas de la sentencia *Gafgen v Germany* en la que la CEDH distingue los términos contenidos en el artículo 3 de la Convención e impone ciertos límites a la prohibición de trato inhumano y degradante, que conforme se demuestra a lo largo del presente ensayo, no encuentran sustento en el texto de la Convención.

PALABRAS CLAVES: Prohibición de tortura - tratos inhumanos o degradantes - jurisprudencia de la Corte Europea de Derechos Humanos.

ABSTRACT: This work analyzes the European Court of Human Rights' interpretation of the absolute prohibition on torture, inhuman and degrading treatment, as contained in articles 3 and 15 of the European Convention of Human Rights. Whilst the Court has generally upheld the absolute nature of the prohibition, this paper discusses a number of cases in which the Court has adopted an overly restrictive view of the prohibition. It discusses the Court's difficulty in defining the terms *torture, inhuman* and *degrading*; it explores cases in which the Court has considered mitigating factors such as *motive* and *the public interest,* and has thus not upheld the absolute nature of the prohibition. Finally, it highlights the Court's problematic decision in *Gafgen v Germany*, in which it distinguishes between the terms contained in article 3 and imposes limits on the prohibition of inhuman and degrading treatment, which, the paper argues, are unsupported by the Convention text.

KEY WORDS: Prohibition of torture - inhuman and degrading treatment - European Court of Human Rigths jurisprudence.

Introducción

Del análisis del artículo 3 de la 'Convención Europea de Derechos Humanos y Libertades Fundamentales' (CEDHLF) (1950), se desprende con claridad que ningún

sujeto *"podrá ser sometido a tortura ni a penas o tratos inhumanos o degradantes"*. La naturaleza absoluta de esta prohibición subyace en el artículo 15.2 de la presente Convención que bajo ninguna circunstancia admite su derogación por los Estados Partes. Asimismo, la adopción universal de este principio en otras convenciones internacionales, así como en la jurisprudencia internacional y en la práctica interna de los Estados, demuestra la convicción universal de considerar a la tortura como una horrenda amenaza al orden moral de nuestra civilización. Sin embargo, el consenso respecto de la prohibición de la tortura, se torna controversial al intentar precisar el alcance del término 'tortura' en la jurisprudencia internacional. Fundamentalmente en supuestos en que la prohibición absoluta de 'tortura' entra en conflicto con otros derechos y obligaciones esenciales de los Estados, como la soberanía de los Estados y su derecho fundamental a proteger su seguridad nacional o su obligación de mantener la paz y la seguridad internacional, así como su obligación de castigar y prevenir los actos derivados del terrorismo internacional. Por ello, este trabajo tendrá por objeto abordar estas cuestiones mediante el estudio y análisis de la aplicación del artículo 3 de la Convención en la jurisprudencia de la CEDH. En primer lugar, se explicará la naturaleza y alcance de la prohibición de tortura en el derecho internacional convencional y consuetudinario. En segundo lugar, se analizarán sentencias de la CEDH en las que dicho Tribunal ha contemplado posibles excepciones a la prohibición de la tortura. Finalmente, se efectuarán algunas propuestas para un nuevo enfoque y hermenéutica del artículo 3 de la Convención según, el alcance que surge de la jurisprudencia analizada.

La prohibición de la tortura y tratos inhumanos o degradantes en el Derecho Consuetudinaria y Convencional y en la Jurisprudencia de la Corte

La naturaleza absoluta de la prohibición de tortura existe en varios niveles. A nivel nacional, la inclusión de la prohibición en constituciones nacionales ha dificultado que las legislaturas nacionales puedan anular o enmendar la norma legal que contiene la prohibición de tortura. Es de observar que, si bien hasta el siglo XVIII algunos sistemas legales de los Estados de Europa Continental todavía admitían la tortura. Sin embargo, lo expuesto no invalidaba la existencia de una norma consuetudinaria regional de prohibición de la tortura. Por tanto, puede afirmarse que el artículo 3 de la Convención Europea que contempla la prohibición de la tortura, "reconoce" de forma positiva una regla que ya existía como una norma consuetudinaria.

Al nivel internacional, la norma que prevé la prohibición de tortura ha sido contemplada en diversas convenciones internacionales y consta de una cláusula específica de no-derogación. A modo de ejemplo podemos mencionar, el artículo 3 de la Convención Europea (art. 3), el artículo 7 del Pacto internacional de Derechos Civiles y Políticos y el artículo 5.2 de la Convención Interamericana sobre Derechos Humanos. Correlativamente a cada disposición normativa que prohíbe la tortura le corresponde un artículo del que se desprende que dicha prohibición no admite derogación alguna (art. 15.2, 4.2, y 27.2 respectivamente). Es menester señalar, que dicha prohibición conlleva la obligación internacional de los Estados de abstenerse de someter individuos a tortura así como la obligación de adoptar todas las medidas tendientes a asegurar el derecho de todo individuo a no ser sometido a tortura, incluso en casos de emergencia.

Más aún, es dable destacar que la prohibición de tortura ha sido reconocida por la jurisprudencia internacional como una norma *jus cogens* que no puede ser

modificado por un tratado ni por derecho consuetudinario.[1] En tanto, las normas *jus cogens* están por encima de cualquier otra norma internacional y constituyen una restricción importante a la capacidad de los Estados de crear y modificar normas internacionales. Por ello, la norma legal que prohíbe la tortura es considerada "absoluta" en un sentido amplio, no solo está prohibida la derogación por razones de emergencia sino que también está prohibido modificar la norma misma a menos que reúna ciertas condiciones.

En lo que se refiere a la jurisprudencia de la CEDH, es posible afirmar que, en términos generales, la Corte ha mantenido tenazmente la prohibición absoluta de tortura en casos donde el artículo 3 se enfrentaba al derecho estatal a proteger su seguridad nacional, amenazada por el terrorismo[2]. Asimismo, la Corte ha rechazado argumentaciones que defiendan la utilidad de los castigos corporales para disuadir actos criminales en el futuro[3]. En *Herczegfalvy v. Austria,* la Corte mantuvo que era necesario emplear el mismo criterio para definir los términos *tortura* y *trato inhumano y degradante,* incluso en casos de personas bajo tratamiento médico. De lo expuesto se deduce que la Corte excluye toda consideración de *motivo* o *utilidad* para la determinación de un trato como *tortura* o *trato inhumano o degradante*.

Es de observar que, la interpretación amplia del artículo 3 por la Corte subyace claramente en una serie de casos vinculados a la extradición de individuos que están en riesgo de ser sometidos a tortura o trato inhumano en sus países de origen. En *Soering v Reino Unido*[4] la Corte declaró que el Estado que envía al individuo tiene responsabilidad bajo el art. 3 de la Convención, si la extradición conllevara la violación del artículo, o existiere riesgo de violación por autoridades ajenas al control del Estado mandante. Sin embargo, en *Saadi v Italia* un grupo de Estados intervinientes pusieron en duda esta posición al mantener que, como consecuencia del aumento del riesgo de terrorismo, los intereses de seguridad nacional (art. 2) debían ser equilibrados con el riesgo enfrentado por el individuo (art. 3). En una decisión unánime, la Gran Cámara de la Corte declaró que las amenazas creadas por el terrorismo ''*must not […] call into question the absolute nature of Article 3.*''[5] La Corte desarrolla el argumento que estar libre de tortura constituye *"one of the most fundamental values of democratic society."*[6] La Corte categoriza la prohibición como esencial a la existencia de un Estado democrático; cualquier derogación, sin importar su 'necesidad,' amenazará la sobrevivencia misma del Estado.

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[1] La Convención de Viena sobre el derecho de los tratados (1969) art. 53: Es nulo todo tratado que, en el momento de su celebración. esté en oposición con una norma imperativa de derecho internacional general. Para los efectos de la presente Convención, una norma imperativa de derecho internacional general es una norma aceptada y reconocida por la comunidad internacional de Estados en su conjunto como norma que no admite acuerdo en contrario y que sólo puede ser modificada por una norma ulterior de derecho internacional general que tenga el mismo carácter.

[2] *Chahal v. Reino Unido,* (1996) 23 E.H.R.R. 413.

[3] *Tyrer v. Reino Unido,* [1978], 5856/72, ECHR portal, at 31.

[4] *Soering v. Reino Unido,* (1989) 11 E.H.R.R. 439, at 91/111.

[5] *Saadi v. Italia,* [2008], 37201/06, at 137.

[6] *Ibid,* at 79; *Soering v. Reino Unido,* at 88.

Las excepciones y limitaciones al carácter absoluto de la prohibición de tortura en la jurisprudencia de la CEDH

Es de observar, que en determinados casos, la CEDH ha adoptado una interpretación restringida de la definición de los términos *tortura, trato inhumano y degradante* y *absoluto*. La decisión de la Corte en *Irlanda v Reino Unido*, por ejemplo, ha sido criticado por adoptar una interpretación demasiado estricta del término 'tortura'. En este supuesto, la Corte utilizó criterios objetivos para determinar si el trato impartido alcanzaba el umbral de dolor mínimo para ser calificado de 'tortura'. La Corte concluyó que el uso de cinco técnicas de 'interrogación profunda', aplicadas durante horas con el objetivo de extraer información, *'did not occasion suffering of the particular intensity and cruelty implied by the word torture'* [7] lo que pone de manifiesto, la dificultad a la hora de definir 'tortura' y la prudencia de la Corte en la interpretación del artículo 3.

A pesar de este alto estándar de 'tortura', la interpretación efectuada por la Corte respecto al trato considerado *inhumano o degradante* continuó hacia una hermenéutica cada vez más amplia del término[8]. Una de las razones de esta tendencia puede observarse en la "doctrina del instrumento vivo"; un método de interpretación de la Convención que fue adoptado por primera vez en *Tyrer v. Reino Unido*, donde la Corte declaró notablemente *"The Convention is a living instrument which […], as the Commission rightly stressed, must be interpreted in the light of present-day conditions."*[9] La doctrina ha sido criticada por llevar a un activismo judicial en exceso. Las graves implicancias jurídicas derivadas de una interpretación de este tipo, pueden observarse en los casos *Jalloh v. Alemania* y la decisión de la quinta sección en *Gafgen v. Alemania*. En el primer caso, la Corte consideró la seriedad del delito y el grado de importancia del interés público en juego como factores atenuantes, para determinar la existencia o no de una violación al artículo 3. Es dable destacar, que dicha interpretación está en clara oposición con el carácter absoluto de la norma que prohíbe la tortura.

En el asunto *Gafgen*, que evaluaba la conducta de oficiales de policía que tenían detenido a un hombre (el solicitante), acusado de secuestrar y matar y un niño, la Quinta Sección de la Corte, al momento de determinar la violación o no del artículo 3 de la Convención consideró como factores atenuantes el hecho de que los policías estaban bajo excesiva presión pensando que sólo tenían unas horas para salvar la vida del niño[10]. Al respecto considero que, si bien una definición flexible de los términos *tortura* y *trato inhumano* puede ser necesaria para proporcionar una mayor protección a los individuos, al mismo tiempo se corre ineludiblemente el riesgo dar cabida a la conformación jurisprudencial de un conjunto de 'factores atenuantes' que debilitan el carácter absoluto de la prohibición de su utilización. Este riesgo es aún más ostensible en los casos de una profunda tensión entre derechos humanos en juego, donde los jueces se ven tentados a restringir la definición de los términos, para alcanzar un resultado que consideran "más justo."

Pese a ello, en el asunto *Gafgen*, la Gran Cámara sostuvo que la intención de

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[7] *Ibid.,* at 167-168.
[8] MURDOCH Jim, The impact of the Council of Europe's "Torture Committee" and the evolution of standard-setting in relation to places of detention", *European Human Rights Law Review, E.H.R.L.R*, 2006, 2, p.267.
[9] MOWBRAY Alastair, 'The creativity of the European Court of Human Rights', *Human Rights Law Review, H.R.L Rev*., 2005, 5(1), p.61.
[10] *Gafgen v Alemania,* [2008], 22978/05, ECHR online Portal, at 69.

los policiales a salvar la vida del niño era irrelevante para considerar si había habido violación del artículo 3 y por tanto, la Corte se expidió reiterando el carácter absoluto de la prohibición de tortura prevista en el artículo 3. Más aún, en la determinación del trato impartido al solicitante, la Corte consideró los efectos físicos y mentales generados sobre su persona. Al respecto, es de observar que, la consideración de este criterio subjetivo demuestra la importante progresión de la Corte, en comparación con la definición restringida de 'tortura' que había sido adoptada en el caso *Irlanda v. Reino Unido*.

No obstante, la decisión de la Gran Cámara con respecto a la admisibilidad de pruebas en el contexto del artículo 6 '*Toda persona tiene derecho a que su causa sea oída equitativa, públicamente y dentro de un plazo razonable'*[11] debilitó la naturaleza absoluta de la prohibición de *tratos inhumanos y degradantes*. El solicitante en *Gafgen* mantuvo que la inclusión de la prueba real, obtenida como resultado del *tratamiento inhumano*, hizo que su proceso fuera injusto, y por tanto, contrario al artículo 6. La Corte ha declarado previamente en el caso de *Jalloh* que las pruebas reales obtenidas como resultado de *tortura* serían excluidas automáticamente[12]. Sin embargo, en el asunto *Gafgen* la Gran Cámara dispuso que la inclusión de las pruebas reales obtenidas como resultado de *tratos inhumanos,* no había sido determinante en la convicción de que el solicitante era autor del crimen y por tanto, no había comprometido los derechos del solicitante contenidos en el artículo 6[13]. La Corte mantuvo que, como el artículo 6 no es absoluto, la cuestión no era dilucidar si había o no una violación del art. 3, sino precisar si la inclusión de la prueba obtenida como resultado de la violación era necesaria y suficiente para asegurar los derechos previstos en el artículo 6[14].

De lo expuesto puede observarse que los argumentos de la Corte son problemáticos en varios niveles. En primer lugar, la afirmación de la Corte respecto a la ruptura del nexo causal entre los tratos degradantes ejercidos al solicitante y la convicción del Tribunal es en si misma una conclusión cuestionable[15]. En segundo lugar, es menester señalar que aún en el caso en que la inclusión de la prueba real no influyera en la sentencia, no puede desconocerse que su inclusión compromete la protección absoluta del derecho de todo individuo a no ser sometido a tratos inhumanos. Al respecto, es dable recordar que para que la prohibición de la tortura en los términos del artículo 3 de la Convención sea efectiva, debe ser concebida como una prohibición absoluta, ya que una interpretación contraría no sería acorde a los objetivos y a la teleología de la misma. Más aún, la misma Corte ha reconocido que la inclusión de la prueba impugnada en razón del medio empleado para su obtención, puede incentivar a las autoridades a la violación del artículo 3 de la Convención, comprometiendo la protección del derecho absoluto de todo individuo a no ser sometido a tratos inhumano o degradantes (La Corte dijo en el mismo fallo que esa protección nunca debe ser comprometida)[16]. En tercer lugar, la Corte resuelve el planteo del solicitante mediante la aplicación del artículo 6. No obstante, dado el

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[11] Convenio para la Protección de los Derechos Humanos y de las Libertades Fundamentales, art. 6.
[12] *Jalloh v. Alemania,* [2006], 54810/00, ECHR online Portal, at 105.
[13] *Gafgen v. Alemania,* [2008], 22978/05, ECHR online Portal, at 69.
[14] *Ibid.,* at 178.
[15] See Judge Kalaydjieva's discussion, he concludes that 'the impugned evidence was of crucial importance in support of the charges, which were reclassified from kidnapping to premeditated murder as a result of the applicant's statements at the investigation stage.'
[16] *Gafgen v. Alemania,* [2010], 22978/05, ECHR online Portal, at 176.

carácter absoluto del art. 3, se podría argumentar que este último tiene precedencia sobre otros artículos en asuntos que involucran ambos.

Finalmente, la distinción que efectúa la Corte entre *tortura* y *trato inhumano o degradante* no está apoyada en el texto de la Convención. La Corte explica la exclusión automática de toda prueba obtenida por *tortura,* argumentando que la prohibición de la tortura constituye un principio fundamental del derecho internacional y enfatiza su carácter como una norma de *jus cogens*. De lo expuesto subyace que para la Corte, la prohibición de *tratos inhumanos o degradantes* no sería tan 'absoluta' como la de *tortura*. Al respecto hay que señalar que, de forma coincidente, otras Convenciones internacionales[17] no otorgan el mismo *status* a la prohibición de *tratos inhumanos o degradantes* en relación con la prohibición de la tortura. No obstante, el texto de la Convención no hace ninguna distinción entre los términos, por lo que la prohibición sería igualmente absoluta para todos los supuestos.

Conclusión: ¿Hacia un nuevo enfoque del artículo 3?

La utilización de la tortura y el trato inhumano y degradante para extraer información orientada a restablecer otros derechos o sancionar sus violaciones, trae consigo una diversidad de controversias en torno al alcance de dichos términos a la luz del principio absoluto de prohibición previsto en el artículo 3 de la Convención. En tanto, tolerar su utilización sobre la base argumentaciones vinculadas a la justicia exigible en el caso concreto conlleva ineludiblemente el riesgo de legitimar el uso extensivo de dichos tratos.

Como consecuencia de ello, parte de la doctrina sostiene que tanto para mantener la naturaleza absoluta de la prohibición de tratos inhumanos y degradantes, como para asegurar la certeza legal, la Corte debería resolver la contradicción creada por la excepción en *Gafgen* y considerar la exclusión automática de pruebas como parte del artículo 3. Otra parte de la doctrina sugiere que la Corte debería interpretar el artículo 3 como lo hace el Comité de la Naciones Unidas sobre la tortura para el art 7 de UNCAT, sin distinguir entre los diferentes tratos contenidos en el artículo. Dicha interpretación resolvería la dificultad que tiene la Corte de definir cada término de forma individual y resolvería el problema derivado de identificar un trato como tortura con las implicancias políticas que eso conlleva[18]. No obstante, lo expuesto no resuelve el problema de determinar cuando un trato alcanza el nivel mínimo de severidad para ser 'inhumano'.

Más aún, la ventaja principal de esta interpretación es que aseguraría la certeza legal en las decisiones de la Corte sobre el art. 3, en particular en relación a otros artículos aplicables al caso. Asimismo, la regla de exclusión automática de la prueba se haría extensiva no sólo a aquellas pruebas obtenidas mediante el sometimiento a tortura sino también a los tratos inhumanos y degradantes. Y por tanto, dicha interpretación alcanzaría mejor las intenciones de los escritores de la Convención. Como lo dice el Juez Evrigenis: *"By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished […] to extend the prohibition in Article 3 of the Convention-in principle directed against torture... to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture."*[19]

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[17] Convención contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes.
[18] Se puede ver la influencia de dichas implicaciones en el caso de *Irlanda v Reino Unido*.
[19] *Irlanda v. Reino Unido,* [1978] 5310/71, ECHR online Portal.

Para concluir, consideramos que dicha interpretación ampliaría la aplicabilidad del artículo 3 y aseguraría un alcance extensivo de la prohibición absoluta extensiva a la tortura, los tratos inhumanos y degradantes.

THE PROHIBITION ON TORTURE IN CASES HEARD BY THE EUROPEAN COURT OF HUMAN RIGHTS – HOW FAR DOES IT REACH?

Katherine Rigg

Introduction

On the surface, the prohibition of torture as contained in article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHRFF) (1950) appears clear-cut. Its absolute nature allows for no derogations and its universal acceptance reflects an understanding that the abhorrence of torture threatens the very moral fibre of our civilization. Despite this clarity, the issue becomes more controversial when discussing the boundaries of what constitutes torture; it comes under strain when the absolute prohibition conflicts with other essential rights and obligations, such as a state's sovereign and fundamental right to protect its national security, or the obligation to maintain international peace and security, and thus to punish and prevent acts of international terrorism. This essay will address these issues by focusing on the Jurisprudence of the European Court of Human Rights (ECHR) in its application of article 3 of the ECHRFF. It will introduce the issues by explaining the nature and extent of the conventional and customary laws - both European and international - dealing with the prohibition of torture. Through a discussion of various cases, this paper will then analyse the possible exceptions to the absolute nature of the prohibition on torture. Finally, this essay will conclude with proposals for a new approach to article 3 and an explanation of the extent of its prohibition as understood by the ECHR.

The customary, conventional and jurisprudential law relating to the prohibition of torture and inhuman and degrading treatment

When a legal norm is said to be 'absolute', it admits no exception. There are three principle ways to strengthen a legal norm and make it 'absolute' in the sense of being less vulnerable to reform and repeal. All three methods have been applied to the legal norm prohibiting torture. Firstly, it has been entrenched in national constitutions so as to be less susceptible to majoritarian change by the parliament of the day. Furthermore, the prohibition of torture has existed within the national legal systems of European countries for centuries. As explained in great detail by Lord Bingham in the English House of lords case *A v Secretary of State for the Home Department (No 2)*[20] the common law system, unlike the civil law system, never embraced torture[21]; its prohibition complements other common law concepts relating to judicial process and evidence and represents a fundamental and deeply embedded common law norm; indeed it was described by Lord Nicholls, in the same case, as a 'bedrock moral principle' of the United Kingdom[22]. Although torture was once integrated in the Civil

[20] *A v Secretary State for the Home Department (No.2)* [2005] UKHL 71.
[21] *Ibid.*, at 11.
[22] *Ibid.,* at 64.

law systems of continental Europe, the intellectual and cultural developments during the Enlightenment period led its intellectuals to strongly condemn torture as barbaric. By the 19th century most continental states had abolished torture. Given this historical development of the legal norm, it is widely accepted that the prohibition against torture has long constituted a regional customary norm. This norm is thus positivistically expressed, rather than created, by Article 3 of the European Convention on Human Rights.[23] Indeed, the European Court of Human Rights has repeatedly observed that Article 3 *"enshrines one of the fundamental values of democratic society."*[24]

The second way to make a legal norm 'absolute' is to attach a specific non-derogation clause to the principle; this method is prominent in human rights treaties and is particularly relevant to this paper. Article 3 of the ECHRFF (1950) states that "*no one shall be subjected to torture or to inhuman or degrading treatment"*[25]. Whilst each of the Convention's High Contracting Parties has the obligation to secure this right to everyone within their jurisdiction (art. 1), article 15 allows derogation from a state's obligation to secure many of the rights contained in the Convention, *'in time of war or any other public emergency threatening the life of the nation…to the extent strictly required by the exigencies of the situation.'* Article 15.2, however, expressly prohibits any such derogation from the right contained in article 3. Thus the prohibition of torture is said to be absolute.

In addition to existing as a conventional European law, the prohibition of torture has also been codified in a number of other regional and international human rights conventions. To name but a few, the Universal Declaration of Human Rights (1948) lays down the rights to be free from torture and inhuman or degrading treatment (art. 5), the International Covenant on Civil and Political Rights, which imposes obligations on its Contracting Parties, develops this right in art. 7; it emphasises its absolute nature by attaching a non-derogation clause under art. 4.2. The American Convention on Human Rights (1969) lays out the prohibition of torture (art 5.2) as a necessary part of the more general right to humane treatment announced in article 5; article 27.2 clearly prohibits any derogation from a Contracting Party's obligation to ensure this right.

The third way in which to strengthen a legal norm and render it 'absolute' is to give it the status of a *jus cogens* norm, i.e. a norm that, due to the fundamental nature of the interests it protects, '*is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character*.'[26] The prohibition of torture was recognised as having such a status by the International Criminal Tribunal for former Yugoslavia (ICTY) in the *Furundzija* case:

> *'It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency .... This is linked to the fact.., that the prohibition on torture is a peremptory norm or jus cogens.'*[27]

The ECHR has repeatedly cited this passage and recognized the prohibition of torture

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[23] JENKINS David, The European legal tradition against torture and implementation of Article 3 of the European Convention on Human Rights, *Public Law*, 2007, p.19.
[24] *Aksoy v Turkey* (1996) 23 E.H.R.R. 553 at [62]; *Selmouni v France* (2000) 29 E.H.R.R. 403 at [95].
[25] European Convention on Human Rights and Fundamental Freedoms (ECHRFF) 1950, art. 3.
[26] Vienna Convention on the law of Treaties 1969, art. 53.
[27] *Prosecutor v Furundzija,* Internatonal Criminal Tribunal for Yugoslavia, 10 December 1998, case no. IT-95-17/I-T, (1999) 38 International Legal Materials 317.

as a *jus cogens* norm.[28] The peremptory nature of the prohibition has also been recognized by national courts[29] and international doctrine.[30].

The absolute nature of the prohibition of torture can thus be understood on various levels: At a national level, the inclusion of the prohibition in national constitutions makes it harder for national legislatures to overturn or amend the legal norm. In this sense states, in their role as *actors* under international law, have contributed to the establishment of regional and international customary law. At the international level, the norm is strengthened by the inclusion of non-derogation articles in regional and international Conventions on Human Rights. In this sense the states are *subjects* of international law in that they are *holders* of obligations; they are obliged to uphold an individual's right to be free of torture, even in cases of emergency. The prohibition is also absolute in a more profound sense: The obligation itself cannot be modified by a treaty or even by an ordinary customary law, its existence as a peremptory norm places it above all other national and international legal norms.[31] The existence of *jus cogens* norms is an unusual but important constraint to a state's ability to create and modify international norms and to their status as *actors* on the international stage. The legal norm prohibiting torture is thus said to be 'absolute' in a broad sense, it goes further than merely prohibiting a state's derogation in times of emergency.

Let us now turn to the jurisprudence of the ECHR. Established by the ECHRFF (Section II), the Court's role is to '*ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention.'*[32] As with all international jurisprudence, the court's rulings have aided in the interpretation of the provisions of its constituent treaty and illustrated the nature and extent of its rights and obligations. As the only international court directly accessible to individuals[33], and as the sole judicial organ of the Council of Europe, the Court's jurisprudence provides unrivaled insight into the complex and multi-faceted nature of the obligations contained in the Convention. Furthermore, the Court's decisions are final and apply to all State Parties, irrespective of whether they are a party to the case. In this respect, and as the Council of Europe's Handbook on article 3 explains *'The jurisprudence or case law of the Convention organs is the life blood of the Convention… the jurisprudence is given equal value to that of the laws enacted by parliament.'*[34]

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[28] 'Case Comment, Dah v France (13113/03): torture - Convention Against Torture' *European Human Rights Law Review*, 2009, E.H.R.L.R. 2009, 4, 588-590.

[29] United States court in *Filartiga v Pena-Irala* 630 F 2d 876 [1980], at 54: "the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind." English House of Lords case *A v Secretary of Stae for the Home Department (No.2)* [2005] UKHL 71, at 33.

[30] Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), paragraph 10.

[31] CULLEN, Anthony, 'Defining Torture in International Law: A Critique of the concept employed by the European Court of Human Rights', *California Western International Law Journal*, Vol. 34 (1) 2003, p.33.

[32] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19.

[33] Protocol 11, 1998, removed all competencies of the commission and allowed active and direct access to individuals.

[34] AISLING Reidy, "The prohibition of Torture, A guide to the implementation of Article 3 of the European Convention on Human Rights" *Human rights handbooks*, No.6

In general, the Court has steadfastly upheld and broadly interpreted the absolute nature of the prohibition on torture. As a method used primarily to extract information, states have often tried to justify torture on the grounds of national security. The ECHR has repeatedly reaffirmed the absolute nature of the prohibition on torture in the face of challenging circumstances such as the fight against organised crime or terrorism. In *Chahal v United Kingdom (1996)*[35], the respondent state argued that the applicant represented a threat to national security and that this should be considered when deciding whether the state's actions in expelling the applicant would constitute a violation of art. 3. The Court analysed the wording and context of the Convention in detail and concluded that the prohibition was absolute and that, as such, it was not possible to balance conflicting interests such as national security.[36] Moreover, it insisted that an individual's past must be irrelevant to judging whether the treatment to which that individual was subjected constitutes a violation of the prohibition contained in article 3 of the Convention.[37]

The Court pointed to the long standing principle that there can be no derogation from the prohibition on torture in times of war. As the American Lieber Code (1863) states *'Military necessity does not admit of cruelty-that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.'*[38] Such a principle is reinforced and developed in international instruments such as the United Nations Convention against Torture (1985), in which the *'threat of war, internal political instability or any other public emergency'* are expressly mentioned as falling within the meaning of *'any exceptional circumstances'* which do not permit any derogation from the prohibition (art. 2).[39] The ECHR was insightful in its reasoning in *Chahal* and recognised the drastic changes in the nature of national security threats in recent years, *'the Court is mindful of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence'*[40]. Despite these difficulties, the Court insisted on the absolute nature of the prohibition on torture.

In explaining its consistent refusal to consider a state's national security as a possible justification for derogating or restricting the reach of art. 3, the Court has referred to the more general argument relating to the objective nature of human rights treaties as compared with states' other obligations under international public law. As the Court pointed out in *Ireland v United Kingdom*[41], a case in which British security forces were accused of torturing twelve suspected IRA members, obligations contained in human rights treaties differ from those of classic treaties; they are more than mere reciprocal engagements between contracting States; objective by nature, they benefit from a collective enforcement.[42] In its advisory opinion on *Reservations*

<http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC 42EEBEAD50C3/0/DG2ENHRHAND062003.pdf>

[35] *Chahal v United Kingdom,* (1996) 23 E.H.R.R. 413.

[36] *Ibid.* at [79].

[37] GENTILI Gianluca, 'European Court of Human Rights: an absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk', *International Journal of Constitutional Law*, 2010 I.J.C.L. 2010, 8(2), 315,

[38] The *Lieber Code*, 1864, art. 16, <http://www.civilwarhome.com/liebercode.htm>

[39] United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment, (1985), art. 2.

[40] *Chahal v United Kindom,* (1996) 23 E.H.R.R. 413 at [79].

[41] *Ireland v the United Kingdom,* [1978] 5310/71, ECHR online Portal.

[42] ORAKHELASHVILI, Alexander, 'Restrictive interpretation of Human Rights treaties in the recent jurisprudence of the European court of human rights' *European Journal of International Law* (2003) 14 (3): 532.

the International Court of Justice pointed out the similar nature of the 1948 Genocide Convention[43] and the Inter-American Court of Human Rights said, of the American Convention of Human Rights, *'the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of states, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.'*[44]

The Court has also rejected defenses that highlight the utility of corporal punishment in deterring future criminal acts. In *Tyrer v United Kingdom,* the Court emphasized that *'a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control.'*[45] Furthermore, in *Herczegfalvy v. Austria* the Court emphasized that the criteria used to define *torture* and *inhuman or degrading treatment* applies equally to treatment of persons detained on medical grounds or undergoing medical treatment[46]. The Court thus highlights the importance of excluding all considerations of *effectiveness* or *motive* when deciding whether or not certain actions constitute *torture* or *inhuman or degrading treatment*.

The Court's interpretation of article 3 as absolute is perhaps most clearly illustrated by its decisions concerning the the possible extradition of individuals who would face a real risk of torture or inhuman or degrading treatment on their return to their native country. In a series of cases the Court developed clear rules concerning the reach of article 3: As first stated in *Soering v United Kingdom,* under article 3, acts of torture or ill-treatment carried out by the receiving state remain the responsibility of the deporting state[47].

Reaffirmed in *Chahal v United Kingdom,* this principle was disputed by other states that intervened as third party in the case of *Saadi v Italy.* The intervening states argued that, due to the increased threat posed by international terrorism, a new approach was needed that would first balance the risk faced by a deportee (art. 3) against a state's interest in national security (art. 2). They also advocated increasing the burden of proof borne by the deportee and reconsidering the aforementioned principle laid down in *Soering v UK*.[48] In a unanimous decision, the Grand Chamber of the ECHR found Italy in violation of article 3, stating that the threats posed by terrorism '*must not […] call into question the absolute nature of Article 3.'*[49] The Court went on to state that the burden of proof must not be increased given the difficulties the deportee already faces in proving risk of degrading treatment. Furthermore, the Court strengthened the protection given by art. 3 as it downplayed the reliability of diplomatic assurances of the receiving state and emphasized the importance of independent reports from international human rights organizations in

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[43] "In such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties" *Reservations to the Convention on the prevention and Punishment of the Crime of Genocide*, ICJ, Advisory opinion, 1950, at 568, 532.

[44] *Effect of Reservations on the entry into force of the American Convention of Human Rights (Arts. 74 and 75),* Inter-American Court of Human Rights, [1982], advisory opinion OC- 2/82, at 27.

[45] *Tyrer v United Kingdom,* [1978], 5856/72, ECHR portal, at 31,.

[46] *Herczegfalvy v. Austria*, [1992], 10533/83, at 82-.

[47] *Soering v. United Kingdom*, (1989) 11 E.H.R.R. 439, at 91/111.

[48] GENTILI Gianluca, 'European Court of Human Rights: an absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk', *International Journal of Constitutional Law*, 2010, 8(2), 311-322.

[49] *Saadi v Italy,* [2008], 37201/06, at 137.

judging the level of risk faced by the deportee. In justifying its decision, the Court goes beyond the literal interpretation of article 3, and discusses the spirit of the Convention as a whole. As Judge Zupancic states in his concurring opinion, '*the Convention is conceived to block such short circuit logic and protect the individual from the unbridled 'interest' of the executive [...] or the legislative branch of the State.*'[50]

Thus the Court not only upholds the absolute nature of article 3 in the sense of allowing no derogation, but it interprets the article widely as covering actions taken by a deporting state that lead to its violation, or serious risk of its violation, by entities beyond the deporting states' control. Given the intimate link to national security that such cases inherently hold, and the subsequent pressure from states to adopt a narrower approach, such a wide interpretation is all the more significant.

Indeed, in *Saadi v Italy*, the court develops an argument it had often referred to, that freedom from torture constitutes *'one of the most fundamental values of democratic society.'*[51] This idea has been emphasised and developed in many judgments relating to the absolute nature of the prohibition on torture. Although never explicitly referred to by the Court, this argument is clearly and famously illustrated in the Israeli Supreme Court *Judgment Concerning the Interrogation Methods Implied [sic] by the GSS (1999)*:

> *This is the destiny of democracy, as not all means are acceptable to it, [...] Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security.*[52]

Judges Myjer and Zagrebelsky develop this argument in *Saadi v Italy*, focusing on the policy reasons for upholding the absolute nature of art. 3: *'States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect.'*[53] Restricting liberty in pursuit of security would *'give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards.'*[54] The prohibition contained in art. 3 is thus described as essential to the very existence of a democratic state; as such, any derogation, no matter how 'necessary' would threaten the state's very survival.

As we have seen, both customary and conventional law, at national, regional and international level, state that the legal norm prohibiting torture admits no derogation, exception, reform or redefinition. It upholds the 'absolute' nature of the prohibition in the broadest sense. Furthermore, the ECHR has interpreted the prohibition of torture and inhuman and degrading treatment contained in art.3 of the ECHRFF widely. It has consistently and explicitly upheld the absolute nature of the prohibition and has dismissed issues such as national security and motive as irrelevant.

The Court's exceptions and limitations to the absolute character of the prohibition

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[50] *Ibid.*
[51] *Ibid*, at 79; *Soering v United Kingdom*, at 88.
[52] President A Barak, *Judgment Concerning the Legality of the GSS-interrogation Methods*, Supreme Court, 38 ILM, (1999), at 39.
[53] *Saadi v Italy,* [2008], 37201/06.
[54] *Ibid.*

The conflict between an absolute prohibition of torture, inhuman and degrading treatment, and national security is long-standing; the recent 'war on terror' has intensified this conflict and, as a result, the link between the absolute prohibition and the moral high ground is no longer perceived to be as clear-cut as it once was.[55] Attempts to legitimize torture in situations of grave emergency have recently become more prominent; the discussion of the classic ticking time bomb being a case in point.[56] Furthermore, elements of popular culture such as the infamous television series 24 implicitly condone torture in such situations and, according to Philippe Sands, have influenced people's outlook on torture, in the western world at least.[57] Philosophical arguments have been put forward to justify a modification of the absolute nature of the prohibition; consequentialism and deontologism[58] dominate the discussion. Legal defences such as the criminal doctrine of necessity have also been discussed, most famously in the *Public Committee against torture in Israel v State of Israel*[59] case, which left open the possibility of a defence of necessity enabling an individual to escape criminal liability. The idea of collective self-defence, whereby torture would be legitimate if employed in the defence of the collective has also been explored.[60]

Although the European Court has consistently upheld the absolute nature of the prohibition on torture, it has, in certain cases, adopted a restrictive interpretation of the definition of *torture, degrading and inhuman* and of the term *absolute*. The European Court has purposefully never adopted an exact definition of the terms contained in article 3. In its judgments the Court has found that *degrading treatment* occurs when it creates anguish and fear, humiliating the victims and shattering their physical or moral resistance, possibly forcing them to act against their will. The Court has found that *inhuman treatment* exists when it is applied for hours at a time, it is premeditated and causes either actual bodily harm or intense physical and mental suffering.[61] When determining whether such ill-treatment attains a sufficient level of severity to be classified as *torture*, the Court has found that such a level would be reached when, for example, the treatment is inflicted intentionally, it causes very serious and cruel suffering, and it is carried out with the view to obtain a specific objective, such as extracting information.[62]

Although the broad characteristics of the three treatments are relatively easy to define, many cases involve treatment that does not fall neatly into one specific category. In such cases, the Court has struggled with the balance between, on the one hand, providing legal certainty and upholding the 'absolute' nature of the prohibition

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[55] EVANS Malcolm D. "Torture", *European Human Rights Law Review*, E.H.R.L.R. 2006, 2, 101-109

[56]DERSHOWITZ Alan, *Why Terrorism Works: Understanding the Threat Responding to the Challenge,* Yale University press, (2002), AT 131-164.

[57] SANDS Philippe, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values,* Palgrave Macmillan, (2008), p.159.

[58] Whilst consequentialism maintains that the consequences of one's actions form the basis from which to judge the morality of those actions, deontologism believes that the morality of one's actions cannot be separated from one's sense of duty.

59 *Public Committee against torture in Israel v State of Israel*, H.C. 5100/94 (1999).

HORNE Alexander, 'Torture - A short history of its Prohibition and Re-emergence', (2009), *Judicial Review*, pp.166.

[61] Factsheet, Council of Europe, *60th anniversary of the European Convention on Human Rights, Strasbourg Court´s judgments: Prohibition of torture and inhuman or degrading treatment.*

<25 june 2010, http://www.coe.int/t/dc/av/Factsheets_en.asp>

[62] *Dikme v Turkey,* [2000], 20869/92, ECHR online Portal.

and, on the other hand, adopting an inclusive interpretation that takes into account all relevant factors. For example, the Court has consistently stated that, in order to uphold the absolute nature of the prohibition, determining whether a given conduct constitutes *torture* cannot take into consideration subjective elements such as the motive of the presumed torturer, or past actions of the victim. However, as the Court explained in *Ireland v UK,* in order to assess whether the minimum threshold of pain or suffering has been reached, subjective criteria such as the age, sex and health of the victim can, in some cases, be relevant.[63]

The Court's decision in *Ireland v UK* has been heavily criticized for adopting an overly narrow interpretation of the term *torture*. Indeed, although it states that in some cases a subjective test is needed to determine whether torture has occurred, it does not apply such a test to the case; it chose not to call witnesses, for example, and offers no assessment of the effect of the treatment on the victims. Rather it concludes, without explaining the relative weight of the various factors involved in its decision, that the use of five techniques of interrogation 'in depth' – i.e. wall-standing, hooding, subjection to noise, depravation of sleep, and depravation of food and drink – applied for hours at a time, and with the intention of extracting information, *'did not occasion suffering of the particular intensity and cruelty implied by the word torture'* but rather *'amounted to a practice of inhuman and degrading treatment.'*[64] Anthony Cullen argues that the objective criteria used by the court set the threshold for torture at an excessively high level, defining the concept primarily in terms of its physical intensity and excluding all but the most barbaric of treatments.[65] The Court's ruling overturned the unanimous decision of the European Commission on Human Rights that the use of the five aforementioned techniques constituted torture under art. 3. Furthermore, as Judge Zekia stated in a separate opinion, many commentators argue that the Court did not wish to cause a wave of public anger in an already fragile situation and as such employed excessively strict criteria so as to avoid giving the treatment the 'special stigma' of being labeled as *torture.* Although by no means an exception to the absolute nature of the prohibition as contained in art. 3, this case illustrates the difficulties involved in defining torture and the initial caution employed by the Court when dealing with article 3.

Although the Court's establishment of a relatively high 'minimum standard' for *torture* was referred to and applied in many subsequent cases, its interpretation of conduct that constitutes *inhuman or degrading treatment* followed an increasingly inclusive trend. The Court has, for example, become bolder in the area of treatment of detainees. In *Dougoz v Greece,* for example, the Court considered the detention accommodation and regime *'quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling'*[66]. The Court has also taken into consideration the increasingly stringent standards of the European Committee to Prevent Torture; in *Mouisel v France*, for example, it considered the handcuffing of a prisoner during transportation to and from a hospital for treatment for cancer to be in violation of art. 3.[67]

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[63] *Ireland v the United Kingdom,* [1978] 5310/71, ECHR online Portal, at 162.
[64] *Ibid.,* at 167-168.
[65] CULLEN, Anthony, 'Defining Torture in International Law: A Critique of the concept employed by the European Court of Human Rights', *California Western International Law Journal*, heinonline,
[66] *Dougoz v Greece,* No 40907/98, 6 March 2001, at 44-49.
[67] MURDOCH Jim, "The impact of the Council of Europe's 'Torture Committee' and the evolution of standard-setting in relation to places of detention," *European Human Rights Law Review*, *E.H.R.L.R,* 2006, 2, p.267.

An underlying aspect of this trend towards a wider interpretation of art. 3 lies in the Court's 'living instrument' doctrine; a method of interpretation of the Convention first adopted in *Tyrer v United Kingdom,* whereby the Court famously stated *'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.'*[68] In the case, the Court considered whether birching constituted a violation of article 3. Although it was argued by the respondent, the Government of the Isle of Man, that the method of corporal punishment was acceptable to its inhabitants, the Court adopted a broad outlook and took developments in other member states' penal codes into consideration. Given that such treatment was unacceptable to the majority of member states, the Court found that the respondent had constituted a violation of article 3. This case illustrates the adaptable nature of the Court's interpretation of article 3 – it allows the court to take into consideration member states' views, which change over time, when defining the article's terms.[69]

In *Selmouni v France* the Court found that treatment which, although in the past would perhaps have amounted only to inhuman or degrading treatment, amounted to torture within the meaning of art. 3. As an explanation for such a development, the Court pointed out that *'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'*[70] The 'living instrument' doctrine can thus be used to update the application of the Convention rights to reflect higher expectations of member states.

The doctrine has been criticized for leading to an over-active Court, and for going beyond the traditional methods of interpretation as announced in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. However, as the Inter-American Court, The international Court of justice[71], the European Court of Human Rights and the European commission have argued, the objective nature of human rights treaties requires that emphasis be placed on the *object and purpose* of a treaty above the subjective intent of the contracting parties. Thus the scope for interpretation by the Court is wider than it would be of other Conventions – the contracting parties' interests, as demonstrated in preparatory work or subsequent agreements, do not restrict the Court as they otherwise might. The ECHRR's *object and purpose* is first and foremost to enhance the protection of individual rights. The Court itself has proclaimed that when *'interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms.'*[72]

The extensive reach of the living instrument doctrine can be seen in the Court's judgment in *Stafford v United Kingdom* whereby the Court took into account the changes in the English courts' views on the nature of life sentences[73]. The perceived dangers of such a powerful doctrine are that it may lead to inconsistency in the law and, given the difficulty in determining how and when member states' 'expectations'

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[68] *Tyrer v United Kingdom,* [1978], 5856/72, ECHR portal, at 31.
[69] Mowbray Alastair, 'The creativity of the European Court of Human Rights', *Human Rights Law Review*, H.R.L Rev., 2005, 5(1), p.61.
[70] *Selmouni v France* (2000) 29 E.H.R.R. 403, at 23.
[71] Presdient A Barak, *Judgment Concerning the Legality of the GSS-interrogation Methods*, Supreme Court, 38 ILM, (1999), at 23.
[72] *Soering v. United Kingdom,* [1989], 14038/88, ECHR online Portal, at 87.
[73] *Stafford v United Kingdom,* [2002], 46295/99, ECHR portal.

change, it may place excessive power of interpretation in the Court. Furthermore, if torture were to become more acceptable by member states' citizens and by those in power, application of the doctrine would conflict with the object and purpose of the Convention. In a comprehensive study of the Court's jurisprudence and the 'living instrument' doctrine in particular, Alastair Mowbray concludes that the *"Court has generally struck a fair balance between innovative judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention."*[74] Care must be taken by the court to ensure that this balance remains.

The dangers of an over-active judiciary are clearly illustrated by the cases of *Jalloh v Germany*[75] and the Fifth Section's decision in *Gafgen v Germany*[76]. The first of these cases involved the forcible administration of emetics to a small time drug dealer. Although the Court found that there had been a violation of article 3, the majority opinion referred to the seriousness of the offense as a factor in determining whether or not there had been a violation of article 3. The judgment suggests that if the public interest had been greater, the police officers may have been justified in their treatment of the detainee[77]. Such a judgment quite clearly runs counter to the absolute character of the norm as laid down in article 15. Furthermore, the decision goes against the fundamental principle of equality before the law, as the dissenting opinion from judges Wildhaber and Caflisch stated, *"the majority appears to value the health of large dealers less than that of small dealers."*[78] This case highlights the difficult moral issues at play when the victim of the alleged torture has himself committed a crime.

The case of *Gafgen v Germany* involved the treatment by police officers of a detainee, the applicant, who had kidnapped and suffocated a young boy. When arrested, the applicant told the police that the boy was still alive but refused to disclose his whereabouts. In order to extract information as to the boy's location, the police officer E threatened considerable pain and was authorized to inflict that pain if necessary. Ten minutes after such force was threatened the detainee confessed that he had murdered the boy and gave the police the location of the body. The case involves many difficult moral and legal issues. Firstly, it highlights the moral dilemma faced by police officers in the 'ticking time bomb' situation – is torture morally wrong if it serves to save a boy's life? Secondly, it once again raises the difficult issues involved in determining what constitutes *torture* and *inhuman or degrading treatment.*

The case initially went to the Fifth Section of the European Court. When discussing whether the treatment by the police officer of the applicant constituted a violation of article 3, the Court considered a number of mitigating factors in determining whether the 'minimum threshold' had been reached. They included amongst these the fact that the police officers were exhausted and under extreme pressure and believed that they had only a few hours to save the boy's life.[79] Thus whilst adaptable definitions of *torture* and *inhuman and degrading treatment* are necessary to enable the Convention to afford greater protection to individuals as member states' standards change, it also leaves room for the inclusion of 'mitigating

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[74] MOWBRAY Alastair, 'The creativity of the European Court of Human Rights', *Human Rights Law Review*, H.R.L Rev., 2005, 5(1), p.79.
[75] *Jalloh v Germany,* [2006], 54810/00, ECHR online Portal.
[76] *Gafgen v Germany,* [2010], 22978/05, ECHR online Portal.
[77] *Jalloh v Germany*, at 77, at 107.
[78] *Ibid.,* at 4.
[79] *Gafgen v Germany*, [2008], 22978/05, ECHR online Portal, at 69.

factors' that chip away at the absolute character of the prohibition. This danger is all the more pronounced in cases involving difficult moral issues –where judges might be tempted to restrict the definition of the terms and thus the applicability of the article in order to reach what they deem a more just outcome.

In an insightful article on the case, Sabrina Wirtz and Wubbo Wierenga ask whether the decision in *Gafgen* represents an understandable incident to create a more just outcome or a dangerous new exception to the absolute prohibition.[80] The question goes to the heart of the debate on the merits of relativising the absolute prohibition of torture – a debate that involves moral and philosophical arguments that reach well beyond the scope of this essay[81]. From a legal perspective, by considering the circumstances and motivation of the police officers as 'mitigating' factors in defining the treatment, the decision is not only a misapplication of articles 3 and 15 of the Convention, but also represents a dangerous move away from principles of fairness and equality before the law – it implies that a criminal's rights are not as important as those of a non-criminal.

The case was subsequently referred to the Grand Chamber of the European Court. Crucially, the Grand Chamber eschewed references to the seriousness of the offense. It holds that the police officers' motive, namely to save a child's life, is irrelevant when considering whether there has been a violation of art. 3. It holds that the article recognizes, in unambiguous terms, an absolute and inalienable right to be free of torture, inhuman or degrading treatment, and that as such no derogation is allowed whatsoever. It concludes its point with a strong explanation of the absolute nature of the article:

> *The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.*[82]

Furthermore, in discussing how to classify the police officers' treatment, the Court takes into consideration the physical and mental effects on the applicant[83] – its appreciation of such subjective criteria and its nuanced approach indicates how far the Court has come since their overly narrow and rigid definitions adopted in the aforementioned case of *Ireland v United Kingdom*.[84]

Despite this aspect of the decision, the Grand Chamber's later discussion of the admissibility of evidence in the context of art 6 arguably weakens the absolute nature of the prohibition on *inhuman and degrading treatment*. Article 6 gives everyone the right to *'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'* (art 6.1); it also affords minimum defense rights such as the right to *'have adequate time and facilities to prepare his defense.'* (art. 6.3.b). The applicant in *Gafgen* argued that the inclusion of the real evidence found as a result of the inhuman treatment rendered his trial unfair,

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[80] WIERENGA Wubbo, WIRTZ Sabrina, 'Case of Gafgen versus Germany: how absolute is the absolute prohibition of torture? The outcome of an ethical dilemma.' *Maastricht Journal,* 2009, 16(3), p.368

[81] GREER Steven, 'Being "realistic" about human rights', *Northern Ireland Legal Quarterly, N.I.L.Q.* 2009, 60(2), p.159.

[82] *Gafgen v Germany,* [2010], 22978/05, ECHR online Portal, at 107.

[83] *Ibid.,* at 103,

[84] 'Gäfgen Grand Chamber Judgment: Threatening with Torture and Fair Trial Rights', 1 June 2010, <http://echrblog.blogspot.com/2010/06/gafgen-grand-chamber-judgment.html>

contrary to article 6. The facts relevant to the discussion are as follows: Upon being threatened with excessive force and suffering inhuman treatment at the hands of the police officer, the applicant confessed to murdering the boy and confessed to the body's location. The 'real evidence' (as opposed to the defendant's confessions) are the tire tracks left by the defendant's car and his shoe prints near the corpse; these were found as a result of the defendant's confession. The defendant then confessed again at the beginning and end of his trial. The trial used the real evidence to verify the veracity of his in-court confessions; his confession made immediately following the inhuman treatment was excluded.

The Court had previously ruled in *Jalloh* that the admission of real evidence obtained by *torture* would automatically render a subsequent trial unfair[85]. The judges agreed that the inclusion of such evidence would '*only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe."*[86] However, the judges left open the question of whether *real evidence* obtained as a result of treatment classified as *inhuman or degrading,* but falling short of *torture,* would also render a trial automatically unfair. It suggests, for example, that if the public interest in convicting the defendant had been greater, the use of the evidence obtained by inhuman treatment may have been warranted.[87] The decision does not explain or justify why the treatment of evidence obtained by *torture* is different from that obtained by *inhuman or degrading treatment*.

The Grand Chamber in *Gafgen* recognizes the lack of consensus on this issue. It begins by reinforcing the absolute nature of article 3: It dismisses factors such as public interest in securing the conviction of criminals, the need for effective prosecution of crime, and the motive of the police officers, as irrelevant in determining whether a given treatment is in violation of the article. Furthermore, it broadens the argument slightly by stating that no other interests should be considered if they would *'compromise the protection of the absolute right not to be subjected to ill-treatment."*[88] However, the Grand Chamber goes on to find that the inclusion of the real evidence secured as a result of *inhuman treatment* did not have a bearing on the applicant's conviction and sentence and that, therefore, it did not compromise the applicant's rights as secured by article 6.[89] The Court argues that as article 6 is not absolute, the issue is not whether there was a violation of article 3 but whether the inclusion of evidence secured as a result was *necessary and sufficient* in order to uphold the rights secured in article 6, namely the right to a fair trial.[90]

The Court's discussion is problematic on many fronts: Firstly, the Court's finding that the chain of causation leading from the initial prohibited treatment to the applicant's conviction and sentencing was broken is highly questionable. The Court considers that the Regional Court relied exclusively on the untainted real evidence and the applicant's confessions in trial for all findings of fact. In order to prove that the inhuman treatment did not directly affect the applicant's in trial confessions, the Court points to the applicant's statements both at the beginning and end of his trial that he was confessing freely out of remorse. The applicant later claimed, however, that the admission of tainted real evidence at trial prompted his confessions.

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[85] *Jalloh v Germany,* [2006], 54810/00, ECHR online Portal, at *105.*
[86] *Ibid.*
[87] *Ibid.,* at 107.
[88] *Gafgen v Germany,* [2010], 22978/05, ECHR online Portal, at 176.
[89] *Ibid.* at 187.
[90] *Ibid.,* at 178.

Furthermore, it is unlikely that the tainted evidence alone would have secured a murder conviction and it is impossible to say whether the applicant would have confessed at the trial if the evidence had not been found. As Judge Kalaydjieva notes in his dissenting opinion of the Fifth Section, the national authorities found that the applicant's statements and further self-incriminatory acts had been influenced by the lasting effect of the inhuman treatment. After a comprehensive discussion of the trial and the national criminal law in question, he concludes that *'the impugned evidence was of crucial importance in support of the charges, which were reclassified from kidnapping to premeditated murder as a result of the applicant's statements at the investigation stage.'*[91] In this respect the Grand Chamber's findings that the real evidence had no impact on the outcome of the trial and that the chain of causation between the violation and the in-court confessions was broken are highly questionable.

Secondly, the Court's primary assertion is misplaced: Even if the inclusion of the impugned real evidence did not have a bearing on the applicant's conviction or sentence, it does not necessarily follow that the inclusion of such evidence does not compromise the protection of the absolute right not to be subjected to ill-treatment. Fairness, for the purposes of article 6, presupposes respect for the rule of law. The argument that such respect necessitates the automatic exclusion of any evidence obtained as a violation of article 3 is a strong one.[92] Indeed, the prohibition of torture, inhuman and degrading treatment is absolute for a reason: It goes to the very heart of the Convention's objectives and purpose. Furthermore, as Judge Kalaydjieva points out, the purpose of the type of inhuman treatment in question, namely that carried out by police officers in criminal proceeding, is to provoke self-incrimination, which in itself leads to unfair trial.[93]

The Court recognizes that the admission of the impugned evidence may give incentive to officials to violate article 3, which in itself compromises the protection of the absolute right not to be subjected to ill-treatment, something the Court stated should never happen. Furthermore, if the authorities can benefit from the use of prohibited conduct falling short of torture by using it as evidence, the prohibition loses its absolute character. As Rosemary Patten argues comprehensively in her article on the issue, the question of whether the use of the impugned evidence will render the defendant's trial fair or unfair ought not to arise. She argues persuasively that the drafters of the Convention felt that article 3 had to be absolute to make it effective and, as such, the exclusionary rule should be read into the article – the Court should not, as it did in *Gafgen v Germany*, see the issue through the lens of article 6, as such a position makes article 3 subservient to article 6.

The Court suggests that a general rule excluding all real evidence obtained as a result of a violation of article 3 may be needed. The implication is that such a rule does not naturally come out of the Convention and requires the intervention of policy-makers. However, by claiming that the facts of the case fall outside the exclusionary rule adopted by the Court thus far, the decision arguably imposes an exception, which is not itself supported by the Convention, or by previous case-law. Thus Judge Kalaydjieva claims that the Fifth Section's decision as to article 6, reiterated in the Grand Chamber judgment, '*deviates from the established case law of the Convention*

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[91] *Ibid.,* dissenting opinion.

[92] SIMONSEN Natasha, *'Is torture ever justified?': The European Court of Human Rights decision in Gäfgen v Germany*, Blog of the European Journal of International Law, June 15 2010.

[93] Dissenting opinion, *Gafgen v Germany*, [2008], 22978/05, ECHR online Portal.

institutions on the standards of protection against violations of article 3.'[94] Furthermore, the exception establishes a precedent which may have unintended consequences, as Natasha Simonsen puts it in her article on the issue, whether the exception will eat up the rule remains to be seen.[95] Thirdly, by viewing the issue through the lens of article 6, the Court is, in a sense, treating art. 3 as subservient to art. Given the absolute nature of the former, this arguably goes against the Convention.

Finally, the Court's distinction between torture and inhuman or degrading treatment is unsupported by the Convention text. In explaining its automatic exclusion of all real evidence obtained by torture, the Court points to the status of the prohibition of torture as a bedrock principle, with *jus cogens* status in international law. It is true that the prohibition of torture is more stringent than that of inhuman or degrading treatment under international law. Under the United Nations International Convention against Torture (UNCAT, 1984), for example, the Convention states' obligation to prevent *torture* are stricter and more detailed than their obligation to prevent *inhuman and degrading treatment*. Indeed, states are only obliged to take all necessary measures to prevent inhuman or degrading treatment when that treatment is carried out by, or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. (art. 16) Furthermore, the clause explicitly stating that no exceptional circumstances whatsoever may be invoked as a justification of torture does not apply to inhuman or degrading treatment (art 2.2, art. 16). The distinction has been justified as avoiding the problem of over-inclusiveness whereby it is argued that lumping torture, inhuman and degrading treatment together dulls down the meaning of torture and leads to morally problematic situations in real ticking bomb situations.[96]

Furthermore, the automatic exclusion of evidence obtained by torture has arguably become a norm under international customary law. Many argue that the status of the prohibition of torture as a *jus cogens* rule obliges all states to reject any violation of the rule and therefore to exclude all evidence obtained by torture.[97] The Vienna Convention on the Law of Treaties, which gave the most famous recognition of *jus cogens,* does not address the issue.[98] However, it makes the prohibition powerful enough to invalidate all subsequent treaties. Furthermore, The ICTY ruled in *Prosecutor v. Anto Furundzija*[99] that national acts condoning torture were unlawful and that international criminal jurisdiction should apply to suspected torturers. By using evidence obtained by torture states are not only benefiting from a violation of a core interest of the international community, but also implicitly lending their support to such a violation.[100] Furthermore, customary law is made up by state practice and *opinio juris*[101], such practice and opinions on this issue may have established an

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[94] *Ibid*.
[95] SIMONSEN Natasha, *'Is torture ever justified?': The European Court of Human Rights decision in Gäfgen v Germany*, Blog of the European Journal of International Law, June 15 2010.
[96] ZE'EV BEKERMAN Omer, 'Torture—The Absolute Prohibition of a Relative Term: Does Everyone Know What Is in Room 101?', 53 *Amer J. Com. L.* (2005), p.758.
[97] THIENEL, Tobias, 'The admissibility of evidence obtained by torture under international law', *European Journal of International Law,* (E.J.I.L.) 2006, 17(2), 349-367.
[98] Vienna Convention on the Law of Treaties, art. 64,
[99] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, ICTY, 10 December 1998.
[100] THIENEL, Tobias, 'The admissibility of evidence obtained by torture under international law', *European Journal of International Law,* (E.J.I.L.) 2006, 17(2), 365.
[101] Art. 38(1)(b) of the Statute of the International Court of Justice, UNCIO XV, 355; *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, at 44.

independent rule on the admissibility of such evidence. As Tobias Theinel points out in his article on the issue, article 15 of UNCAT states:

> *Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*

As of September 2010 UNCAT had acquired 147 state parties and many states have exclusionary rules on coerced statements. The *opinio juris* can be found in UN resolutions such as that repeating the terms of article 15 – General Assembly Resolution 59/182 of 20 December 2004.

It is notable that no such international customary law relates to the prohibition on inhuman or degrading treatment. The English House of Lords case of *A v Secretary of State for the Home Department (No 2)*, deals directly with this issue. The case discusses the question of the use by a special committee of evidence that had been obtained by torture carried out by foreign agents in a foreign country. Lord Bingham finds that, due to the status of the international prohibition as *jus cogens*, and due to the international customary law relating to torture, *"There is reason to regard it as a duty of states, […] to reject the fruits of torture inflicted in breach of international law"*[102]. This conclusion does not pertain to inhuman treatment falling short of torture, however. Lord Bingham believed that the exclusion of evidence obtained through ill-treatment may sometimes be necessary to ensure a fair trial, but that such exclusion was by no means automatic, and that "*Special rules have always been thought to apply to torture, and for the present at least must continue to do so."*[103]

By applying the exclusionary rule only to evidence obtained by torture, the Court in *Gafgen* upholds the distinction between torture and inhuman and degrading treatment that exists in international law. The necessary implication is that the prohibition of *inhuman and degrading* treatment is not as 'absolute' as that of *torture*. In an interview after his tenure as President of the Court, Rudolf Bernhardt highlights the difficulty of adhering to the absolute prohibition in cases of treatment that is not sufficiently severe to qualify as torture:

> *'If someone is genuinely tortured, for example by having their fingernails pulled out or is waterboarded 183 times, of course you say this is a violation […] But other issues are not so clear cut. For example, problems arise in connection with prison conditions, […] whether someone has a right to have daily walks of one hour or of only 30 minutes. In such cases, I would prefer various interests to be balanced, as in most other cases. I insist that there are absolute levels of human rights protection, which are more or less self-evident and hardly need to be addressed. But other issues […] are controversial in an open society and are bound to be controversial.'* [104]

Although there is much debate surrounding the merits of extending the absolute prohibition to inhuman and degrading treatment, and although it is true that the prohibition of such treatment does not enjoy the same status as torture in international law, art 15.2 of the Convention absolutely prohibits article 3 in its entirety; in suggesting that the prohibition of torture is more absolute than that of inhuman treatment, the Court's decision in *Gafgen* goes against the Convention text.

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[102] *A v Secretary of State for the Home Department,* [2005] UKHL 71, at 34.
[103] Ibid., at 53.
[104] Greer, Steven, 'Reflections of a former President of the European Court of Human Rights', *European Human Rights Law Review,* 2010, E.H.R.L.R. 2010, 2, p.172.

The Court also considered the issue of whether the redress afforded to the applicant by the German state had been sufficient compensation for the police officers' violation of article 3. Such a discussion further highlights the problems involved in distinguishing between torture and inhuman or degrading treatment. The Fifth Section ruled that, when dealing merely with the threat of torture, as opposed to its infliction, it was sufficient compensation if a state had legislation in place that criminalized practices contrary to article 3 of the Convention, and that such legislation had been effectively applied through the prosecution of those responsible.[105] As the German police officers responsible for the violation had been found guilty and the German authorities had acknowledged unequivocally that the applicant had been the victim of prohibited ill-treatment, the Court thus found that the applicant had been afforded sufficient redress in a manner other than monetary compensation.

The Grand Chamber, however, finds that the penalties imposed on the police officers for their violation of article 3 were insufficient to create a deterrent effect for the future. Indeed the officers had been subjected only to fines and one had been subsequently promoted. The judgment is significant in that it does not distinguish between the different types of treatment covered by article 3. By establishing a high standard for victims' redress irrespective of whether the violation was due to torture or ill-treatment, the Court acknowledges and upholds the absolute nature of both treatments as covered by article 3.

Despite this wide interpretation, the Court retains a relatively limited view when discussing the exclusionary rule in this sense. It leaves open the question of whether the exclusion of impugned evidence would be necessary to afford the victim sufficient redress. It states that such an issue depends on all the circumstances of the case and once again sees the issue through the lens of article 6; the Court thus implicitly dismisses the view that such an exclusion would automatically be necessary.[106] Such a view points out that in human rights cases one can rarely remedy the continuing psychological effects of abuse, redress is as much about improving the effective prevention of future violations, as it is about victim compensation. As previously demonstrated, the automatic exclusion of impugned evidence may be necessary in order to deter future violations. Thus although the Court's discussion of victim redress upholds the absolute value of the prohibition as contained in article 3, a closer look once again reveals limitations to the absoluteness of the prohibition.

Conclusion: A new approach to article 3?

The temptation to resort to torture, inhuman or degrading treatment in order to extract information is high. As such, any sign of tolerating it risks causing such treatment to become widespread, as Sir William Searle Holdsworth aptly explains in his work *A History of English Law*, *'once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to it.'*[107]

Many have thus argued that, in order to uphold the absolute nature of the prohibition on inhuman and degrading treatment, and to ensure legal certainty, the Court should remedy the inconsistency created by the *Gafgen* exception and read the

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[105] *Gafgen v Germany*, [2008], 22978/05, ECHR online Portal, at 80.
[106] *Gafgen v Germany,* [2010], 22978/05, ECHR online Portal, at 128.
[107] cited in HORNE, Alexander, 'Torture - A short history of its Prohibition and Re-emergence', (2009), *Judicial Review*, p.167.

exclusionary rue into article 3.[108] Others have suggested that the Court should treat the article as the UN Human Rights Committee on torture treats art. 7 of UNCAT, namely without distinguishing between the terms contained in the article. Such an approach would save the Court the difficult task of defining each individual term and would solve the problem of labeling a specific treatment torture, with all the political implications this may have (the influence of such implications are arguably seen in the case of *Ireland v UK*). However, it does not solve the issue of determining when treatment reaches the minimum level of severity so as to be classified as inhuman.

The real advantage to this approach is that it would ensure legal consistency in the Court's discussion of art. 3, particularly in relation to other articles. This approach would, for example, mean that the exclusionary rule relevant to the admissibility of evidence would apply not only to evidence obtained by torture but also to inhuman and degrading treatment. Indeed, if the Court makes no distinction between treatments, the same legal rules must apply to all 3 types. Such an approach would arguably better achieve the drafters of the Convention's intentions: As Judge Evrigenis aptly states:

> *"By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished [...] to extend the prohibition in Article 3 of the Convention-in principle directed against torture... to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture"*[109]

Such an approach would certainly widen the applicability of art. 3 and ensure an extensive reach of the 'absolute' prohibition of all 3 treatments. Given the weakening moral and political consensus surrounding the prohibition on torture, inhuman and degrading treatment, such legal absolutes are all the more valuable.

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