THE PROHIBITION AGAINST TORTURE IN INTERNATIONAL LAW

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Abstract: In accordance with international law, torture and other forms of ill-treatment are absolutely prohibited everywhere and at all times. The prohibition of torture is considered a peremptory norm of international law *(jus cogens)*. Numerous conventions in the field of international human rights law and international humanitarian law provide for the prohibition of torture as the most serious form of violation of the physical and mental integrity of an individual. International conventions stipulate the obligation of the contracting states to incriminate and punish the perpetrators of the crimes of torture on the principle of *aut dedere aut punire*. If torture was committed during the war, it is often attributed to other grave crimes such as war crimes and crimes against humanity. The study analyzes international legal standards on the prohibition of torture and provides appropriate explanations on the protection mechanisms for monitoring their application in international practice.

Keywords: Torture, international law, protection mechanisms

INTRODUCTION

The prohibition of torture in international law stems from the prohibition of ill-treatment, which is one of the oldest and most widespread forms of violation of basic human rights in relation to the protection of human physical and mental integrity and human dignity. In the past, torture was a legitimate part of the investigation process in which the competent state authorities, in order to obtain the confession of the defendants, applied measures to inflict physical and mental pain in order to obtain certain confessions that were used as key evidence in determining their criminal responsibility. In addition, torture was fully permitted in the execution of criminal sanctions. Until the 19th century, torture was fully recognized and accepted in state practice. This was especially the case in the practice of totalitarian states, which used torture en masse in order to discourage their opponents (political,

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religious, ethnic, etc.). Over time, international law has developed, and thus a body of rules on the protection of universal human rights, which prohibits abuse, as well as all its various forms - from torture to cruel, inhuman and degrading treatment and punishment (Brownlie, 2003: 537; Dimitrijević, Popović, Papić & Petrović, 2007:155-157). With the proclamation of torture as an international crime contrary to the interests of the international community *(hostis humani generis)*, the process of suppressing this social phenomenon on a wider international level began. Today's international legal rules prohibiting torture confirm that the international community has meanwhile become fully aware of the importance of banning such behavior that violates the physical and mental integrity of the individual (Casesse, 1993).

DETERMINATION OF TORTURE IN INTERNATIONAL LAW

In international law, torture is generally considered to be the most serious form of violation of the integrity and dignity of a person whose execution requires mandatory incrimination by states. Since torture is prohibited by conventional and customary norms, as well as the general principles of international law, this prohibition is considered a peremptory rule of international law from which there is no derogation. The peremptory nature of this rule indicates that torture cannot be justified by any exceptional circumstance, including a state of war or the danger of war, political instability or other state of emergency (Degan, Pavšić & Beširović, 2011: 209; Etinski, Đajić, 2014: 439). International protection against torture therefore implies an imperative legal norm *(jus cogens),* whose obligatory character includes all states which on the basis of it have an obligation towards the entire international community *(obligatio erga omnes).* The establishment of this norm was originally related to the codification and progressive development of international humanitarian law. As this branch of international law with the rules of warfare *(jus in bello)* developed fastest, it elaborated to some extent the rules prohibiting the abuse and torture of certain categories of protected persons. From a historical perspective, the first significant international legal act that contained the prohibition of torture was passed in 1907, at the Hague Peace Conference. Thus, in the so-called *the Hague Regulation* annexed to the IV *Hague Convention on the Laws and Customs of War on Land* , the provision of Articles 4 and 13 prescribes the obligation of humane treatment of prisoners of war and persons who have been granted such status (Schindler & Toman, 1988:69). From this rule, a common norm has developed that prohibits torture of prisoners of war on the basis of reciprocity. Articles 44 and 50 of the Hague Regulations further prohibit the extortion of information from the civilian population regarding their armed forces, as well as their punishment for acts for which that population cannot be collectively responsible. Significant progressive development of the rules prohibiting torture in international humanitarian law occurred immediately after World War II with the adoption of the four *Geneva Conventions* under the auspices of the Geneva Red Cross in 1949, supplemented by two *Additional Protocols* in 1977. The *Geneva Conventions* contain the most important international rules that limit the barbarism of war and that protect people who do not take part in the fighting (civilians, medics, humanitarian workers), as well as those who can no longer fight (wounded, sick and shipwrecked, prisoners of war). Thus, all four *Geneva Conventions* provide for the prohibition of torture in the provision of Article 3 in situations that do not cover exclusively international armed conflicts but also internal conflicts (the so-called *the rule of humane treatment*). Conventions I and II in Article 12 prescribe the obligation of humane treatment of the wounded and sick soldiers and wounded, sick and shipwrecked members of the armed forces at sea. Article 13, 17 and 87 of the Geneva Convention III prohibit physical or mental torture and any other form of cruelty to prisoners of war. Convention IV contains a general prohibition of coercive measures against civilians in times of armed conflict in Article 31, while Article 32 extends the prohi-

bition of torture to different categories of protected persons. In the subsequently *Additional Protocol I* of 1977 to the Geneva Conventions which relating to the protection of victims of international armed conflicts, Article 75(2) (a) (ii) extends the prohibition of torture "at any time and in any place". The prohibition of torture applies to all perpetrators - civilians, military personnel and state agents. *Additional Protocol II* adopted in 1977, which relating to the protection of victims of non-international armed conflicts in the provision of Article 4(2) (a) confirms the absolute character of the prohibition of torture. In other words, the contracting parties may not derogate from this prohibition either in time of war or in peacetime (Bothe, Partch, Solf, 1982:638).

The evolution of rules prohibiting torture in international humanitarian law in general, has been linked to the development of rules in other branches of international law. Thus, in response to war crimes and crimes committed during World War II, rules prohibiting torture in the field of international human rights law crystallized in the post-war period. The prohibition of torture is first contained in Article 5 of the *Universal Declaration of Human Rights* of 1948. According to this general provision, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This rule was later elaborated in a series of universal and regional acts of international human rights law such as the *UN International Covenant on Civil and Political Rights* of 1966, the *European Convention on Human Rights* of 1950, the *American Convention on Human Rights* of 1969 and in the African *Charter on Human and Peoples' Rights* of 1981, the *UN Convention on the Rights of the Child* of 1989 and the *UN Convention on the Rights of Persons with Disabilities* of 2006**.** It should be noted that the *UN International Covenant on Civil and Political Rights* of 1966 was the first universal instrument of international law that explicitly reaffirmed the prohibition of torture and other cruel, inhuman or degrading treatment, aimed at protecting dignity and physical and mental integrity of the individual. Although it does not contain a description and qualification of prohibited acts, the Covenant in the provision of Article 7 provides in general terms that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". Then, in the provision of Article 10 it further elaborates this obligation of the contracting parties to act "with humanity and with respect for the inherent dignity of the human person" towards all persons deprived of their liberty. The provision states that "detainees could not be subjected to any difficulties or restrictions other than those resulting from deprivation of liberty". Respect for the dignity of such persons should be guaranteed under the same conditions as free persons. Consequently, this solution covers forms of treatment that would not be serious enough to legally qualify as cruel, inhuman or degrading in accordance with the provisions of Article 7 (Nowak, 2005:250; Šurlan, 2017:6).

The most important international legal act of international human rights law prohibiting torture is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* The Convention drafted by the Commission on Human Rights was adopted by the UN General Assembly on December 10, 1987 (Steiner, Alston & Goodman, 2008:226-227). The Convention entered into force on 26 July 1987 and is binding on most countries in the world (currently 172) to take appropriate legislative, administrative and judicial measures to prevent torture in their territory. This international treaty of a universal character is based on the principles contained in the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted by the General Assembly in 1975. In this sense, the Declaration served as a very reliable support in defining torture in the Convention. According to the Declaration, torture is presented in the context of criminal law as "(...) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.

It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners". According to the Declaration, torture also constitutes "(...) an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Similar to the above definition, the provision of Article 1 of the Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". From the conventional formulation, it follows that torture does not involve pain or suffering arising solely from sanctions applied under the law. Also, the definition of torture does not contain clear criteria for distinguishing torture from cruel, inhuman or degrading treatment or punishment. In this regard, the Convention allows states to define more closely the concept of torture in their domestic law in accordance with the elements contained in the conventional definition. In determining the prohibited act, states generally rely on the objective elements of the crime of torture defined in the Convention, which includes any act that intentionally inflicts great physical and mental suffering. These sufferings and pains are inflicted on the basis of an explicit order or consent of an official or some other person acting *ex officio* and do not arise exclusively, nor are they inseparable and inevitable consequences of legal sanctions. In determining the subjective element of the crime of torture, the states start from the assumption that the infliction of great physical and mental suffering and pains is done with the intent of the perpetrator *(dolus).* Hence, the act of execution of this act consists exclusively in an action aimed at obtaining recognition or some other information, punishment or intimidation. The legal qualification of torture also depends on the degree of intensity of intentionally inflicted suffering and pain, which is the main criterion that separates torture from other forms of abuse. In addition to the freedom to incriminate the scope of torture in its domestic law, states also have the obligation to sanction attempts or other forms of complicity in the execution of torture. According to the Convention, states are obliged to establish jurisdiction to conduct criminal proceedings against perpetrators of torture. They are obliged to prosecute and punish perpetrators first on the ground of universal principle which became binding for state parties under Article 5 of the Convention. If states do not want to prosecute the perpetrators of these crimes, they are obliged to extradite them to another state *(aut dedere aut judicare).* States are also expected to provide adequate protection to victims of torture, as well as to guarantee fair and adequate compensation. Expulsion, return and extradition of persons to a country where persons would be subjected to torture are not permitted *(non-refoulement).* In order to achieve general prevention, states are required to implement training programs for civilian, military, medical personnel and civil servants, as well as for other categories of persons involved in the detention, interrogation of arrested, detained or imprisoned persons. States have a duty to adopt rules and guidelines concerning the rights or authorizations of these persons and to systematically control their application. They are obliged to ensure that the competent authorities enter into an impartial investigation as soon as possible whenever there are reasonable grounds to believe that an act of torture has been committed in the territory under their jurisdiction. States are also obliged to ensure that all persons who claim to have been subjected to torture have the right to lodge a complaint with the competent authorities. Finally, states are obliged to criminalize all acts which constitute cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in Article 1 of the Convention, and when such acts are committed by officials or other persons acting *ex officio* or when such acts are committed with the express or tacit persuasion or consent of those persons (Paunović, Krivokapić & Krstić, 2007:171; Milenković, 2001:40-43).

In the field of international criminal law, torture is more precisely defined by the provision of Article 7(2) of the *Rome Statute* of the International Criminal Court adopted on 17 July 1998. Torture under the Statute means: "(...) the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". From the above, there is no possibility to determine the relative intensity of pain or suffering in torture in relation to other forms of abuse. The provision of Article 7 (1) (f) of the Rome Statute covers torture as a material element *(actus reus)* of crimes against humanity, while the provision of Article 8 (2) (ii) and 8 (2) (c) (i) covers torture in the context of serious violations of the Geneva Conventions, i.e. war crimes in international and internal armed conflict (Kreća, 2020: 654-659; Schabas, 2004:41). Similar to the definition contained in the sources of international human rights law, it is understood that no special purpose is required for this crime, nor does the definition of a crime finally specify the status of the perpetrator as an official. In other words, torture is not limited to acts originating from state authorities. In fact, that solution stems from the *Draft Code of Crimes against Peace and Security of Mankind* prepared by the ILC in 1996, which served the Preparatory Committee for the drafting of the Rome Statute of the International Criminal Court. Article 18 (c) stipulates that torture also constitutes torture crime against humanity when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group. In this sense, this Draft is not limited to acts committed exclusively in official capacity or with official connivance. Extensive interpretation of the mentioned solutions has found a place in the *Statutes of the International Criminal Tribunals* for the former Yugoslavia and Rwanda. The provisions of Articles 5 and 3 of these Statutes also provide for a solution according to which torture is sanctioned within the framework of crimes against humanity. Bearing in mind that in any armed conflict, acts of violence against members of the enemy armed forces or civilians are undertaken in order to achieve certain objectives and that these objectives are as a rule discriminatory, the practice of these Tribunals has shown that torture is often equated with ill-treatment which exists in general international law (Lee, 2001; Kaseze, 2005, 134-137).

Following the determination of the concept of torture in international law, it could be concluded that its various definitions and legal qualifications contained in international legal acts arise from the specifics of each of the branches of international law that deal with this crime. Despite the existing differences and the limitations of their scope, which remained within the limits of the prohibition of torture present in customary international law, it cannot be concluded that these instruments did not contribute to the progressive development of international law. This is all the more so because they have established mechanisms for monitoring their application, which have significantly contributed to the further elaboration of the concept of torture in contemporary international practice.

UNITED NATIONS PROTECTION MECHANISMS

The Committee against Torture

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* established a mechanism for protection against torture in the form of a Committee against Torture. This Committee consists of ten experts in the field of human rights, elected according to the equitable geographical criterion, who act in the Committee in their personal capacity. The main function of the Committee is to monitor the implementation of the Convention by states. States parties to the Convention are required to submit, through the Secretary-General of the United Nations, period-

ic reports on the measures they have taken to fulfill their obligations under the Convention. These periodic reports, which are submitted every four years after the submission of the initial report, are considered by the Committee to determine the compliance of state practice with the provisions of the Convention. After consideration in accordance with the Rules of Procedure, the Committee draws up general comments and recommendations, which it forward to the state concerned. These comments and recommendations aim to promote the implementation of the Convention and the fulfillment of international obligations by the States. The Rules of Procedure stipulates the appointment of a Special Rapporteur in charge of supervising the implementation of recommendations and general comments. When the Committee receives information on the systematic practice of torture in one of the States, it shall initiate an investigation. Pursuant to Article 20 of the Convention, the Committee may *ex officio*, in accordance with the confidentiality of this investigation, take certain actions in the territory of the offending state. Thereafter, the Committee may make certain findings and recommendations on how the State should overcome the current situation. The Committee is also responsible for interstate petitions if states explicitly agree. In this case, the Committee shall take measures in its capacity as a mediator to remedy the unlawful practice of the state party. In order to overcome any dispute between states, the Committee may offer solutions through the establishment of a Conciliation Commission. Its formation also requires the consent of the parties to the dispute. If the amicable settlement of the dispute does not result in a satisfactory outcome, the dispute may be referred to the International Court of Justice in accordance with the provisions of Article 30 of the Convention. In addition to this, it is worth mentioning that the Committee may also be responsible for individual petitions. This situation is possible when States accept the competence of the Committee. Thus, if a state party accepts and recognizes the competence to submit individual petitions, the Committee shall become competent to consider them in accordance with the Rules of Procedure. In that sense, the Committee may make a decision on the merits and in situations when it is necessary to avoid irreparable damage, the Committee has the right to issue temporary measures. Their execution is supervised by a Special Rapporteur. Finally, there is an obligation on the Committee itself to inform the UN General Assembly and the member states of its current activities in its annual reports (Andrysek, 2000:871-872; Šurlan, 2014:107-112).

The Subcommittee on the Prevention of Torture

The Subcommittee on the Prevention of Torture was established on the basis of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was adopted in 2002 and entered into force in 2006 (Šurlan, 2014: 113-116). The Subcommittee is a separate and independent treaty body that performs its mandate on the prevention of torture and ill-treatment within the UN system in the field of human rights protection. The Subcommittee is composed of 25 members, human rights experts who serve in their personal capacity and have professional experience in the field of justice and police administration, and who are selected according to the equitable geographical representation and from different civilizations and legal systems. Cooperation with the Committee against Torture is reflected in the submission of reports on measures taken to prevent torture in states parties to the Convention. The Subcommittee has a mandate to undertake visits to states parties, during the course of which it may visit any place where persons may be deprived of their liberty. The rule is that States Parties shall be notified in advance of announced visits by representatives of the Subcommittee. After reviewing the situation, the Subcommittee provides recommendations, instructions and advice to states regarding the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment. In addition, the Subcommittee assists states in building preventive mechanisms, maintains contacts with these mechanisms,

and provides the advice and recommendations necessary to strengthen their capacities and mandates. In addition, the Subcommittee cooperates with relevant UN bodies as well as with other international and regional organizations and bodies in order to strengthen prevention mechanisms. States Parties have the obligation to assist the work of the Subcommittee by providing access to its representatives, by providing relevant information that the Subcommittee may request, and by providing appropriate support in the establishment and operation of national bodies and mechanisms for the prevention of torture. Improving cooperation also presupposes upgrading the legal system of states in accordance with the international legal standards.

The Human Rights Committee

The Human Rights Committee was established by Part IV of the *International Covenant on Civil and Political Rights*. States Parties to the Covenant accepted the mandatory competence of the Committee. The competence of the Committee extends to the provisions of the Optional Protocol, which was adopted at the same time as the Covenant. The Committee is basically an expert body, and its members act in a personal capacity. The selection criteria are the same as for the aforementioned contractual oversight bodies (fair geographical distribution and representation of representatives of different civilizations and legal systems are taken into account). The independence and impartiality of the members of the Committee are its basic characteristics. The Committee's competence under the Covenant is twofold: the Committee first examines the reports that States Parties are required to submit and that relate to the implementation of the Covenant, and then the Committee provides good services in resolving disputes when states report to it that other States Parties have violated obligations from the Pact. In the first case, the Committee has the opportunity to give general comments and recommendations, while in the second case it submits a report stating what has been achieved in the process of providing good services, whether a solution has been reached between the parties or not. In that sense, it can use the possibility of forming an *ad hoc* Conciliation Commission. If the disputed situation regarding the violation of human rights provisions (including the violation of the prohibition of torture) has not been reached, states may seek solutions by other peaceful means (including initiating proceedings before the International Court of Justice). The Optional Protocol introduced a third type of competence of the Committee, which refers to the possibility of considering individual petitions. The submission of individual petitions is conditioned by the exhaustion of all remedies in the legal system of the state in which the provisions of the Covenant have been violated. After the petition is submitted to the Committee, the Committee considers it and adopts a reasoned position with instructions for resolving the disputed situation. Disputes concerning the application of the provision of article 7 of the Covenant concerning the prohibition of torture have thus been resolved before the Committee in many cases. When the Committee determined responsibility for the violation of this prohibition, the injured party was entitled to appropriate compensation for the damage caused. The Committee's practice since 1982 relies on the so-called General Comments emphasizing the obligation of states that, in addition to legislative solutions harmonized with the provisions of the Covenant, states must ensure their effective implementation through the implementation of certain protective measures and the establishment of control mechanisms. Although the Committee has meanwhile increased the efficiency of its work, its work has not been fully effective, which is why it has been suggested that the entire protection system at the United Nations level must be improved. To this end, the United Nations established the Voluntary Fund for the Victims of Torture in 1982 and appointed the Special Rapporteur on Questions Relevant to Torture in 1985, whose mandate is based on the UN Charter and ECOSOC resolutions (Andrysek, 2000:873-874).

EUROPEAN PROTECTION MECHANISM

The European Committee for the Prevention of Torture

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment was set up in 1987 under the *European Convention for the Prevention of Torture* and functions on the principles of cooperation and confidentiality. The Convention provides that the Committee shall be composed of one representative from each State elected by the Committee of Ministers of the Council of Europe. The Committee performs the most advanced preventive oversight ever designed and has the opportunity to visit and examine *ex officio,* the treatment of persons deprived of their liberty with a view to strengthening the protection of such persons from torture and from inhuman or degrading treatment or punishment. The Committee independently plans and organizes visits to the states. He has extraordinary powers that include unrestricted access to any places within his jurisdiction where persons are deprived of their liberty by public authorities. Also, the Committee has the right to a private interview with any detainee and free communication with anyone believed to be able to provide information. After the visit, the Committee gives certain findings with recommendations to the states. On some occasions, the Committee did not hesitate to issue public statements regarding non-compliance with human rights standards. However, the Committee has no right to deal with legal issues within the jurisdiction of the European Commission, or to resolve legal disputes within the jurisdiction of the European Court of Human Rights under the provisions of the European Convention on Human Rights (Nowak & Suntinger, 1993:145-168; Andrysek, 2000:876; O'Connell, Aizpurua &, Rogan: 2021:2).

CONCLUSIONS

The subject study provides an analysis of the most important international legal sources governing torture and other forms of ill-treatment. Although torture is prohibited everywhere and at all times, different regulations of its concept in various branches of international law do not contribute to greater legal certainty and the effectiveness of its prohibition in the international community. Despite these differences, the legal determination of torture as the most severe form of ill-treatment, moves within the framework of the imperative norm *(jus cogens)* whose scope under general international law obliges all states, regardless of whether they are parties to international conventions or are obliged on other legal grounds to implement the prohibition of torture in their legal systems. Otherwise, if there is no clear incrimination of torture the position of victims of torture is much more difficult, which has negative effects on the rule of law, as well as on the position of the state in international relations. Given that these situations pose a certain security risk, states have a special interest in incriminating and punishing the perpetrators of torture on the principle of *aut dedere aut punire,* which is many times proven in international practice. In that sense, most states have banned torture, criminalizing it as a separate crime or as part of war crimes and crimes against humanity. However, the incrimination of this act at the national level should not go beyond the elements contained in the international legal acts of torture. This is all the more so because these international legal acts adopted under the auspices of the UN and other international organizations prescribe obligations and measures of cooperation between states in the prevention and punishment of torture. Therefore, the existing differences in its regulations remain within the limits of prohibition present in customary international law, which do not exclude the possibility of unifying and increasing the efficiency of state practice through protection mechanisms established to monitor the application of international conventions prohibiting torture and other forms of ill-treatment.

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