COMPARATIVE ANALYSIS OF THE PROHIBITION OF TORTURE IN THE CASE LAW OF THE U.S. SUPREME COURT AND OF THE ECtHR

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TABLE OF CONTENTS

ABSTRACT

The right to freedom from torture and inhuman treatment is enshrined by international conventions on human rights as one of the fundamental standards of democratic societies. With due regard to the above statement, this thesis will focus on a comparative analysis of the prohibition of torture and inhuman treatment in the case law of the U.S. Supreme Court and of the European Court of Human Rights.

The thesis will consider, from a comparative perspective, the two main legal provisions, the Eighth Amendment of the U.S. Bill of Rights and Article 3 of the European Convention on Human Rights, the standards used by the two courts in determining infringements of this absolute right and the elements specific to each case law. Ultimately, the scope of this analysis is to determine the strengths and weaknesses of the two systems.

INTRODUCTION

The prohibition of torture and inhuman treatment represents a problem of contemporary society, even though we might have the impression that this kind of acts can no longer occur in the 21st century. Despite the numerous sources of international law prohibiting these abusive behaviors, there are still practices specific to certain countries or regions which run counter this prohibition. In fact, there are a variety of behaviors and treatments which be observed in different areas or institutions of life and which may amount to torture or at least to degrading and inhuman treatment.

In order to understand how these treatments are determined as pertaining to an absolutely prohibited class of behaviors, two major systems will be analyzed in this thesis. The present study will develop the approach taken by two significant judicial systems, one that is renowned for its tradition, the U.S. Supreme Court, and the other that is seen as a model on international and regional level, the European Court of Human Rights (ECtHR). From the case law of these two courts, this thesis will examine those cases dealing with issues pertaining to the Eighth Amendment of the U.S. Bill of Rights and respectively to Article 3 of the European Convention on Human Rights (ECHR).

Having in mind that the right to freedom from torture and inhuman treatment is a fundamental right in a democratic society, it can be stated that a uniform view on the prohibition of torture is of special interest to international law and to the international community of states. The aim of this thesis is therefore to consider these matters by taking as a subject of research the comparative analysis of the Eight Amendment of the U.S. Bill of Rights with Article 3 of the ECHR and of the main case law of the U.S. Supreme Court and of the ECtHR concerning the main standards used by the two courts in determining violations of the right to freedom from torture. Furthermore, I will focus on those specific elements of

each of the two systems, including positive obligations of the states, extradition, the death penalty, and the death row syndrome. In addition, as it is well known, human dignity has been used in various jurisdictions in order to protect the individual from abusive authorities of the state, namely from torture and inhuman treatment. Thus, throughout the thesis, I will draw on the use of human dignity in the case law of the ECtHR and of the U.S. Supreme Court, in order to determine the status of this fundamental value within the prohibition of torture and inhuman treatment in the two judicial systems. However, this thesis will not include the analysis of conditions of detention, although rare references will be made to this topic where necessary.

International provisions regarding the prohibition of torture and cruel, inhuman or degrading treatments or punishments can be found in the Universal Declaration of Human Rights (1948), in the four Geneva Conventions (12 August 1949), in the European Convention of Human Rights (1950), in the International Covenant on Civil and Political Rights (1966), in the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987). However, most of these instruments have chosen not to define the concept of torture and ill-treatment because of the danger that states could take advantage of a limited definition and avoid legal responsibility for acts of torture which would not be included in such a definition. Nonetheless, in the UN Convention against Torture we can find the following definition of this concept:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or

other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.[1]

It can be observed that there are certain elements which must be taken into account when establishing that an act constitutes torture: severe pain and suffering (physical or mental), intention, purpose, an official capacity or accord of such person, and an exclusion of acts which cause pain from lawful sanctions. This is the definition of torture but it does not apply to cruel, inhuman or degrading treatment. For this reason it is frequently, although not generally, considered that the separation between torture and cruel, inhuman or degrading treatment is on considerations of degrees of severity. This debatable aspect will be given attention in this thesis as well.

Furthermore, the danger of this definition can be illustrated with the case of the United States, who are bound by the UN Convention but at the same time there have been situations when they have taken advantage of gaps in the definition. For example, the term severity is open to interpretation. On the other hand other formulations of the prohibition of torture, such as the one in the ECHR is general, with the aim of leaving to the ECtHR the open possibility of extending, in case of need, the application of the Convention. It is therefore evident that a comparison between the two systems raises important questions for international law.

This subject, as formulated by the present thesis, has been dealt with only fragmentarily. Some authors have analyzed the prohibition of torture in the United States and others have studied the same subject in the case law of the ECtHR, always as autonomous and separated matters. For instance authors like Henry Shue, Sanford Levinson, Miriam Gur-Arye, and Alan Dershowitz[2] have discussed the question of torture as a permissible act and as a limited

[1] Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[2] Henry Shue, "Torture," Sanford Levinson, "Contemplating Torture: an Introduction," Miriam Gur-Arye, "Can the War Against Torture Justify the Use of Interrogations? Reflections in Light of the Israeli Experience," Alan Dershowitz, "Tortured Reasoning" in *Torture - A Collection*, edited by Sanford Levinson (Oxford University Press, 2004).

prohibition. On the same question, Yuval Shany scrutinizes the scope of this prohibition under international law and examines whether the absolute right is actually absolute.[3] On the other side, concerning the case law of the ECtHR, there are numerous studies of cases on Article 3.[4] Furthermore, a comparative analysis on the use of human dignity in various jurisdictions, authored by Christopher McCrudden,[5] is relevant in the context of this thesis. As Prof. McCrudden quite rightly asserts, although the ECHR did not include human dignity within its provisions, nevertheless the ECtHR has given importance to this fundamental value, through judicial incorporation especially in the interpretation of Article 3. In addition, McCrudden observes that this concept was introduced in the United States also through judicial incorporation, particularly in the interpretation of the Eighth Amendment.[6] However, this thesis will determine the contributions of human dignity for the prohibition of torture and inhuman treatment in the said judicial systems.

Having in mind the contributions of previous studies on this matter, the novelty of this thesis will consist in determining the similarities and differences between the approaches taken by the U.S. Supreme Court and the ECtHR in dealing with behaviors amounting to torture and to cruel, inhuman or degrading treatment. Ultimately, the comparative analysis in this study will draw attention to the strengths and weaknesses of the two systems. In addition, the main findings will concentrate on the effectiveness of different tests used by the U.S. Supreme Court and the ECtHR in determining violations of the prohibition of torture.

[3] Yuval Shany, "The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?" (November 25, 2005). Available at SSRN: http://ssrn.com/abstract=856905 (accessed February 15, 2009).
[4] Curtis Francis Doebbler, *International Human Rights Law* (CD Publishing, 2004); P. J. Duffy, "Article 3 of the European Convention on Human Rights," *The International and Comparative Law Quarterly* 32, No. 2 (April 1983): 316-346.
[5] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law*19, No. 4 (September 1, 2008): 655-724.
[6] Ibid, 667.

In order to achieve these aims, a comparative analysis of the significant case law of the two courts at issue will be employed in this thesis. Furthermore, the comparison will also include an interpretation and an overview of the literature concerning the prohibition of torture and inhuman treatment.

The first chapter of this thesis will be concerned with the main legal provisions of the prohibition of torture and inhuman treatment in the U.S. and in the Council of Europe. An extensive comparison between the Eighth Amendment of the U.S. Bill of Rights and Article 3 of the Convention which are respectively binding on the two courts will be the focus of this chapter. Furthermore, the efficiency of these instruments will be taken into account. A second chapter will analyze the relevant case law of the ECtHR on Article 3, revealing the main features of this system. It will look into cases concerning the topic of extradition, death penalty and death row. Finally, the last chapter of this thesis will provide an image of the case law of the U.S. Supreme Court on the Eighth Amendment, analyzing the diversity of standards adopted by the Justices and observing the way these standards have been applied to practical situations. Ultimately, an overall assessment on the approach of the two courts to the prohibition of torture and inhuman or degrading treatments will be formulated.

1 STRUCTURE AND INTERPRETATIONS OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE EIGHTH AMENDMENT OF THE U.S. BILL OF RIGHTS

This first chapter will be concerned with the main provisions regarding the prohibition of torture that are binding on the ECtHR and on the U.S. Supreme Court. Although the legal framework of the prohibition of torture includes significant international instruments which have been ratified by the majority of the states of the Council of Europe and by the United States,[7] they will not be discussed in this chapter due to the fact that the analysis will be limited only to Article 3 of the ECHR and the Eighth Amendment of the U.S. Bill of Rights. Furthermore, the efficiency of these instruments will be taken into account. A first section will analyze the meanings given to the concepts that compose Article 3 of the ECHR, the scope of this provision and the rights conferred by it. A second section will be focused on the Eighth Amendment of the U.S. Bill of Rights, considering the meanings given to the terms employed in the Cruel and Unusual Punishment Clause and, in addition, providing a view of the different interpretations that scholars and practitioners have suggested for this Amendment. It will be shown that Article 3 is a much clearer provision than the Eighth Amendment, and that although the Eighth Amendment has survived for a long time, it is an ambiguous and deficient legal provision.

1.1 ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR is considered a living text, a human rights convention to be interpreted with due regard to the developments taking place in society at the moment of interpretation and not at the moment of the drafting. Unlike the approach of a number of justices in the U.S. Supreme

[7] An incomplete list of these instruments includes the four Geneva Conventions of 1949, the International Covenant on Civil and Political Rights of 1966 and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

Court, the Convention is flexible and open to the current problems of society.[8] In this context we must place and understand the interpretation of Article 3. This provision reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

It is a simple and concise provision but the right conferred by it is absolute and unqualified, despite the victim's actions or the protection of national interests.[9] Unlike other rights in the Convention, the right to freedom from torture cannot be limited under any circumstances, not even war, combating terrorism or organized crime. In this respect, Article 15(2) of ECHR prohibits all contracting states to allow any ill treatment of individuals even in the case of public emergency threatening the life of the nation. Furthermore, contracting states cannot use any justification in order to impose a limitation on this right. This article, together with Article 2 regarding the right to life, is one of the fundamental provisions of ECHR. The prohibition it established has become part of customary international law and a *jus cogens.*[10]

Despite the fact that its formulation is simple and concise, without providing an exact definition of the terms it uses, Article 3 encompasses varied practices, official and private. This article protects not just against one type of actions causing a violation of the right, but its range of application extends to all types of violations affecting human dignity and physical integrity. It encompasses individual complaints against ill treatments while in police custody,

[8] Malcolm Evans and Rodney Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman Or Degrading Treatment Or Punishment* (Oxford University Press, 1998), 73.
[9] *See Chahal v. United Kingdom*, Application no. 22414/93, 15 November 1996.
[10] *See* Joan Fitzpatrick, *Human rights in crisis : the international system for protecting rights during states of emergency* (Philadelphia: University of Pennsylvania Press, 1994); Erika Feller, Volker Türk, and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

against inhuman or degrading conditions of detention, against deportations exposing to torture etc. [11]

If Article 3 is broken down according to the types of behaviors it targets, it is evident that the drafters intended to express a difference between *torture* and *inhuman or degrading* treatment or punishment. For the definition of the term "torture" the Court took into consideration Resolution 3452 (XXX) of the UN General Assembly which stated that "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[12]

Furthermore, the Court also referred to the UN Convention against Torture, which defines torture in Article 1 as

> [a]ny 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.

Therefore, it can be observed that, in differentiating between torture and ill treatment, the ECtHR gives significance to the intention of the perpetrator and to the severity of the suffering inflicted. In assessing the severity of the treatment the Court takes into account objective criteria, such as its duration, physical or mental effects, and the manner and method of its execution, and subjective criteria, such as the sex, age and state of health of the victim.[13]

Subsequently, if we exclude this type of actions, the remaining category, which consists of treatments that are not severe enough or do not have a certain purpose, constitutes inhuman or

[11] Stephen Livingstone, "Prisoners' rights in the context of the European Convention on Human Rights," in *Prison Readings. A critical introduction to prisons and imprisonment*, ed. Yvonne Jewkes and Helen Johnston (Portland, Oregon: William Publishing, 2006), 277.
[12] Article 1 of the UN General Assembly Resolution 3452 (XXX) adpted by the General Assembly of the United Nations on December 9, 1975.
[13] *See Kudla v. Poland*, Application no. 30210/96, 26 October 2000, par. 90-94.

degrading treatment or punishment. This category is different than the usual official punishment imposed by judicial authorities. Although a sentence can be humiliating and degrading, this punishment referred to by Article 3 must be inhuman and degrading, therefore it must present certain elements which make it distinct. In the *Greek*[14] case and in *Ireland v. United Kingdom* the ECtHR defined inhuman and degrading treatment. "Inhuman treatment" causes serious physical and mental suffering and serious psychiatric disturbances.[15] In the *Greek* case the ECtHR stated that

> The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable.
>
> The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.
>
> Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his conscience.[16]

Furthermore, in *Ireland v. United Kingdom* the Court was of the opinion that

> Ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[17]

The most important elements taken into account in determining whether there is "degrading treatment" are whether the treatment causes feelings of fear, anguish and inferiority, thus humiliating and debasing the victim.[18] Furthermore, a significant element is the personality of the victim. The fact that the personality of the victim has been negatively affected contributes to a finding of a violation of Article 3. This is not an exhaustive list of elements taken into account in this matter; it is rather an exemplification of the most significant. For instance subjective characteristics, such as personal characteristics of the victim, may be taken into

[14] *Denmark, Norway, Sweden and the Netherlands v. Greece*, 5 November 1969.
[15] See *Ireland v. United Kingdom,* Application no. 5310/71, 18 January 1978.
[16] The *Greek* Case.
[17] *Ireland v. United Kingdom.*
[18] Ibid.

account. However, the absence of one of the elements mentioned above does not rule out the finding of an infringement.

Despite this differentiation made in theory, it must be observed that in practical situations a distinction between torture and inhuman or degrading treatment or punishment is difficult to make and in many instances the ECtHR has been criticized for its findings.[19] This first section on Article 3 has been a brief description mainly due to the fact that its interpretation has been clearly made by the ECtHR. Furthermore, using the case law of the Court in the following chapter, Article 3 will be given a deeper analysis in order to complete this concise description.

1.2 THE EIGHTH AMENDMENT OF THE U.S. BILL OF RIGHTS

To introduce the development of this section, it can be noted that as opposed to the clear interpretation of Article 3, the Eighth Amendment has been highly debated among scholars and practitioners, which constructed an unclear and inconsistent view of this provision. The Eighth Amendment of the U.S. Bill of Rights reads as follows: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[20]

The last part of this amendment, known as the Cruel and Unusual Punishment Clause, is relevant in the context of this analysis. The expression "cruel and unusual punishments" traces its origins back to the English Bill of Rights of 1689 and to the Declaration of Rights of 1776 in Virginia. The original purpose for which it was first drafted in England, to be used as an antidiscrimination tool against executive abuse of power[21], was transmitted to the

[19] See Malcolm D. Evans, "Getting to Grips with Torture," *The International and Comparative Law Quarterly* 51, No. 2 (April 2002): 365-383. In the case of *Ireland v. United Kingdom* the Commission reached the conclusion that the five interrogation techniques used by the authorities in order to obtain confessions amounted to torture. However, the ECtHR found that the behaviors could not be qualified as torture but only as inhuman and degrading treatment.

[20] U.S. Constitution, VIII Amendment.

[21] Laurence Claus, "The Anti-Discrimination Eighth Amendment," *Harvard Journal of Law and Public Policy* 28, No. 119, 122 (2004).

Eighth Amendment.[22] Looking at the Eighth Amendment from this perspective, we see that although the people invest power in the government, to punish offenders, the government cannot punish people in a way which would dehumanize individuals.[23] This is probably the reason why the formulation adopted by the Framers refers restrictively to punishments and not to the more general term of treatments. Therefore, as opposed to Article 3 of the ECHR, the Eighth Amendment does not refer directly to torture as such. Nonetheless, it has been interpreted as a ban on this behavior. The general interpretation is that although the term used is "punishment", there is no need for an official sentence in order for the amendment to be applicable, and consequently the prohibition encompasses both official sentences and unofficial actions. Besides this generally accepted interpretation there is the originalist interpretation that sees a different scope for the Cruel and Unusual Punishment Clause. This different perspective will be analyzed in the following lines, in correlation to the more generally accepted interpretation of the Clause.

Similar to the interpretation held for Article 3 of the ECHR, in the case of the Eighth Amendment, the opponents of the originalist interpretation believe that the Clause should be interpreted in accordance to contemporary standards and not those of three centuries ago when the provision was drafted.[24] In the *Weems v. United States*[25] case the U.S. Supreme Court developed a new standard for the Cruel and Unusual Punishment Clause. It stated that the Clause should be interpreted "progressively" and "may acquire meaning as public opinion becomes enlightened by a humane justice".[26] This decision was followed by Chief Justice Warren in the *Trop*[27] case. He stated that the Clause "must draw its meaning from the

[22] John F. Stinneford, "The original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation," *Northwestern University Law Review* 102, No. 4, (2008): 1748.
[23] Shannon D. Gilreath, "Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent", in *Thomas Jefferson Law Review* (Spring 2003): 28.
[24] Stinneford, 1743.
[25] *Weems v. United States*, 217 U.S. 349 (1910).
[26] Stinneford, 1750-1751.
[27] *Trop v. Dulles*, 356 U.S. 86 (1958).

evolving standards of decency that mark the progress of a maturing society".[28] Later, in *Atkins v. Virginia*[29], where the imposing of death sentences upon mentally retarded people was held unconstitutional, the Court held that the excessiveness of a punishment is measured in accordance with society's "evolving standards" issued from a "national consensus."

Furthermore, concerning the distinction made by the ECHR between torture and ill treatment, the same division has been accepted in the interpretation of the Eighth Amendment, possibly because the same role that the United Nations played in the definition of torture in the Council of Europe was also played in the United States. Both the General Assembly's Resolution and the UN Convention against Torture played a leading role in defining torture. However, a more detailed analysis of this Clause is necessary in order to understand its elements. By breaking down the Clause, like in the case of Article 3 of the Convention, we have three terms to understand: cruel, unusual and punishment. Some authors contend that during the 19th century, the term "cruel" was used by the majority of the states in the U.S. in relation to punishments normally used at common law and the term "unusual" by comparison to other countries' practices. Be that as it may, today the first concept, "cruel", does not provoke any debate as its meaning has generally been accepted as "inflicting pain" or "inflicting suffering". But things are different concerning the meaning of the second term, "unusual". This is the part of the clause that has generally been either ignored or debated by legal scholars and practitioners. One scholar, Laurence Claus, has stated that "unusual" means "immorally discriminatory".[30] The U.S. Supreme Court has taken this view into account but generally its approach has taken two forms. The first approach is expressed in the words of Chief Justice Warren:

[28] *Trop v. Dulles*, 101.
[29] *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).
[30] Claus, *supra* note 21.

> On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual." If the word "unusual" is to have any meaning apart from the word "cruel," however, the meaning should be the ordinary one, signifying something different from that which is generally done.[31]

In a concurring opinion in the case of *Furman v. Georgia*[32], Justice Stewart held that the word "unusual" meant "wantonly and […] freakishly imposed", comparing it to being stuck by lightening.[33] Similar to the above mentioned approach taken by Laurence Clause, the same case gave the opinion of Justice Douglas on the subject, stating that "unusual" is the equivalent of "discriminatory":

> It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

Despite all these subjective interpretations, the understanding of Chief Justice Warren, that unusual is "different from that which is generally done", is the one generally endorsed by the U.S. Supreme Court.

Concerning the second interpretation given by the U.S. Supreme Court to the term "unusual", the interpretation consisted of ignoring the concept and making it meaningless for the interpretation of the Cruel and Unusual Clause. The opposite of this interpretation, the originalist understanding of the Eighth Amendment, identifies the word "unusual" with "contrary to long usage"[34], which leads to the conclusion that the Eighth Amendment prohibits only those cruel new punishments, but not those cruel punishments that have long been used. Furthermore, the originalist interpretation sees the conjunction cruel and unusual as being very important, because there are punishments that may be cruel but not unusual and

[31] Chief Justice Warren delivering the opinion of the court in *Trop v. Dulles*.
[32] *Furman v. Georgia*, 408 U.S. 238 (1972).
[33] Ibid., 309–10.
[34] Stinneford, *supra* note 22.

punishments that are unusual but not cruel. Therefore from this perspective, in order to have a violation of the Eighth Amendment, both conditions must be met in a punishment.[35]

Regarding the third concept in the structure of the Clause, "punishments", as stated above, it has generally enjoyed an extensive understanding, referring not only to official sentences but also to all behaviors that threaten the dignity and integrity of an individual. However, there are justices who sustain that the Framers intended this amendment to be a ban not on the entire area of behaviors that may constitute torture but simply on punishments. This originalist approach to the Eighth Amendment will be detailed below. It is an approach which benefits from the simple and ambiguous formulation of the Eighth Amendment. The most well known figure of the originalist interpretation is Justice Scalia. According to his approach, the list of behaviors prohibited by the Eighth Amendment should be limited only to those that were unacceptable at the time of the drafting.[36]

This perspective on the Eighth Amendment is highly restrictive and unsuitable to the current society. If accepted, it would proscribe only those sentences considered disproportionate in the Eighteenth Century. Therefore, even the death penalty that was easily accepted in those times should be seen as accepted behavior today under the Eighth Amendment. In defending this controversial view, the originalists sustain that because the Fifth Amendment[37] is contemporaneous to the Eighth, the Eighth Amendment could not have been pointed towards the death penalty.[38] But Justice Scalia is ready to break some of the consequences of his

[35] Joshua L. Shapiro, "*AND* Unusual: Examining the Forgotten prong of the Eighth Amendment," *The Social Science Research Network Electronic Paper Collection*: 4-5.
[36] Stinneford, 1742.
[37] The Fifth Amendment of the U.S. Bill of Rights states that the death penalty cannot be imposed without due process: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
[38] Gilreath, 6.

interpretation, due to the development of the judicial system and serious consequences of the application of the death penalty for minor offences.[39] However, for grave offences Justice Scalia is not as flexible as he may seem. Unlike Justice Brennan and Justice Marshall, who are against death penalty because it is a cruel and unusual punishment, Justice Scalia believes the death penalty cannot be included in this category.

To give a more accurate expression of Justice Scalia's understanding of the Cruel and Unusual Punishment Clause, the case of *Harmelin v. Michigan*[40] is the perfect example. The case concerned an accused sentenced to life imprisonment for the possession of 672 grams of cocaine. The law prescribed a mandatory sentence for his offence and therefore the accused claimed that the sentence impeded the court from considering any further mitigating factors. Furthermore, the accused argued that the sentence was unconstitutional because it was highly disproportionate to the offence he had committed. In the opinion authored by Justice Scalia, the U.S. Supreme Court held the sentence constitutional because mandatory sentencing is valid even outside of the category of death penalty cases.

Justice Scalia took this opportunity and wrote the history of the Eighth Amendment and reached the conclusion that the English Bill of Rights used the terms "illegal" and "unusual" with the same meaning. Nonetheless, Justice Scalia acknowledged that the meanings may have changed in time, and therefore "unusual" and "illegal" may not have the same meaning today. Furthermore he sees the difference between the accepted punishments in the Eighteenth Century and the accepted punishments today. Although not in relation to all punishments, Justice Scalia understands the necessity to interpret the Eighth Amendment in

[39] Stinneford, 1742.
[40] *Harmelin v. Michigan*, 501 U.S. 957 (1991).

accordance to the current context.[41] It might not be enough, but it is a significant point for an originalist interpreter of the U.S. Constitution.

1.3 CONCLUDING REMARKS ON CHAPTER 1

By comparing the two relevant provisions of this study, we see that there is a distinction between torture and inhuman or degrading treatment in Article 3 of the Convention and an absence of any similar distinction in the Eighth Amendment. It must be noted that the distance between the moments of drafting of the two provisions is significant, which accounts for part of the differences in formulating the prohibition of torture and cruel and inhuman treatment. The Eighth Amendment is part of the Bill of Rights, which came into force after its ratification, in 1791, with the purpose of limiting the powers of the Federal Government and protecting certain powers of the states and of the individual. Article 3 on the other hand is part of the ECHR, a human rights convention, drafted after the experience of the World War II, with the scope of protecting human rights in democratic states. Although the fundamental values that stand at the basis of these instruments are similar, we see the differences between them. In contrast to the Eighth Amendment, Article 3 is a clear and simple provision, not too detailed and not too vague. Furthermore, although both provisions are formulated in general terms, without specifically defining the concepts they use, the Eighth Amendment is too grounded in tradition and ambiguous for a provision serving as a ban on all behaviors amounting to torture and inhuman treatment. The divergent interpretations of the Supreme Court's Justices described above are a consequence of this vagueness. Finally, as will be seen in the following chapters, the way they were drafted affects the way the prohibition of torture and inhuman treatment will be enforced.

[41] Stinneford, 1763-1766.

2 THE EUROPEAN COURT OF HUMAN RIGHTS

The prohibition of torture and inhuman or degrading treatment or punishment in the Council of Europe enjoys the basis of Article 3 of the Convention developed throughout the case law of the ECtHR. This chapter will illustrate the standards developed by the Court in order to protect this right, the specific doctrine of positive obligations of the Contracting Parties and the rules of evidence established by the Court. Furthermore, cases regarding the death penalty, the death row syndrome and extraditions will be studied in order to illustrate the stable system developed by the ECtHR in cases pertaining to Article 3.

2.1 GENERAL OVERVIEW OF THE STANDARD EMPLOYED BY THE CASE LAW OF THE ECTHR ON TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

As observed in the first chapter, the ECtHR has developed a scale of severity in interpreting Article 3. Qualifying a particular form of inhuman or degrading treatment as torture depends on the nature and degree of the ill treatment, on whether the treatment deliberately causes "very serious and cruel suffering".[42] Nonetheless, the ECtHR has been reluctant in finding practices of torture, preferring to declare that states had only inflicted inhuman or degrading treatment.

A good example of the approach taken by the Court in the past is *Ireland v. United Kingdom.* The case concerned the combined use of five interrogation techniques (wall-standing, hooding, subjection to noise, sleep deprivation, food and drink deprivation) by the UK government in order to obtain confessions from Irish nationals. The Court concluded, by thirteen votes to four, that the five practices amounted to inhuman and degrading treatment and not torture within the meaning of Article 3 because "although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment,

[42] See *Ireland v. United Kingdom,* par. 66-67 and *Aydin v. Turkey,* Application no. 25660/94, 24 August 2005, par. 195.

although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[43] Furthermore, the Court stated that "it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[44]

In a separate opinion, Judge Evrigenis stated that the holding of the Court in this case is a restrictive interpretation of the concept of torture. Furthermore, even within this restrictive definition the five techniques that were used for extracting confessions can be placed within the category of torture. The treatment endured by the persons was of an extreme intensity that caused physical, mental and psychological suffering amounting even to the most restrictive definition of torture.[45] Another separate opinion in this case expressed by Judge Sir Gerald Fitzmaurice showed that the treatments employed by the British, even if combined, were wrongly qualified by the Court because they did not amount even to inhuman and degrading treatment. Sir Gerald Fitzmaurice was of the opinion that the five procedures were wrong to be employed for extracting confessions but the fact that they were so does not bring them under or make them contrary to Article 3 of the Convention.[46] The decision was publicly received with a degree of criticism due to the noticeable torture treatment employed in the case and the absolute prohibition of such practices in international law.

Although the case law changed due to the desire to keep pace with current evolutions of society and with scientific developments, there is a small number of cases regarding torture

[43] *Ireland v. United Kingdom*, par. 167.
[44] Ibid.
[45] Ibid., Separate Opinion of Judge Evrigenis part (ii).
[46] Ibid., Separate Opinion of Judge Sir Gerald Fitzmaurice, par. 24.

as such. In the majority of cases the Court has held violations of Article 3 on the basis of inhuman or degrading treatment. Furthermore, the first finding of a violation of Article 3 on the basis of torture came only in 1996, in the case of *Aksoy v. Turkey*[47]. The case concerned an allegation of torture in police custody for a period of at least two weeks. At the moment of release from detention, the injured applicant was seen by the Public Prosecutor who failed to investigate the circumstances that had produced his wounds. Before the ECtHR the applicant stated that he had been subjected to various prohibited treatments among which the "Palestinian hanging", a technique consisting of suspending the naked victim from the arms tied at the back. This procedure caused him partial paralysis at both arms. Although certain parts of the facts were disputed by the Government, the Court concluded that the practice to which the victim had been subjected was of a serious and cruel nature that amounted to torture.[48] Furthermore, the Court affirmed the principle that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention."[49]

Therefore, if we compare the holdings in *Ireland v. United Kingdom* with those in *Aksoy v. Turkey*, we see the evolution in the case law of the ECtHR. Furthermore, the holding of the *Aksoy* case was confirmed by the Court in *Aydin v. Turkey* and *Selmouni v. France*[50]. In these cases the ECtHR recognized that certain forms of ill treatment in custody can present a level of severity that may amount to torture of prisoners.[51] In addition, in *Selmouni v. France* the Court stated that

[47] *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996.
[48] Ibid., par. 64.
[49] Ibid., par. 61.
[50] *Aydin v. Turkey*, Application no. 25660/94, 24 May 2005 and *Selmouni v. France*, Application no. 25803/94, 28 July 1999.
[51] Livingstone, 277.

> certain acts which were classified in the past as 'inhuman and degrading' as opposed to 'torture' could be classified differently in future. [T]he 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.[52]

The following paragraphs will consider the general scheme followed by the Court in establishing whether there has been an infringement of Article 3. In each case the ECtHR begins its analysis by reminding that this provision "enshrines one of the most fundamental values of democratic societies." The Court reiterates as well that torture and inhuman or degrading treatment or punishment is prohibited in absolute terms by the Convention. Derogations are excluded under Article 15 (2) of ECHR in all circumstances, such as the fight against terrorism or organized crime, or in case of public emergency threatening the life of the nation.[53] The prohibition remains absolute in all circumstances, irrespective of the nature of the offence allegedly committed by the victim.[54]

Furthermore, the test used by the ECtHR in determining whether there has been an infringement is the minimum level of severity that the ill-treatment must attain in order to fall within the scope of Article 3. The introduction of this threshold makes a selection of the cases which fall within the scope of Article 3[55] and reduces the loading of the Court with minor complaints. The minimum level of severity is not an absolute threshold set forth by the Court. It is a relative assessment of the facts, taking into account "all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, "the sex, age and state of health of the victim."[56] The assessment of these standards has evolved

[52] *Selmouni v. France*, par. 101.
[53] Ibid.,, par. 95, and *Assenov and Others v. Bulgaria* 90/1997/874/1086, 28 October 1998, par. 93.
[54] *See Chahal v. the United Kingdom,* Application no. 22414/93, 15 November 1996, par. 79.
[55] Clare Ovey and Robin C.A. White, *Jacobs and White: The European Convention on Human Rights,* 4th ed. (Oxford: Oxford University Press, 2006), 75.
[56] *See Ireland v. United Kingdom*, par. 167; *Kudła v. Poland*, par. 91, and *Peers v. Greece,* Application no. 28524/95, 19 April 2001, par. 67.

towards a "greater firmness" from the Court.[57] This development must be emphasized in order to eliminate any debate on whether the Court could accept specific cruel behaviors that are socially or culturally acceptable in certain regions; this contention must be rejected, as no exception to Article 3 is acceptable based on the relativity of the threshold.[58] Therefore, this relative assessment that takes into consideration specific circumstances and the entire context of the case does not affect the absolute nature of the right protected by Article 3.

On the same line of development, the Court has emphasized that legitimate and inherent levels of distress and suffering do not amount to violations of prohibited treatments within the scope of Article 3. For instance, regarding the minimum level of severity in complaints alleging ill treatment while in police custody, the Court established a threshold with due regard to the treatments that are sometimes necessary in such institutions. The threshold can be seen in *Ribitsch v. Austria*[59], a case in which the ECtHR found a violation of Article 3 due to ill-treatments that the applicant suffered while being held in police custody. Thus, the Court held that "in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3."[60]

Furthermore, in cases concerning conditions of detention the Court differentiated between the minimum level of severity and the inherent level of suffering experienced by inmates while in detention. In the case of *Kudla v. Poland* the Court stated that prisoners have the right to enjoy conditions of detention which are compatible with human dignity. Having in mind that normally the execution of a sentence already subjects the individual to a certain level of

[57] *See Selmouni v. France*, par. 101 in Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 3rd ed. (London: Sweet and Maxwell, 2007), 572.
[58] Stephanie Palmer, "A Wrong Turning: Article 3 ECHR and Proportionality," *Cambridge Law Journal* 65, No. 2 (2006): 438-451.
[59] *Ribitsch v. Austria*, 42/1994/489/571, 4 December 1995.
[60] Ibid., par. 38. This finding was confirmed by the Court in *Tekin v. Turkey*, 52/1997/836/1042, 9 June 1998, par. 52-53 and in *Assenov and Others v. Bulgaria*, par. 94.

suffering inherent in detention, material conditions must not add any distress or hardship. Such a finding would only be based on inhuman or degrading conditions of detention that exceed the inherent level of suffering.[61]

A final observation to be made regarding the test used by the ECtHR concerns the purposive element of any inhuman or degrading treatment. This element is taken into account by the ECtHR in evaluating the facts of the case and determining whether the intention was to humiliate and debase the victim. However, the absence of this element will not inevitably lead to the rejection of the claim.[62]

2.2 OBLIGATIONS OF THE CONTRACTING STATES UNDER ARTICLE 3

In order to give effect to Article 3, certain negative and positive obligations must be respected by the Contracting States. The positive obligation of the Contracting States under Article 3 is related to the positive obligation under Article 2 of the Convention, according to which, besides guaranteeing the right to life, states have the positive obligation to take measures in order to prevent any infringement of the right guaranteed by Article 2.

Under Article 3 a Contracting State has the negative obligation of refraining from exposing an individual to torture, inhuman or degrading treatment or punishment. The positive obligation is a complementary, and consists of protecting individuals from any violation of their right to freedom from torture and, in case such an infringement takes place or is about to take place, the obligation of the state authorities to investigate allegations of abuse. The rationale of this positive obligation is to give practical effect to the absolute right to freedom from torture. The first obligation is substantial and the second is procedural.[63]

[61] *Kudla v. Poland*, par. 94.
[62] *Peers v. Greece*, par. 74.
[63] Palmer, 438-451.

Due to the increase in number of cases concerning inhuman or degrading treatment inflicted by private individuals, the ECtHR had the opportunity to extend the scope of Article 3 beyond the ill-treatment inflicted by state agents. The Court stated that a positive obligation lies on the Contracting States, meaning the obligation to protect individuals from any torture or ill-treatment, no matter the source of such behavior. In the case of *A. v United Kingdom*[64], concerning the assault of a minor by his stepfather who pleaded the defense of "parental chastisement", the ECtHR argued that the Contracting States must take positive measures, among which to pass effective laws,[65] to ensure that their legal system protects individuals from torture and inhuman or degrading treatment even in cases where the abuse comes from a private party. Furthermore, these measures must be effective especially when the possible victims are vulnerable persons such as minors.[66] Therefore the ECtHR requires certain positive and reasonable measures to be taken, even in relation to such a basic obligation of having an adequate legal system protective of personal integrity in a democratic society.

On the basis of the same obligation states may be held responsible in relation to persons who are placed in the care or supervision of state authorities. For instance, social services are under the obligation to take the necessary measures to prevent ill-treatment and protect any possible victim. If this obligation is not given effect, the state is responsible for a breach of Article 3. This was the situation in the case of *Z. v. United Kingdom*[67], concerning the ill-treatment of children within their family for an extensive period and with the knowledge of social services. The Court reaffirmed that Contracting Parties must

> ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. […] These measures should provide effective protection, in particular, of children and other

[64] *A. v. United Kingdom*, Application no. 25599/94, 23 September 1998, par. 22.
[65] Palmer, 438-451.
[66] *A. v. United Kingdom*, par. 22.
[67] *Z. and others v. United Kingdom,* Application no. 29292/95, 10 May 2001.

> vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[68]

The broadness of this obligation raises important questions. Since the right to freedom from torture is absolute, is the positive obligation to prevent inhuman or degrading treatment also absolute and unqualified or is it the obligation to do what is reasonably possible to prevent mistreatment? This is a relevant question, as it could affect the outcome of cases. The stand taken by the ECtHR is that the Contracting States must take preventive measures which include those "reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[69] Following the reasoning of the Court, the House of Lords dismissed the appeal in the case of *E. v. Chief Constable of the Royal Ulster Constabulary and Another*[70] and stated that this obligation is not unqualified and absolute. The House of Lords affirmed that this obligation imposes the duty to do everything that is reasonable in order to avoid "a real or immediate risk to an individual once the existence of that risk was known or ought to have been known."[71] We see therefore that the extent of this obligation has consequences on whether the state will be held responsible or not under Article 3.

Concerning the procedural obligation of the Contracting States, it must be noted that it is mostly found in cases involving prisoners, whose lives are generally more at risk in custody than in liberty. The obligation is to conduct a timely, effective and thorough official investigation concerning allegations of ill-treatment or torture.[72] The Court stressed the importance of this procedural obligation for the prohibition of torture and inhuman or degrading punishment, stating that if this obligation were to be absent, the prohibition would be "ineffective in practice and it would be possible in some cases for agents of the State to

[68] Ibid., par. 73.
[69] Ovey and White, 86.
[70] *E. v. Chief Constable of the Royal Ulster Constabulary and Another* (Northern Ireland Human Rights Commission intervening) [2008] UKHL 66; [2008] WLR (D) 351.
[71] See *E. v. Chief Constable of the Royal Ulster Constabulary and Another*.
[72] Ovey and White, 84.

abuse the rights of those within their control with virtual impunity."[73] One significant case on this matter is *Assenov and Others v. Bulgaria*[74] in which the ECtHR found a violation of Article 3 because the state breached the procedural obligation implied in this absolute right. The case concerned ill-treatment suffered by the applicants while in police custody and the refusal of competent authorities to investigate the subsequent allegations of the applicants. Although there was not enough evidence to conclude that the injuries had been caused at the police station, still there was a "reasonable suspicion" on the causality of the injuries. In conclusion, the Court stated that

> where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible.[75]

Similar allegations of ill-treatment were made in *Labita v. Italy*[76]. The Court did not find a violation of Article 3 based on inhuman or degrading treatment but it held a violation of this article due to the violation of the procedural obligation to thoroughly and effectively investigate credible allegations of ill-treatment in prison. The investigation must include serious attempts of the authorities to find out exactly what happened in the alleged events and furthermore, that the authorities should not hastily draw any conclusions only to close the investigations. As the ECtHR held in *Gül v. Turkey*, national authorities are urged to

> take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. […] Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.[77]

[73] *Assenov and Others v. Bulgaria*, par. 102.
[74] Ibid.
[75] Ibid., par. 102.
[76] *Labita v. Italy*, Application no. 26772/95, 6 April 2000.
[77] *Gül v. Turkey*, Application no. 22676/93, 14 December 2000, par. 89.

Therefore, according to the ECtHR, a Contracting State who fails to carry out an effective official investigation pursuant to an allegation of ill-treatment violates Article 3 although inhuman or degrading treatment cannot be found. Yet, the limit of this responsibility is within the jurisdiction of each Contracting State.[78] Therefore that an important role in the use of this "inventive doctrine"[79] of positive obligation has been played by the ECtHR, by improving and adapting this doctrine to those cases involving prohibited behaviors originating in the actions of Contracting States and also in the actions of private individuals. A significant element of this original doctrine lies in the fact that the state's obligation to take positive measures consists of those actions that are reasonable in the context of the case.

2.3 THE BURDEN OF PROOF IN CASES REGARDING ARTICLE 3

One significant aspect for the analysis of ECtHR's case law on Article 3 regards the burden of proof. Due to the fact that finding a Contracting State in breach of Article 3 carries a special stigma[80] and affects international reputation, the Court requires a very strict standard of proof. In assessing the evidence, the Court adopted the standard "beyond reasonable doubt"[81]. Thus, the Court has repeatedly stated that an applicant must support its allegations of torture and inhuman or degrading treatment with appropriate and compelling evidence.[82] However, the Court takes into account that cases regarding Article 3 involve unequal parties, with Contracting States being in a stronger position for collecting evidence than private parties. Consequently, there are cases in which the Court will accept to draw inferences from the known facts of the case and from submissions presented by the parties. If these inferences are strong and clear enough and the Government does not present evidence to rebut them, the

[78] Ovey and White, 86.
[79] Stephanie Palmer, 438-451.
[80] Ovey and White, 86.
[81] *See Ireland v. United Kingdom*, par. 161.
[82] *Labita v. Italy*, par. 121.

Court will be satisfied.[83] For instance, in the case of Ireland v. United Kingdom, the Commission was of the view that in a case where the victim of ill-treatment is in the custody of national security forces, the burden of proof does not lay on the victim but it is up to the government to rebut the evidence presented by the victim in support of its claim.[84]

Following the argument that a victim of torture or inhuman or degrading treatment is in a weaker position than the State in gathering evidence to support its allegations, the Court has stated that the burden of proof lies on the Contracting State when the authorities are the only ones who have exclusive knowledge of the real events in a case. For instance, in the case of *Aydin v. Turkey*, the applicant was the wife of a person arrested and held in police custody. The applicant alleged a violation of Article 3 in respect of herself and her husband, found shot in the head near the facility where he was being held. The Court could not find enough evidence of ill-treatment while the person was alive but it stated that

> where it is the non-disclosure by the Government of crucial documents in their exclusive possession until the advanced stages of the examination of the application, […], which is putting obstacles in the way of the Court's establishment of the facts, it is for the Government to argue conclusively why the documents and the witnesses in question cannot serve to corroborate the allegation made by the applicant.[85]

This is frequently the situation in cases where the alleged victim is in custody of national authorities and suffers injuries or even death. In these cases the Court held that:

> where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention. [86]

Furthermore, when the individual dies in custody of national authorities, the obligation of the Government to account for the ill treatment of the individual is "particularly stringent".[87]

[83] *See Ireland v. United Kingdom*, par. 161.
[84] Michael O'Boyle, "Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom," *The American Journal of International Law* 71, No. 4 (October, 1977): 697.
[85] *Aydin v. Turkey*, par. 148.
[86] *See Selmouni v. France*, par. 87.
[87] *See Salman v. Turkey*, Application no. 21986/93, 27 June 2000, par. 99.

However, the applicant or the persons continuing the action before the Court must present convincing evidence regarding the injury and the time it was caused. Otherwise, if the Court is not convinced, it will not give effect to the presumption.

Today an important role for the gathering of evidence in cases on Article 3 is played by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT is a body of experts who perform periodic visits to detention facilities of each Contracting State. The relation of the Committee with each Contracting State is based on the principles of confidentiality and cooperation.[88] The advantage of having experts who perform direct visits under the above mentioned principles is that the reports of the CPT become a reliable source of evidence and present an unbiased image of detention facilities and practices in the Contracting Parties. Although the scope of these visits is not to judge the situation and determine whether there are practices of torture in certain cases, the CPT will formulate recommendations showing those aspects or practices that should be improved. Therefore, applicants before the ECtHR can benefit from the CPT reports by presenting convincing and unbiased evidence. Furthermore, besides the use of the CPT reports, the Court takes into account reports of independent international organizations for the protection of human rights such as Amnesty International and Human Rights Watch, or reports of governmental sources, such as the US State Department.[89]

Therefore the evidential system established by the ECtHR in cases concerning the prohibitions of Article is quite sensitive to the alleged victim. It cannot be said that this system makes it much easier for a private person to support its allegations, because having regard to the serious consequences that a finding of a violation of Article 3 means for the Contracting State, the Court still keeps a burden of proof "beyond reasonable doubt". Still, it

[88] http://www.cpt.coe.int/en/about.htm, Accessed March, 2009.
[89] See *Chahal v. United Kingdom*, par. 99-100 and *Saadi v. Italy*, Application no. 37201/06, 28 February 2008, par. 131.

must be appreciated that the Court takes into consideration the particular situation of the individual in relation to the State and introduces derogations from the general rule to counterbalance the differences between parties and support the protection of human dignity.

2.4 THE APPROACH OF ECtHR TO THE DEATH PENALTY AND THE DEATH ROW SYNDROME

Protocol No. 6[90] to the European Convention concerning the abolition of the death penalty was adopted in 1982 following a tendency of national and international level to abolish the death penalty. However, since under Article 2 of this Protocol, contracting States could still enforce death penalty for acts committed "in time of war or of imminent threat of war", a new Protocol, No. 13,[91] had to be adopted in order to permanently solve this matter. Therefore, although not all contracting states signed and ratified Protocol No. 13,[92] the abolition of the death penalty entered into force after ten Contracting Parties completed the ratification on July 1st, 2003. Concerning the approach taken by the ECtHR towards the death penalty, it can be noted that the Court never stated directly that the death penalty amounts to torture, in violation of Article 3. However, in *Soering v. United Kingdom*[93] the Court stated that

> the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.[94]

[90] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg, 28 April 1983.
[91] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the abolition of the death penalty in all circumstances, Vilnius, 3 May 2002.
[92] Only 41 states of the Council of Europe ratified and acceded to Protocol No. 13. This information is provided by the Council of Europe at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=8&DF=&CL=ENG (accessed March 24, 2009)
[93] *Soering v. United Kingdom*, Application no. 14038/88, 7 July 1989.
[94] Ibid., par. 104.

Moreover, in *Öcalan v. Turkey*[95] the Court concluded that the imposition of the death penalty subsequent to an "unfair trial by a court whose independence and impartiality were open to doubt amounts to inhuman treatment in violation of Article 3 of the Convention":

> In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.[96]

The Court's finding of a violation of Article 3 in this case seems to assess the consequences of enforcing the death penalty on the individual. The conclusion of the Court is that such a sentence will invariably lead to mental torture during the period spent on death row.

Concerning the death row phenomenon, the ECtHR did not find a violation of Article 3 solely based on this so-called "genuine death row phenomenon" but rather on a cumulative effect of conditions of detention. This is the approach taken by the Court in cases concerning Ukraine.[97] The Court found an infringement of Article 3 based on conditions of detention to which the applicants had been subjected on death row. The violation was not based on the death row syndrome as such, mainly because all death penalties imposed by the national courts had been commuted to life imprisonment following the criticism received by Ukraine from the Council of Europe. However, the Court argued that being on death row may lead to mental inhuman treatment, consisting of fear, stress and anguish related to the uncertainty of the execution.[98] Although the Court did not find a violation of Article 3 based on the death row phenomenon, it is worth noting the similarity of the approach taken by the Court in this case with the one taken in *Öcalan*.

[95] *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005.
[96] Ibid., par. 169.
[97] *Poltoratskiy v. Ukraine*, Application no. 38812/97, 5 April 2005; *Aliev v. Ukraine*, Application no. 41220/98, 29 April 2003; *Kuznetsov v. Ukraine*, Application no. 39042/97, 29 April 2003; *Nazarenko v. Ukraine*, Application no. 39483/98, 29 April 2003; *Dankievich v. Ukraine*, Application no. 40679/98, 29 April 2003.
[98] Ibid., par. 135.

The Court's attitude towards holding death row per se a violation of Article 3 is visible in *Soering v. United Kingdom*. The case concerned a United States citizen accused of murder. Under the criminal law of the State of Virginia his crime was punishable by death. The United Kingdom was requested to extradite him to the United States, under the provisions of a bilateral treaty between the two countries,[99] but Soering invoked Article 3. The ECtHR took into account the age of the applicant, who was eighteen at the time he committed the crime, and the fact that there were significant chances of him being convicted to a capital punishment. Furthermore, the ECtHR emphasized that the State of Virginia, following United Kingdom's request, had only promised to present to the jury this country's request but could not give assurance that the capital punishment would not be applied.

Moreover, the ECtHR gave attention to the conditions of imprisonment to which the applicant would be submitted on death row. The Court showed that inmates on death row were constantly being moved to the so-called "death chambers", close to the execution room, depending on the prisoner's choice to exercise his appeal rights. This moving back and forward was putting mental pressure on the convicted, which was constantly being held in a state of insecurity and stress. Furthermore, the Court showed that these "death chambers" in which prisoners are kept are isolated from the rest of the facility and do not have any windows. Another important issue considered by the Court was the fact that a person convicted to death was under a higher risk of being raped by inmates and frequently subjected to assaults. The aspects presented above contributed to the finding of a violation of Article 3 and the prohibition of the applicant's extradition to the United Stated.[100]

The ECtHR further observed that,

[99] *Soering v. United Kingdom*, par. 14.
[100] Ibid., par. 92-111.

> as movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.[101]

The importance of *Soering* lies in the fact that it extended the scope of Article 3 by enlarging the responsibility and obligations of the Contracting States for conditions that do not pertain to their jurisdiction but for individuals placed within their territory. The holding of this case was extended and represents the basis for refusal to extradite persons to countries that accept the death penalty if the person would risk being subjected to this punishment.

Thus, it can be stated that the ECtHR's attitude towards cases involving death penalty and death row is to respect the absolute right to freedom from torture and inhuman or degrading treatment. The persistent view of the Court is that no exception can be made from Article 3, thus respecting human dignity and personal integrity in all circumstances.

2.5 OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTING STATES IN EXTRADITION CASES

In the present case law of the ECtHR, states can be held responsible for a variety of reasons. Besides holding a state responsible for failing to prevent forms of ill-treatment, another basis for responsibility is to knowingly place a person under a real risk of ill-treatment by extradition or expulsion.[102] The requirement that must be emphasized here is the awareness of the state regarding the risk to which the person is exposed. However, in connection to positive obligations of the Contracting States, if allegations of ill-treatment were brought to the authorities' attention but they were ignored, the state will be held responsible for a breach of Article 3, because of a failure to investigate these allegations.

[101] Ibid., par. 89.
[102] Malcolm D. Evans, "Getting to Grips with Torture," *The International and Comparative Law Quarterly* 51, No. 2 (April 2002): 378.

In cases concerning extraditions or expulsions that represent a risk of ill-treatment for the individual, the Court has developed a case law in accordance to international law. The ECtHR repeatedly reminds the Contracting States that they have the right to "control the entry, residence and removal of aliens" as there is no right to political asylum conferred by the Convention or in its Protocols.[103] However, a case of expulsion by a Contracting State can engage the responsibility of the state by giving rise to a claim under Article 3 of the Convention, when there is enough evidence to show that the person to be deported would face a real risk of torture or inhuman or degrading treatment in the receiving state.[104] In determining whether this risk of ill-treatment exists, the Court will assess the general situation in the receiving country, the evidence adduced by the parties and the personal circumstances of the individual.[105] Due to the fact that the *Soering* case has been discussed in the previous section, this case will not be analyzed once more. However, there are two other cases that merit attention: *Chahal v. the United Kingdom* and *Saadi v. Italy*. The tendency of expanding the scope of Article 3 is visible in these cases concerning extraditions.

The first case, *Chahal v. the United Kingdom*, concerned a Sikh against whom a deportation order was issued by the British authorities. The applicant argued that his deportation to India represents a real risk of being tortured or inhumanely treated, that would represent an infringement of Article 3. The ECtHR found a violation of Article 3 and considered two important issues regarding extradition cases: the moment in time to which the authorities must refer when assessing the risk of torture or ill-treatment and the possibility of balancing the interest of the deporting state with the interest of the individual.[106]

[103] *Saadi v. Italy*,par. 124.
[104] *Soering v. the United Kingdom*, par. 90-91.
[105] *Saadi v. Italy*, par. 130.
[106] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, Aileen McColgan, and Jim Murdoch, *European Human Rights Law: Text and materials*, 3rd ed. (Oxford University Press, 2008), 219.

Regarding the first issue, the ECtHR held that the moment to be considered when assessing the risk of the applicant being subjected to inhuman treatment is the point in time at which the Court is considering the case[107]. Having in mind that the situation in one country can change, this is a rational statement. Concerning the second question, whether a balancing exercise of the interests at issue can take place within Article 3, the Court reminded once again that the prohibition of Article 3 is absolute even in cases of expulsion. A Contracting State cannot justify its decision to deport an individual at risk of being tortured by a risk for the national security of the state. According to the words of the Court

> whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[108]

Dissenting opinions in this case affirmed that Article 3 was not correctly interpreted. The minority stated that considerations pertaining to national security indeed cannot be invoked to justify ill-treatment. However, the absolute prohibition of Article 3 should be applied only within the jurisdiction of Contracting States and not beyond. When the application of Article 3 takes place outside this jurisdiction, the Contracting States should be able to strike a fair balance between "the nature of the threat to its national security interests if the person concerned were to remain and the extent of the potential risk of ill-treatment of that person in the State of destination."[109] The minority concluded that "the greater the risk of ill-treatment, the less weight should be accorded to the security threat."[110]

[107] *Chahal v. The United Kingdom*, par. 86.
[108] Ibid., par. 80.
[109] Ibid., Joint partly dissenting opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits.
[110] Ibid.

The second case to be analyzed in this section, *Saadi v. Italy*, came before the ECtHR in a context of extraditions and deportations to countries that have wide known practices of torture based on the argument of "war on terrorism". In *Saadi v. Italy* the ECtHR reaffirmed the absolute prohibition of torture and the Contracting State's obligation to refuse deportations to countries that practice torture, despite an increase of terrorist threats.[111] The case of *Saadi v. Italy* concerned a Tunisian national arrested in Italy for suspicion of involvement in terrorist actions. He was released by the Italian authorities after four years but the Tunisian courts had convicted him *in absentia* for membership in a terrorist organization and incitement to terrorism. Subsequently, he was sentenced to twenty years imprisonment.[112] According to the arguments presented by the Italian government, Saadi was to be deported due to the fact that he represented a threat to national security and he was disturbing public order. He requested political asylum arguing that in Tunisia he would be in danger of being tortured and subjected to "political and religious reprisals".[113]

Following the refusal of his application by national authorities, Saadi claimed that his deportation was a violation of Article 3 of the Convention, because of the real risk of being subjected to torture, a common knowledge practice that was taking place in Tunisia against suspects of terrorism. The Italian government argued that Tunisia was a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and to the UN Convention Against Torture, which take precedence over national statutes, and therefore by enforcing the deportation order there was no infringement of Article 3.[114] Furthermore, the United Kingdom, in a third party intervention, argued that the ECtHR should reconsider the principle of *Chahal v. United*

[111] Fiona de Londras, "International Decision: Saadi v. Italy," *American Journal of International Law* 102, (2008): 4.
[112] *Saadi v. Italy*, par. 154.
[113] Ibid., par. 32-35.
[114] Ibid., par. 111.

Kingdom, that states cannot take the dangerousness of the individual into account when assessing expulsions under Article 3.[115] The United Kingdom claimed that the "real risk" standard should be replaced with whether the individual is "more likely than not" to be exposed to ill treatment.[116]

However, the ECtHR rejected the United Kingdom's proposal and reaffirmed the "real risk" standard. It reminded that the nature of the crime for which the individual is suspected or accused is without relevance for the purpose of Article 3.[117] As Judge Zupančič quite rightly pointed out in his concurring opinion, if the attempt made by the United Kingdom to change the standard would be accepted, a difference would be made between cases involving domestic and foreign terrorist suspects,[118] and therefore the inference would be that foreign terrorist suspects "do not deserve human rights […] because they are less human."[119]

In addition, the Court stated that in assessing the risk, it will take into account the evidence presented by the applicant and by the Court itself. The circumstances of the case and the information that the sending state knew or ought to have known are considered. In this case diplomatic assurances and the mere existence of the law prohibiting torture and ill treatments were not sufficient to avoid a risk of infringing the prohibition of Article 3. The Court further emphasized that the sufficiency of diplomatic assurances must be analyzed on a case by case basis, taking into account whether despite diplomatic assurances a practice of torture or ill-treatment is known to take place in the receiving state.[120]

[115] Ibid., par. 117-123
[116] Fiona de Londras, "Saadi v. Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases," *ASIL Insights* 12, No. 9 (May 13, 2008).
[117] *Saadi v. Italy*, par. 127.
[118] Daniel Moeckli, "Saadi v. Italy: The rules of the game have not changed," *Human Rights Law Review* 8, No. 3 (2008): 534-548.
[119] *Saadi v. Italy*, Concurring Opinion of Judge Zupančič, par. 2.
[120] *Saadi v. Italy*, par. 148.

Concerning diplomatic assurances, the UN Human Rights Committee and the UN Committee against Torture, reached the conclusion that these mechanisms are not reliable enough to guarantee the elimination of inhuman treatment.[121] Furthermore, besides observing that these assurances are not reliable when there are enough grounds to believe that the person is likely to be subjected to ill-treatment, the UN Special Rapporteur on Torture observed that such assurances generally must be requested from states about which the public already knows that they systematically employ torture and inhuman treatment. His opinion is that "states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return."[122] This position shows that in cases of extradition, diplomatic assurances are not an effective means of guaranteeing the right to freedom from torture. On the other hand, the position adopted by the ECtHR does not seem to absolutely dismiss the use of diplomatic assurances, although their use would be corroborated with other elements. Be that as it may, it must be recognized that if a state feels the need to require such assurances then this means there is a risk of torture or inhuman treatment in the receiving state. In any case, when there is a real risk of being subjected to proscribed treatment under Article 3, whether that treatment is within or outside the jurisdiction of the Contracting States, all members have the obligation to refuse extraditions.

2.6 CONCLUDING REMARKS ON CHAPTER I

The case law of the ECtHR on Article 3 illustrates the absolute nature of the right to freedom from torture. The Contracting Parties cannot derogate from this provision under any circumstance and no justification for interfering with this right is accepted by the Court. Consequently, no balancing exercise can be made by the Contracting Parties between the

[121] Moeckli, 534-548.
[122] Ibid.

right to freedom from torture and legitimate purposes of the national authorities. [123] By refusing to accept derogations, despite the requirements of a number of Contracting Parties, the Court enshrines the fundamental values of human dignity and personal integrity.

The minimum level of severity instated by the Court is applied in all cases regarding Article 3 and is appreciated because although its assessment is relative, this does not affect the absoluteness of the right. Furthermore, the doctrine of positive obligations must be valued because it gives practical effects to Article 3. In addition, the improvement of the burden of proof for the alleged victims of infringements of Article 3 is another strong point of the system established by the ECtHR. Thus, the case law on Article 3 has seen improvements and despite the fact that improvements can always be made, today it can be considered an archetype for the protection against torture and inhuman or degrading treatment.

[123] Palmer, 438-451.

3 THE U.S. SUPREME COURT

Due to the fact that the Eighth Amendment was not applicable to the states until 1962, the early case law on the Eighth Amendment is considered a poor resource of information because it was developed only by federal courts.[124] Only after the Supreme Court selectively applied the Eighth Amendment to the states through the Fourteenth Amendment, the case law on this matter developed around a principle of proportionality.[125] Otherwise said, the U.S. Supreme Court analyses whether a certain punishment is excessive in relation to the offence. As observed in the first chapter of this analysis, Justice Scalia has constructed an opposing view of this clause, accepting that only torture and other similar punishments that are "cruel and unusual" were aimed by the Clause. Although this interpretation does not dominate the majority of the Court, it has influenced the outcome of certain decisions.

Furthermore, the case law on the Eighth Amendment has been criticized, as the Court interpreted the Amendment inconsistently, adopting different approaches according to the type of cases presented before it. For instance, for cases concerning prison conditions, the U.S. Supreme Court has used the Eighth Amendment Clause to condemn inhuman conditions but in different cases the Clause has either been ignored or misused.[126] Therefore, the standards adopted by the U.S. Supreme Court resulted in a division between cases concerning proportionality standards and cases pertaining to prison conditions. As the analysis of cases regarding prison condition has been omitted from this study, only those cases regarding proportional sentences will be considered here.

In order to understand these cases systematically, the case law will be divided in cases concerning the application of the principle of proportionality in cases regarding the death

[124] Alexander A. Reinert, "Eighth Amendment Gaps: can conditions of confinement litigation benefit from proportionality theory?" *Fordham Urban Law Journal* xxxvi (2009): 57.
[125] Thomas G. Stacy, "Cleaning up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* 14, No. 2 (2005): 28.
[126] Ibid., p. 8.

penalty and cases concerning this principle in cases of non-capital punishments. The following analysis will reveal that the case law of the U.S. Supreme Court concerning the violation of the Eighth Amendment by the death penalty has had its share of inconsistent and varied standards. Furthermore, the case law regarding non-capital punishments challenged as cruel and unusual, has used the principle of proportionality only as a façade, the result being an incongruent case law. Therefore, a first section of this chapter will consider the developments of the standards employed by the U.S. Supreme Court, and subsequent sections will reflect on the constitutionality of the death sentence and of the death row phenomenon.

3.1 General Overview of the Standards Employed by the U.S. Supreme Court - Proportionality and Non-capital Cases

The tests employed by the U.S. Supreme Court are varied, depending on the preferences of the Justices. These tests include: public antipathy, inherently excessive suffering, respect for human dignity, excessiveness in relation to the purpose, unusualness and arbitrariness.[127] In addition, all these standards are taken in relation to the proportionality test. The U.S. Supreme Court takes into account public opinion from polls and statistics, and more frequently from the tendencies followed by juries. If juries seem to dislike and reject a certain penalty, the Justices conclude that the penalty, according to the first test, is not proportionate.[128] The second test, the inherent excessive pain, concerns the degree of suffering naturally involved in a punishment, according to civilized societies.[129] Torture and inhuman treatment is therefore rejected by this second test.

The third test used by the Supreme Court is related to the first two and looks at whether a certain punishment is infringing human dignity. The concept of human dignity, according to

[127] Malcolm E. Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment after Furman v. Georgia," *Stanford Law Review* 25, No. 1 (November 1972): 62-83.
[128] Ibid., 64.
[129] Ibid., 65.

the Justices must be flexible and relative, in accordance with public opinion and mores.[130] This test will be analyzed in more detail in the following sections regarding death penalty and death row, mainly in order to point out that although theoretically the Supreme Court concedes that human dignity must be respected, practically cases show the opposite.

The fourth standard employed by the Supreme Court concerns the scope of the punishment, mainly retribution and deterrence.[131] As in the case of human dignity, the Supreme Court has used this test in an incongruent manner especially in cases concerning the death penalty. As for the last two tests, unusualness and arbitrariness, they regard the question whether a punishment is customary at a certain point in time when the penalty is assessed and respectively, whether the penalty is imposed following certain guidelines and safeguards in order to avoid discrimination. This last test has been debated due to the juries, who need certain abstract guidelines in order to avoid the imposition of biased penalties.

In addition, all these tests are regarded by the U.S. Supreme Court within the more general context of the proportionality test. Although the Supreme Court has repeatedly stated that this principle means that courts would not impose punishments more severe than the offence, still it has repeatedly upheld harsh punishments infringing the principle of proportionality.

The first significant case in which the Supreme Court overturned a disproportional sentence for being an infringement of the Eighth Amendment was *Weems v. United States*[132]. Weems was sentenced to fifteen years of hard labor and a severe fine after he falsified official documents. The reasoning of the Court introduced the standard of proportionality into the case law of the Eighth Amendment, a standard later used in all cases regarding the Cruel and Unusual Punishment Clause. After overturning this excessive punishment, in *Rummel v.*

[130] Ibid., 68.
[131] Ibid., 74-75.
[132] *Weems v. United States*, 217 U.S. 349 (1910).

Estelle[133] the Supreme Court upheld the imposition of a life sentence for a repeat offender and declared that it was in line with the Eighth and Fourteenth Amendments. The arguments of the Court were that the law in the state of Texas was not singular among the states as it was rather similar to the law concerning recidivists in other states. Furthermore, the sentence was not really life imprisonment since Rummel could be released on parole. Another suggestive case for the U.S. Supreme Court's approach to the Eighth Amendment is *Solem v. Helm*[134]. The case concerned the imposition of life sentence for repeat felons, in accordance with the law of South Dakota, in a case of repeat minor offences. The Supreme Court ruled that the sentence was grossly disproportionate in relation to the offences committed.

This line of cases was broken in 1991. Strongly connected to *Weems v. United States,* the *Harmelin v. Michigan*[135] decision concerned the application of a mandatory life sentence without parole for possession of over 650 grams of cocaine. This decision shows the inconsistency of the Supreme Court in cases regarding proportionality for non-capital cases. Justice Scalia, delivering the opinion of the Court, argued that there is no principle of proportionality inherent in the Eight Amendment. He affirmed that "mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout the Nation's history."[136] Declaring the opposite would mean, according to Justice Scalia, to intervene within the legislative power. Therefore, the Court refused to extend the doctrine of individualized sentencing developed for death penalty cases in this area of non-capital punishments. The effects of this decision are negative in light of the progress made by the previous decisions. This decision essentially destroyed everything that the earlier holdings have built for the proportionality principle of the Eighth Amendment.

[133] *Rummel v. Estelle*, 445 U.S. 263 (1980).
[134] *Solem v. Helm*, 463 U.S. 277 (1983).
[135] *Harmelin v. Michigan*, 501 U.S. 294 (1991).
[136] Ibid.

Regarding corporal punishments, in 1977 the U.S. Supreme Court refused to extend the application of the Eighth Amendment to such disciplinary penalties.[137] Although the evidence clearly suggested that the punishment of paddling was severe, as the applicants needed medical attention, the Court did not find it degrading[138] or disproportionate. Only Justices White and Stevens dissented and unfortunately only to emphasize that this decision violates due process rights as the punishment is inflicted before any review is made. Compared to this, the ECtHR permitted "three 'whacks' on the bottom through shorts with a rubber-soled gym shoe" inflicted by a headmaster on a seven year old boy in *Costello-Roberts v. United Kingdom*[139] and furthermore, in the case of *Tyrer v. United Kingdom*[140], it held that three strokes of a birch for a 15 year old boy on the naked rear administered by the authorities as a sentence amounted to degrading treatment within the meaning of Article 3.

As for proportionality and torture used in interrogations, in 1936, one of the landmark decisions was pronounced by the U.S. Supreme Court: *Brown v. Mississippi*[141]. At the time of this decision, torture was a practice usually employed in order to extract confessions. In this case, the applicant had been severely beaten and whipped by police officers in order to extract a confession to a murder. Justice Hughes, delivering the opinion of the Court stated: "Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." This case is significant because it opened a new line of cases to limit the authorities from using mental and physical coercion in order to obtain incriminatory evidence and confessions.

[137] *Ingraham v. Wright*, 430 U.S. 651 (1977).
[138] Allen E. Shoenberger, "The European View of American Justice," Loyola University Chicago Law Journal 36, 603 (2005): 607-609.
[139] *Costello Roberts v. United Kingdom*, Application no. 13134/87, 25 March 1993.
[140] *Tyrer v. United Kingdom*, Application no. 5856/72, 25 April 1978.
[141] *Brown v. Mississippi*, 297 U.S. 278, (1936).

A more recent case, *Chavez v. Martinez*[142], is a good example for the line taken by the U.S. Supreme Court concerning the use of torture in interrogations. Although the complainant Martinez did not mention the Eighth Amendment, this case can be regarded as raising the issue of Cruel and Unusual Punishment Clause and, in addition, the application of binding international law by the U.S. Supreme Court. As stated in the first chapter of this study, an excessive punishment does not mean it has to be an officially imposed sentence, but instead it can be a treatment, official or not.

In this case, the complainant Martinez had been interrogated by the official police sergeant Chavez, while he was being treated in hospital for serious wounds, going in an out of consciousness and without having been read the Miranda warnings[143]. Although the Court had the opportunity to affirm the application of international treaties relevant to this case, i.e. the International Covenant on Civil and Political Rights and the UN Convention against Torture, the Court did not take this chance, especially taking into account the reluctance of American courts in invoking provisions of international law.[144] In this case, having regard to the facts and to the UN definition of torture, it is clear that Martinez was submitted to torture because mental pain was inflicted on him by the threat that a refusal to give answers would deny him medical treatment for life threatening wounds.[145] The conclusion is that the Court failed to find a violation of the Eighth Amendment, while ignoring the provisions of international instruments protecting human rights.

[142] *Chavez v. Martinez*, 538 U.S. 760 (2003).
[143] *Miranda v. Arizona*, 384 U.S. 436 (1966), established that "the person in custody must, prior to interrogation, be clearly informed that he or she has the right to remain silent, and that anything the person says may be used against that person in court; the person must be clearly informed that he or she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he or she is indigent, an attorney will be provided at no cost to represent him or her."
[144] Marjorie Cohn, "Chavez v. Martinez: The Court Fails to Hold That Interrogation by Means of Torture is Unconstitutional," in *We Dissent: Talking Back to the Rehnquist Court, Eight Cases That Subverted Civil Liberties and Civil Rights*, ed. Michael Avery (New York: New York University Press, 2008), 153.
[145] Cohn, 154.

Thus, in non-capital cases, the approach of the U.S. Supreme Court on the Eighth Amendment is not clear and consistent. There great uncertainty added by the Supreme Court in this area because of the varied and unpredictable standards it employs, which only makes it difficult for the individuals to foresee the incurred punishments. This situation would clearly be condemned by the ECtHR as a violation of Articles 3 and 6 of the Convention.

3.2 PROPORTIONALITY AND CAPITAL OFFENCES

As mentioned above, the death penalty case law has been characterized by the Supreme Court's approach against disproportionate penalties. The Court's view is that the Eighth Amendment prohibits abhorrently disproportionate punishments to the offence and culpability of the offender.[146] As it will be explained below, although according to the Court's statements, this principle of proportionality should be applied, this has hardly been the case, and if the Court did apply it, the result has been an inconsistent and bizarre case law.

Normally, the world considers a capital punishment the most severe penalty possible, the perfect opposite of the clause of the Eighth Amendment. As stated by Joshua Shapiro, it is the opposite because the Eighth Amendment prohibits "cruel and unusual punishment" and a death sentence is the cruelest punishment imaginable. Joshua Shapiro considers a death sentence even more severe than torture because although torture affects dignity, it leaves a human being alive. On the opposite, a death sentence takes away the very essence, the life of the individual.[147] Despite this comment we still find states in the United States that prescribe and enforce capital punishments. On this matter the United States are the total opposite of the European view.[148] Although it has found that when the death penalty is imposed the procedures must be strictly scrutinized, the Supreme Court never held the death penalty per

[146] Stacy, 28.
[147] Shapiro, 2.
[148] Russell Miller, "The Shared Transatlantic Jurisprudence of Dignity," *German Law Journal* 4, No. 9 (September 1, 2003).

se to constitute cruel and unusual punishment. Only in certain categories of offenders and offences has the court completely prohibited the death penalty. Two of these categories, the death penalty imposed on mentally retarded people and on juveniles, will be analyzed below.

The main test employed by the Supreme Court, the "evolving standards of decency" was introduced in 1958 in the case of *Trop v. Dulles*. The case did not concern the death penalty but the standard it introduced was extensively used in death penalty cases. The Court also mentioned human dignity and international standards as elements that should be taken into account when assessing the constitutionality of a punishment. Therefore the test that resulted from *Trop* can be formulated in the following words: if a punishment is contrary to the "evolving standards of decency" measured according to proportionality factors, the punishment violates the Eighth Amendment.

One unprecedented case that used the standard initiated by the Court in *Trop* was *Furman v. Georgia*[149], in 1972. The decision concerned the imposition of the death penalty in a case of murder and in two cases of rape. The Supreme Court, in a five-to-four opinion, ruled that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments". As it can be seen from this holding, the Court did not abolish the death penalty per se as a violation of the Cruel and Unusual Punishment Clause. The success was not the one expected since it merely stated that this penalty was not correctly imposed and temporarily stopped the imposition of the death penalty. In their concurrences, Justice Brennan and Justice Marshall argued that the death penalty was unconstitutional per se, basing their argument on the previous decision in *Trop v. Dulles*[150]. In *Trop v. Dulles* the Court conceded that

[149] *Furman v. Georgia*.
[150] *Trop v. Dulles.*

> the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.[151]

For the respect of human dignity, the two Justices showed that a punishment must not be degrading to human dignity and that in a death penalty case this requirement is violated. This is a significant step for the Justices of the Supreme Court, since the argument of human dignity is being used in the continental system against the death penalty.

Furthermore, in support of their argument, the Justices stated that there is a large amount of evidence against capital punishment besides the infringement of human dignity, such as the absence of any deterrent effect of capital punishment in relation to crime rates, the absence of any retributive purpose and the violation of the standard recognized by the U.S. Supreme Court's "evolving standards of decency that mark the progress of a maturing society". Further arguments pertaining to discrimination in the imposition of this penalty and its discretionary infliction were advanced by the Justices.[152] Unfortunately, this was not enough to totally invalidate the death penalty, due to the fact that the Fifth Amendment holds that "no person shall be deprived of life […] without due process of law". Consequently, following this decision, the states could pass new laws to eliminate discrimination and arbitrariness of the jury and continue with the imposition of this penalty.

The first option undertaken by the states was in the form of mandatory death penalty for a limited number of capital offences. The second option was the introduction of guided discretion statutes making it mandatory for the jury to consider aggravating and mitigating factors to determine whether the imposition of the death penalty was necessary or not, on a case by case basis.[153] The mandatory death penalty laws did not survive for a long time as they were held in violation of the Cruel and Unusual Punishment Clause by the Supreme

[151] Ibid.
[152] Furman v. Georgia, Concurring opinion of Justice Marshall.
[153] Gilreath, 11-13.

Court, in the cases of *Woodson v. North Carolina* and *Roberts v. Louisiana*[154]. The Supreme Court showed that mandatory sentencing was not acceptable as it left the jury with no power of deciding "which first-degree murderers shall live and which shall die".[155] The issues raised by these cases were pointed towards two problems. First, the fact that the jury was left without the power to decide on the death penalty was in opposition to contemporary standards and second, that human dignity was violated because the individuality of each offender was ignored by automatic sentencing. [156] Therefore, by striking down these mandatory schemes of death penalty, the Supreme Court introduced "individualized sentences", encouraging the courts to consider each death penalty on a case-by-case basis, taking into account aggravating and mitigating circumstances.

Concerning the second option taken by part of the states, *Gregg v. Georgia*[157] is the case that shows their effect. The Supreme Court reinstated the death penalty that had been suspended in *Furman v. Georgia* and held that the capital punishment does not violate the Eighth Amendment in all circumstances, because the scheme developed in guiding statutes for the jury eliminated arbitrariness and discrimination. The Court was divided seven-to-two, with Justice Brennan and Justice Marshall dissenting.

In the view of the Court, contemporary values of society must be assessed when a sanction is challenged as being contrary to the Eighth Amendment. Furthermore, given the fact that the Eighth Amendment has not been a static provision, the assessment will not take place according to subjective standards but in accordance with "objective indicia that reflect the public attitude toward a given sanction". However, the court appreciated that in the course of its case law the "evolving standards of decency" have not been convincing enough and

[154] *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).
[155] *Woodson v. North Carolina*.
[156] Gilreath, 11-13.
[157] *Gregg v. Georgia*, 428 U.S. 153 (1976).

therefore, "a penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment'."[158] Consequently, in the view of the Court, the death penalty was constitutional in this case because it passed the test of "evolving standards of human decency" and respected the "dignity of man".[159] Justices Powell, Stewart and Stevens concurring, have explained this holding by showing that in their view, a "cruel punishment" is one that is "so totally without penological justification that it results in the gratuitous infliction of suffering."[160] Therefore, a cruel punishment must not promote any penological purpose and it must have no redeeming value according to those inflicting the punishment.

Two years after *Gregg*, the U.S. Supreme Court confirmed that respect for human dignity is a fundamental aspect of the Eighth Amendment case law, requiring the Court to consider mitigating factors. According to Chief Justice Burger, such mitigating factors include "the character and record of the individual offender".[161] Therefore, besides the schemes aimed at eliminating arbitrariness and discrimination for the imposition of each capital punishment, courts must take into consideration the uniqueness of the individual, which leaves the jury with an unlimited discretion to give mercy. It can be argued that these two tendencies are incongruous or at least representing a limit imposed upon each other. Be that as it may, it is difficult to imagine them functioning in practice.

Further developments in capital punishment cases have taken place after almost twenty years following the case of *Gregg*, in *Callins v. Collins*[162], a decision in which the U.S. Supreme Court denied a grant of certiorari to review a capital punishment. Although the Justices denied the writ without an opinion, Justices Blackmun and Scalia wrote dissents, the first because he no longer believed that the procedural guarantees upheld in *Gregg* were

[158] Ibid.
[159] Gilreath, 13-14
[160] Stacy, 8-9.
[161] *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).
[162] *Callins v. Collins*, 510 U.S. 1141 (1994).

functioning and the second to support the death penalty. After having dissented in *Furman* and concurred in *Gregg*, Justice Blackmun wrote here a famous dissent and stated that

> despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness-individualized sentencing.[…]The basic question-does the system accurately and consistently determine which defendants 'deserve' to die?-cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, see, e. g., Arave v. Creech (1993), relevant mitigating evidence to be disregarded, see, e. g., Johnson v. Texas (1993), and vital judicial review to be blocked, see, e. g., Coleman v. Thompson (1991). The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[163]

Justice Blackmun also stated that objective standards rather than subjective should be used in determining the imposition of the death penalty and ensuring the individual's right to consistency of the judicial system. Yet, he seems concedes that a fair imposition of the death penalty is very difficult to achieve and the American system is full of error in this matter:

> Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it-and the death penalty-must be abandoned altogether'.[164]

In the same case Justice Scalia argued for overruling the right to individualized sentencing because no constitutional basis could be found. In his view, the death penalty has its basis in the Fifth Amendment as opposed to this judicially created right, and therefore the capital punishment should prevail over this right to individualized sentencing.[165]

[163] Ibid., Dissenting opinion of Justice Blackmun.
[164] Ibid., Dissenting opinion of Justice Blackmun.
[165] Gilreath, 14-16.

Concerning the proportionality of the death penalty to certain offences, the Supreme Court held in *Coker v. Georgia*[166] that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[167] The argument in support of this holding was the difference between rape and murder, both serious offences but the latter involving the taking of human life. In 2008 the question that remained unanswered in *Coker*, regarding the age of the victim taken as an aggravating circumstance, was clarified as the Supreme Court reversed a death penalty for the rape of a child under 12 years of age.[168]

3.2.1 UNCONSTITUTIONALITY OF METHODS OF EXECUTION

The U.S. Supreme Court declared at the end of the 19th century that certain punishments which inflict severe pain are prohibited "because they involve torture and lingering death" [169]. Nonetheless, it is still upholding other methods of execution. Each method used to execute convicts is regarded at the time of the execution as presenting the necessary safeguards to prevent unnecessary pain. However, as time has proved it, each method is being disqualified because it inflicts pain and it amounts to torture. Electrocution was repeatedly held by the U.S. Supreme Court to be a safe method of execution but practice proved the contrary. After surviving an execution by electrocution, the applicant in *Louisiana Ex Rel. Francis v. Resweber*[170] claimed that a second execution would constitute "cruel and unusual punishment" in violation of the Eighth Amendment. Although he had already endured extreme suffering from the first attempted execution the U.S. Supreme Court, in a five-to-four decision, rejected his claim and stated that since the execution had failed because of technical problems, the absence of intentionally inflicted pain eliminates responsibility. The

[166] *Coker v. Georgia*, 433 U.S. 584 (1977).
[167] The victim of the rape was a married 16 year-old woman.
[168] *Kennedy v. Louisiana*, 554 U.S. ___ (2008).
[169] *In re Kemmler*, 136 U.S. 436 (1890).
[170] *Louisiana Ex Rel. Francis v. Resweber*, 329 U.S. 459 (1947).

future of the death penalty began to change with the case of *Fierro v. Gomez*[171] of the Ninth Circuit Court of Appeals. The decision held that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual in violation of the Eighth and Fourteenth Amendments". This is considered a significant evolution in death penalty cases as well as an invitation for the U.S. Supreme Court to revise its case law on the matter.[172]

Unfortunately, one recent decision of 2008 concerning the constitutionality of methods of execution, *Baze v. Rees*[173], represents a setback for the prohibition of the death penalty. The case concerned the challenge of the lethal injection protocol employed by the State of Kentucky. The Supreme Court held that the protocol did not violate the Eighth Amendment and emphasized that as long as states use sufficiently painless procedures for executions, the ban on cruel and unusual punishment is not infringed. Furthermore, the majority held that it would be a violation of the Eighth Amendment if a state would have at its disposal improved execution procedures that would eliminate or significantly reduce substantial risks of severe pain but it would choose not to implement these procedures. In a seven-to-two decision, the Court argued that the use of the said protocol is wide spread in the states that allow death penalty mainly because, if administered correctly, the prisoner will not experience pain, and also because only qualified personnel is allowed to administer those drugs. Although it recognized that a faulty administration of the drugs exposes the person to "objectively intolerable risks of pain", the Court concluded that there are sufficient safeguards to protect individuals from substantial or imminent risks that would violate the Eighth Amendment.[174] In a concurring opinion, Justice Stevens stated that "instead of ending the controversy, I am

[171] *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).
[172] Deborah W. Denno, "Getting to Death: Are Executions Constitutional?" *Iowa Law Review* 82 (1997): 321.
[173] *Baze v. Rees*, 553 U.S. ___ (2008), affirmed 217 S. W. 3d 207. *See* Julian Killingley, "Killing Me Softly : Baze v. Rees," *Human Rights Law Review* 8, No. 3 (2008): 560-569.
[174] Ibid.

now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, […], but also about the justification for the death penalty itself."[175]

This is a regrettable decision, widely criticized because many experiences of faulty executions causing severe pain have taken place throughout the history of the death penalty. Furthermore, *Baze* was taken in the context of a failed execution in 2006, when Angel Diaz had been executed by lethal injection and experienced excruciating pain because of a faulty execution.[176] Therefore, as shown by earlier and recent cases, procedures can always go wrong and the risk of causing agonizing pain amounting to inhuman treatment is present in each case. Furthermore, many studies have showed that if the legislatures or the courts would analyze each method of execution they would find that all of them are unconstitutional, in the light of the recent medical developments and because each of them is inflicted without due regard to the principle of humane treatment.[177]

3.2.2 UNCONSTITUTIONALITY OF THE DEATH PENALTY FOR CERTAIN OFFENDERS: MENTALLY RETARDED AND JUVENILES

Two significant decisions have marked an essential step towards the absolute prohibition of the death penalty in the United States: *Atkins v. Virginia* and *Roper v. Simmons*[178]. In *Atkins v. Virginia*, the Rehnquist Court overturned the death sentence imposed in cases of mentally retarded offenders. In a six-to-three decision, the U.S. Supreme Court reaffirmed the use of "evolving standards of decency" due to the legislative consensus of the states on abolishing the death penalty in cases of mentally retarded offenders. The decision authored by Justice Stevens emphasized the cognitive impairment of the mentally retarded, leading to the absence of any deterrent and retributive effect of the death penalty and furthermore the higher risk of

[175] *Baze v. Rees*, Concurring opinion of Justice Stevens.
[176] Suzanne Goldenberg, "America turns its back on death penalty after botched lethal injection of killer," *The Guardian* (January 10, 2007).
[177] Denno, 326.
[178] *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005).

being submitted to wrongful executions as they are vulnerable, more inclined into making false confessions, they cannot help their defense counsel and their attitude may be equated to lack of remorse for the crimes committed.[179]

Concerning the decision in *Roper v. Simmons*, the Court ruled that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed."[180] The case concerned the imposition of the capital punishment against Simmons, who at the age of seventeen had planned and committed a murder. His appeals and petitions were denied but meanwhile the Court issued *Atkins*. Simmons used this decision, sustaining that its holding is also applicable to juveniles under eighteen, and obtained a favorable decision. Justice Kennedy, delivering the opinion of the Court, reminded that a punishment must be "graduated and proportioned to the offence". In order to determine "which punishments are so disproportionate as to be cruel and unusual", the Court must follow the "evolving standards of decency."

Determining these standards of decency was done in this case by analyzing the national consensus on the matter, the international law and the approach of the Supreme Court. The majority reasoned that there was at that moment a strong national consensus in the states' legislatures against the imposition of the death penalty for minor criminals. Furthermore, Justice Kennedy observed that the United States was the only country in the world still implementing the death penalty in juvenile cases. Moreover, the United States together with Somalia were the only countries that had not ratified the United Nations Convention on the Rights of the Child that prohibits capital punishment for juveniles.[181] Therefore, the majority

[179] *Atkins v. Virginia*.
[180] *Roper v. Simmons*.
[181] Article 37 (a) of the UN Convention on the Rights of the Child reads as follows: "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." The United States has signed the UN Convention on the

considered that the United States should align its interpretation of the Eighth Amendment to the overwhelming international prohibition of juvenile death penalty. Justice Kennedy, a well known enthusiast of the use of international law, further emphasized that taking into account international sources does not affect the interpretation of the U.S. Constitution but rather it emphasizes the core of the same fundamental rights and values significant for all nations. Concerning the last point to be taken into consideration in order to determine the "evolving standards of decency", the Court considered that the two purposes of the imposition of this penalty, deterrence and retribution, were not valid in the case of minors. In addition, the Court showed that minors cannot be held responsible as adults because they are vulnerable to external pressures and frequently emotionally unstable when committing a crime.

These two recent decisions are thus significant for the reasoning framework they provide, a framework that could be used by the Supreme Court in future cases to invalidate the death penalty in all circumstances. However, the chances of the death penalty being abolished are weak. The trend of the Supreme Court in upholding the death penalty, even when there is inconclusive evidence as to the guilt of the applicant[182], is persistent and regrettable.

Observing the case law of the U.S. Supreme Court and of the ECtHR on death penalty and death row prisoners, it can be stated that the ECtHR is much more protective of prisoners than the U.S. Supreme Court. Furthermore there are different thresholds regarding levels of punishment.[183] In addition, Allen E. Shoenberger observed a difference in the two courts' case law not only in their attitude towards death penalty but also towards human dignity. He correctly asserts that the protection offered by the Eighth Amendment was "groundbreaking" at the time of its framework but today it is not suitable for an accurate protection of the

Rights of the Child on February 16, 1995 but it did not ratify it. President Barack Obama regards this matter as "embarrassing" and in October, 2008 has promised to review it.

[182] *See Davis v. Georgia,* 554 U.S.__(2008).

[183] Allen E. Shoenberger, "The European View of American Justice," *Loyola University Chicago Law Journal* 36 (2005): 607.

individual's dignity. In his conclusions, Shoenberger proposes the adoption of a new amendment to ban any further use of inhuman and degrading treatment.[184]

Having in mind that this is not the only option, perhaps other approaches should also be analyzed, such as increasing the respect due to international instruments ratified by the United States. If we live in an era of globalization and cooperation and other countries can keep pace with developments of international law, the United States should also be capable of aligning its law regarding torture to international law. Furthermore, having in mind the problems encountered by the current system, such as U.S. citizens escaping sentences imposed by American courts by fleeing the country and recurring to international law and the issue of giving effect to extradition agreements between the Contracting States of the Council of Europe and the United States, a change is even more necessary.

3.3 CONSTITUTIONALITY OF THE DEATH ROW PHENOMENON

At the time the Eighth Amendment was framed there was no question of any death row phenomenon since executions took place rapidly after the capital sentence was pronounced.[185] The question of this phenomenon as a violation of the Eighth Amendment appeared after procedural guarantees were introduced and offenders exhausted their appeal rights. According to the Death Penalty Information Center, a non-profit organization in the United States, the average death row for United States inmates can reach more than ten years, during which the prisoner is usually kept in solitary confinement for up to 23 hours a day, excluded from education or employment programs and with significant restrictions compared to the rest of the inmates.[186] The same organization has emphasized psychologists' findings that this period is marked with psychological impairment, as most inmates on death row experience anxiety and uncertainty regarding their execution and generally attempt suicide as

[184] Ibid., 610-611.
[185] http://www.deathpenaltyinfo.org/time-death-row
[186] Ibid.

a means to control their situation. In these conditions, specialists warn the public that death row is becoming an additional punishment to the already received death penalty. As Justice Breyer quite rightly asserted in *Foster v. Florida*[187], "if executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel."[188]

The situation in the U.S. is becoming even more concerning in those cases in which old death row inmates are executed. For instance, the oldest inmate executed was 74 years old, had spent 27 years on death row, and had a seriously deteriorated state of health. He suffered from dementia and cancer, and he could hardly remember who he was.[189] The Supreme Court denied certiorari for his last appeal in a five-to-four decision. Hubbard's execution in 2004 is therefore the image of a faulty system that refuses to treat its prisoners humanely.

The approach taken by the U.S. Supreme Court on this matter consists of refusals to grant certiorari in cases in which the complainants request the recognition of the death row phenomenon as amounting to a practice of inhuman treatment proscribed by the Eighth Amendment. However, Justices Stevens and Breyer have manifested their opposition to this situation. For instance, in the case of *Knight v. Florida*[190], concerning two inmates who had spent 19 and respectively 25 years on death row, Justice Breyer dissented and presented statistics showing the high percentage of inmates on death row that attempt suicide, a sign of their dehumanization and psychological instability caused by prolonged death row. Furthermore, Justice Breyer cited the case of Soering and observed that the death row

[187] Foster v. Florida, 537 U.S.__ (2002).
[188] Ibid., Dissenting opinion of Justice Breyer. The inmate had spent 27 years on death row.
[189] *Hubbard v. Campbell*, 542 U.S. 958 (2004).
[190] *Knight v. Florida*, 528 U. S. 990, 993–999 (1999).

phenomenon in the United States is an obstacle to extraditions from foreign countries, as it amounts to "cruel, inhuman, or degrading treatment or punishment".[191]

In this case Justice Thomas argued against holding prolonged death executions as a violation of the Eighth Amendment because delays play the role of procedural safeguards against arbitrary infliction of death penalty. Justice Thomas argued that excessive delays are the consequence of the use of numerous appeals by the offenders and a way of manipulating the system. According to Justice Thomas, it would be a vicious circle to give them all procedural safeguards that lead to lengthy death row and afterward establish a violation of the Eight Amendment for excessive delay.[192] However, a lengthy death row is not always attributable to the convict's fault. The judicial system can also be held accountable for unjustified delays. As Justice Breyer quite rightly observed, "where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."[193]

Besides Justice Breyer, another Justice that has evolved towards opposing to the death row phenomenon is Justice Stevens. Although he supported the denial of certiorari in this year's case of *Thompson v. McNeil*[194], Justice Stevens qualified the situation of an inmate who had been on death row for 32 years as "dehumanizing" and his execution "unacceptably cruel". Justice Stevens argued that conditions of confinement for death row inmates are extremely severe, and no longer serve retributive and deterrent purposes. Furthermore, in *Baze v. Rees*, Justice Stevens emphasized the massive costs of death penalty litigation and the unacceptably

[191] Ibid., Dissenting opinion of Justice Breyer.
[192] *Knight v. Florida,* Justice Thomas delivering the opinion of the Court.
[193] *See* supra note 191.
[194] *Thompson v. McNeill,* 556 U. S. ___ (2009)

cruel delays in these cases that are more a "product of habit and inattention rather than an acceptable deliberative process."[195]

Therefore, as opposed to the ECtHR, it must be observed that the attitude of the Supreme Court towards death row has been to dismiss the claims that a prisoner subjected to death row is in fact subjected to torture and cruel treatment. Furthermore, it must be noted that although there are Justices who recognize the psychological effects of this practice, when it comes to deciding on which part they stand in this debate, they most frequently choose to deny that the practice would amount to cruel treatment.

3.4 CONCLUDING REMARKS ON CHAPTER 3

The "evolving standards of decency" test has been criticized for its instability and inefficiency. Concerning the death penalty for mentally retarded or juveniles, numerous critics assert that this test cannot guarantee the permanent abolition of the death penalty. On an international level this standard is acceptable as long as it promotes human dignity, but as was seen in the above cases, although human dignity is theoretically the core of the Eighth Amendment, the Supreme Court had trouble even in declaring the death penalty for minors unconstitutional, not to mention in general. This view of respecting human dignity and still imposing the death penalty is difficult to digest from a European perspective. The critique of the death penalty accentuates when foreign nationals are sentenced to death, in violation of the United States international obligations. For instance, since 1984 the United States violated the Vienna Convention on Consular Rights, by executing German and Mexican citizens despite repeated requests from the International Court of Justice.[196] As international standards have not always been welcomed in the Supreme Court's case law, critics are not convinced

[195] *Baze v. Rees,* Concurring opinion of Justice Stevens.
[196] *See* Michael Dorf, "When U.S. states execute citizens of other countries: The Case of Gerardo Valdez" Findlaw.com (Legal Commentary, July 25, 2001) and http://www.csmonitor.com/2008/0731/p03s05-usju.html (Accessed March, 2009).

that the interpretation of the Eighth Amendment is permanently settled. Those who doubt the efficacy of the test emphasize the assumption that decency and moral standards of the nation will always evolve towards greater support for the prohibition of the death penalty, that could prove erroneous in times of war or national emergency.[197] Furthermore, the originalist interpretation gives great weight to the term "unusual" as "contrary to long usage". If this interpretation would prevail, the "evolving standards of decency" would be dismissed.[198] It would matter only what punishments have been inflicted in the history of the United States and therefore the death penalty would have an indisputable constitutional basis.

[197] http://www.abanet.org/statelocal/lawnews/Summer05/Supremecourt.html
[198] Stinneford, 1746.

CONCLUSION

Article 3 of the ECHR and the Eighth Amendment of the U.S. Bill of Rights are formulated in general terms, without providing a definition of torture and inhuman treatment. If the interpretation of Article 3 is enjoying a consensus, on the other side, the Cruel and Unusual Punishment Clause is more debated. Having as a starting point two diverse legal foundations, the ECtHR and the U.S. Supreme Court have constructed different approaches to the prohibition of torture and inhuman treatment.

In its past case law the ECtHR has been cautious in finding violations of Article 3 or in establishing authoritarian guidelines and standards. This was frequently due to the margin of appreciation left to the Member States and to the respect of their sovereignty. But in its recent case law there has been an increased readiness of the ECtHR to develop a coherent body of case law regarding the prohibitions established by Article 3. The evolution of this case law has been a positive one, from the cases of *Reed v. United Kingdom* and *B. v. United Kingdom*, to the improvements in establishing clear and humane standards. Furthermore, like the Court has often emphasized the Convention is a living instrument and therefore the interpretation of its provisions may change in accordance with world developments.

The case law of the U.S. Supreme Court has also seen positive evolutions, especially having regard to the prohibition of certain disproportionate penalties. Regrettably, there have also been drawbacks and criticized decisions. It is unfortunate that the majority of Justices tend to change their views toward death penalty in their last years on the Court, which is not enough to produce any significant change in the case law. Furthermore, because their nomination and appointment takes into account their views, the future of the Supreme Court's approach towards death penalty for instance can be predetermined. In addition, taking into account the

fact that the new administration supports capital punishment, although not for those innocents, any change in the future of the U.S. Supreme Court case law is unclear.

Concerning the standards used by the two courts, a significant fact is that both of them encourage a case-by-case analysis, an individualized assessment of the facts and circumstances. Furthermore, in opposition to the U.S. Supreme Court, the ECtHR is ready to find violations of Article 3 even in the absence of intention or bad faith. It must also be noted that the ECtHR is ready to take even further its settled standards. For the same considerations for which the formulation of a definition of torture would be unadvisable, the Court is taking the same position regarding the establishment of thresholds for Article 3 violations. The Court is ready to reconsider its previous findings and avoid a focus on permanently established thresholds. Therefore, as a tendency, it must be observed that the Court is following a course of expanding the scope of Article 3.[199] In this line of development it must be noted that the ECtHR takes mental inhuman treatment more seriously than the U.S. Supreme Court and that the two courts take divergent views towards the appropriate level of punishment.[200]

On the other side, the U.S. Supreme Court's case law regarding the Eighth Amendment is unpredictable and confused. Although in theory there are certain subjective and objective standards established and enunciated in many of its decisions, the holdings of the Supreme Court often contradict its principles. One illustration of this contradiction is the assertion that human dignity is the core value of the Eighth Amendment. In practice however, the cases analyzed have showed the Court's refusal to give effect to this principle. The jurisprudence on the death penalty is quite illustrative for this confusing situation. Human dignity is always given a core function but at the same time the Supreme Court never gives it the winning role

[199] Evans, 365-383.
[200] Shoenberger, 607-609.

against the interests of the state in deterrence and retribution.[201] It is true that the Supreme Court is often split in five-to-four opinions and that a number of recent decisions have abolished the death penalty for certain offenders and offences but this is not enough to give force to this fundamental value in all circumstances. Thus, a new standard should be formulated by the Supreme Court, different than the "evolving standards of decency". This new standard should give more consideration and practical effect to human dignity.

In regard to international law, the European approach is aligned to the absolute prohibition of torture and inhuman treatment provided by international human rights conventions and it has become a model for the protection of human rights in Europe. The possibility of accepting diplomatic assurances in extraditions that pose a threat of inhuman treatment on the individual however can be considered a weakness of the system. On the other hand, the American approach has often ignored international provisions and infringed the United States international obligations. The death penalty and the death row phenomenon tolerated by the U.S. Supreme Court have been largely criticized by international human rights organizations as unacceptable in the 21st century.

In view of the above analysis of both European and US systems, it can be affirmed that the ECtHR's case law is more protective of the individual than the U.S. Supreme Court. The ECtHR does not tolerate the death punishment as this would go against the absolute right to life and the right to freedom from torture and inhuman treatment.[202] Furthermore, the death row phenomenon has seen opposite approaches taken by the two courts. If the ECtHR prohibited the extradition of Soering only because there was a real risk of inhuman treatment on death row, the U.S. Supreme Court frequently denies certiorari in challenges made to the

[201] Maxine D. Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence," *Nebraska Law Review* 84, 740 (2006).
[202] Sandra Babcock, "The Global Debate on the Death Penalty," *Human Rights Magazine* 34, No. 2 (Spring 2007).

death penalty and death row phenomenon as amounting to cruel and inhuman treatment. In addition, a number of cases before the U.S. Supreme Court regarding the death row syndrome have showed that this practice becomes an additional punishment to the death penalty and dehumanizes the individuals.

To conclude this analysis, it must be noted that there are flaws and strong points for each of the two systems. Further development is always welcomed but I will abstain here from stating what the two systems can learn from each other, mainly because their traditions are different and what is excellent for one might not have the same fine effects for the other.

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