DETERMINING TORTURE IN INTERROGATION CASES.

COMPARATIVE ANALYSIS OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, THE UN BODIES AND THE U.S. COURTS

By

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ABSTRACT

This study provides an extended outlook on the process of determining torture in interrogation cases from the ECtHR, the UN bodies (the UN Committee Against Torture and the UN Human Rights Committee) and the U.S. The study contributes to a better understanding of the current interpretation of the definition of torture as it provides an extensive and detailed analysis of the classical situation in which torture takes place, the interrogation setting.

The main areas discussed in this research include (1) the elements that prevail in assessing torture claims, i.e. severity and intention&purpose, and how they are determined in the case law; (2) other factors that can be taken into account and their consequences on the definition of torture and on the overall evolution of the torture case law; (3) whether there is a uniform view of what amounts to torture in the context of interrogations; (4) the evolution of the threshold for torture in interrogations.

The dissertation shows that severity is the element that prevails in the definition of torture, while purpose and intention are merely secondary elements, placed somewhere in the background. With regard to pain and suffering specific of severe ill-treatment, the study shows how a quantitative approach (the effects on the victim expressed by the amount and gravity of injuries or the number of acts inflicted) has been largely the main criteria for determining the severity of an ill-treatment and its overall qualification of torture. Other criteria include the cruel nature of an ill-treatment and, gradually gaining in importance, the vulnerability of the victim, two criteria which render secondary the classic elements of the definition of torture. The dissertation also shows that the quantification method used in interpreting "severe pain or suffering" has pushed the uniform agreement on what amounts to torture towards higher thresholds of pain or suffering. While recent

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developments give more meaning to psychological suffering and to the victim's vulnerability the overall threshold for torture remains elevated.

It is concluded that for legal purposes, the UN definition of torture is a well done construct and that it is the case law that should give more substance to the principles and ideals that inspired the prohibition of torture, an issue that becomes more obvious in seemingly borderline cases.

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INTRODUCTION

WHY THIS TOPIC?

Torture is the foremost example of human rights denial and dehumanizing behavior. It is an abuse against which people enjoy the widest protection possible, as such inhumane acts, we say with wide consensus, have no place in today's society and civilization. Torture is part of a triad that we know as "torture, inhuman or degrading treatment," and from these three types of ill-treatment,[1] torture is perceived as the gravest and most serious. Although torture might be used loosely, especially in the media, without any particular concern for determining its exact meaning, defining torture has been the subject of international concern for the purpose of protecting values inherent in all human beings, such as human dignity, integrity, or autonomy.

At the international level the most accepted definition of torture is the one in Article 1 of the UN Convention Against Torture – briefly, the intentional infliction of severe pain or suffering for a purpose by a public official. It is applied in the interpretation of more general international instruments prohibiting torture where no definitions are provided, but also interpreted by legal scholars. However, the study of the case law on torture where this generally accepted definition is applied is not extensive or complete. Secondary literature consists of general treaties on human rights, where one chapter is usually devoted to analyzing ill-treatments with reference to the most significant case law and highlighting the general principles applicable in this subject matter for all

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[1] In this dissertation the term "ill-treatment" is used to refer to the range of possible abuses and coercive treatment, whether they amount to torture, inhuman or degrading treatment. Other sources of law also use this term to designate all three categories of harm (see for instance *International Committee of the Red Cross policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty*, adopted by the Assembly Council of the ICRC on 9 June 2011, p. 548, footnote 1, available at https://www.icrc.org/eng/resources/international-review/review-882-armed-groups/review-882-all.pdf last accessed in November 2016).

types of cases (see for instance Harris, O'Boyle & Warbrick; White & Ovey).[2] Other studies, especially after 9/11 and the "war on terror" abuses, have focused on the justifiability of torture and discussing the absolute character of this prohibition with references to the ticking bomb scenario.[3] Furthermore, other research specifically on the issue of the definition of torture presents a philosophical account of torture or a theoretical view of its elements without a comprehensive and in-depth account of how these elements are interpreted in the case law,[4] or it focuses on other specific topics such as degrading treatment[5] or psychological torture.[6]

The only study that has undertaken a rather systematic analysis of the definition of torture is that of Steven Dewulf who looked at the elements of torture in a more extensive manner than previous

[2] See David Harris, Michael O'Boyle, Ed Bates, et al, *Law of the European Convention on Human Rights* (2nd edition), (Oxford, New York: Oxford University Press, 2009), 69-119; Robin CA White and Clare Ovey, *The European Convention on Human Rights*, (Oxford, New York: Oxford University Press, 2010), 167-194.

[3] See, among others, Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument," *Journal of Applied Philosophy*, Vol. 23, Issue 3 (2006): 355-373; Jessica Wolfendale, "Training Torturers: A Critique of the "Ticking Bomb" Argument," *Social Theory and Practice* Vol. 32, Issue2 (2006): 269-287; Robert Brecher, *Torture and the ticking bomb*, (Oxford: Blackwell Publishing, 2007); Lucia Zedner, "Terrorism, the ticking bomb, and criminal justice values," *Criminal Justice Matters*, Vol. 73, Issue 1 (2008): 18-19; Yuval Ginbar, *Why not torture terrorists?: moral, practical and legal aspects of the "ticking bomb" justification for torture*, (Oxford, New York: Oxford University Press, 2008); Jeremy J. Wisnewski, "It's About Time: Defusing the Ticking Bomb Argument," *International Journal of Applied Philosophy*, Vol. 22, Issue 1 (2008): 103-116.

[4] See, among others, David Luban, "Human Dignity, Humiliation, and Torture," *Kennedy Institute of Ethics Journal*, Vol. 19, Issue 3 (2009): 211-230; Elaine Webster, "Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk," *Human Rights Review*, Vol. 17, Issue 3 (2016): 371-390; Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006): 809-841; Manfred Nowak and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment," *Torture*, Vol. 16, No. 3 (2006): 147-151; Richard Matthews, *The absolute violation: Why torture must be prohibited*, (Montreal & Kingston, London, Ithaca: McGill-Queen's University Press, 2008); Andreas Maier, "Torture," in *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, edited by Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster, (Dordrecht: Springer 2011), 101-117; Jeremy Waldron, "Inhuman and degrading treatment – the words themselves," *Canadian Journal of Law and Jurisprudence*, Vol. XOXIII, No. 2 (July 2010): 269-286; Kimberly Alexa Koenig, "Indefinite Detention / Enduring Freedom: What Former Detainees' Experiences Can Teach Us About Institutional Violence, Resistance and the Law" (PhD diss., University of California, Berkeley, Fall 2013); David Sussman, "What's Wrong with Torture," *Philosophy and Public Affairs*, Vol. 33, Issue 1 (2005): 1-33.

[5] See Elaine Webster, "Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights," (PhD diss., University of Edinburgh, 2009).

[6] See David Luban and Henry Shue, "Mental torture: a critique of erasures in US law," *Georgetown Law Journal*, Vol. 100 (2012): 823-863.

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studies.[7] My evaluation is however that his research has several drawbacks which, I believe, are worthwhile avoiding. First, the perspective that he takes in his study of the definition of torture is rather theoretical. Although he provides certain references to case law from international human rights law, international criminal law and humanitarian law, the study does not go into an extensive analysis of these cases, nor does it explain the choice of specific cases and the subject matter that they cover and consequently, why other cases have not been considered. Furthermore, because he does not look at legal arguments, he misses the perspective of the legal practice and a more informed interpretation of the definition by courts. Finally, his research avoids the issue of why certain ill-treatments were considered to be torture by taking the findings in the referenced case law as a given (occasionally taking methods of ill-treatment out of context or privileging a listing of methods and findings). Overall, the study is commendable given the absence of any other extensive perspective on the theoretical definition of torture but at the same time it could have benefited from a more solid argumentative basis if it had focused on the line of reasoning of the torture jurisprudence. This is one of the issues I intend to address in this dissertation.

Therefore, considering that no systematic comparative account of the understanding and determination of torture in interrogations has been made, this is the gap in the legal literature that this dissertation seeks to fill. It will look at how torture is interpreted in the case law, by what means, what reasoning and what features are recurrent; what is the meaning of torture that can be drawn from cases and how these cases' understanding of torture align with the ideals behind this prohibition; does the case law get it right? Ultimately, to the extent possible, what is torture?

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[7] Steven Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law,* (Antwerp: Intersentia, 2011).

Writing about torture and essentially about what constitutes torture is an ethically challenging endeavor. The resulting work must avoid any setting of definite lines between what is torture and what is inhuman or degrading treatment at the risk of inadvertently manipulating decision making processes. At the same time, this should not mean that one cannot analyze how the case law reaches conclusions that a certain ill-treatment amounts to torture and whether in practice there is a consistent definition. The uneasiness and reluctance of setting transparent standards can lead to arbitrariness and uncertainty. In this sense, I consider this study to be necessary especially because there is a chronic lack of explanations of the reasons for which courts and international bodies reach the conclusion that a certain ill-treatment is torture or is not torture but inhuman and degrading treatment. For instance, the European Court of Human Rights (ECtHR) has reached a certain level of international respect for its constant development of principles and commitment to the protection of human rights, so one would expect that in the case of an absolute right such as the right not to be subjected to torture the analysis of reasons would be as complete and convincing as possible. Also, the Brighton Declaration plainly highlights the need for legal certainty ensured through clear, consistent and quality judgments.[8] I have found however many references to principles or statements which remain without an explanation as to why in a certain case they are valid and applicable, which might spill over into national or international jurisdictions. This chronic lack of explanation is even most obvious in the decisions of the UN bodies, the UN Committee Against Torture (the UNCAT) and the Human Rights Committee (UNHRC or HRC). Their views have a very impersonal way of presenting arguments, they "note", "observe" but never out rightly show whether certain observations are central or relevant to the conclusion. The whole

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[8] The Brighton Declaration, adopted by the High Level Conference on the Future of the European Court of Human Rights, April 2012, par. 23, at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf last accessed in August 2017.

argumentation is mostly a repetition of factual submissions of the party (or parties, if the State sends submissions). It is a very opaque way of considering the facts and evidence in a case file.

RESEARCH QUESTIONS

The purpose of this thesis is to inquire whether there is a uniform understanding of torture and whether the case law presents a commonly agreed-upon sense of what separates torture from inhuman treatment. To avoid impunity, the UNCAT has emphasized that State parties should avoid "serious discrepancies" between the definition of torture in the Convention and the definition of torture as incorporated in domestic law.[9] However, I believe that this is also valid for the case law interpreting the definition of torture, which should also provide a sense of uniformity.

Furthermore, it is uncertain to what extent torture is generally found in cases concerning interrogations and the thesis will look at whether in these cases there has indeed been the same trend of lowering the level of severity, as shown in the relevant literature. The thesis will show that there are a very small number of ill-treatments that can be automatically classified as either torture or inhuman treatment. The majority of ill-treatments are subject to an assessment following all or part of the elements determined in the UN Convention Against Torture definition of torture. Therefore, the thesis will determine the elements of the definition that have prevailed in the case law, it will look at the way in which these elements are analyzed and the consequences of considering one of them as the distinguishing feature of torture. Also, the thesis will consider whether other factors can be taken into account when categorizing ill-treatments.

The current line of reasoning in the case law follows the "totality of the circumstances" approach when evaluating whether an act constitutes torture or inhuman treatment. This is a very general

[9] UNCAT, General comment no. 2, par. 9.

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and all-embracing method, which looks at the nature of the act, the duration of the treatment, the physical and psychological condition of the victim, as well as her personal characteristics, the planning of the act. It therefore means that everything is relevant and at the same time it provides great leeway for picking and choosing any of these factors as relevant in the assessment of torture.

I would however like to note that the scope of this thesis is not to focus on creating lists of coercive methods that amount to torture, but rather to uncover why certain methods are considered to amount to torture or to inhuman and degrading treatment. This is one matter that has been poorly researched so hopefully this dissertation will inform and clarify these aspects.

METHODOLOGY

In this dissertation I will comparatively analyze the case law arising in three jurisdictions: the ECtHR case law on Article 3 of the European Convention on Human Rights (the ECHR), the UN case law on torture comprising the views of the Committee Against Torture and of the Human Rights Committee, and the U.S. case law on substantive due process as well as case law concerning damages for torture.

The choice of these jurisdictions can be explained by the scope of providing a comprehensive and wide-ranging view of torture from some of the most important and advanced case laws. The ECtHR has been primarily chosen because it provides the most prolific and well-grounded human rights case law on the issue of torture. At the same time, the extent of the case law provides examples for all the possible approaches taken in order to determine torture. It is also representative for the developments taking place in terms of the evolving meaning of torture and inhuman treatment, so that it constitutes an important source of chronological assessment.

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The UN case law has been chosen especially due to the UNCAT, the body in charge of interpreting the most widely used and accepted definition of torture. Along with the UNCAT, I have included the UNHRC, which completes the UN's case law on torture. Although the UNHRC is known for not providing a qualification for the ill-treatment, I have however identified cases finding torture, which I will analyze into more detail than those cases in which the UNHRC does not categorize the ill-treatment.

Lastly, the U.S. provides a specific domestic perspective on torture, where the implementation of the UN Convention Against Torture has been marred from the very beginning by reservations and understandings on the definition of torture, leaving room for abuse by the government. Furthermore, as explained in more detail in the first chapter, the U.S. is a fragmented jurisdiction when dealing with torture, with a multitude of statutes that might form the basis of an action for a violation of this prohibition. In the long run this fragmentation has shaped a case law that reserves torture for extreme forms of ill-treatment. Although substantive due process cases are not immediately relevant for the definition of torture, since few of them would readily identify and categorize an ill-treatment as torture, I have decided to include them since they provide an important component of the overall context for understanding torture in the U.S.

There are of course other jurisdictions that could have been included in this study. However, for practical considerations of space, among others, I have decided to focus only on the three jurisdictions already mentioned. At the domestic level, besides the U.S., included in this study for the reasons stated above, I have avoided other national jurisdictions since the subject itself dictates the need to look preponderantly to cases that reflect a certain degree of international consensus and representativeness. At the international level, I have also considered including the Inter-

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American system (the Court and the Commission) and the international criminal tribunals. While the former is an informative source for the interpretation of torture, the approach adopted is largely similar to the one of the European Court of Human Rights. Although the Inter-American Torture Convention does not include severity as a criteria for the definition of torture, the Inter-American case law has closely followed the ECtHR case law and confirmed that only severe pain or suffering is specific of torture.[10] As regards the international criminal tribunals, adding this jurisdiction would have raised, to a certain extent, issues of comparability. International criminal law is concerned with individual criminal responsibility, which would have led the comparison towards considerations pertaining to the public or private capacity of the perpetrator of torture. While this is a relevant topic when discussing torture, it is an issue that concerns responsibility rather than categories of ill-treatment. Furthermore, criminal responsibility for torture in the case law of the international criminal tribunals arises in contexts that go beyond the topic of torture committed during interrogations, so any meaningful comparisons would have been difficult to make with the other chosen jurisdictions. Nonetheless, it is possible that further research could integrate these jurisdictions in order to achieve an even more comprehensive view of the prohibition of torture.

With regard to the topic of the cases, I have also chosen to reduce the area to be analyzed and decided to focus solely on cases concerning interrogations. Besides concerns of comparability of cases, this choice was also motivated by the fact that interrogations are the setting in which from the start one can find two of the elements of torture, an official acting with a purpose. Interrogations are also an unequal environment among the two parties, a situation in which one party is particularly vulnerable to being intentionally subjected to severe pain. Unlike other categories of cases that might have been selected for this study (ill-treatments applied between private

[10] Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago*, 11 March 2005, No. 123, par. 70.

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individuals, risks of ill-treatment following extraditions or deportations to certain countries, conditions of detention, etc.), cases concerning interrogations present all the elements of torture, and especially the severity and purposive elements which, as it will be concluded in the first chapter, are the main distinguishing elements of torture. Therefore, interrogations provide the perfect setting to test the definition of torture and weigh in on the elements that might distinguish torture from inhuman treatment.

The limitation of this thesis to cases concerning only interrogations was also done for practical reasons. While finding the ideal answer to the question of what constitutes torture in general is certainly a commendable and valuable endeavour, during my research I have come to realize that such an objective is too massive for a PhD thesis if the focus is on all types of cases involving ill-treatment. Besides the size limitations, trying to fit such a research into one PhD thesis would mean to run the risk of ignoring the differences that exist between the various types of ill-treatments, reaching easily challengeable or even false conclusions and overgeneralizing where subtle distinctions should not be ignored. While I do not wish to suggest that the definition of torture differs depending on the type of cases that is analysed, I would not ignore the fact that a different element might be the one prevailing in different categories of cases where torture is found. To minimize this, I have limited the area to interrogation cases.

From this limited scope of the thesis comes its limitation. All the conclusions of this dissertation will be based on the analysis of interrogation cases and, where relevant, country reports and other general reports pertaining to interrogation practices. The findings should therefore be understood as being limited to the field of interrogation cases and any ramifications for defining torture and

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inhuman treatment in other contexts or for more general fields such as criminal law or detention in general should be done with caution.

Nonetheless, while the cases analysed in this thesis have been selected, in their greater majority, on the topic of interrogations, a very small number of cases dealing with other instances of torture was included only with reference to principles or considerations mentioned in their reasoning that are also applicable for interrogation cases and only to the extent necessary to understand how torture is determined in interrogations and how wider approaches and evolutions affect this category of torture cases. Their factual background and analysis on the merits is not subject to discussion in this thesis.

Also, although the thesis concerns torture, cases finding inhuman treatment (originating in their large majority from the ECtHR) will also enjoy a certain degree of exposure in the analysis. They offer an outlook on factors that are missing from certain treatments and which would be specific of torture.

With regard to a more technical issue, the identification of the cases for this research has been done with the help of various case law databases or were identified from the legal scholarship. With regard to the ECtHR, the HUDOC database was the main source. The relevant cases were identified based on various searches of terms and their variations (confess, interrogate, suspect, admit, etc.) and limitations (for instance Chamber or Grand Chamber formation, violation, torture, inhuman treatment, or searches limited to document sections). With regard to the UNCAT and UNHRC cases, I have used the UN Human Rights Treaties database at http://www.bayefsky.com which provides a list of all the views adopted by these committees, classified by articles. The results obtained were crosschecked with searches in the database of the UN High Commissioner

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for Human Rights (http://juris.ohchr.org). However, fewer relevant cases were identified from this latter database. As for the U.S., I have used Westlaw, HeinOnline, as well as free access online databases. To process the large volume of cases I have made use of a qualitative data analysis software which allowed me to take notes and code the information while going through the material. This step has made it easier to revisit the cases for each chapter and make use of all the relevant information through specific queries.Besides case law, legal scholarship, and various reports, where relevant, I also make reference to empirical studies (sometimes only in the footnotes) that reveal important aspects for distinguishing torture from inhuman treatment. For instance, the victim's perspective is not entirely uncovered by legal sources, as legal opinions are based on evidence specific to the criminal field. However, empirical studies can be more focused on the experience of the victim, on the personal meaning and assessment she gives to the ill-treatments, or even on the motivations of the perpetrator. They thus help to take into consideration the subjective experience of the parties involved and to provide a more complete picture of torture.

One important remark - considering that the thesis concerns torture and the cases depict some of the cruelest and most brutal acts imaginable, out of respect for the sensibilities of the readers, I have occasionally chosen to include the citation of the exact account only in footnotes.

OUTLINE OF THE DISSERTATION

Structurally, the dissertation follows the division between the two elements that distinguish torture from inhuman treatment, severity and the purposive element (intention&purpose). While this might give rise to concerns of fragmentation of the definition and the appearance that torture is analyzed only one-dimensionally, this deconstruction is necessary in order to provide informed conclusions about the role of these elements and about how they and consequently how torture is

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determined in interrogations. Furthermore, this fragmentation mirrors the trends that are followed in categorizing ill-treatment as torture.

The dissertation is divided into five chapters. The first chapter looks at the overall theoretical distinctions between torture and inhuman or degrading treatment. It contextualizes the prohibition of torture by providing a historical account and focusing on the definition of torture as understood in the chosen jurisdictions and in the legal scholarship. It also examines the dominant elements used in distinguishing between torture and inhuman treatment, namely the purpose and severity of the treatment, and considers the appropriateness of dividing ill-treatments into separate categories.

Chapter two addresses the element of severity through the lens of the effects of ill-treatment on the victim. It discusses in detail the principal method used in determining such effects, the quantification of pain or suffering expressed on the basis of medical evidence in days of recovery for the victim, in the gravity of the consequences (diminished work capacity, disability, death), in the amount of injuries, acts, or methods inflicted, or in the length of the ill-treatment. The chapter shows that although the definition of torture does not explicitly mention any effect requirement, the case law has effectively embedded such threshold within the severity element for acts of torture. From all the chapters of the thesis this is the largest one (which is also representative for the status of the effects of ill-treatment within the overall assessment of torture) and could have been easily split into two chapters. However, in order to avoid breaking the logic of the chapter I have kept it as is.

Chapter three analyzes the issue of cruelty as an indicator of torture and looks preponderantly to treatments that by their nature have been characterized as egregious and amounting to torture. It will show that "cruel" has been used very differently in the studied jurisdictions, with the ECtHR

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mentioning "cruel" only when referring to torture and especially with regard to egregious methods considered almost automatically to amount to torture (e.g. suspension, falaka, electric shocks, rape). On the other hand the UN bodies refer to "cruel" as the equivalent of inhuman treatment. In between, the U.S. uses "extreme cruelty" for torture and "cruel" for inhuman treatment. Furthermore, it has also included a separate crime of cruelty in the Uniform Code of Military Justice. The chapter concludes that torture is found on the basis of the cruelty of the treatment inflicted because by its nature the treatment is capable of inflicting severe pain or suffering specific of torture or because of the premeditation characteristic that such treatment conveys. Ultimately however, both of these reasons might be read as simply another way of determining torture through a mechanical exercise of quantifying pain or suffering. Lastly, it is observed that the use of "cruel" can also be seen as an avoidance strategy – naming an ill-treatment "cruel" might appear sufficient and render unnecessary a qualification of torture.

In chapter four the thesis looks at an emerging approach in determining severity and implicitly torture – the vulnerability of the victim. The chapter analyses several types of vulnerability encountered in interrogations cases: vulnerability as a powerlessness resulting from the inferior position of the person placed in custody combined with her vulnerability caused by the ill-treatment; vulnerability as a weakness exploited by interrogators, especially in cases concerning psychological ill-treatment which involves for instance threats to relatives or the sexual autonomy of the victim; vulnerability resulting from the victim's prior state of health, her mental disability or from demographic characteristics (age, sex, ethnic and national origin, etc.). The chapter shows that this emerging concept of vulnerability may be considered a positive development for determining torture where the ill-treatment is of a psychological type, while at the same time if it

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does become a central element in the final assessment it would render the definition of torture irrelevant.

The fifth and final chapter of the thesis analyses the second determinant component of torture, intention and purpose, two elements that integrate the perpetrator's perspective into the overall assessment of ill-treatment. The two are analysed together because they are closely connected and the case law sometimes confounds them under the label "purposive element." The chapter shows that intention and purpose are determined on the basis of inferences from the circumstances of the case or from the element of severity and that they usually occupy a secondary place in all the studied jurisdictions or even become a burden for findings of torture.

Lastly, while I will try to analyze all the relevant aspects pertaining to how torture employed in interrogations is defined and determined in specific cases, it is almost impossible to cover all the points of interest that a reader might think of and there will always remain further sub-topics to explore. Therefore, I hope that this study will provide some clarity and understanding for both academia and legal practitioners on an area that has been rarely explored in detail.

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1 GENERAL OVERVIEW OF THE DEFINITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT

1.1 INTRODUCTION

The prohibition of torture and inhuman treatments is one of the core principles of contemporary human rights protections. The wide array of international and national documents dealing with this prohibition proves that the prohibition of torture and inhuman or degrading treatments enjoys a large consensus among the world states and occupies an important place in customary international law and most importantly it has the value of a *jus cogens*.[11] Nonetheless, the definition of torture and inhuman treatment still entices debates as developments in this field are inevitable, with unforeseen methods being created or with new contexts in which the prohibition is to be applied. The labeling of an act as torture or as inhuman treatment will have important practical consequences and this gives the subject of this study a significant impact in the overall studies that have so far analyzed the prohibition of torture and inhuman treatment.

The theoretical distinctions between torture and inhuman or degrading treatment will be the subject of this first chapter, which will look into detail at the specific elements separating the two types of treatments within the chosen jurisdictions. The main purpose of this chapter will be to find and analyze the dividing line between torture and inhuman or degrading treatment in the numerous international documents offering slightly different approaches to defining the two conducts.

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[11] *See* Joan Fitzpatrick, *Human rights in crisis: the international system for protecting rights during states of emergency*, (Philadelphia: University of Pennsylvania Press, 1994); *See also* Erika Feller, Volker Türk, and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), 152.

The United Nations Universal Declaration of Human Rights states in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[12] After 1948, when this standard formulation for the proscription of ill treatments was drafted, more than a few international human rights instruments reproduced the same wording of the prohibition,[13] sometimes keeping in line with its phrasing or reshaping specific elements to contextualize it.

The same phrasing of the Universal Declaration of Human Rights was followed in the International Covenant on Civil and Political Rights (hereinafter ICCPR) in 1966. In 1975, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment offered a more specialized perspective, inspiring the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) drafted in 1984 and effective from 1987. Lastly, two conventions on different continents have been inspired by the Universal Declaration and the UNCAT: the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) in 1950 and the Inter-American Convention to Prevent and Punish Torture in 1985.

The structure of this chapter will follow the jurisdictions chosen, from the most influential international instrument to the national perspective on defining torture and inhuman or degrading treatment. From an international perspective, the provisions include Article 1 of the UNCAT and Article 3 of the ECHR. Accordingly, after this introduction, the second section will offer a brief theoretical contextualization of torture within historical, ethical, and philosophical accounts of the changes that have taken place in how torture was viewed especially starting with the sixteenth

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[12] Article 5 of the UN Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly on December 10, 1948, available at http://www.un.org/en/documents/udhr/index.shtml, last accessed in September 2010.
[13] Anthony Cullen, "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights," *California Western International Law Journal*, Vol. 34, (2003): 29.

century and leading up to the abolition of judicial torture. The third section offers an overview of the definition of torture that is mostly used in national and international systems, the definition proposed by Article 1 of the UNCAT. The fourth section will center upon the terms employed in the ECHR and on the characteristics developed by the case law of the European Court of Human Rights. From the national perspective, the fifth section of the chapter will deal with the concepts used in the U.S. jurisdiction to define torture and inhuman treatment. It will look at the provisions of the relevant Amendments of the U.S. Bill of Rights, the U.S. Code, the sources of civil remedies for torture, and the attempts of the Bush Administration to narrow the definition. Finally, after analyzing these different perspectives in defining torture and inhuman treatment, another section will look at the dominant elements used in distinguishing between torture and inhuman treatment; in particular, I will consider the question of whether it is the special purpose or the severity of treatment that determines the placing of the act into one of the two categories. Furthermore, I will also consider the appropriateness of dividing between torture and inhuman treatment. One last section will provide an overview of the legal scholarship that looks at the meaning of torture and the underlying values protected by this norm.

This chapter will show the particularities of each of the systems under analysis and it will conclude that in theory the prohibition of torture enjoys a wide support on the international stage, that there are common traits to the definitions of torture and inhuman treatments throughout the different jurisdictions but that at the same time there are distinctive elements depending on the context in which the provision was drafted or applied. Furthermore, this chapter will serve as a platform for advanced discussions on the issue of whether there is a uniform understanding on what amounts to torture and what amounts to inhuman treatment in practice.

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1.2 CONTEXTUALIZING TORTURE

Torture has been a commonly used practice since the ancient society to the early modern times. It was considered a legally and morally acceptable practice used in criminal trials in order to gather evidence and confessions.[14] Within the Western society torture was banned in the 18th century but rose again in the 20th century when the communist and fascist regimes gained power in Europe. Comprehensive ethical, historical and philosophical studies have explained the use and subsequent abolition of torture, as well as its resurgence in the 20th century.

These studies have resulted in several perspectives and accounts for the demise of torture: an ethical perspective from Judith Shklar in *Ordinary Vices*,[15] humanitarian advancements during the Enlightenment (M. Ruthven, 1978; E. Peters, 1996; Hunt, 2007),[16] changes in criminal procedural law which took a turn away from focusing on confessions (J. Langbein, 1977),[17] the growing support for disciplining methods for social control which replaced the use of torture and corporal punishment (M. Foucault, 1977),[18] and a shift in the conceptualization of pain (L. Silverman, 2001).[19] Furthermore, Damaška presents an account concerning the role of social status in explaining the origin and the demise of torture.[20] While this is not the place to discuss the merits of these theories nor to determine whether one is more accurate than the others in explaining the

[14] Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative and Historical Analysis," *Sociological Theory,* Vol. 25, Issue 2 (2007), 104.
[15] Judith N. Shklar, *Ordinary Vices*, (Cambridge, Massachusetts and London: The Belknap Press of Harvard University Press, 1984).
[16] Malise Ruthven, *Torture: The Grand Conspiracy*, (London: Weidenfeld and Nicolson, 1978); Edward Peters, *Torture: Expanded Edition,* (Philadelphia: University of Pennsylvania Press, 1996); L. Hunt, *Inventing Human Rights: A History,* (New York, London: W.W. Norton and Company, 2007).
[17] J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime*, (Chicago: University of Chicago Press, 1977).
[18] Michel Foucault, *Discipline and Punish*, (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).
[19] Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago and London: University of Chicago Press, 2001).
[20] M. Damaška, "The death of legal torture," *The Yale Law Journal*, Vol. 87 (1978), 878; See also Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative and Historical Analysis," 107.

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abolition of torture, especially since the causes for such a complex process are most likely multi-layered and interconnected, a short depiction of these theories is in order so that the topic of this dissertation is contextualized in the overall evolution of the concept of torture.

As Judith Shklar observed in *Ordinary Vices*, the classical moral philosophy and Christian tradition did not note a concern with cruelty as a vice or a deadly sin. Shklar observed that it was outside of the "divinely ruled moral universe"[21] that it was possible for the first time for political philosopher Montaigne, followed by his disciple Montesquieu, to "put cruelty first [among vices]"[22]. She explains that this was made possible because Montaigne mostly feared "the pure glamour of power, the show of valor that accompanies it, and the cruelty that both encourage."[23] Moral cruelty was seen by Montaigne, and later on by other philosophers more or less inspired by his views, as humiliation and unnecessary suffering. Though bodily damage might be a consequence of cruelty, he did not necessarily confine cruelty to mere physical brutality.

Montaigne's ideas inspired Enlightenment thinkers who further challenged the brutality and cruelty of torture in the mid-eighteenth century causing a change in social attitudes and subsequent advancement of human rights. Through reason, sensibility and empathy were more obvious in the understanding of others, which became essential for the crystallization of ideas of universality and equality as the basis of natural rights. The understanding of bodies, pain, punishment, and personhood changed radically and led to calls for reforming criminal law.[24] As Hunt argues in support of the humanitarian concerns behind the abolition of torture, the old framework of pain and bodies was gradually replaced by a new one, in which "individuals owned their bodies, had

[21] Judith N. Shklar, *Ordinary Vices*, 1.
[22] Ibidem, 1-43.
[23] Ibidem, 28.
[24] L. Hunt, *Inventing Human Rights: A History*, 104.

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rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments and sympathies as in themselves."[25] Pain and body could no longer be used for the restoration of the community's religious, political, and moral order.[26]

According to Beccaria in his work *Of Crimes and Punishments*, torture was contrary to the principle that only the guilty must be punished and not the innocent. He thus argued that a body in pain was no longer the "test of truth."[27] Instead of being the symbol of reparation for offending and aggrieving society, pain came to be seen as rather an obstacle in such reparation. This change in the meaning and perception of pain as devoid of value is one conceptual revolution that contributed to the abolition of torture. According to Silverman, the growing influence of medical opinions that pain was in fact negative spread in the eighteenth century throughout society, which came to view pain as missing any spiritually uplifting worth and eventually losing its place as the moral foundation for the use of torture.[28]

In the same line of conceptual revolutions, punishment was no longer the symbol of penance for sins, since such penance would be attained through a mutilation of the body, a barbaric and absurd "offspring of religion."[29] In *Discipline and Punish*, Foucault advances the theory that torture was abolished because the authorities found other methods, discipline and surveillance, more effective in social control than corporal punishment. The symbolic value of torture and corporal punishments was evident in public spectacles through which a political message of terror was sent to the audience. The wounded body was used as a proof of the power and control of the sovereign

[25] Ibidem, 112.
[26] Ibidem, 94.
[27] Cesare Beccaria, *Of Crimes and Punishments*, available at http://www.constitution.org/cb/crim_pun16.htm, last accessed in September 2017.

[28] Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France*, 24.
[29] Beccaria, *Of Crimes and Punishments*; L. Hunt, *Inventing Human Rights: A History*, 97 and 102-105.

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and as a tool to ensure the subjects' loyalty by way of example. In his theory, torture was replaced by discipline and surveillance which are methods of control of the "docile body," serving the purpose of rehabilitating the defendant.[30] However, although he challenges egalitarian and humanitarian reasons for the shift from torture, he similarly focuses on the role of the body in achieving this change. Since punishment is taken away from the public arena and becomes the hidden part of the judicial system, the body no longer plays the role of public symbol for an audience and there is no more violence being inflicted on it. However, the body remains within the confinement of the sovereign through surveillance and control as a means to reach the individual's soul.

Challenging the role of Enlightenment, Langbein focuses more on the changes that took place in criminal procedural law. He argues that torture was abolished because evidentiary rules specific to the Roman-canon law for serious crimes, namely the requirement for convictions to be based either on the testimony of two eyewitness or on the defendant's confession, were relaxed even before Enlightenment by the development of another system of proof in parallel to the Roman-canon law. It was a system that used a "free judicial evaluation of evidence"[31] and it had already developed in the sixteenth and seventeenth centuries. This allowed for convictions to take place in the absence of confessions, essentially rendering torture useless in the judicial process. Furthermore, Langbein explains how along with this change in evidentiary requirements new

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[30] Michel Foucault, Discipline and Punish, (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977), 34, 135-170; Daniel W. Boyer, "Kafka's Law-Writing Apparatus: A Study in Torture, A Study in Discipline," *Yale Journal of Law & the Humanities*, Vol. 27, Issue 1 (2015), 85.
[31] J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime*, 3-4, 11.

modes of punishment were being developed,[32] thus supporting the developments noted by Foucault in his theory of discipline and surveillance as new methods of control of the individual.

Further interpretive observations are presented by Damaška, who argues that rank and social status played an important role in explaining both the origin of torture and also its demise.[33] Indeed, beginning with the Greek antiquity, torture had been reserved for non-citizens and later for second-class citizens. These categories included foreigners, slaves, prisoners of war, or members of outsider groups.[34] In general, society had been marked by status considerations which usually protected elites from subjection to torture and in which suffering was directly dependent on the social status of the defendant. According to Damaška, society lacked a "general human empathy independent of social class, a universal conception of human rights transcending status."[35] However, once the bourgeoisie arose, human suffering caused by torture became more obvious, so that considerations of the inhumanity of torture became applicable to a larger segment of the population. This increased the sense that torture was an irrational institution and condemnable under the Enlightenment, further boosting the abolition of state sanctioned judicial torture by the end of the eighteenth century.[36]

Nonetheless, in the 20th century the use of torture rose again following world wars and totalitarian regimes. In reply, liberalism and liberal governance were seen as the solution to preventing cruel acts emanating from the state. As Shklar observed, it would not be possible to end all coercive government and all fear, but liberalism aims to avoid fear that is "created by arbitrary, unexpected,

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[32] J. H. Langbein, 12, 49.
[33] M. Damaška, "The death of legal torture," *The Yale Law Journal*, Vol. 87 (1978), 878.
[34] Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative and Historical Analysis," 107.
[35] M. Damaška, "The death of legal torture," 878-881.
[36] Ibidem, 881.

unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime."[37] International human rights law reacted to this "fear of systematic cruelty"[38] and to the possibility of seeing cruelty arise again. It advanced general and specific human rights instruments prohibiting torture and inhuman or degrading treatment based on the idea of human dignity.[39] But even so, current challenges posed by new types of wars and conflicts rationalized by the need to protect national security against the threat of terrorism, the increase of migration and displacement of persons that are readily categorized as "non-citizens," as well as the rise of far right parties and ideologies provide several immediate sources of anxiety for the prohibition of torture. As varied as the explanations for the prohibition of torture might be, these current developments might make it necessary to re-emphasize the role of certain concepts in the prohibition of torture. Pain, body, fear of cruelty, or even status were central to the understanding of torture and to the way that governments and society at large chose to address it. They were essential to seeing torture as a dehumanizing practice and as the symbol of total state abuse and power. Indirectly, this thesis will also show that these concepts are very much still relevant to the use of torture and especially to the interpretation of its meaning. In fact, this dissertation is structured around these concepts, pain and body, cruelty and status (or some other similar characteristic that differentiates and singles out the victim), that have been relevant for so long when discussing torture.

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[37] Judith N. Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum, (Cambridge, London: Harvard University Press, 1989), 29.
[38] Ibidem, 30.
[39] For a detailed discussion of the meaning of human dignity in the interpretation of the prohibition of torture see Elaine Webster, "Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk," *Human Rights Review,* Vol. 17, Issue 3 (2016): 371-390.

1.3 Definitions provided by UN Instruments. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

After World War II the United Nations had an active attitude in prohibiting torture, especially with regard to the drafting process of legal instruments. The UN has been the source of a number of legal instruments that have shaped the international framework for this prohibition. Beginning with the first UN legal document to prohibit torture and inhuman treatments, the 1948 Universal Declaration of Human Rights has set up the principles that were gradually followed and elaborated. It held in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[40] This exact formulation was reproduced by the 1966 International Covenant on Civil and Political Rights in Article 7, which advanced the prohibition by adding that "no one shall be subjected without his free consent to medical or scientific experimentation."[41] The UN was also at the origin of the most specific document on the ban on torture, the UNCAT drafted in 1984. The first article of this convention provides the most followed definition of torture:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.[42]

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[40] http://www.un.org/en/documents/udhr/index.shtml, last accessed in September 2013.
[41] Article 7 of the *International Covenant on Civil and Political Rights* adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, last accessed in September 2013.
[42] Article 1 of the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at http://www.hrweb.org/legal/cat.html, last accessed in September 2010.

From the definition cited above, four important components can be determined for the definition of torture. First, torture is the infliction of severe suffering, irrespective of whether it is physical or mental pain. The level of suffering that the victim will experience for the treatment to amount to torture is identified as 'severe'. Although not a direct consequence of the UN definition of torture, the severity component has been considered by the ECtHR to be dependent on the characteristics of the victim,[43] as some treatments may cause severe suffering on an ill person for instance, while the same treatment may cause only slight suffering to a healthy person. Furthermore, the assessment of what is severe and what is mere suffering is also a subjective judgment of the person undertaking such an assessment. Therefore, the severity component of torture makes for a subjective experience not only of the victim but also for the person assessing the treatment and it could be anticipated that it will raise difficulties in determining what amounts to torture especially when combinations of treatments or victims with distinctive characteristics are involved.

The second component of torture is that the perpetrator must have the intention to inflict such a severe pain upon his victim and thus negligent infliction of severe pain will not amount to torture,[44] but might fall under the category of inhuman treatment. This component is closely related to the third one, the requirement that the perpetrator must aim towards a goal from those listed in Article 1. The formulation "such purposes as" ensures that the list of goals is, to a certain extent, open ended, as it is limited to purposes that are similar to those listed in Article 1 of the

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[43] See for instance *Selmouni v. France* [GC], no. 25803/94, 28 July 1999, par. 100; *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 120; *Cestaro v. Italy*, no. 6884/11, 7 April 2015, par. 171.

[44] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (Dordrecht: Martinus Nijhoff Publishers, 1988), 118; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, (Oxford, New York: Oxford University Press, 2008), 73; Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006): 830.

Convention.[45] As Burgers and Danelius have also observed, the list of purposes is connected to state policies or state interests.[46] Lastly, the fourth element requested by the UNCAT is that the perpetrator must be a state official or at least have a certain degree of official authority. This last requirement represents a significant limitation placed upon the behaviors that can be considered torture and the *travaux préparatoires* of the Convention reveal that this requirement was considered by the drafters an important element in engaging the responsibility of the State.[47] Punishable torture from the point of view of international human rights law is therefore not engaged into by anyone. There is the need for a degree of official power or control, which is open to a broad interpretation, but which stops at simple private capacity when punishing acts of torture. Where private persons are concerned, with no connection to public official action or inaction, the UNCAT drafters considered that the normal criminal judicial system would cover such acts. On the contrary, if the authorities of a state would be involved in torture, the mechanisms of investigation and prosecution might not function properly, so the scope of the Convention was to avoid such risk of impunity.[48]

As for the definition of inhuman and degrading treatment in the UN instruments, it can be observed that there is an absence of such a definition in the UN treaties and conventions. In fact, if the text of the UNCAT is examined, one will find that the only reference to inhuman treatment in the body of the treaty is found in Article 16, which states that every State Party undertakes "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or

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[45] Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006): 821, 831; Burgers and Danelius, 118.
[46] Burgers and Danelius, 119.
[47] Sandesh Sivakumaran, "Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals," *Leiden Journal of International Law*, 18 (2005): 549.
[48] Burgers and Danelius, 119-120.

punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[49] The two elements for determining inhuman treatment are therefore the lesser severity of treatment and the official capacity of the perpetrator. The lack of special intention and of a specific purpose when inflicting pain and suffering upon a victim will amount only to inhuman or degrading treatment.[50] Any treatment that causes pain and suffering which is not severe or which is severe but is not inflicted for a specific purpose will fall under the category of inhuman or degrading treatment.

Furthermore, from the phrasing of the prohibition of inhuman and degrading treatment, it is noticeable that State Parties are under the conventional obligation to prevent acts of inhuman treatment. Article 16 makes reference to obligations arising in relation to torture which will also apply in relation to inhuman treatment: education and information of law enforcement personnel through rules and instructions (Article 10), review of applicable rules for interrogation and custody (Article 11), prompt and impartial investigation where inhuman treatment has occurred (Article 12) and the right to lodge a complaint and have impartial and prompt justice (Article 13). Article 12 and 13 may be interpreted to include an obligation to punish this type of treatment but the obligation itself does not explicitly follow from any of the provisions of the convention.

Further aspects which are explicitly applicable only for torture concern its prohibition in all circumstances without exception even in case of war or public emergency (Article 2(2)). Additionally, the Convention also stipulates that the superior order defense cannot be applied for cases involving torture (Article 2(3)) and that each State Party is under the obligation to exercise

[49] Article 16 of the UNCAT.
[50] Nowak and McArthur, *The United Nations Convention against Torture. A Commentary*, 558.

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universal jurisdiction for acts of torture (Article 5). Additionally, according to Article 3(1), there is an obligation not to extradite a person whenever there is the risk that she will be submitted to torture in the requesting state. The last significant point which distinguishes between torture and inhuman treatments in terms of obligations is that State Parties have the obligation to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[51] All these elements indicate that the obligations imposed on State Parties are much broader in relation to torture and subsequently the level of protection provided by the UNCAT for torture victims is much higher than the one for victims of inhuman treatment. Although in the General Comment no. 2 the UNCAT states that the obligations ranging from Article 3 to Article 15 apply to both types of ill-treatment,[52] the provisions of general comments are not legally binding[53] and the fact that the obligations were divided by the drafters into two separate categories may indicate a preference expressed by the State parties with regard to their obligations to implement the Convention.

The above analysis illustrates the theoretical division between torture and inhuman or degrading treatment as provided in the UNCAT. The guidelines provided in this Convention have become the classical view on torture and inhuman treatment and have established a definition widely used on national as well as international arena; the definition provided by UNCAT has become an inspiration for judges, international organizations, scholars, and also drafters of international instruments. Due to this repetitive use and also to its merits shortly discussed above it has come to

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[51] Article 15 of the UNCAT.
[52] UNCAT, *General Comment No. 2, Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, par. 6.
[53] See Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights," *Vanderbilt Journal of Transnational Law*, Vol. 42 (2009): 905-947.

be regarded as "representative of customary international law."[54] Its influence on international law will also be noticeable below, in the analysis of the definitions of torture and inhuman or degrading treatment as provided by other chosen jurisdictions.

1.4 The Definition of Torture and Inhuman Treatment under the European Convention on Human Rights and in the Case Law of the European Court of Human Rights

Article 3 of the European Convention on Human Rights appears quite simple and concise: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"[55] but the right conferred by this provision is absolute and non-derogable. As Article 15(2) makes clear, the right to freedom from torture and ill-treatment cannot be derogated from, not even in times of "war or other public emergency threatening the life of the nation."[56] Similar to the Eighth Amendment of the U.S. Bill of Rights, there is no express definition of torture in the Convention and as the *travaux préparatoires* reveal, the framers (especially the British representative, Mr. Cocks) were preoccupied to create a "sweeping ban" and not to explicitly state particular instances of torture, so that they would avoid undermining the general scope of the prohibition.[57] However, unlike the Eighth Amendment, there is a clear distinction between torture and other inhuman or degrading treatments, following the division established by the UNCAT between torture and other less severe treatments. However, unlike the UNCAT, it does not offer a precise definition of what constitutes

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[54] *See Prosecutor v. Delalic*, Case No. IT-96-21-T, ICTY 1998, par. 459; *See* also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ICTY1998, par. 160.
[55] The European Convention on Human Rights, Article 3, available at http://www.hri.org/docs/ECHR50.html, last accessed in September 2010.
[56] *Ibidem*, Article 15.
[57] Antonio Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, (Oxford: Oxford University Press, 2008), 298.

torture, a gap left for the Court to fill through its developing case law. As the Court affirms repeatedly in its case law on Article 3, the European Convention is a "living instrument"[58] and its provisions should be interpreted accordingly. As other scholars have written on this subject,[59] leaving the text in general terms gives the Court a much needed flexibility to adapt the provision to the most up to date circumstances and to new problems faced by the State Parties. For that reason the interpretation of Article 3 has been a liberal one, the Court proving efficient and willing to expand its meaning to varied actions or omissions of state officials but also willing to direct its attention to other international instruments on the subject of torture. The Court has turned to Resolution 3452 (XXX) of the UN General Assembly in order to define torture as "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[60] Additionally, the Court was also inspired by the definition provided in the UNCAT, requesting the four elements to be present before categorizing an act as torture: severe pain or suffering, intentional infliction, an open list of purposes and the official capacity of the perpetrator.[61] Therefore, similar to the UNCAT, the purpose of ill treatment and its severity will lead to the classification of the treatment as torture. In assessing the severity of the suffering the Court will consider objective as well as subjective criteria. The Court will analyze the duration, effects, method of execution of the act that allegedly amounted to torture but also the sex, age and health of the victim.[62]

As for the definition of inhuman and degrading treatment, the Court affirmed in the *Greek* case that "the notion of inhuman treatment covers at least such treatment as deliberately causes severe

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[58] *Selmouni v. France*, no. 25803/94, 28 July 1999, par. 101.
[59] 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*, (New York: Oxford University Press, 1998), 73.
[60] Article 1 of the UN General Assembly Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on December 9, 1975.
[61] Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at http://www.hrweb.org/legal/cat.html accessed in September 2010.
[62] *Kudla v. Poland*, no. 30210/96, 26 October 2000, par. 90-94.

suffering, mental or physical, which, in the particular situation is unjustifiable."[63] Therefore, it can be observed that there is a scale of aggravating forms of ill treatment in defining torture, inhuman and degrading treatment. Torture corresponds to the most serious of all ill treatments whereas degrading is the mildest one, amounting only to a humiliation, feelings of fear, anger or inferiority.[64] However, the Court observed in *Ireland v. United Kingdom* that

> [i]ll-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.[65]

Therefore, the same treatment applied on different persons could constitute either torture or inhuman treatment, depending on the subjective characteristics of the victim. This issue will be the subject of a deeper analysis in the following chapters, where the practical applications of these guidelines will be scrutinized.

Besides the elements discussed above there is one last element, the requirement that the perpetrator be an official of the state or at least enjoy some degree of official capacity. As a rule then, the acts perpetrated by private individuals will not fall within the category of prohibited treatment. Exceptionally however, the Court has held that it will "not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials."[66] Positive obligations are consequently imposed on State Parties that must "take measures designed to ensure that individuals within their jurisdiction are not subjected to

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[63] *Denmark, Norway, Sweden and the Netherlands v. Greece*, Nos. 3321-23/67 and 3344/67, 5 November 1969 (hereinafter "the *Greek* case").
[64] According to the Court in the *Greek* case, degrading treatment grossly humiliates the victim before others or drives her to act against her conscience.
[65] *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978.
[66] Sivakumaran, 552.

torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."[67]

The above description is a general but not exhaustive view of the approach taken by the Court in dealing with Article 3 cases. Given that the Court deals with individual cases, each determination of a violation of the Convention is on a case by case basis. Therefore, it is not excluded that when one of the elements determined above is missing there could still be a finding of a violation, depending on the individual circumstances of the case and on the applicant's situation. Furthermore, the Court has often been criticized for the difficulty in differentiating between torture and other ill treatments in its case law, as continuous developments on finding new acts or treatments to amount to at least inhuman treatment and new positive obligations imposed on State Parties have brought a certain degree of unpredictability and criticism from scholars who claim that there is a certain easiness with which the Court is determining violations of Article 3. More specifically, their argument is that the Court has been showing certain easiness in holding that a certain action or omission amounts to inhuman or degrading treatment or that the Court does not undergo a detailed analysis of the alleged inhuman treatments. They exemplify this with the evidentiary materials used by the Court and the frequency with which the Court refers to secondary sources, such as the reports of international non-governmental organizations, and uses them as the sole material evidence for the case.[68]

The apparent differences between torture and inhuman treatment as understood by the UNCAT and the ECHR consist in a different level of specificity in the drafting of the Conventions. While

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[67] *See A v. United Kingdom*, no. 25599/94, 23 September 1998, par. 22.
[68] *Katayoun C. Sadeghi*, "The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-finding," *Connecticut Journal of International Law*, Vol. 25, No. 1, (2009): 127-151.

Article 3 of the ECHR is drafted in very general terms and does not provide a specific definition of torture, the UNCAT has provided the inspiration for a very well-articulated definition of torture, with specific elements to be checked into the definition. Inhuman treatment on the other hand has not been defined in any of these legal provisions but was the subject of an implicit definition in the UNCAT and of case law interpreting the ECHR in order to determine a specific definition, a definition that is actually subject to continuous change in the case law of the Court. Both torture and inhuman treatment have similar defining elements in both Conventions but the obligations stemming from them may be interpreted slightly differently. This issue will be however the subject of following chapters and thus there is no need to further analyze here its implications.

1.5 DEFINITIONS UNDER THE U.S. JURISDICTION

In the U.S. there is no separate crime of torture in a federal law. Any act of torture will be considered illegal but the crime itself will be prosecuted under state criminal law as acts of violence against a person (the crime of assault, battery, sexual abuse, violation of civil rights, etc.).[69] Some states do indeed provide torture (or in one instance "cruelty") as a separate crime but there are very few examples[70] (three that I know of) and they are not at all uniform. Because of its federal structure and its refusal to criminalize torture as a federal crime, the U.S. provides a fragmented protection from torture so that none of its instruments can be indicated as a definite source of protection from ill-treatment during interrogation or more generally during criminal investigation. The U.S. Bill of Rights contains several amendments that prohibit confessions (and material

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[69] CAT/C/28/Add.5, 9 February 2000, par. 11 and 101, available at https://www.state.gov/documents/organization/100296.pdf last accessed in October 2016.

[70] CAT/C/28/Add.5, 9 February 2000, par. 102 cites California, which prohibits the crime of torture (California Penal Code Title 8 § 206), Connecticut, which prohibits "cruelty to persons" (Conn. G.S.A. § 53-20), and Alabama, which prohibits sexual torture (Alabama Stats. § 13A-6-65.1).

evidence) obtained through torture or torture as a punishment, while a variety of federal statutes more or less specific are also applicable in interrogational torture cases and were enacted to provide criminal remedies for torture committed abroad (18 U.S.C. § 2340,[71] analyzed in sub-section 6.2 below) or civil remedies (The Federal Civil Rights Statute, The Federal Tort Claims Act, The Alien Tort Claims Act or ATS, and the Torture Victims Protection Act,[72] analyzed in sub-section 6.3 below). Surprisingly, the latter may constitute the only meaningful source for defining torture committed in the U.S. so attempts to narrow the definition of torture have not been absent (sub-section 6.4 below).

1.5.1 The Prohibition of Torture in the U.S. Bill of Rights

Unlike other general and all-encompassing acts concerning rights accorded to individuals, the U.S. Bill of Rights does not include an explicit reference to a general prohibition of torture or inhuman treatment. There are however several amendments (the Fifth, Eighth, and Fourteenth Amendments)[73] that could provide protection against torture.

For the purposes of this thesis, the relevant clauses of the Fifth Amendment state that no person "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."[74] The Self-Incrimination Clause essentially

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[71] The Torture Statute enacted in 1994 in order to implement the UNCAT, codified at 18 U.S.C. § 2340.
[72] See The Federal Civil Rights Statute, codified at 42 U.S.C. § 1983; The Federal Tort Claims Act, codified at 22 U.S.C. § 2671 et seq.; The Alien Tort Claims Act (also called The Alien Tort Statute, abbreviated as ATS), codified at 28 U.S.C. § 1350, and the Torture Victims Protection Act included in the same provision of the U.S.C. as a note to the ATS.
[73] One could also include the Sixth Amendment right to counsel, but this provision applies after formal charges have been brought against the suspect. See *Massiah v. United States*, 377 U.S. 201 (1964).
[74] Fifth Amendment of the U.S. Bill of Rights, available at https://www.archives.gov/founding-docs/bill-of-rights-transcript last accessed in January 2014.

places constitutional limits on police forcing a person to incriminate herself.[75] Because originally this right only applied against federal action, the U.S. Supreme Court has incorporated the Self-Incrimination Clause to the states[76] through the Due Process Clause of the Fourteenth Amendment, which provides that no State shall "deprive any person of life, liberty or property without due process of law."[77] Furthermore, the Fifth and Fourteenth Amendments Due Process Clause can be interpreted to mean that torture is prohibited since torture has been considered a denial of liberty[78] and bodily integrity without due process.

While the Fifth and Fourteenth Amendments provide procedural and substantive guarantees, the Eighth Amendment contains certain specific concepts which may be relevant for determining the meaning of torture and inhuman treatment in interrogation cases. The Cruel and Unusual Punishment Clause, the Excessive Bail Clause, and the Excessive Fines Clause form the Eighth Amendment of the U.S. Bill of Rights ratified in 1791 with the purpose of limiting the government's power regarding criminal offenses.[79] For the purposes of this thesis, only the Cruel and Unusual Punishment Clause will be of interest. Historically, this clause was inspired by two documents, the 1689 English Bill of Rights and by the 1776 Virginia Declaration of Rights,[80] in which its scope was to protect citizens from abusive punishments. Several authors have showed that this clause was aimed at protecting individual offenders from state power[81] and that the use of

[75] Akhil Reed Amar and Renee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause," *Michigan Law Review* Vol. 93, Issue 5 (1995): 857-928.
[76] See *Miranda v. Arizona*, 384 U.S. 436 (1966).
[77] Fourteenth Amendment of the U.S. Bill of Rights, available at https://www.archives.gov/founding-docs/bill-of-rights-transcript last accessed in January 2014.
[78] Justice Kennedy concurring in *Chavez v. Martinez*, 538 U.S. 760 (2003) ("[use] of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person").
[79] The text of 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."
[80] *See* The 1689 Bill of Rights at http://www.constitution.org/eng/eng_bor.htm, and also Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights*, Rowman & Littlefield, 1992, 170.
[81] Laurence Claus, "The Anti-Discrimination Eighth Amendment," *Harvard Journal of Law and Public Policy* Vol. 28, No. 119, 122 (2004); John F. Stinneford, "The original Meaning of "Unusual": The Eighth Amendment as a Bar

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the word punishments indicates a protection for convicted persons.[82] Some have argued that the clause does not refer to "criminal punishment"[83] so the scope of the Eighth Amendment would be unduly limited by a restrictive interpretation of the word punishment. It has also been argued that the Cruel and Unusual Punishment Clause should be interpreted in a more humane manner, in line with society's belief that certain punishments are too barbaric and inhumane to be inflicted on anyone.[84] Furthermore, the Eighth Amendment has been incorporated into the due process clause of the Fourteenth Amendment[85] and the U.S. Supreme Court has stated that the due process rights of a person in the custody of police "are at least as great as the Eighth Amendment protections available to a convicted prisoner."[86] Therefore, while it is unclear whether a person alleging ill-treatment during interrogation, prior to being convicted, could successfully claim a violation directly under the Eighth Amendment, the same person could however raise her claim under the Due Process Clause and the Eighth Amendment could be incorporated in the analysis of the claim.

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to Cruel Innovation," *Northwestern University Law Review* Vol. 102, No. 4, (2008): 1748; Shannon D. Gilreath, "Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent," *Thomas Jefferson Law Review* (Spring 2003): 28.

[82] Alan M. Dershowitz, *Why Terrorism Works: Understanding The Threat, Responding To The Challenge*, (New Haven: Yale University Press, 2002), 136; See also the positions expressed by the authors of the torture memos that the Eighth Amendment applies only to convicted persons (U.S. Department of Justice Office of Legal Counsel, *Memorandum for William J. Haynes II, General Counsel of the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 14 March 2003, p. 10, available at https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf last accessed in September 2013) or the approach of Justice Scalia who was of the opinion that the cruel and unusual punishment clause of the Eighth Amendment should be interpreted in a restrictive manner and that torture is not punishment as understood under the Eighth Amendment (*60 Minutes' Lesley Stahl interview with Supreme Court Justice Antonin Scalia,* available at http://www.cbsnews.com/8301-18560_162-4040290.html?pageNum=4, last accessed in September 2013).

[83] Dissenting opinion of Justice White joined by Justice Brennan, Justice Marshall, and Justice Stevens in *Ingraham v. Wright*, 430 U.S. 651 (1977).

[84] Dissenting opinion of Justice White joined by Justice Brennan, Justice Marshall, and Justice Stevens in *Ingraham v. Wright*, 430 U.S. 651 (1977), at 685 ("if it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class. Although there were no ears cut off in this case, the record reveals beatings so severe that, if they were inflicted on a hardened criminal for the commission of a serious crime, they might not pass constitutional muster.").

[85] *Robinson v. California*, 370 U.S. 660 (1962).

[86] *City of Revere v. Mass. Gen. Hospital*, 463 U.S. 239 (1983), at 245.

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The relevant terms of the clause, "cruel" and "unusual" have been the subject of debates on whether they have the same meaning or they should be understood as additional requirements for the application of the Eighth Amendment.[87] Whereas "cruel"[88] does not seem to be an ambiguous word, generally understood as referring to the infliction of unnecessary pain and suffering,[89] the second term in the clause has provoked quite a few debates. Generally scholars have tied the meaning of "unusual" to discriminatory behavior or action, equating it with for instance something that is "immorally discriminatory"[90] or "not regularly employed."[91] Furthermore, the originalists' understanding of this term causes a very narrow interpretation of the Eighth Amendment. Given that to them "unusual" means "contrary to long usage,"[92] then in the context of the Eighth Amendment it will mean that only those punishments that are new and cruel are prohibited. Finally, the U.S. Supreme Court has endorsed the view of Chief Justice Warren, understanding "unusual" to mean something that is "different from that which is generally done."[93]

The Cruel and Unusual Punishments Clause and the Due Process Clause have been interpreted with the aid of the 'shock the conscience' test. Sarcastically called the "Celophane of subjectivity,"[94] the 'shock the conscience' test was established in the case of *Rochin v. California*,[95] which concerned the ill-treatment of a suspected criminal by police officers. After

[87] Tom Stacy, "Cleaning Up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* Vol. 14, Issue 2, (2005): 491.
[88] For a detailed discussion of "cruel" and "cruelty" in the context of interrogations, see Chapter 3.
[89] Tom Stacy, "Cleaning Up the Eighth Amendment Mess," 481.
[90] Lawrence Claus, "The Anti-Discrimination Eighth Amendment," *Harvard Journal of Law and Public Policy*, Vol. 28, (2004).
[91] Tom Stacy, "Cleaning Up the Eighth Amendment Mess," 486.
[92] 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. Joshua L. Shapiro, "*AND* Unusual: Examining the Forgotten prong of the Eighth Amendment," *The Social Science Research Network Electronic Paper Collection*: 4-5.
[93] *Trop v. Dulles* 356 U.S. 86 (1958).
[94] Justice Scalia concurring in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), at 861, calling the shocks the conscience test "the Napoleon Brandy, the Mahatma Ghandi, the Celophane of subjectivity."
[95] *Rochin v. California*, 342 U.S. 165 (1952).

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swallowing narcotics in order to prevent the officers from using them as criminal evidence, Rochin's stomach was pumped and the morphine extracted was used as evidence at trial despite the defendant's objection. The treatment and police procedures used on Rochin were considered "too close to the rack and the screw" which "shock the conscience" beyond "some fastidious squeamishness" and "offend even hardened sensibilities."[96] Note however that it was the use of evidence obtained through treatment that shocked the conscience that was held to be in violation of the Due Process Clause of the Fourteenth Amendment. So when a subsequent case that did not include the evidence and trial component was presented before the U.S. Supreme Court, the difficulties of interpreting due process and the U.S. Constitution as sources of protection from torture and inhuman treatment in interrogations[97] were more obvious.

When asked about the use of torture in interrogations when the evidence or information obtained is not used at trial to convict the tortured person, Justice Scalia stated: "[w]e have never held that that's contrary to the Constitution. I don't know what provision of the Constitution that would contravene."[98] This dilemma was presented in 2003 in *Chavez v. Martinez*.[99] In this case the Court held (five to four) that "the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances."[100] However, only three Justices (Kennedy, Stevens, and

[96] *Rochin v. California*, 342 U.S. 165 (1952), at 172.
[97] See Marcy Strauss, "Torture," *New York Law School Law Review*, Vol. 48, (2003): 201-274; Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture," *Journal of Constitutional Law*, Vol. 6, No. 2 (2003): 278-325; Jeremy Waldron, "Torture and positive law: jurisprudence for the White House," *Columbia Law Review* (2005): 1681-1750.
[98] Debra Cassens Weiss, *Is torture unconstitutional? Scalia returns to the subject*, December 16, 2014, at http://www.abajournal.com/news/article/is_torture_unconstitutional_scalia_returns_to_the_subject/ accessed in December 2016.
[99] *Chavez v. Martinez*, 538 US 760 (2003).
[100] *Ibidem*, 773. With regard to the Fifth Amendment's Self-Incrimination clause, the Court held that a "criminal case" should be understood restrictively, meaning that mere "police questioning does not constitute a "case"" so the Fifth Amendment Self-Incrimination Clause is not the provision protecting an individual from coercive interrogations. The Circuit Courts are divided on this issue, as the Second, Seventh, Ninth, and Tenth Circuits interpret "criminal case"

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Ginsburg) agreed that "no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement"[101] while other three Justices (Justice Thomas, Chief Justice Rehnquist, and Justice Scalia), focused on the lack of purpose to harm the plaintiff and cause him pain,[102] so they were not convinced that the methods used were conscience shocking. The Court remanded this issue for consideration of the particular circumstances of the case to the lower courts. Without going into further details concerning the arguments presented in this plurality opinion, I will note that the shock the conscience test is a source of vagueness for the protection against torture and inhuman treatment within the Constitution. It has been the subject of criticism precisely because of its imprecision, the impossibility to use it in order to determine a neutral rule that would be generally applicable beyond the case under examination, and the resulting lack of uniform constitutional standards.[103] When there is no issue of evidence arising and the only issue is the treatment itself, as it was the case in *Chavez*, suddenly uncertainty creeps in. Substantive due process, considered a "nebulous and historically much-abused concept,"[104] should provide protection in a blurry constitutional landscape[105] where no explicit reference to the terms torture and inhuman treatment is made. But when there are challenges as to what provision

more extensively than the Third, Fourth, and Fifth (see Amanda L. Wineman, *I Plead the Fifth!.....But Does it Matter?*, available at http://www.cumberlandtrialjournal.com/i-plead-the-fifth-but-does-it-matter/#_edn27 accessed in May 2017). For a similar conclusion, see also *Wilkins v. May*, 872 F.2d 190 (1989) (holding that "[t]he Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case").

[101] Justice Kennedy, concurring in part and dissenting in part, joined by Justices Stevens and Ginsburg in *Chavez v. Martinez*, at 798. See also, highlighting this point, Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture," *Journal of Constitutional Law*, Vol. 6, No. 2 (2003): 294.

[102] *Chavez v. Martinez*, at 775.

[103] Laurence A. Benner, "Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective," *Washington University Law Quarterly*, Vol. 67, (1989): 59-163; John T. Parry, "Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after *Chavez v. Martinez*," *Georgia Law Review*, Vol. 39 (2005): 737.

[104] *Wilkins v. May*, 872 F.2d 190 (1989).

[105] See Tom Stacy, "Cleaning Up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* Vol. 14, Issue 2, (2005): 475-553. Consider also that in *Graham v. Connor* (490 U. S. 386 (1989)) the Court held that claims of excessive use of force by police are to be analyzed under the Fourth Amendment, rather than the Due Process Clause of the Fourteenth Amendment.

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applies to interrogational torture and inhuman treatment, especially for a non-citizen, what are the remaining remedies for a victim of torture? Possible criminal and civil remedies are explored in the following sub-sections.

1.5.2 TORTURE IN THE U.S. TORTURE STATUTE

Title 18, Chapter 113C of the U.S. Code was enacted in 1994 by the U.S. Congress with the scope of implementing the UN Convention against Torture and extending the protection against torture and inhuman treatment accorded by the provisions of the Fourth, Fifth, Eighth, and Fourteenth Amendments. It extends this protection outside of the criminal jurisdiction that the U.S. generally enjoys within its territory. However, under this provision torture is a distinct federal crime only for acts committed outside U.S. territory (18 U.S.C. § 2340A). Deference to the federal states who retain competence in criminal matters and the belief that the existing state and federal criminal law would be sufficient to cover acts of torture committed within the U.S.[106] has led the Government not to adopt any provision that would make torture a distinct federal crime. This incomplete implementation of the UN Convention Against Torture has been repeatedly criticized by the UN Committee Against Torture which has highlighted in several reports the need for the U.S. to introduce a federal crime of torture.[107]

Title 18, Chapter 113C§ 2340 of the U.S. Code defines torture as "(1) an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within

[106] U.N. Doc. CAT/C/28/Add.5 (15 October 1999), par. 48.
[107] Ibidem, par. 178.

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his custody or physical control."[108] The same legal provision found it necessary to provide specific and exhaustive examples of "severe mental pain or suffering":

> [t]he prolonged mental harm caused by or resulting from— (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[109]

A first reading of the U.S. Code's provision concerning torture gives the impression that the drafters were inspired by the definition of torture provided by Article 1 of the UNCAT. The common elements to the two definitions are the commission of an act of great pain or suffering by a person "acting under the color of law"[110] meaning a person that enjoys a certain degree of governmental authority. However, § 2340 of the U.S. Code becomes more precise than the UNCAT by adding specific acts that may cause severe mental pain for the victim and requiring that the suffering be prolonged. These two requirements limit the acts or conducts that may constitute mental suffering and they are two novel conditions that were not included in the UNCAT. A further change concerns the purpose of torture, which has been totally eliminated in § 2340 of the U.S. Code. Nonetheless, the U.S. Code adds the specific intent and the power over the victim requirements. The interpretation of specific intent is uncertain, as a reasonable person may understand that the perpetrator should specifically intend to inflict pain, and not to obtain information for instance. The provision paradoxically becomes more specific than the UNCAT in terms of specific intent, while the elimination of the list of purposes envisioned by the UNCAT

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[108] Title 18, Chapter 113C§ 2340 of the U.S. Code, http://www.law.cornell.edu/uscode/18/usc_sec_18_00002340----000-.html last accessed in September 2010.
[109] *Ibidem.*
[110] *Ibidem.*

may indicate a broadening of the acts that may be considered torture. David Luban and Henry Shue have criticized the introduction of elements that were not included in the UNCAT, as they observed that when specific intention to cause pain and suffering is coupled with the requirement of prolonged mental harm, the result is that the act may amount to mental torture only if the perpetrator specifically intended to cause "pain or suffering that lingers."[111]

A further limitation provided by the U.S. Code concerns jurisdictional matters for the offence of torture. Jurisdiction in accordance with this federal law is subject to the U.S. nationality of the offender or to the presence of the offender in U.S., irrespective of the nationality of the victim or the offender.[112] To have an accurate view of the protection of individuals against torture and inhuman treatment, one may add to the relevant provisions of the U.S. Bill of Rights and of the U.S. Code other statutes, such as the Alien Tort Statute[113] or the Torture Victim Protection Act,[114] that provide remedies for interferences with the prohibition.

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[111] David Luban and Henry Shue, "Mental torture: a critique of erasures in US law," *Georgetown Law Journal*, Vol. 100 (2012): 849-850.
[112] Title 18, Chapter 113C§ 2340A of the U.S. Code.
[113] 28 U.S.C. §1350.
[114] The Torture Victim Protection Act of 1991 (TVPA) provides for the possibility of filing a civil damages claim for torture against a state official. Civil damages under TVPA are addressed for citizens or foreigners but they are statutorily limited to those claims against foreign state officials and even provide for a ten year statute of limitations.

1.5.3 THE TORTURE VICTIMS PROTECTION ACT

As mentioned above, civil remedies for torture[115] can be brought under a variety of federal statutes, including The Federal Civil Rights Statute,[116] The Federal Tort Claims Act,[117] The Alien Tort Claims Act (ATS),[118] the Torture Victims Protection Act (TVPA). However, as some of them are general tort statutes, they do not explicitly provide a definition of torture, so if a case is brought on the basis of these statutes to claim ill-treatment during interrogations, courts might look to the definition of torture as provided in the U.S. Code, the TVPA, or in international sources. Of relevance for the present chapter is the Torture Victims Protection Act of 1991, which was included

[115] Further civil remedies are provided by Bivens actions, a creation of the judiciary (see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) for a violation of a federal constitutional right committed during the exercise of official duties by a federal official. The test that is requested from the claimant is to show that "no special factors counsel hesitation on the court" and that no other alternative remedies exist for his case. The government opposed this judicially created remedy, arguing that issues of national security, military efficiency and separation of powers arise when a state official's responsibility is called into question and therefore these aspects should be considered special factors that limit the courts from providing remedies. For victims of torture this remedy has been largely inefficient (See Kyle McConnell, "Torture by the U.S.A.: How Congress Can Ensure Our Human Rights Credibility," *The John Marshall Law Review*, Vol. 46, Issue no. 4 (Summer 2013): 1209-1231; Alexander A. Reinert, "Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model," *Stanford Law Review*, Vol. 62, Issue 3 (2010): 809-862).

[116] Under the Federal Civil Rights Statute, codified at 42 U.S.C. § 1983, an individual can bring a civil action against state or local officials for a violation of fundamental rights, including for a violation for the Fifth, Eighth, or Fourteenth Amendment ("Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

[117] Under the Federal Tort Claims Act, codified at 22 U.S.C. § 2671 et seq., an individual can bring an action seeking damages against federal officials for negligence or intentional torts committed in the course of their official duties (for further details see Paul F. Figley, "Understanding the Federal Tort Claims Act: A Different Metaphor," *Tort Trial & Insurance Practice Law Journal*, Vol. 44, (Spring/Summer 2009): 1105-1138).

[118] The Alien Tort Claims Act, also called the Alien Tort Statute (ATS), was enacted in 1789 (codified at 28 U.S.C. § 1350). It provides original jurisdiction to the district courts for actions lodged *by a non-citizen* for a tort committed in violation of the law of nations (including torture) or of a treaty of the United States by a foreign or U.S. official. Since the landmark decision of *Filartiga v. Pena-Irala* (630 F.2d 774 (2d Cir. 1980)), the ATS has been invoked in human rights cases adjudicated in U.S. courts. Although claims under the ATS can be filed against U.S. state officials, a subsequent act, the Westfall Act (28 U.S.C. § 2679), states that if the Attorney General certifies that the state officials has acted within the scope of his employment duties at the time of the alleged torture, then the United States will be substituted to the state official. The precedent on this provision is that the actions that are encompassed by an employee's duties are extensive so it is not inconceivable that even torture could be considered to be within the scope of employment (see *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008)).

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in the U.S. Code as a note to the ATS.[119] It provides jurisdiction for torture and extrajudicial killings for actions for damages brought by U.S. citizens and foreign nationals against foreign government officials. The TVPA provides a detailed definition of torture as

> "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind;"[120]

Furthermore, the TVPA precisely defines the phrase "mental pain or suffering" in identical terms as the Torture Statute analyzed in the previous sub-section.[121] Therefore, when compared to the UN Torture Convention, the TVPA contains two important limitations of the definition of torture[122]: first, the torture victim must be in the custody or physical control of the offender; and second, mental pain or suffering is specifically defined. When compared to the Torture Statute of 1994, the TVPA provides an identical definition of mental pain or suffering but also includes an open list of purposes.

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[119] For further information on the relationship between the ATS and the TVPA see, among others, Eric Engle, "The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge," *Albany Law Review*, Vol. 67 (2003): 501-525; Peter Henner, *Human Rights and the Alien Tort Statute. Law, History and Analysis*, (Chicago: American Bar Association Publishing, 2009); Ekaterina Apostolova, "The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act," *Berkeley Journal of International Law*, Vol. 28, Issue No. 2 (2010): 640-652; Philip Mariani, "Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act," *University of Pennsylvania Law Review*, Vol. 156, No. 5 (May, 2008): 1383-1438.

[120] Torture Victim Protection Act, note following 28 U.S.C. § 1350, § 3(b)(1), available at https://www.law.cornell.edu/uscode/text/28/1350?qt-us_code_temp_noupdates=1#qt-us_code_temp_noupdates last accessed in October 2016.

[121] Ibidem.

[122] Peter Henner, *Human Rights and the Alien Tort Statute. Law, History and Analysis*, 159.

To conclude on the U.S. definition of torture, it may be noted that there is a wide variety of legal instruments from which the prohibition of torture draws its force[123] but the drawback is that there is a profound fragmentation of this protection.

1.5.4 NARROWING THE DEFINITION OF TORTURE IN THE TORTURE MEMOS

There are several memorandums issued by the U.S. Department of Justice,[124] all in the context of combating terrorism after the 9/11 attacks on the U.S. In 2003, when the Memorandum concerning *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*[125] (hereinafter Torture Memo) was issued, the U.S. government was involved in a war against terrorist organizations. Due to the need to interrogate the alleged enemies captured during this conflict in order to obtain useful information, the Bush Administration needed guidelines that it

[123] Consider also the definitions of torture and cruel, inhuman or degrading treatment in the U.S. Manual for Military Commissions of 2010, at III-9 and III-10. Torture follows the definition of Title 18, Chapter 113C § 2340 of the U.S. Code discussed above. Cruel, inhuman or degrading treatment is defined as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture […]" (available at https://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions_2010.pdf last accessed September 2016).

[124] *See Memorandum for William J. Haynes, II General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens held in Guantanamo Bay, Cuba*, issued on December 28, 2001, available at http://www.antiwar.com/rep/011228_philbinmemo.pdf, last accessed in September 2010. *See* also *Memorandum for William J. Haynes, II General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees*, issued on January 9, 2002, available at http://www.antiwar.com/rep/020109_yoomemo_1-10.pdf, last accessed in September 2010; Assistant Attorney General Jay S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, August 1, 2002, available at http://nsarchive.gwu.edu/torture_archive/docs/Document%2001C.pdf last accessed in September 2010; Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 USC. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*, issued on May 10, 2005, available at http://luxmedia.com.edgesuite.net/aclu/olc_05102005_bradbury_20pg.pdf, last accessed in September 2010; *Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency Re: Application of United States Obligations Under Article I6 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value at Qaeda Detainees*, issued on May 30, 2005, available at http://luxmedia.com.edgesuite.net/aclu/olc_05302005_bradbury.pdf, last accessed in September 2010.

[125] Deputy Assistant Attorney General John C. Yoo, *Memorandum for William J. Hayne II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, Washington, March 14, 2003, available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf, last accessed in September 2010.

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could follow in its interrogational policy and most importantly it needed the interpretation of domestic and international legal standards applicable in these situations. The source of the most well-known guidelines would become the U.S. Department of Justice. In the 2003 Torture Memo, the U.S. Deputy Assistant Attorney General, John Yoo, attempted to explain to the government the definition of torture according to the domestic and international standards applicable in the U.S., standards that would be enforced by U.S. courts in case a dispute arose out of the government's interrogational policies. The two aspects that were therefore analyzed in the Torture Memo and that are of relevance for this thesis are first, what is the definition of torture that should be considered by the U.S. government and second, what are the obligations of the U.S. government regarding the interrogation of foreigners detained overseas.

Concerning the definition of torture and inhuman treatment, the Department of Justice interpreted the relevant provisions of the U.S. Constitution (the Fifth, Eighth, and Fourteenth Amendments), and it particularly looked at the provisions of the U.S. Code prohibiting torture, discussed here in sub-section 1.5.2. John Yoo concluded that these provisions should not apply to the case of aliens detained overseas. To reach this conclusion, he analyzed the formulation of the text and his main argument was that according to the legal text specific intent to cause severe pain is required and therefore simple knowledge that a certain act might reasonably cause severe pain is not sufficient. Otherwise said, if the specific objective of the defendant is not to cause severe pain through the acts inflicted then there is no specific intent and the act will not amount to torture.[126] According to this view, it is sufficient that the defendant "acts with an honest belief that he has not engaged in the proscribed conduct"[127] to conclude that the conduct did not amount to torture. Therefore, if this

[126] *Ibidem,* 36-37.
[127] *Ibidem,* 37.

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line of argument is followed, if one tortures a person without a specific purpose to inflict severe pain but simply to obtain information, it can be claimed that the act does not amount to torture. Placing the emphasis on the honest belief of the perpetrator enables the interpreter to avoid the qualification of the offence as torture and places the process of torturing within a closed box, with no visible connections between the act itself and the end result.

The second argument presented by John Yoo in support of his theory is the reading of the term "severe" which is not interpreted in the U.S. Code. The adjective "severe" was understood in the Torture Memo as a high level of intensity for the pain experienced by the victim, that would be "difficult for the subject to endure."[128] John Yoo further emphasized that torture should be retained only for the most extreme acts in which

> [t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning.[129]

The interpretation provided for the term severe in the Torture Memo precludes the qualifications of many acts as acts of torture under the U.S. law, while under the UNCAT they would definitely amount to torture. The interpretation of the severity of suffering is so extreme that only a handful of treatments would amount to torture.

What is also to be noted is that John Yoo cited decisions of the ECtHR and of the Israeli Supreme Court in support of his arguments. He referred to *Ireland v. United Kingdom* and to the *Public*

[128] *Ibidem*, 38.
[129] *Ibidem*, 45.

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Committee Against Torture in Israel v. Israel[130] as examples of cases that show an "aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist."[131] However, these two decisions have been criticized because the two courts were reluctant to declare that the methods used in interrogations amounted to torture and legal scholars have also observed that the techniques at issue amounted to torture.[132] The Torture Memo used the holdings as an argument in favor of the extreme view of torture but ignored the different opinions of legal scholars, as well as further developments in the case law of the ECtHR. John Yoo concluded that the ECtHR and the Israeli Supreme Court "appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist."[133]

Furthermore, the Memo examined the obligations of the U.S. under the UN Convention Against Torture and specifically whether there could be any defense available for acts of torture. It concluded that given that the Congress did not incorporate into the U.S. Code the CAT clause according to which "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"[134] then legal justification for torture is possible. The Torture Memo supports the doctrine of self-defense as a justification for torture "because the combatant by aiding and promoting the terrorist plot 'has culpably caused the situation where someone might get hurt.

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[130] *Public Committee Against Torture in Israel v. Israel*, 5100/94 (1999).
[131] *The Torture Memo*, March 2003, 71.
[132] See articles published before the Torture Memo was drafted: Catherine M. Grosso, "International Law in the Domestic Arena: The Case of Torture in Israel," *Iowa Law Review* Vol. 86 (2000): 305-337; Ardi Imseis, "Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement concerning the Legality of General Security Service Interrogation Methods," *Berkeley Journal of International Law* Vol. 19, Issue 2 (2001): 328-349; John T. Parry, "What is torture, are we doing it, and what if we are," *University of Pittsburgh Law Review* Vol. 64 (2002): 243, footnote 33.
[133] *Torture Memo*, March 2003, 71.
[134] Article 2 (2) of the Convention against Torture.

If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible.'"[135] This statement is contrary to international law and to the status of *jus cogens* norm achieved by the prohibition of torture. Although at some points it appears to be far-fetched in technicalities, the interpretation provided by the Torture Memo exploits all the weaknesses of the incomplete and specific implementation of the UNCAT by the U.S.

1.6 WHAT SEPARATES TORTURE FROM INHUMAN TREATMENT AND WHY IS SUCH A SEPARATION NECESSARY?

The jurisdictions chosen for this study reveal a constant focus on the act of torture and a slight marginalization of inhuman treatment. The *travaux préparatoires* of the UNCAT illustrate that torture was at the forefront of the proposals. The U.S. for instance suggested that the Convention's sole focus should be torture. Even one of the drafts proposed covered only torture.[136] Then it is no surprise that the definition of torture was carefully considered and the term inhuman treatment hardly appears in the Convention. The jurisdictions chosen for this study reveal relatively similar definitions of torture and inhuman treatment, with only slight differences between the two conducts. Both of these acts must attain a minimum of severity or provoke pain or suffering that goes beyond the level of pain entailed by lawful sanctions.

For torture, the element of severe physical or mental pain and suffering is constant in every jurisdiction, with a specific enumeration of the causes of mental pain or suffering in the U.S. The second component of torture is that the infliction of such severe pain must be intentional and not

[135] *Torture Memo*, March 2003, 79.
[136] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, 539.

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just due to negligence. With regard to this requirement, the U.S. applies what appears to be a particular component, the "specific intention" to inflict severe pain. The meaning of this exact phrase will be further analyzed in Chapter 5, where intention and purpose will be further explained on the basis of the case law. The third component of torture is the specific purpose for the infliction of severe pain, a purpose that is limited to obtaining information, a confession, punishing, intimidating, discriminating or any purpose similar in nature to those enumerated. This requirement has been eliminated from the U.S. Code but it has been replaced with the above mentioned specific intent, which although it apparently enlarges the category of acts of torture, it may lead to a more restrictive reading of the definition of torture. The last requirement for torture is that some degree or link to public authority is exercised by the perpetrator. The U.S. has eliminated the public official requirement but has replaced it with the condition that the victim is within the custody or physical control of the perpetrator. When compared to the thorough delineation of torture, inhuman treatment appears more marginalized. None of the international instruments analyzed above provide a specific definition but one certain element in the UNCAT and for the ECHR is the infliction of suffering by a public official. For the UNCAT, any ill-treatment less severe than torture but with a purpose and any ill-treatment without a purpose but severe could qualify as inhuman treatment. According to the ECtHR, it is the level of severity that will most likely distinguish between torture and inhuman treatment. In theory there is no requirement of intention and purpose in order to hold that an act amounts to inhuman treatment so these elements have been often overlooked in the detriment of the severity of treatment. Lastly, in the U.S. jurisdiction, the act of inhuman treatment does not appear to have been defined.

It can therefore be said that in theory two main elements provide the distinction between torture and inhuman treatment: the level of pain and suffering and the specific purpose of the act. The first

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approach is chosen by the ECtHR, for which the difference between the two conducts lies in the severity of the treatment and intensity of the pain inflicted. This standard is however more prone to subjective assessments and to manipulations. The U.S. provides such an example in relation to mental pain and suffering, for which a list of causes was predetermined. This list focuses on the different types of treatments, it ignores other types that may cause the same level of pain, and at the same time it does not take into account the effects on the victim.

With regard to severe pain or suffering, the legal literature varies between those that require a certain gravity, and those that argue that the treatment need not be severe to amount to torture. Burgers and Danelius consider that "only acts of a certain gravity" [137] will amount to severe pain, though even a single act could constitute torture.[138] John Parry for example argues that, even if it lasts relatively briefly and the effects on the victim are less than severe, an act could amount to torture if one takes into account the total loss of control and the powerlessness of the victim in relation to the authority of the perpetrator.[139] Parry's take on severity and his focus on the issue of control over the victim has been criticized for its potential to include all custodial interrogation, whether coercive or not.[140] So severity is a significant point of disagreement no matter how broad or restrictive it is interpreted.

When compared to the element of severe pain or suffering, the component of specific purpose appears fairly easy to determine and to evaluate, and more easily manageable in practice. For Manfred Nowak, the distinction between torture and cruel and inhuman treatment is made by this

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[137] J. Herman Burgers and Hans Danelius, 117.
[138] Ibidem, 117.
[139] John T. Parry, "Escalation and Necessity: Defining Torture at Home and Abroad," in *Torture: A collection* edited by Sanford Levinson, (Oxford, New York: Oxford University Press, 2004), 145-164; John T. Parry, *Understanding torture: law, violence, and political identity*, (Ann Arbor, Michigan: University of Michigan Press, 2010), 205.
[140] Michael W. Lewis, "A Dark Descent into Reality: Making the Case for an Objective Definition of Torture," *Washington & Lee Law Review*, Vol. 67, Issue 1, (2010): 102-103.

element, the purpose of the conduct, and the powerlessness of the victim.[141] Nowak's argument is based on the fact that direct power and control over the victim is the decisive factor in whether inhuman treatment is permitted or not. He argues that police interventions may include violent acts, such as shooting or use of force, but these will not be qualified as inhuman treatment unless they are excessive, and despite the fact that they amount to interferences with personal integrity. However, as soon as the person is under the control of the authorities, such acts would immediately be prohibited as inhuman treatment or torture, depending on whether the treatment has the purpose of extracting a confession or punishing.[142]

If a mere theoretical division is hardly possible to establish and very clear categories are impossible to reach, then why keep the very distinction between torture and inhuman treatment? Why not designate all the acts with the encompassing expression of "inhuman treatment" considering that torture is also a form of inhuman treatment, though an aggravated one? The Human Rights Committee generally refers to both torture and inhuman treatment as "violations of Article 7 of the ICCPR", with no specific reference as to whether the conduct amounted to torture or to inhuman treatment.[143] This approach is however contrary to the guidelines provided by the UNCAT to the State parties in its General comment no. 2. According to the UNCAT interpretation of the Convention "it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present."[144] The distinction between torture and

[141] Manfred Nowak and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment," *Torture*, Vol. 16, No. 3 (2006): 150.
[142] Ibidem, 150-151. See also UN Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, "Report of the Special Rapporteur on the Question of Torture, Manfred Nowak," 2005, http://antitorture.org/wp-content/uploads/2012/07/ZZ-Thematic-Report-Activities-Methodology-Diplomatic-Assurances-Distinction-between-torture-and-CIDT.pdf.
[143] Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law*, 3d ed. (Oxford: Oxford University Press, 2009): 83.
[144] UNCAT, *General comment no. 2*, 24 January 2008, par. 10, available at http://www.refworld.org/docid/47ac78ce2.html last accessed on 30 January 2013.

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other ill-treatments is therefore considered necessary by the UNCAT but completely useless by UNHRC. The ICCPR is indeed a more general instrument, adopted in 1966, before the UNCAT, which was adopted in 1984. However, the UNCAT is *lex specialis* when compared to the ICCPR and yet, as will also be shown in the following chapters, the UNHRC has not aligned its approach to that of the UN Committee Against Torture. The views adopted in the individual complaints procedure by these two bodies of the same international system have remained contradictory on whether to distinguish torture from inhuman treatment.

An approach similar to the one of the UNHRC is encountered in some of the ECtHR judgments,[145] as the assessment itself may be difficult to make especially in borderline cases or due to the lack of sufficient evidence, despite the varied criteria developed in its case law. Furthermore, there are studies that advocate for renouncing the distinction altogether, as the elements of torture may not be visible at the moment of assessment of the conduct or they may not be accurately assessed. In one psychological study it has been observed that post-traumatic stress disorder or severe mental harm could appear in victims a long time after they had been subjected to torture or that victims subjected to physical pain that could be said to amount to torture did not experience any disorder.[146]

The distinction appears however necessary due to considerations of prevention, criminalization, punishment, and redress. The UNCAT has emphasized that naming and defining the crime of torture contributes to prevention of this crime by warning the public and the perpetrators about the

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[145] See, among others, the following ECtHR cases: *Ayse Tepe v. Turkey*, no. 29422/95, 22 July 2003; *Balogh v. Hungary*, no. 47940/99, 20 July 2004 ; *Hasan Kiliç v. Turkey*, no. 35044/97, 28 June 2005; *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005; *Yusuf Gezer v. Turkey*, no. 21790/04, 1 December 2009; *Taraburca v. Moldova*, no. 18919/10, 6 December 2011; *Dvalishvili v. Georgia*, no. 19634/07, 18 December 2012.

[146] M. Başoğlu et al., "A multivariate contextual analysis of torture and cruel, inhuman, and degrading treatments: Implications for an evidence-based definition of torture," *American Journal of Orthopsychiatry*, Vol. 79, Issue 2 (2009): 135-145; M. Başoğlu, M. Livanou, and C. Crnobaric, "Torture versus other cruel, inhuman & degrading treatment: Is the distinction real or apparent?" *Archives of General Psychiatry*, Vol. 64, Issue 3 (2007): 277-285.

gravity of the crime.[147] In the UN Convention Against Torture, evidentiary rules and deterrent punishments differ depending on the classification of the act. The exclusionary rule provided in Article 15 applies to evidence obtained as a result of torture and no such express rule is provided for evidence obtained through inhuman treatment. Deterrent punishments or simply the duty to punish is also not provided explicitly with regard to inhuman treatment. In General Comment no. 2 the UNCAT has stated that "articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment,"[148] but as already mentioned above, general comments do not have binding force on the State parties. A further consideration to take into account when deciding whether to distinguish between torture and inhuman treatment is the issue of redress accorded to the victim. Any act of torture that would be generally qualified only as inhuman treatment would amount to a lack of redress and a further injury to the victim.

To this day it is not clear why torture and inhuman treatment in international provisions were separated in the first place, whether it is only common sense or a need to actually divide the two and provide different levels of protection against them. The latter might be true, considering that in the original draft of the 1975 Declaration against Torture all state obligations were formulated so that they would apply to both torture and inhuman treatment.[149] A further point of uncertainty is whether the prohibition of inhuman treatment would have actually gained such a high level of protection had it not been included alongside torture in the UNCAT. A separation between torture and inhuman treatment is however necessary, despite the fact that in theory it is uncertain which specific element separates them.

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[147] UNCAT, *General Comment No. 2*, par. 11.
[148] Ibidem, par. 6.
[149] See Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law*, 31-33, 83.

1.7 TORTURE IN THE LEGAL SCHOLARSHIP

The definition of torture provided in the UNCAT has been widely used and discussed in the legal scholarship, and it has not been short of critique. Richard Matthews observes that the definition of torture in the UNCAT is necessary for legal purposes and for continuing the fight against torture. However, he points that it is a mistake to rely too heavily only on this definition, as it fails to provide a complete understanding of the nature and structure of torture, as well as to identify the specific wrong, the harm caused and the victims of torture.[150] For different reasons, Michael Davis also warns that the UNCAT definition is too narrow. He takes issue with the limitation of torture to governmental actions, which leaves acts and conducts of private parties outside of the prohibition.[151] In a similar manner, though from a feminist endeavor, Catherine MacKinnon argues that we should consider sexual violence and rape as torture although it is committed by non-state actors.[152] Also, Herbert Kelman focuses on "the larger policy context in which the practice of torture is embedded" and on the systematic character of torture.[153]

With regard to the elements of severity in the UNCAT definition, there are scholars that consider only the extreme ill-treatments to amount to torture. Richard Posner for instance argues that torture involves extreme pain and suffering, that torture begins at "the point along a continuum at which

[150] Richard Matthews, *The absolute violation: Why torture must be prohibited*, 9, 36-38. For instance, with regard to the identification of victims, Matthews argues that subjecting a person to torture inevitably harms more than the direct victim, since humans are social beings and part of social networks.
[151] Michael Davis, "The moral justifiability of torture and other cruel, inhuman, or degrading treatment," *International Journal of Applied Philosophy* Vol. 19, Issue 2 (2005): 163.
[152] Catherine A. MacKinnon, "On Torture: A Feminist Perspective on Human Rights," in *Human Rights in the Twenty-First Century: A Global Challenge*, edited by Kathleen E. Mahoney and Paul Mahoney, (Dordrecht: Martinus Nijhoff Publishers, 1993), 21-33.
[153] Herbert C. Kelman, "The policy context of torture: A social-psychological analysis" *International Review of the Red Cross*, Vol. 87, No. 857 (2005): 124. See also the dissenting opinion of Justice White, joined by Justice Harlan and Justice Stewart in *Miranda v. Arizona*, 384 U.S. 436 (1966), at 538 (the dissenting Justices argue that the privilege against self-incrimination is about more than the human dignity of the accused and relates to societal interests and the human personality of others).

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the observer's queasiness turns to revulsion."[154] For Posner queasiness is not enough, it must involve revulsion or horror for the conduct to amount to torture. Also, Michael Davis considers extreme suffering to be one of the distinguishing features of torture.[155]

Going beyond the definition, what unites legal scholarship is an ample agreement that torture is an attack on several values, such as human dignity, autonomy, privacy, and identity.[156] However, few studies (and even fewer judgments) actually go beyond this statement to clarify what is meant by assaulting these values. The Torture Memos and the methods used during the interrogations of suspected terrorists after 9/11 brought to the fore the use of torture by public authorities and triggered a wide array of articles discussing this practice, but as David Luban and Henry Shue observed, many of the philosophical studies focus on ticking bomb scenarios and on justifications for torture, sometimes marginalizing the nature and wrongfulness of the act.[157]

[154] Richard A. Posner, "Torture, Terrorism, and Interrogation," in *Torture: A Collection*, edited by Sanford Levinson, (Oxford, New York: Oxford University Press, 2004), 291.
[155] Michael Davis, "The moral justifiability of torture and other cruel, inhuman, or degrading treatment," 164.
[156] Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006): 832; Manfred Nowak and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment," *Torture*, Vol. 16, No. 3 (2006): 150; Richard Matthews, *The absolute violation: Why torture must be prohibited*, (Montreal & Kingston, London, Ithaca: McGill-Queen's University Press, 2008), 23; Andreas Maier, "Torture," in *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, edited by Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster, (Dordrecht: Springer 2011), 101-117; Jeremy Waldron, "Inhuman and degrading treatment – the words themselves," *Canadian Journal of Law and Jurisprudence*, Vol. XOXIII, No. 2 (July 2010): 269-286; Kimberly Alexa Koenig, "Indefinite Detention / Enduring Freedom: What Former Detainees' Experiences Can Teach Us About Institutional Violence, Resistance and the Law" (PhD diss., University of California, Berkeley, Fall 2013): 287; David Sussman, "What's Wrong with Torture," *Philosophy and Public Affairs*, Vol. 33, Issue 1 (2005): 30; David Luban, "Human Dignity, Humiliation, and Torture," *Kennedy Institute of Ethics Journal* Vol. 19, Issue 3 (2009): 211-230.
[157] David Luban and Henry Shue, "Mental torture: a critique of erasures in US law," 6. Examples of studies on torture focusing on the ticking bomb scenario include: Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument," *Journal of Applied Philosophy*, Vol. 23, Issue 3 (2006): 355-373; Jessica Wolfendale, "Training Torturers: A Critique of the "Ticking Bomb" Argument," *Social Theory and Practice* Vol. 32, Issue2 (2006): 269-287; Robert Brecher, *Torture and the ticking bomb*, (Oxford: Blackwell Publishing, 2007); Lucia Zedner, "Terrorism, the ticking bomb, and criminal justice values," *Criminal Justice Matters*, Vol. 73, Issue 1 (2008): 18-19; Yuval Ginbar, *Why not torture terrorists?: moral, practical and legal aspects of the "ticking bomb" justification for torture*, (Oxford, New York: Oxford University Press, 2008); Jeremy J. Wisnewski, "It's About Time: Defusing the Ticking Bomb Argument," *International Journal of Applied Philosophy*, Vol. 22, Issue 1 (2008): 103-116.

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The main value emphasized in the legal scholarship discussing torture is human dignity. It is viewed as something that must be fundamentally encountered in every human being, which is constant, as well as something that must be actively developed and promoted throughout the individual's life.[158] Andreas Maier explains that torture attacks human dignity as it denies the victim's "very standing as a moral being"[159] that deserves a justification for her treatment. Inspired by Jewish biblical writings, David Luban explains human dignity as the characteristic of relationships between human beings rather than as a characteristic of the individual. He further notes that respecting someone's dignity means not subjecting the person to humiliation, though he does admit that human dignity might be something greater than not being shamed or embarrassed.[160]

Similar interpretations of dignity are found in judgments, though not as extensively discussed. The ECtHR considers human dignity in the context of Article 3 as something that is akin to a status or standing that is diminished or undermined by ill-treatment.[161] In the context of interrogational torture, ideas of humiliation and debasement feature prominently in the reasoning of the Court's judgments, included in general principles concerning degrading treatment but also as a basic harm caused by torture.[162] On the other hand, humiliation in the UNCAT cases is mostly encountered in

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[158] Elaine Webster, "Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk," *Human Rights Review,* Vol. 17, Issue 3 (2016): 383.
[159] Andreas Maier, "Torture," 113.
[160] David Luban, "Human Dignity, Humiliation, and Torture," *Kennedy Institute of Ethics Journal,* Vol. 19, Issue 3 (2009): 214.
[161] Elaine Webster, "Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk," 383.
[162] See, among others, *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, par. 167; *Menesheva v. Russia*, no. 59261/00, 9 March 2006, par. 59; *Sheydayev v. Russia*, no. 65859/01, 7 December 2006, par. 60; *Chitayev and Chitayev v. Russia*, no. 59334/00, 18 January 2007, par. 156; *Carabulea v. Romania*, no. 45661/99, 13 July 2010, par. 147; *Gelayevy v. Russia*, no. 20216/07, 15 July 2010, par. 127; *Gisayev v. Russia*, no. 14811/04, 20 January 2011, par. 143; *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, 25 June 2013, par. 98; *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 43 and 46; *Olisov and others v. Russia*, nos. 10825/09, 12412/14, and 35192/14, 2 May 2017, par. 86; *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, par. 107.

the individual submissions of the complainants[163] rather than in the Committee's assessment of the facts.

The role of human dignity in prohibiting torture is also manifest in the drafting history of legal provisions concerning torture and inhuman treatment. For instance, the *travaux préparatoires* for Article 7 of the ICCPR, which prohibits torture, cruel, inhuman or degrading treatment,[164] reveal that the draft proposals of this article took various forms which made references to dignity. One proposal made during the first session of the Drafting Committee in 1947 prohibited torture as well as "unusual punishment or indignity." Another proposal made in the same year by the U.S. during the second session of the Commission on Human Rights included "cruel or inhuman indignity."[165] It is unclear though why indignity did not meet a general agreement or why it was proposed in association with the category of cruel treatment and replaced by inhuman treatment. It is possible that since dignity is a value for all types of ill-treatment, torture, inhuman and degrading treatment, it was seen as inappropriate to attach it only to one of these categories.

Furthermore, it cannot be said that human dignity as a protected value is what differentiates between torture and other ill-treatments; at least in the case law, it is rather used to differentiate between no violation and degrading treatment. Further values come into play in order to explain torture. With regard to autonomy and identity, Richard Matthews states that torture is also the loss of any self-governance and autonomy over the body, while David Sussman takes the argument

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[163] See UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 2.2; UNCAT, *Niyonzima v. Burundi*, Communication no. 514/2012, 21 November 2014, par. 2.6.
[164] Article 7 of the ICCPR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation," available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx last accessed in June 2014.
[165] M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: M. Nijhoff, 1987): 147.

further stating that torture is not simply an attack on personal autonomy but a very exploitation of it. He argues that the torturer turns the victim's agency against itself, making her feel that her helplessness makes her complicit and participant in her own violation, which perverts the individual and the relation with others. He calls torture a "systematic mockery"[166] and humiliation.

Peter Barry argues that torture goes beyond a mere violation of autonomy, it completely destroys it, in an extreme example of using the person as a means for a certain purpose.[167] Matthews further explains that torture generally aims to break the will of the person through fear, suffering, and terror; when employed for political purposes, torture is especially aimed at destroying the very personality and identity, to make the victim submissive and achieve a more specific political goal.[168] This is not to say that interrogational torture is not an attack on identity, but rather that interrogational torture has a specific purpose of obtaining information or a confession, which is achieved through terror and destruction of dignity and identity.[169]

Lastly, a perspective that appears to incorporate these protected values along with an elaboration of the UNCAT definition, consists of focusing on the relation between the victim and the torturer. I agree with many scholars that consider, with certain variations, that the powerlessness and inequality between the torturer and the victim is one of the defining features of torture. An asymmetrical relation between the two has been highlighted by David Sussman and Andreas Maier, with the first considering the "asymmetry of power, knowledge, and prerogative"[170] as absolute and the second stating that this asymmetry is "the specific reason for the moral wrongness

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[166] David Sussman, "What's Wrong with Torture," *Philosophy and Public Affairs* Vol. 33, Issue 1 (2005): 1-3.
[167] Peter Brian Barry, "The Kantian Case Against Torture," *Philosophy,* Vol. 90, Issue 4 (2015): 607-608.
[168] Richard Matthews, *The absolute violation: Why torture must be prohibited*, 59-61.
[169] Ibidem, 63.
[170] David Sussman, "What's Wrong with Torture," *Philosophy and Public Affairs* Vol. 33, Issue 1 (2005): 1-3.

of torture."[171] Though not as categorically as in Maier's account, the powerlessness of the victim has been identified as one element (besides the purpose of the conduct) of distinction between torture and cruel and inhuman treatment by Manfred Nowak and Elisabeth McArthur.[172]

Furthermore, David Luban sees torture as a "communicative medium" through which the torturer asserts unlimited power over the victim to render her absolutely powerless[173] and Henry Shue considers torture "a cruel assault upon the defenseless."[174] Michael Davis also considers that torture is a vast inequality between the tortured and the torturer.[175] He attaches importance to the helplessness of the person subjected to torture. Going into further details about powerlessness, Davis argues that the victim's helplessness is of two types: first, a physical kind (deriving from being physically restrained or physically weakened by the actions of the torturer), and second, an "intellectual helplessness" (originating from the fact that the torturer knows more about the tortured person than the other way around and is in control of the situation while the tortured is in a position of uncertainty).[176] In a way, this is in contradiction to his argument that we should completely abandon the division between physical and psychological torture, as he considers all torture to be mental as well as physical.[177] What I would propose for this perspective on torture (in more detail in Chapter 4), is to consider the vulnerability and powerlessness of the victim as twofold, stemming from being under the total control of the perpetrator and also from being subjected to illegal acts of ill-treatment.

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[171] Andreas Maier, "Torture," 111.
[172] Manfred Nowak and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment," *Torture*, Vol. 16, No. 3 (2006): 150.
[173] David Luban, *Torture, Power, and Law*, (Cambridge: Cambridge University Press, 2014): 111-136.
[174] Henry Shue, "Torture," in *Torture: A Collection*, edited by Sanford Levinson, (Oxford, New York: Oxford University Press, 2004), 51.
[175] Michael Davis, "Torture and the Inhumane," *Criminal Justice Ethics*, Vol. 26, No. 2, (2007): 29-43.
[176] Michael Davis, "The moral justifiability of torture and other cruel, inhuman, or degrading treatment," 164.
[177] Michael Davis, "Torture and the Inhumane," 29-43.

Therefore, from this succinct outlook over the legal scholarship, it is noticeable that torture is a complex notion, covering several human rights values, symbols, dynamics, and relations, which makes any endeavor to define it rather challenging. The variety of subtexts that could be covered are then easily lost in legal instruments and their subsequent interpretations in the case law.

1.8 CONCLUSION

This chapter had the role of introducing the definitions of torture and inhuman treatment from a theoretical perspective, as well as to offer a succinct view of the meaning of torture in the legal scholarship. The findings of this brief analysis represent the basis of the following chapters that will examine the distinctions between the two conducts from a more practical perspective. A brief overview and assessment of the definitions provided by an entire record of international documents has revealed that there is a constant and recurring structure of the elements that define both torture and inhuman treatment. The structure consists of the severity of the treatment, the intention, the purpose and the official capacity of the perpetrator. To this generally accepted framework each jurisdiction has brought its own peculiar mark, however small but important for the consequences that it brings. The differences found in each jurisdiction with regard to the definition of the same conduct should also be considered against the background of each system under consideration. Furthermore, the drafting of the provisions themselves took place in different historical settings. For instance, Article 3 of the ECHR is a provision that enjoys simplicity and clarity when one compares it for instance to the relevant U.S. Amendments. It is phrased with a welcomed degree of generality while at the same time with enough specificity to avoid ambiguities. The temporal divergence in their drafting could account for these differences. Also, consider that this definition is provided by the UNCAT, a legal instrument that needed to provide a universal framework for

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the prohibition of torture. There might be more than this definition could possibly comprise. For instance, notions of "use and abuse of public trust" or "state abuse of public trust,"[178] as mentioned by Darius Rejali; cruelty and vulnerability, all notions that might lower the levels of pain or suffering required for torture.

As for the differences between torture and inhuman treatment, it was observed that while torture appears to be well defined in theory, inhuman treatment is rather evasive in definitions, as unlike the definition of torture which is provided in legal documents, the definition of inhuman treatment depends solely on case law. Due to this lack of definition in legal provisions, it is uncertain what actually separates the two conducts. Debates have arisen between the supporters of the severity of treatment and those of the special purpose of the treatment. An overall analysis is offered by the ECtHR, where the minimum level of severity occupies a central place, together with the duration and effects of the treatment and the characteristics of the victim. The uncertainty of what amounts to torture and what amounts to inhuman treatment may ultimately affect the way the two norms are enforced. A proper formulation would facilitate their implementation on the international level as well as internally by the State Parties.

Despite the dissimilarities in how it is defined in various systems of law, the prohibition of torture enjoys the attention of the entire international stage and the consensus is that it does amount to an international customary law. More importantly, there is consensus that it is a peremptory norm from which no derogation is possible under any circumstances.[179] In the *Furundzija* case, the

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[178] Darius Rejali, *Torture and democracy*, (Princeton and Oxford: Princeton University Press, 2009), 39.
[179] See, among others, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, Ed., *An Introduction to International Criminal Law and Procedure* (second edition), (New York: Cambridge University Press, 2010), 251; M. Cherif Bassiouni,"International crimes: jus cogens and obligatio erga omnes," *Law and Contemporary Problems*, Vol. 59, No. 4 (1996): 68; Erika De Wet, "The prohibition of torture as an international norm of jus cogens and its implications for national and customary law," *European Journal of International Law* 15.1 (2004): 97-121.

International Criminal Tribunal for the former Yugoslavia (ICTY) stated that the prohibition of torture has evolved into a customary international law given that the treaties containing customary international law, and in particular the Geneva Conventions, have been ratified by all States, that there is no opposition from states to implement the provisions concerning torture, and lastly because the International Court of Justice has confirmed the process of creating customary international law in the *Nicaragua* Case.[180] The most important point of the *Furundzija* decision was that the prohibition of torture amounts to *jus cogens*, an absolute prohibition from which no derogation is possible.[181] What follows from this is that "every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."[182] Additionally, the ICTY held that States are under "the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials"[183] and "to forestall its occurrence."[184] However, whether there is a uniform understanding of torture in practice will be the subject of analysis in the following chapters.

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[180] *Prosecutor v. Furundzija*, par. 137-138.
[181] *Ibidem*, par. 153-157.
[182] *Ibidem*, par. 156.
[183] *Ibidem*, par. 145.
[184] *Ibidem*, par. 148.

2 THE EFFECTS OF ILL-TREATMENT IN INTERROGATIONS. QUANTIFYING PAIN AND SUFFERING

2.1 INTRODUCTION

While in the first chapter of the thesis I examined the theoretical distinction between torture and inhuman treatment, in the second chapter I will analyse the first element of torture – the severity of pain or suffering, the most controversial and at the same time the factor most relied on by courts and international bodies to determine torture. Since the determination of this element of torture encompasses multiple aspects, I have decided to address in this chapter the effects of ill-treatment on the victim and the principal method of determining the level of severity – quantifying the pain and suffering inflicted. Chapter 3 and 4 will look at different aspects of severity and different perspectives of assessment.

In the "quantification approach" the courts usually stress the high number of visible physical injuries as noted in expert medical reports, the combination of a number of methods of interrogation, and the (long-lasting) effects on the health of the victim. Although it is not recognized as a crucial element for torture, the long-lasting effects on the health of the victim is also used as an indicator of torture.[185] This was emphasized during the drafting process of the UNCAT, when the United States made clear that permanent physical or mental impairment is not an essential component of torture, though it may be an indicative one.[186] For each jurisdiction, I will look at how the case law has employed these factors to determine severity and every so often

[185] Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture: a commentary*, (Oxford, New York: Oxford University Press, 2008), 37.
[186] Ibidem, 37.

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even torture. By looking at each jurisdiction and each topic from a chronological perspective, I will also try to identify and analyse in more detail those cases that have signalled a change in the threshold for torture. For the ECtHR it is quite a challenge to make sense of an extensive and prolific case law on quantifying pain or suffering. Though changes in the case law are gradual, this study will distinguish certain underlying standards for determining severity. It will also show for instance that only recently has the ECtHR started to truly lower the threshold for torture and give meaning to psychological suffering on a wider basis, going beyond the standardized formulas usually employed for mental suffering and beyond cases concerning sexual assault. For the UN bodies this chapter will demonstrate that their succinct method of argumentation could be an obstacle in providing a more comprehensive understanding of torture, which is quite worrying considering that the UNCAT is the standard-setter for the UN Convention against Torture. Further, for the U.S. I will show how the division between due process cases and civil litigation cases has resulted in an increased threshold for torture.

The structure of the chapter includes a first section concerning certain historical and more general considerations concerning severity and a second section concerning essential concepts for discussing severity (pain and suffering; physical ill-treatment and psychological ill-treatment). A third section will analyse the ECtHR case law, namely the origin of the quantitative approach in this jurisdiction, the importance of the amount of injuries, acts or methods inflicted, and the dichotomy of short versus long-term effects on the victim. A fourth section will analyse the UN bodies' case law and a fifth section will look at the U.S. case law divided between due process cases, civil litigation cases and the standards of the Army Field Manual. Finally, the chapter includes certain issues analysed from a comparative perspective within the same section, since for certain topics it was possible to do so without breaking the logic of the chapter. Therefore, the final

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three sections provide perspectives on how the studied jurisdictions have dealt with claims of ill-treatment during interrogations allegedly resulting in the death of the victim; a comparative look at psychological suffering and torture; and finally, an analysis of the duration of the ill-treatment as a factor for determining the effects of ill-treatment and severity specific of torture.

2.2 Historical and General Considerations concerning Severity

With regard to the element of severity, the *travaux préparatoires* of the UNCAT reveal that the U.S. and the United Kingdom supported the introduction of this notion in the definition of torture and even proposed the phrase "extremely severe pain and suffering" to be used as an alternative to the concept of severe pain or suffering.[187] For the UK, this was the time when the case of Northern Ireland was pronounced by the European Court, so it had a special interest in promoting a vertical approach to severity and a narrow definition of torture. The USSR on the other hand, proposed that the word severe be deleted altogether.[188] Although the elimination of severity broadens the definition of torture, other shortcomings compensate these positive takes and further limit the definition of torture.[189] Different from these two positions, the Swiss proposed that no distinction should be made between torture and inhuman treatment on account of the severity of pain or suffering,[190] arguing for what could be called a horizontal approach to torture, inhuman

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[187] Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture: a commentary*, 37 and 67.
[188] Ibidem, 38. According to Gail H. Miller, this approach can be found in Egypt, where the offence of torture does not contain a requirement of degree or extent of severity (See Gail H. Miller, Defining Torture, Volume 3 of Floersheimer Center for Constitutional Democracy, New York: Occasional paper, Benjamin N. Cardozo School of Law, 2005).
[189] In Egypt for instance, although severity was excluded, the definition of torture also excluded mental suffering and limited the victims to those accused in criminal proceedings and the acts to ill-treatments which take place only during interrogations (see Human Rights Watch, *Egypt's Torture Epidemic*, February 25, 2004 available at https://www.hrw.org/legacy/english/docs/2004/02/25/egypt7658_txt.pdf last accessed in March 2017).
[190] Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture: a commentary*, 67.

and degrading treatment, in which all three categories are on the same level of intensity of pain and suffering.

Alternative concepts used to designate the severity of torture are numerous. Although without visible significance, some states implemented the UNCAT definition into their domestic criminal law following the French translation of the Convention, where "severe" is translated by "aiguës"[191] ("acute"), a slight change in terminology. The expression mostly used by the ECtHR when it refers to the severity of torture is "very serious and cruel suffering"[192] and, when it refers to inhuman treatment it mentions "sufficiently serious"[193] harm, pain or suffering. The UNCAT refers to "acute pain and suffering"[194] or the classic "severe pain and suffering."[195] These terms suggest that when referring to torture, courts tend to focus on the outermost end of ill-treatment and mostly prefer a vertical approach, meaning that they assess severity in a quantitative manner. In this understanding, torture consists of more pain and suffering and is "an aggravated […] form of cruel, inhuman or degrading treatment or punishment."[196]

[191] For the French version of the UNCAT see http://www.ohchr.org/FR/ProfessionalInterest/Pages/CAT.aspx last accessed in March 2017. Luxembourg for instance uses the phrase "une douleur ou des souffrances aiguës, physiques ou mentales" (see Article 260-1 of the Criminal Code of Luxembourg, available at http://legilux.public.lu/eli/etat/leg/code/penal last accessed in March 2017).

[192] See, among others, *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, par. 167; *Kismir v. Turkey*, no. 27306/95, 31 May 2005, par. 129; *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, par. 159; *Isayev and others v. Russia*, no. 43368/04, 21 June 2011, par. 164; *Taylan v. Turkey*, no. 32051/09, 3 July 2012, par. 39; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, par. 514; *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 43; *Olisov and others v. Russia*, nos. 10825/09, 12412/14, 35192/14, 2 May 2017, par. 86.

[193] See, among others, *Afanasyev v. Ukraine*, no. 38722/02, 5 April 2005, par. 61; *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, par. 51; *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, 16 December 2010, par. 93; *Nasakin v. Russia*, no. 22735/05, 18 July 2013, par. 54; *Mostipan v. Russia*, no. 12042/09, 16 October 2014, par. 60.

[194] UNCAT, *Niyonzima v. Burundi*, Communication no. 514/2012, 21 November 2014, par. 8.2; UNCAT, *Kabura v. Burundi*, Communication no. 549/2013, 16 November 2016, par. 7.2.

[195] UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 9.2; UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.2.

[196] Article 1 of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975 and cited by the ECtHR in *Ireland v. the United Kingdom* (no. 5310/71, 18 January 1978).

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In the ECtHR's case law on torture the element of severity plays a central role. Since *Ireland v. the United Kingdom* the assessment of the "minimum level of severity" (the threshold separating treatment that falls within the scope of Article 3 and conduct that falls outside) "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".[197] This general principle highlights that the first focus in an Article 3 case concerning the substantive aspect is on severity. This is the first obstacle that any applicant has to overcome when presenting a substantive ill-treatment claim before the ECtHR. Further, if an allegation of torture is made, the Court then looks at the distinction between this type of ill-treatment and inhuman or degrading treatment. The threshold for torture is formulated as "a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[198] Severity is therefore essential in both thresholds, for determining the minimum level of severity at which the conduct falls under Article 3 and for determining whether the conduct is torture. Even if commentators have argued that this is not the determining element of torture,[199] the practice suggests otherwise. Furthermore, because courts emphasize this element, lawyers are also compelled to follow this trend if they are to win cases for their clients.[200] The relevance of

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[197] *Ireland v. the United Kingdom*, par. 163.
[198] *Selmouni v. France*, par. 96.
[199] Nigel S. Rodley, "The definition(s) of Torture in International Law," *Current Legal Problems* (Oxford University Press, 2002): 467; Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006): 809-841; Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture: a commentary*, 74 and 558.
[200] The NGO Redress, submitting a complaint with the UNHRC alleging a violation of Article 7 of the ICCPR, argued that the ill-treatment amounted to torture because the criteria of severity had been fulfilled (see Individual Complaint to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, *Akwanga v. Cameroon*, 20 June 2008, at http://www.redress.org/FINAL_CORRECTED_VERSION_OF_HRC_DOCUMENTWEBSITE.pdf last accessed in March 2017).

this element of torture is also obvious in the fact that it is determinative for the amount of damages awarded.[201]

For the UN bodies, severity is also mostly considered from the perspective of the nature of the ill-treatment and the injuries caused to the complainant. As it will be seen however, the opinions of the UNCAT and UNHRC (or more specifically views, as they are termed) have been for many years quite succinct and opaque, despite frequent criticism[202] of their approach.

In the U.S. the standing of this element differs whether one analyses due process cases or cases concerning civil damages. For due process cases, the element of severity does not occupy the central position that it does for the ECtHR. Though the physical or psychological effects on the petitioner are noted to further strengthen the holding, severity is evaluated from a different perspective, of whether the treatment "shocks the conscience"[203] or whether the confession so obtained was voluntary.[204] So due process cases do not provide much help in determining the severity needed for a treatment to arise to torture level. What they do show is the point at which a confession is obtained by coercive methods, including methods that do not include ill-treatment

[201] See *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19 (D.D.C. 2001), at 26, where the judge compared the severity of one of the plaintiff's torture to the severity of the torture suffered by the plaintiff in *Anderson* and *Cicippio* cases, so that the amount ordered was lower than in the two latter cases.

[202] With regard to the UNCAT see R. Bank, "Country-oriented procedures under the Convention against Torture: Towards a new dynamism," in Alston, P. & J. Crawford (eds), *The Future of Human Rights Treaty Monitoring*, (Cambridge: Cambridge University Press, 2000): 145-174. With regard to the UNHRC see Henry J. Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000): 15-54. For both committees, see D. Kretzmer, and Burns, P., "Commentary on Complaint Processes by Human Rights Committee and Torture Committee Members," in A. Bayefsky (ed), *The UN Human Rights System in the 21st Century* (The Hague: Kluwer, 2000).

[203] Rosalie Berger Levinson, "Time to Bury the Shocks the Conscience Test," *Chapman Law Review*, Vol. 13, (2010): 307-356.

[204] Joseph D. Grano, "Voluntariness, Free Will, and the Law of Confessions," *Virginia Law Review* Vol. 65, No. 5 (1979): 859-945; Mark A. Godsey, "Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination," *California Law Review*, Vol. 93, Issue 2 (2005): 465-540; Eve Brensike Primus, "The Future of Confession Law: Toward Rules for the Voluntariness Test," *Michigan Law Review*, Vol. 114, Issue 1 (2015): 1-56.

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(promises, misrepresentation, and deception for instance). The focus is therefore on whether a violation of due process rights took place, analysed with the help of the voluntariness test, to determine whether a confession was obtained by breaking the will of the suspect, and the "shock the conscience test," employed to determine whether a treatment or conduct is so egregious that it necessarily violates the Constitution. With respect to the voluntariness test, in a similar fashion to the ECtHR, the totality of the circumstances of the case is considered by a judge to see whether a person willingly confessed or provided information.[205] So although the focus in the U.S. coercive interrogation cases is on due process, the elements considered relevant in the courts' analysis are often times the same as those considered in the ECtHR. As for cases in which damages for torture are sought, severity will be determined in a similar fashion to that of the ECtHR, by looking at the types of ill-treatment or the effects on the victim.[206]

[205] See, among others, *Reck v. Pate*, 367 U.S. 433 (1961), at 440; *Fikes v. Alabama*, 352 U. S. 191 (1957), at 198.

[206] See *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D. D.C. 1998) ("He was subjected to terrifying interrogation. Convinced that Cicippio worked for the C.I.A. because he remained in Lebanon after most other Americans had left, his captors sought to force a confession from him by a grisly game of Russian roulette: a revolver was placed to his head with a single bullet in the cylinder. Each denial of a C.I.A. connection produced a pull of the trigger. He was also threatened with castration. A slight stutter, a speech impediment that antedated his capture, was exacerbated by his captivity."; "Those acts of torture and hostage-taking, all clearly actionable as tortious conduct under U.S. law, thus inflicted legally cognizable, profoundly serious, and largely permanent personal injury upon each of the hostages and their spouses."); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) ("During Hall's confinement, […] Iraqi guards or officers interrogated him, in the process accusing him of espionage. At times they threatened him with physical torture, such as cutting off his fingers, pulling out his fingernails, or shocking him electrically in his testicles. He was in constant fear that he would be killed or suffer serious bodily harm."; "The treatment of Clinton Hall by employees or agents of defendant, as detailed above, including holding him at gunpoint, threatening to injure him physically if he did not confess to espionage or otherwise provide information, and incarcerating him in a room with no bed, window, light, electricity, water, toilet or adequate access to sanitary facilities, constituted torture"); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C.2002) ("While held captive Cronin was severely beaten numerous times. Tr. at 43. He explained that guards in teams of two or three would enter the cell, and one guard would ask him questions like "what are you doing here? Why were you in Israel? Are you CIA? Are you with Mossad, the Israeli intelligence agency[?]" Tr. at 43-44. The other guards would proceed to punch him repeatedly in the abdominal region until he could no longer stand, and then they would proceed to kick him as he lay on the ground. Tr. at 44. In addition to his own beatings, Cronin was forced to witness other prisoners being savagely beaten. […] In addition to a deteriorating physical condition, Cronin's situation adversely affected his mental state as well."); *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003) ("The Iraqi captors' extreme and outrageous conduct succeeded in causing severe emotional distress for the POWs. The POWs constantly feared torture and death as a direct result of the severe physical and mental abuse imposed by the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein. The outrageous physical and mental torture by Iraq, the denial of requests to notify family members, the forced propaganda tapes by injured POWs, the refusal to permit the ICRC to inspect

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2.3 ESSENTIAL CONCEPTS FOR DISCUSSING SEVERITY

2.3.1 PAIN (THE PHYSICAL EXPERIENCE) V. SUFFERING (THE MENTAL EXPERIENCE)

Before I turn to the core of this chapter, I must first explain what I understand by several basic concepts routinely used in conjunction with severity in the context of interrogational torture. I will look firstly at "pain" and "suffering" and secondly, at "physical" and "mental". As the UNCAT mentions, torture is the act by which "severe pain or suffering" is inflicted. The term "pain" is defined by several dictionaries as mainly referring to the physical experience. Among them, Oxford dictionary defines pain as the "highly unpleasant physical sensation caused by illness or injury"[207] and Merriam Webster dictionary defines it as "usually localized physical suffering associated with bodily disorder (as a disease or an injury)".[208] Secondarily, this terms is also understood as referring to a feeling of unhappiness, acute mental or emotional distress or suffering.[209] The term suffering is mainly defined as the emotional experience. Oxford dictionary defines suffering as "the state of undergoing pain, distress, or hardship"[210] while Merriam Webster defines it as "the state or experience of one that suffers."[211] Thus, although it might not be apparent, "pain" and "suffering" have two different meanings. The two can of course be used

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the prisoners' conditions, and Iraq's public announcement that POWs would be used as human shields intentionally caused severe and enduring emotional distress for the POWs. In this case, the POWs suffered pain and mental anguish during two separate periods. First, they suffered severe pain and anguish during the period of sustained mental and physical torture while in captivity in Iraq. Second, they endured — and continue to endure — pain and mental anguish resulting from the lasting injuries they sustained during the torture, painful medical treatment for those injuries, and the continuing impact on their relations with loved ones and on their professional life"; "The POWs and their families have continued to suffer over the years since repatriation. For many, the physical and mental effect of the torture and mental anguish produced lasting damage. Some have permanent physical impairments. Some have undergone painful and extensive medical treatments in an effort to reverse the damage done by their captors in Iraq. All have suffered the effects of lasting emotional harm, whether to their marriages, their relationship with their families and friends, or their professional lives.").

[207] See https://en.oxforddictionaries.com/definition/pain , last accessed in March 2017.

[208] See https://www.merriam-webster.com/dictionary/pain , last accessed in March 2017.

[209] See https://en.oxforddictionaries.com/definition/pain and https://www.merriam-webster.com/dictionary/pain, last accessed in March 2017.

[210] See https://en.oxforddictionaries.com/definition/suffering , last accessed in March 2017.

[211] See https://www.merriam-webster.com/dictionary/suffering , last accessed in March 2017.

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interchangeably, as the above mentioned dictionaries also recognize, but this use is only secondary. Although the case law and the legal instruments might not pick up on the nuances that the distinction implies, in the context of interrogational torture and in this chapter, for the sake of avoiding confusions, note that I understand "pain" to mean the physical experience and "suffering" to refer to the emotional experience. The distinction is useful in terms of the consequences that an ill-treatment has on the victim and when discussing the experience of the victim, because physical pain might also include emotional suffering but emotional suffering might not necessarily include physical pain.

2.3.2 PHYSICAL ILL-TREATMENT V. PSYCHOLOGICAL ILL-TREATMENT DURING INTERROGATIONS

Defined in a rather restrictive manner, physical ill-treatments are acts that presuppose violent direct contact with the body of the victim. This short definition is formulated in terms of the nature of the act that is inflicted on the body of the victim. Variations of intensity may run from mild slaps that involve minor physical pain to more severe forms including for instance brutal beatings, use of electric shocks or even rape. If looked upon from the point of view of the effects resulting from these acts, physical ill-treatments may also be considered to include treatments that do not necessitate direct contact with the victim but which result in physically wearing down the victim and causing her, besides physical injuries, psychological suffering. In this category one can find methods such as sleep deprivation, dietary manipulations, use of loud music, stress positions such as wall standing to induce muscle fatigue, water dousing (pouring of cold water over a person), etc. These are techniques that could be considered both physical, as they impact the body even in

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the absence of direct physical contact, and psychological, as they affect the mental state of the victim.

As for psychological ill-treatment, the literature suggests that it is the attack directed against "the essence of being human,"[212] the person's recognition and respect and consists of actions that instil humiliation, fear, and degradation. The effects of this kind of ill-treatment on the victim are mostly hidden from the public eye and also very difficult to appreciate by an external assessor.[213] In the absence of visible and quantifiable scars, the assessment of these methods depends mostly on how willing the victim is to share her suffering and on whether a medical professional is able to discern the specific psychological responses (flashbacks, emotional numbing, hyperarousal, symptoms of depression, etc.) and provide a reliable diagnosis (anxiety, panic attacks, acute stress disorder, depressive disorders, post-traumatic stress disorder, personality disorders, etc.).[214] This was a concern expressed even during the drafting process of the UNCAT[215] and is still very much a predicament. For instance, Italian attempts to introduce a separate offence of torture in domestic law gave rise to concerns about the interpretation of the phrase "infliction of mental suffering" in the context of interrogations of criminal suspects and in conditions of detention cases, two fields in which there is great potential for complaints arising for psychologically abusive conduct.[216] On

[212] Nora Sveaass, "Destroying minds: psychological pain and the crime of torture," *New York City Law Review*, Vol. 11, No. 2 (2008): 303-324.
[213] In the case of *Nechiporuk and Yonkalo v. Ukraine*, the second applicant complained of degrading treatment in police custody. She was eight months pregnant and she alleged she had been threatened and humiliated while being questioned in a nearby room to where her husband was being tortured. The Court held that while her interrogation may have been a source of stress and anxiety, it did not reach the threshold of Article 3 and rejected the applicant's complaint as manifestly ill-founded (par. 285-288).
[214] Office of the United Nations High Commissioner for Human Rights, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York and Geneva, (2004): 46-49, at http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf last accessed in October 2016.
[215] Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture: a commentary*, 38.
[216] Antonio Marchesi, "Implementing the UN Convention Definition of Torture in National Law," *Journal of International Criminal Justice* 6 (2008): 195-214.

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the other hand, the concept of psychological ill-treatment is an important aspect in domestic violence cases and was recognized as such by the European Court.[217] Although the prohibition of torture refers "not only to acts that cause physical pain but also to acts that cause mental suffering to the victim,"[218] when both of them have been inflicted on the same victim, judgments and decisions focus less on mental suffering in interrogational torture cases. This is mostly because from an evidentiary perspective it is much easier to give legal significance to physical injuries than to psychological experiences.

The distinction between physical and psychological torture has been a point of contention for many scholars. Some argue that the distinction should be totally abandoned,[219] while others view the repeal of this distinction as an injustice and a misrecognition of the ill-treatment suffered by the victims.[220] I personally support the latter, as I consider that distinguishing between the physical and the psychological elements can be a helpful approach in understanding the concept of torture as a whole.

The methods by which psychological ill-treatment is inflicted may take the form of direct physical attacks[221] or may consist of methods that do not directly touch the body; the list is open-ended. Besides physical pain, a person that is subjected to beatings for instance experiences feelings of fear, anxiety, and uncertainty. Severe emotions are caused by the exploitation of phobias, while sexual humiliation destroys personal integrity by taking advantage of personal limits and cultural

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[217] *Valiulienė v. Lithuania*, no. 33234/07, 26 March 2013.
[218] ICCPR General Comment No. 20, par. 5, available at http://www.refworld.org/docid/453883fb0.html, last accessed in March 2017.
[219] Michael Davis, "Torture and the Inhumane," *Criminal Justice Ethics*, Vol. 26, No. 2, (2007): 29-43.
[220] Pau Perez Sales, *Psychological Torture: Definition, Evaluation and Measurement*, (New York: Routledge, 2016).
[221] In the case of *Mikheyev v. Russia* (no. 77617/01, 26 January 2006, par. 127-136) psychological suffering was inflicted through physical torture consisting of electric shocks and beatings in such a way that it led to the applicant attempting suicide. The Court held that he had been subjected to a stressful situation but found that only the whole of the treatments amounted to torture.

or religious values. Food deprivation, sleep deprivation, exposure to extreme temperatures or stress positions, isolation and mock executions, threats and promises, make the person dependent on the perpetrator and cause psychological suffering. Though compared to physical ill-treatment, psychological abuse may be intuitively considered a second-class type, a less severe one, studies have contradicted this position. In terms of the severity of mental suffering inflicted and the long-term effects, studies have shown that the consequences of psychological ill-treatment does not substantially differ from the consequences of physical ill-treatment.[222] Even more so, the distress associated with certain psychological ill-treatments (witnessing torture of close ones, mock executions, threats of rape, sexual assaults, and isolation) may be even higher than the distress associated with physical torture.[223] As shown in this chapter and in the one concerning the vulnerabilities of victims of ill-treatment, the case law often fails to recognize and give legal meaning to the victim's psychological suffering.

Lastly, during coercive interrogations, physical or psychological methods are either applied by themselves or in combination with another treatment and each of them will inflict either mental suffering, physical pain or both. When applied individually, the level of severity of the pain or suffering may not reach that of torture, but combined with other factors relating to the context in which the treatment is applied or with the victim's subjective characteristics, the treatment may reach the level of torture. This is confirmed by empirical studies which show that a combination of physical ill-treatments will have a cumulative and concurrent impact resulting in more psychological suffering.[224] For example, if a victim is subjected to beatings during an interrogation

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[222] Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, "Torture vs Other Cruel, Inhuman, and Degrading Treatment. Is the Distinction Real or Apparent?," *Archives of General Psychiatry* Vol. 64, No. 3 (2007): 277-285.
[223] Ibidem.
[224] Ibidem.

which takes place while she is shackled and hooded, the severity of suffering will be higher than if she would be subjected to beatings, due to the anxiety caused by the uncertainty of predicting the direction and exact moment at which the next blow will strike.[225]

After clarifying the basic notions used when speaking of severity, I will now turn to each jurisdiction and its own understanding of severity.

2.4 THE ECTHR AND SEVERITY BY THE NUMBERS

The Court's consideration of the term severe is based on similar criteria as its consideration of the minimum level of severity under Article 3. The test used is "the totality of the circumstances"[226] as severity "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."[227] From all these examples of factors indicated by the Court, the effects of the treatment is frequently used in determining severity. To analyse the quantification of these effects in the case law of the Court, first, I will explain the origin of this approach (the majority opinion in *Ireland v. the United Kingdom*); second, I will show how the proportionality between the amount of injuries, acts, or methods influences the severity of the treatment; third, I will look at the gravity of injuries as another indicator of severity (the death of the victim, the temporary or permanent damage to health and the length of recovery); lastly, I include a sub-section on the nature of the ill-treatment as an indication of the gravity of injuries.

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[225] Başoğlu, Livanou, and Crnobarić, "Torture vs Other Cruel, Inhuman, and Degrading Treatment. Is the Distinction Real or Apparent?"
[226] *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 120.
[227] *Ibidem*, par. 120.

2.4.1 *IRELAND V. THE UNITED KINGDOM*: THE ORIGIN OF THE ECTHR'S QUANTITATIVE APPROACH

The case law of the ECtHR has recurrently noted certain principles with regard to the severity of ill-treatment and they mostly originated in the first case in which the Court used the criterion of severity as the basis for distinguishing between torture and inhuman treatment. This was in the 1978 case of *Ireland v. the United Kingdom*, in which the Court stated that the distinction between torture and inhuman treatment "derives principally from a difference in the intensity of the suffering inflicted."[228] The case concerned the events that unfolded in Northern Ireland between August 1971 and December 1975 in a background of antiterrorist campaign against the actions of the IRA members. The campaign was based on the exercise of extrajudicial powers and included measures of arrest, detention and internment with a view to interrogating and obtaining information concerning the terrorist actions of the IRA. In the 16 "illustrative cases" selected for a detailed analysis and 41 in which medical and written documents were considered, the Court analysed the combined use of five methods of in-depth interrogation. These techniques of "disorientation" or "sensory deprivation" consisted of wall-standing (a method applied for several hours in which the body is spread against the wall in a position that forces the person to shift the weight of the body on the toes; the method effectively amounts to a stress position), hooding (covering the head of the detainee with a dark coloured bag aiming at limiting the vision of the person and disorienting her), subjection to noise (placing the detainee in a room with a continuous loud noise also aiming at disorienting the victim while affecting her senses), deprivation of sleep

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[228] *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, par. 167.

during the interrogation, deprivation of food and drink during the interrogation and generally during detention, which lasted for several days or more than a week.[229]

The Commission found that the combination of the five methods inflicted suffering that amounted to torture and in terms of effects it noted light bruising, loss of weight and psychiatric symptoms where all five techniques were used in combination.[230] Unlike the Commission, the Court decided in favour of inhuman and degrading treatment. By thirteen votes to four, it was concluded that the suffering resulting from the combined application of the five practices did not amount to torture as they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[231] The Court held that the suffering inflicted by the techniques caused "at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation"[232] whereas the suffering inflicted through torture must amount to "very serious and cruel suffering."[233] However, the distinction between "very serious and cruel" and "intense physical and mental suffering" was not explained further. While it is stated that the intensity of the suffering inflicted upon the victim is the essential element in distinguishing between torture and inhuman or degrading treatment, no extensive explanation is provided as to why the suffering inflicted through the five techniques was not of such gravity that would bring such practices within the category of torture.

One possible explanation is that the Court was not yet ready to place a special stigma on any of the Member States. Any such finding carries with it a negative reputation on the political stage and

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[229] *Ibidem*, par. 96.
[230] *Ibidem*, par. 103-106.
[231] *Ibidem*, par. 167.
[232] *Ibidem.*
[233] *Ibidem.*

a loss of trust and respect among not only the Member States but also outside the Council of Europe. Another explanation is the emphasis on severity and on finding torture where there is "very serious and cruel suffering," which at the time did not resonate with interrogation techniques that leave no signs of physical violence or cause only psychiatric trauma. This latter explanation seems plausible since in certain cases from *Ireland v. the United Kingdom* there were also allegations of physical violence besides the five techniques, and the Commission found that it was very likely that physical violence frequently accompanied the use of some of the five techniques. However, not enough evidence was available to conclude beyond a reasonable doubt that beatings had always been used as a practice, though in cases in which it was indeed found to have been used, it was concluded that they were severe.[234]

The Court was not unanimous in its finding. Dissenting judges (Judges Zekia, O'Donoghue, Evrigenis, and Matscher) observed that the fact that the practices were not violent and did not leave serious marks on the bodies of the victims does not mean that suffering was not caused, and that psychological suffering may also be of such a severity as to amount to torture. Furthermore, it was also observed that the meaning of torture was pushed towards the extreme intensity of pain and consequently the very notion of torture was limited, going against the intention of Article 3 of the Convention.[235] At a complete opposite is the view of Sir Gerald Fitzmaurice who argued that the treatments employed in *Ireland v. the United Kingdom* did not even amount to inhuman and degrading treatment.[236] His argument also pointed at the severity of the treatment and specifically on the duration (allegedly not continuous).[237] As it can be noted, all the opinions focused on

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[234] *Ibidem*, par. 169-172.
[235] *Ireland v. the United Kingdom,* Separate Opinion of Judge Evrigenis.
[236] *Ireland v. the United Kingdom*, Separate Opinion of Sir Gerald Fitzmaurice.
[237] *Ibidem*, par. 24.

assessing the severity of treatment and yet conflicting outcomes were reached despite the fact that the two sides followed the same method. This is an indicator that assessing the severity of treatment may not be a reliable test for determining the gravity of the treatment. The "prerequisite" of attesting visible injuries of a certain gravity in order to reach a severity specific of torture was therefore established in *Ireland v. the United Kingdom* and subsequently followed in later case law.[238] It has since become an actual feature of the Court's case law concerning torture. Emphasizing that torture takes place only when there is a particular intensity and cruelty implied by torture led to a poorly reliable test for determining severity. Although the Court mentions it as the totality of the circumstances approach, the test is more akin to a "we know it when we see it" approach.[239]

After *Ireland v. the United Kingdom,* the Court has repeatedly stated that torture must consist of "very serious and cruel suffering"[240] while for inhuman treatment it has mostly used "intense"[241] or "serious"[242] physical or mental suffering. When these principles are applied to the specific facts of a case it can be discerned that the Court continues to look at the severity of the treatment from

[238] See, among others, *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 64; *Sheydayev v. Russia, no. 65859/01,* 7 December 2006, par. 61; *Hüseyin Esen v. Turkey*, no. 49048/99, 8 August 2006, par. 44; *Buzilov v. Moldova*, no. 28653/05, 23 June 2009, par. 31; *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, par. 115; *Hajrulahu v. "The Former Yugoslav Republic of Macedonia",* no. 37537/07, 29 October 2015, par. 100.

[239] See Evelyn Mary Aswad, "Torture By Means of Rape," *Georgetown Law Journal Association, Vol.* 84, (May 1996): 1913-1943.

[240] *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, par. 114; *Kismir v. Turkey*, no. 27306/95, 31 May 2005, par. 129; *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, par. 159; *Isayev and others v. Russia*, no. 43368/04, 21 June 2011, par. 164; *Taylan v. Turkey*, no. 32051/09, 3 July 2012, par. 39; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, par. 514; *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 43; *Olisov and others v. Russia*, nos. 10825/09, 12412/14, 35192/14, 2 May 2017, par. 86.

[241] See, among others, *Tomasi v. France,* no. 12850/87, 27 August 1992, par. 112; *Barabanshchikov v. Russia*, no. 36220/02, 8 January 2009, par. 51; *El-Masri v. "the Former Yugoslav Republic of Macedonia" [GC]*, no. 39630/09, 13 December 2012, par. 209; *Ochelkov v. Russia,* no. 17828/05, 11 April 2013, par. 94.

[242] See, among others, *Afanasyev v. Ukraine*, no. 38722/02, 05 April 2005, par. 61; *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005**,** par. 51; *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, 16 December 2010, par. 93; *Nasakin v. Russia*, no. 22735/05, 18 July 2013, par. 62; *Mostipan v. Russia*, no. 12042/09, 16 October 2014, par. 60.

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a quantitative perspective. It highlights aspects such as the amount of repeated acts (of the same method) administered to the victim,[243] the number of visible injuries attested by expert medical reports,[244] the effects on the physical health of the victim[245] or the duration of ill-treatment and the length of time necessary for the injuries to subside.[246] The expressions used by the Court exemplify these preferences in the analysis: "numerous acts of violence,"[247] "large number of blows,"[248] "numerous injuries,"[249] and "numerous and widespread"[250] injuries.

2.4.2 THE ECTHR AND THE IMPORTANCE OF THE AMOUNT OF INJURIES, ACTS, OR METHODS INFLICTED

By analysing the ECtHR case law on ill-treatment during interrogation one can observe a certain proportionality between the severity of treatment and the injuries caused to the victim. The higher the number and intensity of the ill-treatment, the higher the probability that torture will be the conclusion. This approach has been prominent in the case law for a long time. In 1992, in *Tomasi v. France*, the Court found that inhuman or degrading treatment had taken place during interrogation when the applicant was subjected to slaps, kicks, punches and blows, was made to stand handcuffed for long periods, he was spat upon, kept naked in front of an open window and

[243] *Selmouni v. France*, no. 25803/94, 28 July 1999, par. 102 ("The Court is satisfied that a large number of blows were inflicted on Mr Selmouni"); *Hajrulahu v. "The Former Yugoslav Republic of Macedonia",* no. 37537/07, 29 October 2015, par. 100 ("he was beaten with a plastic bottle and rubber tube all over his body").
[244] *Abdulsamet Yaman v. Turkey,* no. 32446/96, 2 November 2004, par. 13 ("there were injuries to various parts of his body"); *Buzilov v. Moldova,* no. 28653/05, 23 June 2009, par. 31 ("the Court notes that the applicant sustained numerous injuries"); *Hajrulahu v. "The Former Yugoslav Republic of Macedonia",* no. 37537/07, 29 October 2015, par. 100 ("According to the medical evidence, he had twenty-seven bruises on his back, chest, stomach, arms and legs and the left buttock.").
[245] *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, 25 June 2013, par. 98 ("the applicant's beating was of such severity that he had to be carried to the court room by police officers").
[246] *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, par. 115.
[247] *Selmouni v. France*, par. 98.
[248] *Ibidem*, par. 102 ("The Court is satisfied that a large number of blows were inflicted on Mr Selmouni").
[249] *Buzilov v. Moldova*, par. 31.
[250] *Lenev v. Bulgaria,* par. 113.

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threatened with a gun.[251] It held that the two elements sufficiently serious to conclude that inhuman and degrading treatment had taken place were *the large number of blows* and *their intensity*, as confirmed by the medical expert reports.[252] What is more, the notion of suffering itself is not present in the Court's reasoning in this case. The focus is on the number and intensity of the blows. Following the same line of reasoning but with a slight transition from the acts themselves (blows) to their physical effects on the victim (injuries), in 1995, the Court held in *Ribitsch v. Austria* that *the injuries* suffered by the applicant (who had been subjected to beatings) are indicative of the fact that the ill-treatment amounted to inhuman and degrading treatment.[253] Again, in 2008, to reach a conclusion of inhuman treatment resulting from beatings of the applicant in the case of *Nadrosov v. Russia*, the Court referred to *the nature and the extent of the injuries* (haematomas and injuries to the chest, kidney, ear and leg).[254] In 2013 in the case of *Nasakin v. Russia* the Court concluded that the applicant sustained "multiple injuries to his chest, left leg and foot"[255] during questioning by police officers and that these injuries were "serious"[256] enough to amount to inhuman and degrading treatment but not to torture. Again in 2013, also in a case where the Court found inhuman treatment, in *Ochelkov v. Russia*, the Court held that "judging by the quantity and nature of the applicant's injuries, the treatment […] must have caused him intense mental and physical suffering."[257] In 2014, in *Bobrov v. Russia*, the Court emphasized "the accumulation of the acts of physical violence inflicted on the applicant"[258] to conclude that inhuman treatment had been inflicted on the applicant, a suspect of drug-related offences. Lastly, in *Mostipan v. Russia*

[251] *Tomasi v. France*, no. 12850/87, 27 August 1992, par. 108.
[252] *Ibidem*, par. 115.
[253] *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, par. 39.
[254] *Nadrosov v. Russia*, no. 9297/02, 31 July 2008, par. 37.
[255] *Nasakin v. Russia*, no. 22735/05, 18 July 2013, par. 54.
[256] Ibidem, par. 62.
[257] *Ochelkov v. Russia*, no. 17828/05, 11 April 2013, par. 119.
[258] *Bobrov v. Russia*, no. 33856/05, 23 October 2014, par. 45.

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the Court referred to the "multiple injuries"[259] sustained by the applicant "to her chest and abdomen, which must have caused her mental and physical suffering"[260] that amounted to inhuman treatment.

As it can be seen, findings of inhuman treatment have been made despite the high number of visible injuries or the large number of blows. *Tomasi* and *Ribitsch* were both pronounced before 1996 when the first finding of torture had been made by the Court for infliction of severe pain and suffering by Palestinian hanging resulting in temporary paralysis of the arms.[261] They were also pronounced before *Selmouni*, a period where findings of torture were made only for the most egregious forms of ill-treatment, such as rape, Palestinian hanging, falaka, or the use of electric shocks. In *Selmouni* the Grand Chamber of the Court referred for the first time to the UNCAT definition, specifically to the meaning of severity, and unanimously relaxed the standard for torture, stating that "certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future."[262] The Government itself observed in *Selmouni* that the Court's case law at the time did not support a finding of torture where beatings were the only physical method applied. The analysis of the pain and suffering in *Selmouni* reveals an emphasis on the large number of blows presumed to have caused a substantial amount of pain as the medical evidence attested to the fact that the applicant's entire body was covered in marks of violence.[263] Furthermore, the Court listed all the acts[264] that were proven to

[259] *Mostipan v. Russia*, no. 12042/09, 16 October 2014, par. 60.
[260] *Ibidem*, par. 60.
[261] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, par. 64.
[262] *Selmouni v. France*, no. 25803/94, 28 July 1999, par. 101.
[263] *Ibidem*, par. 102.
[264] *Ibidem*, par. 103 ("The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe").

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have been inflicted on the applicant, insisting on providing a very detailed and visual description, in order to show the violent nature of the acts. This emphasis on the quantity of acts and injuries is only one of the determinative features of severity amounting to torture. A second one, also present in *Selmouni*, is the cruelty of the acts ("heinous and humiliating for anyone, irrespective of their condition"[265]), but this feature will be analysed in more details in a separate chapter concerning cruelty as an indication of severity.

As for the other examples of inhuman treatment cases mentioned above (besides *Tomasi* and *Ribitsch,* I have mentioned *Nadrosov, Nasakin*, *Ochelkov, Bobrov, Mostipan*), although multiple injuries were confirmed by the medical evidence and the Court, they were essentially insufficient to amount to the severity of torture. There is no explanation as to why the mental and physical suffering caused in each of these cases is only intense or serious but not severe. Even with the lowering of the level of severity in *Selmouni* and the fact that these cases concerned mainly the same method, beatings, (and even more, *Nasakin* also included electric shocks), the Court did not envision the possibility that the pain and suffering could have been severe even where the applicant had alleged that the qualification should be torture.

Cases in which torture was found also present severity evaluated on the basis of the quantity or number of injuries and acts inflicted. To exemplify, one could mention *Selmouni v. France*, where the Court was "satisfied that a large number of blows were inflicted on Mr. Selmouni,"[266] *Abdulsamet Yaman v. Turkey*, where the applicant presented injuries on various parts of his

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[265] *Selmouni v. France*, par. 103.
[266] *Ibidem*, par. 102.

body,[267] *Kopylov v. Russia*, where the applicant "sustained numerous injuries"[268] as a result of multiple acts of ill-treatment acts, or *Nikiforov v. Russia*, where the Court, unlike the domestic courts, found that the applicant's "broken nose and multiple bruises and abrasions"[269] were severe and not light injuries. So what is the necessary quantity of visible injuries (lesions, swellings, abrasions, haematomas, bruises, etc.) for the conduct to be torture? Does the Court presume that superficial haematomas convey a lower level of pain than severe lesions? Such a specific medical assessment has of course never been made, nor should it be, but realistically the chances of proving torture are increased if the applicant can prove numerous physical injuries. In *Nikiforov v. Russia,* which concerned beatings by police in order to determine the applicant to write a confession, the panel was split four to three on whether the pain and suffering was severe enough to amount to torture. The concurring opinion of Judge Malinverni, joined by Judges Rozakis and Jebens, argued for a violation of Article 3 in the form of inhuman treatment. One of their arguments is that the severity of the injuries caused to the applicant in *Nikiforov* is incomparable to the treatment of Mr. Selmouni "who was left with marks over almost all of his body after enduring repeated and sustained assaults over a number of days of questioning."[270] This was of course the opinion of only three minority judges, but their assessment would make the definition of torture applicable only to the most extreme of ill-treatments, a perspective which was already entertained in the U.S. war on

[267] *Abdulsamet Yaman v. Turkey,* no. 32446/96, 2 November 2004, par. 13.
[268] *Kopylov v. Russia*, no. 3933/04, 29 July 2010, par. 125 ("the applicant […] sustained numerous injuries. In particular, it was established that the police officers had punched and kicked the applicant, hit his heels with truncheons, subjected him to electric shocks, put a gas mask on him and closed the air vent or forced him to inhale cigarette smoke through the vent, tied his hands behind his back and suspended him in the air by means of a rope, jumped on his chest and stomach, threatened to rape and shoot him, attempted to strangle him, spat at him, and forced him to undress and to kneel in front of a photograph of the policeman of whose murder he had been suspected and apologise for killing him. That treatment had caused him severe mental and physical suffering and resulted in grave injuries, such as brain oedema, post traumatic displacement of two ribs, post-traumatic hearing impairment, deformation of both feet and shoulder-blade deformation, as well as in a general brain dysfunction and a chronic psychiatric disorder.")
[269] *Nikiforov v. Russia*, no. 42837/04, 1 July 2010, par. 46.
[270] Concurring opinion of Judge Malinverni, joined by Judges Rozakis and Jebens, par. 9, in *Nikiforov v. Russia*, no. 42837/04, 1 July 2010.

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terror. Furthermore, although they reached a different conclusion, the concurring judges' approach does not differ greatly from the quantity-based vertical approach of the majority. Also, no considerations can be seen in either of the majority or the minority's opinion with regard to the possible psychological effects of the treatment and no psychological assessment was carried out. The Court indeed draws presumptions that the pain must have been "substantial" when there are a high number of acts or visible injuries.[271] Such presumptions are especially used when injuries cover the entirety of the victim's body or where the intensity of the blows was so serious that they could only be characterized as torture. This was the case for instance in *Selmouni v. France* and in *Polonskiy v. Russia*, where the Court also affirmed that this presumption is valid irrespective of the state of health of the victim, so such a presumption based on a quantity (of injuries, blows, or acts) might in effect be sufficient in itself for a finding that severity reaches the level entailed by torture.[272]

Furthermore, looking at the way forensic medical reports are drafted, reports which the Court cites in its judgments, it can be observed that the injuries of a victim are enumerated numerically and by mentioning their size and location (e.g. "an injury measuring three to two centimetres to the parietal area of the skull; an injury measuring one and a half by one and a half centimetres to the inner left elbow"[273]). By using these reports as the central evidence of the ill-treatment that occurred to an applicant, the Court has inadvertently transformed the reasoning behind the characterization of the ill-treatment into a determination of whether the injuries enumerated amount to torture or inhuman treatment. In what might be a simple error of phrasing, the Court

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[271] *Selmouni v. France*, par. 102.
[272] *Ibidem*, par. 102 ("Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain").
[273] *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, par. 24.

explicitly stated in *Lenev v. Bulgaria* that "it remains to be determined whether those injuries are to be characterised as inhuman or degrading treatment or torture."[274] Even though this error might not have been repeated in other cases, it is still telling that this is the underlying approach of the Court. The ill-treatment and the entire traumatic experience, physical and mental, to which an applicant has been subjected is then unfortunately reduced to the injuries sustained as a result of the acts, although as the Istanbul Protocol shows, the absence of a visible injury does not mean that a trauma did not occur.[275] This quantitative approach might be completely damaging to applicants required to demonstrate physical ill-treatment that does not leave visible marks. Furthermore, evidence from experts in forensic medicine (and not just any type of medical report) becomes essential for their case but even so, medical opinions offer an objective view of what is visible or communicated by the victim. They might assess the injuries in terms of severity of the treatment in an explicit manner ("light bodily injuries,"[276] "the injuries were very slight with no serious features and could not lead to incapacity for work"[277]) or indirectly, by implying that the attack was of a serious nature considering the type of instrument that has apparently been used to inflict the injury (most commonly mentioned are blunt objects).[278] But medical reports make no reference to whether the whole of injuries are severe, significant, serious, or extreme. A very rare

[274] Ibidem, par. 115.
[275] Office Of The United Nations High Commissioner For Human Rights, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, New York and Geneva, 2004, pp. 46-49, available at http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.
[276] ECtHR, *Buzilov v. Moldova*, no. 28653/05, 23 June 2009, par. 9 ("[the injuries] could have been caused in the circumstances and at the time indicated and are qualified as light bodily injuries").
[277] *Tomasi v. France*, no. 12850/87, 27 August 1992, par. 47 ("In both cases the injuries were very slight with no serious features and could not lead to incapacity for work").
[278] *Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007, par. 20 ("Finding it unnecessary to determine the degree of gravity of these injuries, the expert concluded that they had been caused by a hard blunt object"); *Nikiforov v. Russia*, no. 42837/04, 1 July 2010, par. 14 ("Mr Nikiforov had a fractured nose, abrasions and a bruise on his face [measuring 7 x 4 cm]. The injuries could have been caused by the impact of a hard blunt object or as a result of falling on such an object... It is impossible to establish when Mr Nikiforov's nose was broken because of his belated request for it to be X-rayed...").

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case in which a medical report referenced the qualification of the overall ill-treatment was in *Tomasi v. France*, where by contrasting expected injuries specific to torture, the medical expert stated that no such injuries had been found,[279] and indeed the Court did not consider the ill-treatment to amount to torture. In its vertical approach to the types of ill-treatment, the Court finds it difficult to go beyond the level of inhuman treatment.

Focusing on the effects and number of injuries has visible consequences on the qualification of the ill-treatment. In the 2003 case of *Hulki Güneş v. Turkey* the Court found as proven the injuries of the applicant (grazes and bruises) allegedly caused during his interrogation by specialized personnel. However, with regard to the gravity of the ill-treatment (which included beatings and fifteen days spent in isolation), the Court found that it amounted to inhuman and degrading treatment. It referred to the act complained of as capable of causing physical pain and psychological suffering.[280] Although the applicant did not explicitly invoke torture, he did however complain before the Court that the ill-treatments had been inflicted during interrogation in order to obtain a confession. Without further explanation, the Court did not address this possible qualification nor the fact that the ill-treatment had a purpose specific to torture. The main focus of the Court's analysis was on the injuries caused by beatings, while the issue of isolation for fifteen days is secondarily mentioned for further support of its finding. As there was no psychological medical examination, the Court did not have further evidence to actually assess the effects of the ill-treatment on the applicant. However, the applicant's subjection to isolation could have been the

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[279] *Tomasi v. France*, par. 50 ("[w]e did not find any scar, any burn mark, or any other injury capable of suggesting that acts of torture had been committed").
[280] *Hulki Güneş v. Turkey,* no. 28490/95, 19 June 2003, par. 74 ("74. Quant à la gravité des faits allégués, la Cour considère que les actes dénoncés étaient assurément de nature à engendrer des douleurs ou des souffrances tant physiques que mentales chez M. Güneş, et, compte tenu notamment de l'isolement de l'intéressé pendant sa garde à vue, qui dura quinze jours, à faire naître en lui des sentiments de peur, d'angoisse et d'infériorité propres à l'humilier et à l'avilir, voire à briser sa résistance physique et morale. Ces éléments amènent la Cour à dire que les traitements exercés sur la personne du requérant ont revêtu un caractère à la fois inhumain et dégradant").

subject of a more detailed analysis, to strengthen its argument and to further educate the authorities and the public at large. Furthermore, the applicant in *Hulki Güneş* was already in custody and the Court accepts this on the basis of the evidentiary file so there was no issue of use of force during arrest, as the Government claims; then, the applicant's claim that he was ill-treated during an interrogation is no longer an issue of lawfulness and proportionality of use of force. Regrettably, the Government's argument of necessary use of force during arrest spills over and inadvertently deters the Court from examining the possibility that torture might have taken place (especially where a purpose is also invoked by the applicant).

The 2015 judgment in *Bouyid v. Belgium* [GC][281] is another good example of the challenges posed by the quantitative approach, especially in borderline cases. In *Bouyid*, the act consisted of an isolated slap for each of the applicants and, for the second applicant (of relevance here), who was slapped while being questioned, the slap resulted in bruising on one of his cheeks.[282] The Chamber of the Court and the dissenters in the Grand Chamber judgment considered that since the slap had been a one-off occurrence in a context of heightened tension there was no violation.[283] The majority in the Grand Chamber judgment did not make use of the Court's customary "totality of the circumstances" test and took a more principled approach, holding that "a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity"[284] and a violation of Article 3 (degrading treatment). Natasa Mavronicola explains that it is the character of the treatment, an objective wrong, which is

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[281] Although it might be argued that *Bouyid v. Belgium* ([GC], no. 23380/09, 28 September 2015) does not rightly fit with the subject matter of the cases analyzed in this thesis, as the first applicant had been merely taken into custody for an ID check, I have decided to include this case since the acts inflicted on the second applicant by police (a slap and a threat of being taken to a cell) took place during his questioning.
[282] *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, par. 15-16.
[283] *Ibidem,* par. 51, and Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens And Mahoney in the Grand Chamber judgment of the same application, par. 6.
[284] *Bouyid v. Belgium* [GC], par. 103.

prohibited by Article 3.[285] The dissenters rather focus the essence of Article 3 on the pain and suffering inflicted. So does this case signal a gradual movement away from the minimum level of severity test? Is this test outdated? It might be too soon to tell since it is a singular and exceptional case, but this case certainly lowered the threshold for Article 3 to the bare minimum of physical ill-treatment.

2.4.3 THE ECTHR AND THE EFFECTS ON THE HEALTH OF THE VICTIM

In the ECtHR case law, the effects on the health of the applicant are categorized depending on whether they have caused long-term consequences on the health of the victim. The exact meaning of long-term is vague, and it is also subject to the evolving standards of severity of the Court. The effects on the health are usually expressed in a number of days of sick leave or in days spent in the hospital. Although the Court considers this medical convention to be a helpful tool for judges, who are not a priori medical forensic experts, the number of days necessary for recovery is not always a determinative criteria for the qualification of the ill-treatment. For instance, in the same year, a finding of torture was made in the case of *Hüseyin Esen v. Turkey* where there were seven days of sick leave,[286] but also in the case of *Corsacov v. Moldova* where the applicant had spent approximately seventy days in hospital.[287] Also, seven days of sick leave can be as specific for torture[288] as it can be for inhuman treatment.[289] So while this medical "tool" could be an indication

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[285] Natasa Mavronicola, "Bouyid v. Belgium: The 'minimum level of severity' and human dignity's role in Article 3 ECHR," *Cyprus Human Rights Law Review*, (2016): 15.
[286] *Hüseyin Esen v. Turkey*, no. 49048/99, 8 August 2006, par. 44.
[287] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 64.
[288] *Hüseyin Esen v. Turkey*.
[289] *Rivas v. France*, no. 59584/00, 1 April 2004.

of the immediate effects on the physical well-being of the victim, it is not indicative for instance of the pain that might be experienced even after years have passed from the physical trauma.[290]

Interrogation cases in which long-term effects on health are confirmed, such as fractures or injury of an organ, impairment or disability, are usually considered to amount to a severity degree specific of torture. The effects on the health of the victim which were held to be of a severity characteristic of torture include for instance branchial plexus lesions for the first applicant and the reopening of a four months old surgery wound for the second applicant in *Ölmez v. Turkey*.[291] It included "brain oedema, post-traumatic displacement of two ribs, post-traumatic hearing impairment, deformation of both feet and shoulder-blade deformation, […] general brain dysfunction and a chronic psychiatric disorder"[292] some of which were irreversible damages to the health in *Kopylov v. Russia*. A permanent disability resulting from the ill-treatment was also unanimously held to be so severe as to amount to torture in *Savin v. Ukraine*.[293] Furthermore, in this case the Court explicitly recognized that the key element leading to a finding of torture was the severity of the treatment, the fact that the applicant had become disabled. [294]

[290] Studies have confirmed that pain can persist even after a decade has passed from the physical trauma. See, among others, Annemarie B. Thomsen, Jørgen Eriksen, and Knud Smidt-Nielsen. "Chronic pain in torture survivors," *Forensic science international*, Vol. 108, Issue 3, (2000): 155-163 (Victims of torture from the Middle East subjected to stress positions, falaka, Palestinian hanging, and beatings were evaluated after more than 10 years from the events. Findings indicated neuropathic pain – chronic pain – caused by injuries of peripheral nerves associated with the methods of torture inflicted.); Dorte Reff Olsen et al., "Prevalent musculoskeletal pain as a correlate of previous exposure to torture," *Scandinavian Journal of Public Health*, Vol. 34, Issue 5, (2006): 496 – 503; Dorte Reff Olsen et al., "Prevalent pain and pain level among torture survivors: a follow-up study," *Danish medical bulletin*, Vol. 53, Issue 2 (2006): 210-214.

[291] *Ölmez v. Turkey*, no. 39464/98, 20 February 2007, par. 60. The reopening of the surgery wound as a result of the ill-treatment was of course a short-term effect on the health but it was indicative of the violence of the attack on the applicant.

[292] *Kopylov v. Russia*, no. 3933/04, 29 July 2010, par. 125.

[293] *Savin v. Ukraine*, no. *34725/08*, 16 February 2012, par. 61-63 (The long-lasting effects on the applicant's health included "a cerebral cicatrix, liquor hypertension syndrome, right-side sensory and motor impairment, and a convulsive disorder, which all together had led to the loss by the applicant of thirty per cent of his general working capacity and fifty per cent of his professional working capacity" (par. 16)).

[294] ECtHR, *Savin v. Ukraine*, par. 62.

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And yet, not every kind of long-term health damage will be considered sufficiently severe to amount to torture. In the 2010 case of *Eldar Imanov and Azhdar Imanov v. Russia*, the first applicant alleged a combination of ill-treatments during interrogation, of which the Court considered the hits on his face and body in the final analysis, and concluded that despite the long-term health damage (a deformed spinal disc, post-traumatic arthritis at the shoulder and wrist joints), on the basis of the nature and extent of the injuries, the ill-treatment could be characterized only as inhuman treatment.[295] For the second applicant, the Court made similar findings, as factually the applicants' situations were similar, with the difference that the second applicant had suffered post-traumatic encephalopathy.[296] The standard applied in this case with regard to the severity of the ill-treatment appears to be quite high and it shows that the approach of focusing on the injuries to determine the gravity of an ill-treatment is a strongly subjective and sometimes arbitrary process.

Also, the existence of grave injuries as a result of the ill-treatment might not make it necessary for the Court to analyse whether there were long-term consequences. In the pilot judgment of *Kaverzin v. Ukraine* the Court concluded that the gravity of the injuries ("bleeding into the eyeball, haematomas and abrasions on the left side of his chest, arms and legs"[297]) and their intentional character determined a finding of torture.[298] Also, in a judgment pronounced in 2013, *Tarasov v. Ukraine*, the Court determined solely on the basis of the serious nature of the applicant's injuries that the applicant had been subjected to torture.[299] The injuries had been caused by beatings,

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[295] *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, 16 December 2010, par. 13, 93-94.
[296] *Ibidem*, par. 109.
[297] *Kaverzin v. Ukraine*, no. 23893/03, 15 May 2012, par. 12.
[298] *Ibidem*, par. 123-124.
[299] *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, par. 65 ("In the light of the above, it must be considered that the applicant sustained the injuries as a result of ill-treatment and that having regard to the serious nature of those injuries such treatment can be classified as torture for which the Government must bear Convention responsibility").

suffocation, and use of electric shocks to genitalia and included trauma to the abdominal area, bruise in the lumbar region, and whitish marks consistent with the application of electric shocks.[300] They were so serious that the applicant had to be carried to the domestic court hearing on a stretcher under medical supervision and allegedly lost consciousness several times during the hearing.[301]

Furthermore, the absence of long-term effects on health can be better correlated with findings of inhuman treatment. The absence of evidence for long-term effects on the victim was specifically highlighted in *Egmez v. Cyprus,* as a factor supporting the conclusion that the applicant had not sustained torture and the ill-treatment amounted to inhuman treatment.[302] The Court decided that the seriousness of the injuries allowed it to conclude that the treatment amounted only to the level of inhuman treatment.[303] The same conclusion was reached in *Nadrosov v. Russia*[304] and in *Barabanshchikov v. Russia*[305] in which both applicants had been subjected to beatings during interrogation by police but no long-term damage to the applicants' health had been recorded. This line of reasoning is also followed in *Alchagin v. Russia, Nitsov v. Russia and Ochelkov v. Russia*[306], in which the Court held that the nature and extent of the applicants' injuries did not have a serious effect on their health and concluded that the ill-treatment inflicted on the applicants during the criminal investigation amounted to inhuman and degrading treatment.[307] The expert medical reports in the first two cases noted that the injuries sustained included bruises and abrasions,[308]

[300] *Ibidem*, par. 37, 52, and 63.
[301] *Ibidem*, par. 23.
[302] *Egmez v. Cyprus*, no. 30873/96, 21 December 2000, par. 78 ("no convincing evidence was adduced to show that the ill-treatment in question had any long-term consequences for the applicant").
[303] *Egmez v. Cyprus*, no. 30873/96, 21 December 2000, par. 79.
[304] *Nadrosov v. Russia*, no. 9297/02, 31 July 2008, par. 36-37.
[305] *Barabanshchikov v. Russia*, no. 36220/02, 8 January 2009, par. 52.
[306] *Ochelkov v. Russia*, no. 17828/05, 11 April 2013, par. 94-96 (the issue of absence of long-term consequences on the health of the applicant was noted by the Court on in regard to the first set of events, the ill-treatments during police interrogation from 16-17 January 2002).
[307] *Alchagin v. Russia*, no. 20212/05, 17 January 2012, par. 57; *Nitsov v. Russia*, no. 35389/04, 3 May 2012, par. 53-54; *Ochelkov v. Russia*, par. 96.
[308] *Alchagin v. Russia*, par. 14; *Nitsov v. Russia*, par. 11; *Ochelkov v. Russia*, par. 95.

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while in the third case the applicant had spent twelve days in the hospital for "closed cranio-cerebral injury, concussion, and multiple injuries to the head, back, arms and chest."[309] For the latter, the Court noted that the ill-treatment "did not apparently result in any long-term damage to his health."[310] Also, in *Gäfgen*, the Court took into account the effects of the ill-treatment consisting of threats on the applicant. Since the effects entailed only mental suffering, specifically fear and anguish, the Court noted that no long-term adverse effects could be noted and the ill-treatment amounted to inhuman treatment.[311]

Even with the importance of physical injuries decreasing, one can still discern the influence of this factor as the main determinant of severity, especially in cases concerning inhuman treatment and despite standardized arguments that might indicate otherwise. For instance, in the 2015 case of *Gorshchuk v. Russia*, the Court held that the intentional ill-treatment caused the applicant "considerable fear, anguish and mental suffering" and considering "the nature and circumstances of the ill-treatment"[312] it concluded that the acts amounted to inhuman and degrading treatment.[313] As the Court's analysis indicates, the psychological effects and the nature of the acts were the determinants for the severity of the ill-treatment. From the rest of the four elements of torture usually considered when such allegation is made, the intention is confirmed by the Court but the purpose is not mentioned, although clearly from the facts of the case the purpose of the ill-treatment was to obtain a confession. Furthermore, the physical injuries are only mentioned in the

[309] *Ochelkov v. Russia*, par. 7, 15, 85.
[310] *Ibidem*, par. 95.
[311] *Gäfgen v. Germany [GC]*, par. 103.
[312] *Gorshchuk v. Russia*, no. 31316/09, 6 October 2015, par. 33 ("the Court finds it established that the applicant was subjected to ill-treatment while in police custody. The ill-treatment was intentional and caused him considerable fear, anguish and mental suffering. Having regard to the nature and circumstances of the ill-treatment, the Court finds that it amounted to inhuman and degrading treatment").
[313] *Ibidem*, par. 33. According to the medical evidence submitted the applicant suffered "haemorrhages on the upper chest up to 7cm in size, a haematoma on the left shoulder, an abrasion on the chin and an oedema on the back of the head," injuries that could have been caused by a hard or blunt object (par. 13 and 33).

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establishment of the facts but not in the part of the analysis concerning the qualification. The case law cited by the Court in support of its finding is not all relevant for the qualification of the ill-treatment (*Salman* was a Grand Chamber torture case, *Gäfgen'*s finding was inhuman treatment but concerned threats of ill-treatment; both of these are relevant for outlining the general principles on Article 3 complaints). Also cited, *Mostipan* and *Nasakin* made findings of inhuman treatment based on the physical injuries resulting from beatings inflicted on the applicants. So despite the fact that in this case, *Gorshchuk*, the physical injuries do not appear to be the main focus, the cited case law discloses otherwise; the injuries that were serious but not severe and the lack of any other relevant ill-treatment besides beatings, were most probably the reason behind the finding of inhuman treatment.

More straightforward is the case of *Asllani v. "the former Yugoslav republic of Macedonia"* in which the applicant had been insulted and physically assaulted during questioning at the police station. The Court noted the resulting injuries, a broken nose and bruises on his face, and held that he had been subjected to inhuman treatment since such treatment must have caused him "physical pain, fear, anguish and mental suffering."[314] Also, in *Shlychkov v. Russia*, the Court concluded that beatings inflicted during questioning and resulting in broken ribs amounted to inhuman treatment.[315] Therefore, despite the fact that ill-treatment consisting of beatings denotes the "use of brute force,"[316] a broken nose or broken ribs will be insufficient to rise to the severity specific of torture in the absence of more egregious methods being used.

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[314] *Asllani v. "the former Yugoslav republic of Macedonia"*, no. 24058/13, 10 December 2015, par. 86.
[315] *Shlychkov v. Russia*, no. 40852/05, 9 February 2016, par. 67-70.
[316] *Asllani v. "the former Yugoslav republic of Macedonia"*, par. 86.

2.4.4 THE ECTHR: SEVERITY AND THE NATURE OF THE ILL-TREATMENT (AS AN INDICATION OF THE GRAVITY OF THE INJURIES)

Besides the consequences on the health of the victim, the nature of the ill-treatment is another indicator of severity. In the 2009 case of *Polonskiy v. Russia* for instance, the Government had used the lack of deterioration of the applicant's health as an argument before the Court to claim that no violation of Article 3 had taken place.[317] The Court replied to this argument by enumerating the methods applied on the applicant ("hit at least several times in his face, shoulders, back and legs and was subjected to electric shocks which is a particularly painful form of ill-treatment"[318]) and by stating a principle derived from *Egmez.* It stated that "the absence of long-term health consequences cannot exclude a finding that the treatment is serious enough to be *considered inhuman or degrading*."[319] However, in *Egmez,*[320] the Court had mentioned the absence of evidence for long-term consequences and the uncertainty as to the gravity of the injuries as a supporting argument for excluding a finding of torture.[321] Here, in *Polonskiy*, the Court finds torture by citing a case that does not support its conclusion and by considering that the nature and extent of the injuries (confirmed by medical evidence to include bruises, abrasions, thermo-electrical burns[322]) did not result in deteriorating the applicant's health,[323] they had caused the applicant severe mental and physical suffering amounting to torture. Therefore, while the Court's

[317] *Polonskiy v. Russia*, no. 30033/05, 19 March 2009, par. 124.
[318] *Ibidem*, par. 124.
[319] *Ibidem*, par. 124.
[320] *Egmez v. Cyprus*, no. 30873/96, 21 December 2000, par. 78 (The Court can also not disregard the uncertainty concerning the gravity of the applicant's injuries. This uncertainty was caused in part by the "retouching" of the photographs that had been submitted with the application form, and the applicant did nothing to dispel it before the Court. Finally, the Court notes that no convincing evidence was adduced to show that the ill-treatment in question had any long-term consequences for the applicant.")
[321] *Egmez v. Cyprus*, par. 79 ("In the light of all the above, the Court considers that the ill-treatment to which the applicant was subjected cannot be qualified as torture").
[322] *Polonskiy v. Russia*, par. 9.
[323] *Ibidem*, par. 124.

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standard was that even without long-term effects, an ill-treatment could be considered inhuman or degrading, at least after *Polonskiy*, the standard apparently lowers to ill-treatment amounting to torture even in the absence of long-term effects. The change was possible by focusing on the nature of the treatment (a cruel method of torture, electric shocks, which will be analysed in more detail in a different chapter) and also since there is no precise meaning for "long-term damage to health" the standard remains open to interpretation.

The standards enunciated in *Polonskiy* was subsequently applied in *Nechiporuk and Yonkalo v. Ukraine* (2011)[324] and in *Grigoryev v. Ukraine* (2012),[325] both finding torture for ill-treatment consisting of electric shocks, a "particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering, […] even if it does not result in any long-term damage to health."[326] In a more recent judgment, *Myumyun v. Bulgaria* (2015),[327] the Court considered the effects of an ill-treatment that included "repeated blows with a wooden bat and a rubber truncheon, numerous kicks, and a number of electric shocks administered with an electroshock prod,"[328] an ill-treatment that left the applicant with several haematomas and bruises. The Court referred to findings made in the domestic proceedings, which specified that the injuries fell under the "minor bodily harm" category and that the applicant experienced a month of physical pain, as well as fear and anxiety. It then concluded that despite the absence of long-term health damage the ill-treatment was serious enough to amount to torture.[329] Of course haematomas and bruises do not denote any long-term health damage but it might be debatable if one month of physical pain accompanied by

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[324] *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, par. 157.
[325] *Grigoryev v. Ukraine*, no. 51671/07, 15 May 2012, par. 64.
[326] *Ibidem*.
[327] *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015.
[328] *Ibidem*, par. 62.
[329] *Ibidem*, par. 62.

further psychological effects fall under minor bodily harm. In any case, what is telling is that after concluding that the ill-treatment amounted to torture, the Court added one short paragraph in its analysis of the qualification for further support of its finding: "[i]ndeed, the Bulgarian Supreme Court of Cassation recently came to the same conclusion in a case which likewise concerned the use of an electroshock prod in the course of a custodial interrogation."[330] Therefore, although the analysis was focused on the injuries and their seriousness, the Court points to the essential issue, the nature of the treatment. Therefore, when the nature of the ill-treatment is specific of torture, the injuries and effects on the health seem to take a secondary role (see Chapter 3 concerning cruelty for further developments on this issue).

2.5 THE UN BODIES

The overall view of the UN bodies' interrogation cases is rather unusual if compared to the case law of the ECtHR. First, while the Human Rights Committee analyses cases in order to determine whether there was a violation of Article 7 of the ICCPR, the UN Committee against Torture goes beyond the step of determining whether there was a violation of the Convention, by pointing to the qualification of the treatment as torture or inhuman treatment. Before the UNHRC, even when the ill-treatments would without a doubt amount to torture, there are cases where no specific indication is made to such a finding.[331] With a few exceptions in which the Committee refers to the ill-treatment as torture in the content of the views, the majority of its violations of Article 7

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[330] *Myumyun v. Bulgaria*, par. 64.

[331] Consider for instance the case of *Kirpo v. Tajikistan*, presented before the UNHRC (no. 1401/2005, 27 October 2009, par. 6.2-6.3) in which the victim had been subjected to beatings and electric shocks. The UNHRC found a violation of Article 7 ICCPR but did not categorize the ill-treatment although the use of electric shocks in order to obtain a confession had previously been qualified as torture in various cases, such as *Motta v. Uruguay* (no. 11/1977, 29 July 1980), *Burgos v. Uruguay* (no. 52/1979, 29 July 1981), *Arzuada v. Uruguay* (no. 147/1983, 1 November 1985).

ICCPR do not specify if the violation found is that of torture. Second, the UNCAT has never found that an ill-treatment applied during interrogation amounts to inhuman treatment and its analysis of the level of severity is not detailed to such an extent as in the case of the European Court. Rather, the very fact of being subjected to ill-treatment during interrogations, whether of a physical or psychological type, will very likely determine the UNCAT to find that torture was inflicted on the victim.

Before I start the analysis of the UNCAT and UNHRC jurisprudence, there are a few general observations that are in order about the peculiarities of interrogational torture complaints presented before these bodies. First, unlike the Governments' defences submitted before the ECtHR, usually prepared for each case brought against a Council of Europe Member State, the State parties before the UNCAT or the UNHRC might not submit information on the complaint as a whole or might submit incomplete information, concerning only part of the claims. In these conditions, even allegations of injuries that are unsupported by medical evidence might be accepted by the UN bodies. Second, also compared to the ECtHR, the allegations of torture presented before the UN bodies are at times some of the most egregiously possible. Insertion of hot needles under the nails,[332] nails being torn from fingers with pincers,[333] being subjected to the rag technique,[334] methods which are what one would imagine closest to "the rack and the screw."[335] Therefore, findings of torture will be made for the majority of the cases (except, as already noted, the special

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[332] UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013; UNHRC, *Giri v. Nepal*, Communication no. 1761/08, 24 March 2011.
[333] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015; UNCAT, *Taoufik Elaiba v. Tunisia*, Communication no. 551/2013, 6 May 2016; UNHRC, *Mulezi v. Democratic Republic of the Congo*, Communication no. 962/2001, 6 July 2004; UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015, par. 17.3.
[334] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 2.4 and 11.2 ("forcing the victim to swallow a very large quantity of dirty water to the point of suffocation").
[335] *Rochin v. California*, 342 U.S. 165 (1952), at 173.

situation of the UNHRC, where no qualification might be given). Lastly, with regard to the number of cases analysed, it should be noted that for both UN committees the analysis relies mostly on cases in which a violation was found and in which a qualification of the ill-treatment was provided. For the UNCAT for instance, I have identified fifteen cases in which the Committee has found a violation of Article 1 of the UN Convention Against Torture in interrogations. For the UNHRC, I have identified approximately one hundred cases containing allegations of ill-treatment during interrogations. From these, I have analysed more than fifty, choosing randomly cases from each year, from 1980 to 2016. However, from these cases I could identify only seventeen cases in which a violation is found and a qualification of torture is provided, so these are the cases that I have mostly relied on for this study.[336] For the rest of the cases the conclusion reached by the UNHRC is either no violation (usually because the claims were unsubstantiated by evidence[337] or because the domestic authorities had already analysed the claim and no arbitrariness could be discerned in

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[336] I have also identified one case in which the UNHRC found inhuman treatment for what at first sight appeared to be an interrogation case, *de Bouton v. Uruguay* (Communication No. 37/1978, 27 March 1981). However, at a closer look I have concluded that it is unclear whether the Committee's finding included ill-treatment that had allegedly took place during interrogation since the formulation used by the Committee is too vague.

[337] A case that is to a certain extent revealing for the elements taken into consideration by the UNHRC when assessing complaints of torture in interrogation cases is *Soyuzbek Kaldarov v. Kyrgyzstan* (no. 1338/2005, 18 March 2010). In this case the complaint had been dismissed as unsubstantiated for lack of adequate information. However, the most that the case reveals is a "totality of circumstances approach" without providing any clues as to a clearer standard (par. 7.3: "He does not provide any information on when and where these beatings are supposed to have taken place, how often and for what duration. He provides no specific description of either the methods of the beatings, or of the identity or description or number of officers allegedly responsible, nor indeed of any consequences, medical or otherwise, resulting from the alleged treatment. No corroborating medical certificate attesting to ill-treatment of any kind has been submitted").

their analysis)[338] or violation (often without an analysis where the State Party has not contested the allegations or with an analysis of the allegations but without a qualification being provided).[339]

2.5.1 THE UNCAT: FROM A FOCUS ON INJURIES TO A FOCUS ALSO ON THE NATURE OF THE ILL-TREATMENT

In three very similar complaints brought by Serbian citizens of Roma origin against Serbia and Montenegro, the UNCAT held that beatings applied for approximately one hour during police questioning amounted to torture.[340] These were the first ever cases in which the Committee made findings of substantive torture and they have been referred to as the "Serb/Roma cases."[341] The elements that are highlighted by the Committee in its analysis include the injuries of the complainants, or rather the fact that evidence in the case file, medical or of other nature, proves the complainants' claims. The Committee does not dwell on detailing the physical injuries as the ECtHR normally does, but this is in line with the very succinct method of argumentation in the Committee's cases. For the first of these cases, *Dimitrijevic v. Serbia and Montenegro*

[338] See, among others, HRC, *Kelly v. Jamaica*, no. 253/1987, 8 April 1991; HRC, *Grant v. Jamaica,* no. 353/1988, 31 March 1994; HRC, *Chaplin v. Jamaica*, no. 596/1994, 02 November 1995; HRC, *Errol Johnson v. Jamaica*, no. 588/1994, 22 March 1996; HRC, *Blaine v. Jamaica*, no. 696/1996, 17 July 1997; HRC, *Sahadeo v. Guyana*, no. 728/1996, 1 November 2001; HRC, *Kouidis v. Greece*, no. 1070/2002, 28 March 2006; HRC, *Rajapakse v. Sri Lanka*, no. 1250/2004, 14 July 2006; HRC, *Pustovoit v. Ukraine*, no. 1405/2005, 20 March 2014; HRC, *Soyuzbek Kaldarov v. Kyrgyzstan*, no. 1338/2005, 18 March 2010.

[339] For cases in which the HRC found a violation but no qualification see, among others, HRC, *Juan Fernando Terán Jijón v. Ecuador*, no. 277/1988, 26 March 1992; HRC, *Blanco v. Nicaragua*, no. 328/1988, 20 July 1994; HRC, *Chung v. Jamaica*, no. 591/1994, 9 April 1998; HRC, *Kennedy v. Trinidad and Tobago*, no. 845/1998, 26 March 2002; HRC, *Kurbanova v. Tajikistan*, no. 1096/2002, 6 November 2003; HRC, *Tarasova v. Uzbekistan*, no. 1057/2002, 20 October 2006; HRC, *Njaru v Cameroon*, no. 1353/2005, 19 March 2007; HRC, *Khuseynov and Butaev v. Tajikistan*, nos. 1263/2004 and 1264/2004, 20 October 2008; HRC, *Koreba v. Belarus*, no. 1390/2005, 25 October 2010; HRC, *Oleg Pustovalov v. Russian Federation*, no. 1232/2003, 23 March 2010; HRC, *Kirpo v. Tajikistan*, no. 1401/2005, 27 October 2009; HRC, *Akwanga v. Cameroon*, no. 1813/2008, 22 March 2011; HRC, *Andrei Khoroshenko v. Russia*, No. 1304/2004, 29 March 2011; HRC, *Mohamed v. Libya*, no. 2046/2011, 17 October 2014; HRC, *Vasily Yuzepchuk v. Belarus*, no. 1906/2009, 24 October 2014; HRC, *Khadzhiev v. Turkmenistan*, no. 2079/2011, 1 April 2015.

[340] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004; UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005; UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005.

[341] Sarah Joseph, "Committee against Torture: Recent Jurisprudence," *Human Rights Law Review,* Vol. 6 Issue 3 (2006): 571.

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(Communication No. 207/2002), no medical examination certificate was presented to the Committee but given that the State did not challenge the submissions, the author's claims, supported only by statements of his relatives, prevailed. With regard to the effects of the ill-treatment he submitted that he had to stay in bed for several days as he was bleeding from his ear, his eyes were swollen and he had further injuries on his arms and legs.[342] For *Dimitrov v. Serbia and Montenegro* (Communication No. 171/2000), a medical report and the statements of the complainant's sister confirmed numerous injuries (discolorations and swellings) resulting from beatings all over the body, which left the complainant in need of bed rest for ten days.[343] Lastly, for *Dimitrijevic v. Serbia and Montenegro*, (Communication No. 172/2000) the injuries, which consisted of bruises on the outside of the complainant's legs, were confirmed by photographs submitted to the Committee.[344] The case file did not contain any medical report but this was not an issue since the State did not submit any information in reply to the complainant's claims.[345]

The same approach of relying on physical injuries to find severe pain and suffering is continued in all the UNCAT cases. However, the Committee does not publicly provide details with regard to the number or gravity of injuries. These can only be determined if the facts of the case contain a detailed description of the medical evidence submitted. In *Slyusar v. Ukraine*[346] for instance, two medical certificates stated that the physical injuries of the complainant were light and that he had

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[342] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 2.2, 5.1-5.3.
[343] UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 2.1-2.2 and 7.1.
[344] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 2.3 and 7.1.
[345] The complainant had submitted to the UNCAT official documents in which a judge had ordered an inquiry into the alleged ill-treatment, a release order from police custody, and pictures of the injuries.
[346] UNCAT, *Slyusar v. Ukraine*, Communication no. 353/2008, 14 November 2011 (In this case, the complainant, suspected of murdering his father, was interrogated for several days with the use of physical and psychological ill-treatments, including severe beatings, being kept in a cold cell, deprived of food and sleep, and threatened with the ill-treatment of his wife and mother).

been later diagnosed with hypertensive cardiovascular disorder.[347] No further details are provided and the Committee based its finding of torture on the complainant's allegations, inadequately challenged by the State party, and on the two medical certificates.[348] While in *Slyusar* the effects of the injuries might not appear to be too serious, in *Evloev v. Kazakhstan,* the Committee made reference to a medical report that confirmed numerous injuries to the complainant's head, broken ribs and a fracture to the left foot. [349] From the Committee's analysis it can be concluded that severity was determined based on this medical report (referenced no more than three times in the final analysis), so on the physical damage to the health, and on the detailed description of the nature of the acts provided by the complainant, acts which included humiliation, beatings to the head and the soles of the complainant's feet, threats with sexual violence, suffocation, sleep deprivation, and insertion of hot needles under the nails.[350] In *Gerasimov v. Kazakhstan*, the UNCAT followed the same approach and held that in view of the treatment detailed by the complainant (blows to the kidneys, threats with sexual violence, repeated acts of "dry submarino"[351]) and the physical and psychological damage documented by medical reports (including "major closed craniocerebral trauma, brain contusion, contusions to the right kidney, the lumbar region, and the soft tissue of the head, and a contused wound to the right superciliary arch,"[352] and post-traumatic stress disorder), the ill-treatment had caused severe pain and

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[347] Ibidem, par. 2.4 and 4.3.
[348] Ibidem, par. 2.4, 4.3 and 9.2. The State party's challenge of the complainant's allegations were incomplete, relating mostly to the lack of a link between the allegations of torture and the findings of the medical reports.
[349] UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 2.2 -2.4, 9.2.
[350] UNCAT, *Evloev v. Kazakhstan*, 2.2 -2.4, 9.2.
[351] UNCAT, *Gerasimov v. Kazakhstan,* Comm Number: 433/2010, 24 May 2012, par. 2.3 (The technique of dry submarino is described as follows: "The officers tied his hands behind his back using his belt. Four officers held his legs and torso so that he could not move. The fifth officer took a thick clear polypropylene bag and placed it over his head. This officer then forced his right knee into his back, and began to pull the plastic bag backwards, suffocating him until he bled from his nose, ears and from the abrasions on his face […] before finally losing consciousness. When the complainant started losing consciousness, the bag was loosened. This process was repeated multiple times.")
[352] UNCAT, *Gerasimov v. Kazakhstan,* Communication no. 433/2010, 24 May 2012, par. 2.2-2.7.

suffering.[353] Further, in *Bairamov v. Kazakhstan*, the UNCAT relied on the description provided by the complainant for the acts and injuries, even in the absence of medical evidence, to find a violation of Article 1 of the Convention.[354] Among all these decisions pronounced by the UNCAT from 2004 to 2014, there has been only one, *Hanafi v. Algeria*[355] in which the Committee's final assessment made a detailed description of the ill-treatments to which the victim was subjected, and this case concerned a victim that died as a result of torture. Until *Hanafi,* a detailed description of the acts was only found in the first paragraphs of the Committee's decision, in the submissions of fact provided by the complainant, and was merely noted in the final assessment.[356]

The new style of argumentation, if it can be called in this way, was picked up again in 2014 with *Abdelmalek v. Algeria.* In this case the UNCAT based its assessment of severity mainly on the nature of the acts which included some of the most egregiously possible methods of interrogation (out of respect for the sensibilities of the readers, I have included the enumeration only in the footnote).[357] The Committee enumerated the long list of methods in its analysis, while only mentioning that the complainant's claims are substantiated by medical documents. This is even more significant since the effect on the health of the applicant included a permanent disability (50% work impairment),[358] which apparently takes second place to the nature of the acts. The focus on the nature of the ill-treatments is also the central element in determining severity in

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[353] Ibidem, par. 12.2.
[354] UNCAT, *Bairamov v. Kazakhstan*, Communication Number: 497/2012, 14 May 2014, par. 8.2-8.4.
[355] UNCAT, *Hanafi v. Algeria*, Communication no. 341/2008, 03 June 2011, par. 9.2 – 9.3.
[356] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 7.1; UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 7.1; UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 5.3; UNCAT, *Slyusar v. Ukraine*, Communication no. 353/2008, 14 November 2011, par. 9.2.
[357] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.2 ("[…] he was beaten repeatedly, subjected to the rag technique, given electric shocks, hung from the ceiling by his left foot, had his leg violently twisted until it broke, had his right foot pierced through, and had a bar inserted in his anus").
[358] Ibidem, par. 3.1.

Ramiro Ramírez Martínez et al v. Mexico, in which the complainants were subjected to repeated beatings with guns, blindfolding, electric shocks, nails being torn from their toes, and threats of death.[359] The medical consequences, which included at least multiple lesions and perforated ear-drum, are not mentioned in the assessment of severity or of the ill-treatments as a whole. Furthermore, in *Niyonzima v. Burundi* the UNCAT also took note of the type if ill-treatments inflicted, namely physical abuse with various torture instruments until the complainant bled and almost lost consciousness, followed by "a stone in his mouth to stifle his cries."[360] Although medical evidence attested numerous injuries,[361] this factor was not of concern in the Committee's final analysis. Continuing to focus on the nature of the ill-treatments, in the recent decision pronounced in 2016 in *Taoufik Elaiba v. Tunisia,* the UNCAT enumerates for an entire paragraph the types of ill-treatments inflicted on the complainant during the interrogation.[362] The difference from previous cases is that in *Taoufik Elaiba* the Committee also focuses on the long-term physical consequences on the health of the complainant. The medical reports submitted by the complainant confirmed that he had suffered, among others, from fractures of a toe and of the jaw, back pain, a swollen finger, and psychological sequelae,[363] so the threshold for torture is significantly elevated. In *Kabura v. Burundi,* the UNCAT again provides a detailed enumeration of the brutal acts

[359] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015, par. 17.3.
[360] UNCAT, *Niyonzima v. Burundi,* Communication no. 514/2012, 21 November 2014, par. 8.2.
[361] UNCAT, *Niyonzima v. Burundi,* Communication no. 514/2012, 21 November 2014, par. 2.13.
[362] UNCAT, *Taoufik Elaiba v. Tunisia*, Communication no. 551/2013, 6 May 2016, par. 7.3 ("[…]the Committee takes note of the complainant's claim that, for six days, officers of the national guard hit him very hard on the face; beat him on the soles of his feet with a rubber stick for about five minutes; placed a motorcycle helmet on his head and beat him on the head with a baseball bat for about 15 minutes, damaging his hearing; tied him by the wrists and ankles to a large wheel fixed to the wall and spun the wheel very fast in one direction and then the other until he fainted; sprayed his genitals with a gas; gave him electric shocks; repeatedly beat him on the fingers with various implements; and ripped out the nail from one of his big toes. After that, the Committee notes that, according to the complainant, he was held incommunicado for 6 days; was able to eat only a sandwich a day and was allowed to go to the toilet only once a day; received no medical treatment for the entire duration of his custody, while he had an open wound on his belly as a result of the use of force during his arrest; was kept tied to a chair when not being questioned or tortured; and was slapped when he asked to read the transcripts of his questioning, including the transcript in which one of the officers forged the date of his arrest, before signing them").
[363] Ibidem, par. 7.4.

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inflicted which caused the complainant "acute pain and suffering."[364] One last case, that partially backtracks this line of cases, concerns an analysis that mentions in general that the complainant alleged physical ill-treatment and long-term pain for several months.[365] None of the acts (beatings, falaka, being forced to stay motionless and beaten a movement was made, being handcuffed, blindfolded, and insulted) or injuries are discussed in detail. The possible explanation is that essentially the case concerned beatings, a physical assault of a type that might not be perceived as brutal as the acts inflicted in the previous cases.

To conclude on the UNCAT case law analysis, is the number or gravity of injuries important for determining severity or is the nature of the act that is more relevant? I would conclude that there is an equal importance of injuries and nature of the acts in more recent cases, a development from focusing solely on injuries to looking beyond this criteria.

So one might wonder whether the UNCAT emphasizes the nature of ill-treatment mostly when the ill-treatment consists of brutal physical abuse. The majority of cases analysed above seem to suggest this. As for whether there is a corresponding drive away from determining severity on the basis of physical injuries and other effects on health, it can only be observed that, out of fifteen interrogation cases, only two state in detail the type of injuries suffered by the complainants[366] and one mentions pain for several months.[367] Based on this analysis, I would conclude that both the nature of the acts and the consequences on the health of the complainant are relevant when

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[364] UNCAT, *Kabura v. Burundi*, Communication no. 549/2013, 16 November 2016, par. 7.2 ("they beat him with sticks on different parts of his body, particularly the back, face, feet and genitals, squeezed his genitals with their hands and used a piece of electrical cable to tie a five-litre container of water to them").
[365] UNCAT, *Asfari v. Morocco*, Communication no. 606/2014, 15 November 2016, par. 13.2.
[366] UNCAT, *Hammouche v. Algeria,* Communication No. 376/2009, 08 April 2013, par. 6.2 (the ill-treatment resulted in the death of the applicant); UNCAT, *Taoufik Elaiba v. Tunisia,* Communication no. 551/2013, 6 May 2016, par. 7.4.
[367] UNCAT, *Asfari v. Morocco*, Communication no. 606/2014, 15 November 2016, par. 13.2.

assessing severity, that at least publicly the Committee does not seem particularly concerned only with injuries when assessing severity. Out of fifteen cases there are six that provide a detailed enumeration of the acts inflicted and only two that provide a detailed enumeration of the injuries caused (with a third one mentioning pain for several months). Nonetheless, only three cases out of fifteen do not mention injuries, medical reports or witnesses confirming claims. Can it be said that although the UNCAT follows largely the same approach as the ECtHR for determining severity (i.e. looking mostly at the amount and gravity of physical injuries), the level of severity for torture is lower than for the ECtHR? In *Slyusar* the medical evidence confirmed light injuries and a diagnosis of hypertension cardiovascular disorder, whereas the ECtHR might deal with cases concerning broken ribs or broken nose resulting from interrogational ill-treatment and hold that they are only inhuman treatment.[368]

What is unfortunate is that the UNCAT views adopted in individual complaints do not offer a clearer reasoning supported by stronger and more substantial arguments so that its views would contribute to providing meaning and a better understanding of the definition of torture. The example that is set by these views is less than convincing, especially coming from a body that is the international standard setter in all the Torture Convention related matters.

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[368] Also note that with regard to the five techniques that were used in the case of *Ireland v. the United Kingdom*, the UNCAT has observed in 1997 with regard to similar methods used by Israel in interrogations pursuant to the "Landau rules," that the combined use of methods that include "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill" will amount to torture (See UNCAT, Concluding Observations on Israel (1997), UN Doc. A/52/44, par. 257). Even with regard to the use of these methods individually, the UNCAT had admitted that they constitute torture but the Committee further highlighted that their combined use amounts to torture (See UNCAT, Concluding Observations on Israel (1997), UN Doc. A/52/44, par. 256).

2.5.2 THE UNHRC: THE HAYSTACK OF INTERROGATIONAL TORTURE

The decisions of the UNHRC on the subject of interrogation in violation of Article 7 ICCPR are even more challenging to interpret than those of the UNCAT. Although I will use the word "analysis" for the merits part of these decisions, this word is an overstatement, since the merits part of the UNHRC decisions are in their substance factual statements. These sterile decisions suffer from a chronic lack of reasoning,[369] which may also account for the State parties delays or failures to comply with these decisions.[370] Added to this is the UNHRC's publicly stated position of not separating between torture and inhuman treatment,[371] which is at odds with the UN Convention against Torture and the UNCAT's case law, as well as with the UNHRC's stance on requesting national governments to incorporate the UNCAT definition of torture in their national law.[372] Given that the UNHRC's position on differentiating between torture and inhuman treatment was later qualified[373] so that the Committee would name specific ill-treatments torture where it considers that such an endeavour is warranted, I will mostly look at those cases that I have identified as qualifying the ill-treatment, so that I can provide a most accurate view of the UNHRC's understanding of severity specific of torture. Furthermore, I will also make use of cases in which qualifications of torture may be mentioned inadvertedly in the analysis of the State's obligation to provide an effective investigation into allegations of ill-treatment or where such

[369] This criticism is not limited to views dealing with interrogational torture, but it is valid for all the views of the UNHRC. See Henry J. Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" in P. Alston & J. Crawford (Eds.), *The Future of UN Human Rights Treaty Monitoring,* (Cambridge: Cambridge University Press, 2009), 15-54.
[370] Lutz Oette, "Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies," *INTERIGHTS Bulletin*, Volume 16, Number 2, (2010): 51.
[371] UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, par. 4, available at http://www.refworld.org/docid/453883fb0.html last accessed in December 2016.
[372] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (third edition), (Oxford: Oxford University Press, 2013), 9.25.
[373] See HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 7.5.

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qualifications can be deduced from the fact that the Committee accepts the unchallenged torture allegations of a complainant.[374] Note also that the UNHRC has publicly stated that the distinction between torture and inhuman treatment will depend on the elements of severity, purpose and nature of the treatment applied.[375]

In two of the first cases in which the UNHRC found the ill-treatment applied in interrogation to amount to torture, *Motta v. Uruguay*[376] and *Burgos v. Uruguay*,[377] the Committee provided an almost identical reasoning. As mentioned above, it focused on establishing the facts, which was considered sufficient to find that torture was inflicted on the complainants. No mention of severity, purpose or qualifications is provided in the merits section of the decision, so the Committee's views are essentially a succinct reproduction of the facts submitted by the author. In order to determine what is understood by torture in these cases one must go to the detailed description provided by the author of the complaint. In the first case, *Motta v. Uruguay*, the complainant had been subjected to, among others, electric shocks, waterboarding, and rape.[378] In *Burgos v. Uruguay*, the author had been subjected to beatings, suspension by the arms, electric shocks, and had been kept naked and wet, ill-treatment that caused him physical injuries, including a perforation of the eardrum.[379] A decision pronounced in the same decade, *Cariboni v. Uruguay*, follows the same pattern of not mentioning severity, ill-treatments or resulting injuries in the merits

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[374] See for instance HRC, *Grishkovtsov v. Belarus*, no. 2013/2010, 1 April 2015, par. 8.2.
[375] UNHRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, par. 4, available at http://www.refworld.org/docid/453883fb0.html last accessed in December 2016.
[376] HRC, *Motta v. Uruguay*, no. 11/1977, 29 July 1980, par. 13-14.
[377] HRC, *Burgos v. Uruguay*, no. 52/1979, 29 July 1981, par. 11.3.
[378] HRC, *Motta v. Uruguay*, par. 2 ("he cites in his case, inter alia, the application of electric shocks, the use of the "submarino" (putting the detainee's hooded head into foul water), insertion of bottles or barrels of automatic rifles into his anus and forcing him to remain standing, hooded and handcuffed and with a piece of wood thrust into his mouth, for several days and nights").
[379] HRC, *Burgos v. Uruguay*, no. 52/1979, 29 July 1981, par. 2.3.

part. The factual statement of the complainant, not contested by the State, reveals however that the finding of torture is made for the use of psychological methods (threats of torture, use of loud music and being forced to listen to the sounds made by those being tortured), coupled with blindfolding, forced standing applied up to exhaustion and loss of any notion of time.[380] Therefore, extreme ill-treatments or extreme ill-treatment causing permanent physical injuries is considered by the UNHRC to be of such a severity that it amounts to torture. Although these cases were analysed in the 1980s, largely the same approach can be distinguished in more recent cases. Severe and long-lasting physical injuries are also the basis of a finding of torture in the 2016 case of *Askarov v. Kyrgyzstan*, in which the UNHRC focused on medical evidence that confirms injuries, but paradoxically did not provide details in its analysis as to what are the ill-treatments and the injuries proven by this evidence.[381]

The first decision in which severity appears as relevant for the Committee in interrogation cases was adopted in 1983, *Estrella v. Uruguay*, and provided a more informative analysis. Although it mentions that physical and psychological torture has been used on the complainant, the Committee focuses only on one psychological method of interrogation, the mock amputation with an electric saw, and on the long-lasting effects to the complainant's arms and hands (eleven months of loss of sensitivity).[382] The focus only on this method is rather peculiar since the complainant had also been subjected to physical torture that included waterboarding, beatings, suspension, electric shocks, and stress positions for up to twenty hours. While, it is commendable that the UNHRC found a violation of torture for the infliction of psychological ill-treatment and went beyond mere

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[380] HRC, *Cariboni v. Uruguay*, no. 159/1983, 27 October 1987, par. 4, 9.1, 10.
[381] HRC, *Askarov v. Kyrgyzstan*, Communication no. 2231/2012, 31 March 2016, par. 8.2, 8.3.
[382] HRC, *Estrella v. Uruguay*, no.74/1980, 29 March 1983, par. 1.6 and 8.3.

theoretical condemnations of such practices,[383] the finding could also be explained by the fact that the threat of amputation was the only method used during the interrogation that resulted in long-lasting physical damage to the health of the complainant or by the cruelty of the ill-treatment (threatening a pianist with cutting off his hands), though the author's profession is mentioned only in the facts of the case. If the infliction of lasting physical consequences on the health of the victim is the real reason behind a finding of psychological torture, this would clearly challenge the potential of psychological ill-treatments to actually amount to torture. Contrary to *Estrella*, in *Arzuada v. Uruguay* the UNHRC enumerated the physical ill-treatments and omitted the psychological ones,[384] but again following the same pattern of mentioning those methods that caused certain physical effects on the health of the victim.

In another approach (though still in the form of a story-like argumentation), the Committee (partially) identifies and enumerates the types of ill-treatment inflicted on the complainant but does not pay attention to the injuries caused by these ill-treatments. This could signal that the nature of the ill-treatment has the potential to trump the effects caused to the victim's health in the overall consideration of the ill-treatment. This was the case in *Muteba v. Zaire*, where the Committee specifically mentions three of the methods of interrogation used on the complainant, including beatings, electric shocks, and mock executions.[385] The Committee omits however one of the most brutal methods alleged by the complainant, the so-called "typist."[386] The same line of reasoning

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[383] Although it has not determined in an individual complaint concerning ill-treatment during interrogations that a threat constituted torture, the UNCAT members, in their concluding observations on a New Zealand's report, have expressed the position that a threat could in theory rise to the level of severity specific of torture (See UNCAT, Concluding observations on New Zealand, UN Doc. A/48/44, 1 January 1993, par. 148).
[384] HRC, *Arzuada v. Uruguay*, no. 147/1983, 1 November 1985, par. 4.3, 13.2 and 14.
[385] HRC, *Muteba v. Zaire*, no. 124/82, 24 March 1983, par. 10.2 and 12.
[386] Ibidem, par. 8.2 ("The 'typist' - another form of torture which consists of squeezing the prisoner's fingers after pieces of wood have been placed between them - electric shocks and withholding of food were also used during the interrogation.")

appears in *Herrera v. Colombia*, where the UNHRC enumerated the types of ill-treatments inflicted on the victim, which included waterboarding, hanging, beatings, and serious threats of death to his parents, which were later found to have been killed.[387] The Committee does not however appear concerned about mentioning specific effects on the victim. A similar analysis is provided in *Khalilov v. Tadjikistan*, where the UNHRC mentions in the analysis that the complainant's son had been subjected to beatings and forced to witness the torture of his father. No concern is expressed for the effects of this treatment on her son.[388]

Nonetheless, the focus on injuries and especially on medical evidence is actually a common denominator for many of the Committee's decisions. In *Arhuaco v. Colombia*, the UNHRC combined the focus on medical evidence of injuries resulting from torture, for the first three victims, with the mention of the ill-treatment inflicted, for the other two victims.[389] In *Domukovsky et al. v. Georgia*, the UNHRC partially mentioned the nature of the ill-treatments (physical and, where relevant, psychological) and the physical effects on the health of each of the complainants.[390] In *Acosta v. Uruguay*, the finding is made based on the facts not contested by the new Uruguayan government and the conclusion is that the complainant's incommunicado detention for forty days coupled with beatings, suspension, electric shocks, forced standing and asphyxiation resulting in nervous hypertension amounted to torture.[391] In the case of *Chiti v. Zambia* although a combination of grave ill-treatments was applied on the complainant's husband while in police custody, the UNHRC highlighted only the physical injuries caused.[392] In *Jumaa v.*

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[387] HRC, *Herrera v. Colombia*, no. 161/1983, 2 November 1987, par. 10.2 and 11.
[388] HRC, *Khalilov v. Tadjikistan*, Communication 973/01, 18 October 2005, par. 7.2.
[389] HRC, *Arhuaco v. Colombia*, no. 612/1995, 29 July 1997, par. 2.5, 8.4-8.5
[390] HRC, *Domukovsky et al. v. Georgia*, nos. 623, 624, 626, and 627/1995, 6 April 1998, par. 18.6.
[391] HRC, *Acosta v. Uruguay*, no. 162/1983, 25 October 1988, par. 5, 10.2, 10.4, 11.
[392] HRC, *Chiti v. Zambia*, Communication no. 1303/2004, 26 July 2012, par. 2.1 and 12.2 (the methods consisted of regular beatings with different objects, subjection to stress positions, suspension, threats with death, disfigurement, drowning or being fed to crocodiles; they resulted in an eardrum perforation).

Libyan Arab Jamahiriya, the type of ill-treatment (rape and electric shocks) is mentioned only as a way of determining whether the treatment took place.[393] These decisions were followed by a more detailed analysis in *Akmatov v. Kyrgyzstan*, where the applicant died as a result of the ill-treatment, so there is a more careful establishment of the facts, with increased attention to the medical evidence[394]

What can be observed when compared to the UNCAT, is that since 2004 when the views in *Mulezi v. Democratic Republic of the Congo* were adopted, the approach of the UNHRC has aligned its style to the one in the UNCAT's first cases. The Committee finds that the detailed factual account of the treatments to which the complainant had been subjected and the medical documents proving sequelae are sufficient to find a violation of Article 7 ICCPR and uses the word torture to refer to the ill-treatment.[395] No further details are provided in the analysis, despite the fact that the treatments were quite brutal and resulted in physical and psychological consequences on the health of the complainant.

In 2011, in *Giri v. Nepal*,[396] the UNHRC offered a rare glimpse of the reasoning that is behind its findings of torture. It has stated that, in accordance to its General Comment no. 20 concerning Article 7 ICCPR,[397] its usual practice is to not identify the type of ill-treatment. Exceptionally, it

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[393] HRC, *Jumaa v. Libyan Arab Jamahiriya*, Communication no. 1755/2008, 19 March 2012, par. 2.3, 8.2 and 8.6 ("Methods of torture allegedly included extensive use of electric shocks on legs, feet, hands and chest while stretched naked on a steel bed; beatings on the soles of the feet; being hung by the hands; creation of a sensation of suffocation and strangulation; being suspended from a height by the arms; being threatened of attack by dogs while blindfolded; beatings on the body; injection of drugs; sleep deprivation; sensory isolation; very hot or ice-cold showers; being held in overcrowded cells; being blinded by bright lights. The author was allegedly subjected to anal rape.").
[394] HRC, *Akmatov v. Kyrgyzstan*, Communication no. 2052/2011, 29 October 2015, par. 8.2 and 8.8.
[395] HRC, *Mulezi v. Democratic Republic of the Congo*, no. 962/2001, 6 July 2004, par. 2.4 and 5.3.
[396] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011.
[397] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at: http://www.refworld.org/docid/453883fb0.html, last accessed in October 2016.

might provide a qualification if it considers that this is warranted and in so doing it will be guided by the definition of the CAT. Most importantly, it pointed to what it considers the "critical distinction" between torture and inhuman treatment, and that is the purposive element.[398] Furthermore, in indicating to the purpose of torture, the UNHRC noted that this is a different approach from the one in the 1975 Torture Declaration,[399] which emphasized severity as the distinguishing feature between torture and inhuman treatment. Turning to the substance of the case, the UNHRC noted the method used on the applicant to obtain a confession, being held incommunicado for thirteen months, during which the complainant was allegedly torture for approximately 100 times. The Committee however does not detail the specific acts inflicted on the complainant,[400] and in its final conclusion it mentions only incommunicado detention and the conditions of detention. So it is unclear why the Committee would go to great lengths to explain that severity is not the distinguishing feature in this case. Is it because in this case incommunicado detention would not rise to the level of torture if severity would be the defining criteria? Taking into consideration that the medical documents submitted by the complainant did not provide evidence of physical torture, and the State party raised this issue on the merits, this seems to be a plausible explanation.

It has been stated that since *Giri v. Nepal* was pronounced, the UNHRC has been more robust in making specific findings of torture.[401] While that may be true for other categories of cases, for

[398] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 7.5.
[399] Article 1 par. 2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeclarationTorture.aspx last accessed in October 2016.
[400] The acts inflicted on the complainant in *Giri v. Nepal* included beatings all over the body with various instruments, while blindfolded and handcuffed, and being rubbed against ice blocks and pierced with needles on the back, chest and under the toenails (par. 2.5).
[401] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (third edition) (Oxford: Oxford University Press, 2013), 9.27.

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interrogation cases there is no significant impact to be noticed, unless by more robust one would refer to a more detailed reasoning being provided.

2.6 THE U.S.

As I have shown in Chapter 1 in the section concerning the definitions of torture in the U.S. jurisdiction, the U.S. is rather fragmented with regard to defining torture and providing remedies for violations of this norm. The same is true for determining severity.

2.6.1 THE U.S. AND DUE PROCESS CASES: RARE DETERMINATIONS OF A QUALIFICATION OF THE ILL-TREATMENT

In the 1930s "the third degree" was routinely used by police to obtain confessions and the extent of the practice was officially recorded in the 1931 Wickersham Commission Report which referenced cases of use of waterboarding, boxing gloves, and ropes for asphyxiation of the suspect.[402] The report was followed by a number of cases that reached the U.S. Supreme Court, in which plaintiffs sought to reverse convictions based on violations of the Fifth and Fourteenth Amendments. Also, in 1953 Chief Justice Warren was nominated to the U.S. Supreme Court, which revolutionized criminal law and the way confessions were obtained.[403] By the 1960s the physical abuses that were pernicious in the 1930s seemed to have subsided.[404] These developments are visible in the type of ill-treatment alleged before the U.S. Supreme Court cases. After the 1936

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[402] See Mark Costanzo and Allison Redlich, "Use of physical and psychological force in criminal and military interrogations," *Policing around the world: Police use of force,* (Praeger Security International, 2010); Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices After Dickerson*, (Ann Arbor: The University of Michigan Press, 2001), 18; John T. Parry and Welsh S. White. "Interrogating Suspected Terrorits: Should Torture Be an Option," *University of Pittsburgh Law Review*, Vol. 63, (2001): 748.
[403] Paul Finkelman Ed., *Encyclopedia of American Civil Liberties* (New York: Routledge, 2013), 318.
[404] R. A. Leo, "Inside the interrogation room," *Journal of Criminal Law and Criminology* Vol. 86 (1996): 266-303.

case of *Brown v. Mississippi,*[405] and the 1940 case of *White v. Texas*,[406] with both presenting a similar physical ill-treatment during interrogations (whipping of petitioner during trips in the woods at night in order to induce a confession), the cases presented before the U.S. Supreme Court alleging a violation of the Fourteenth Amendment due process rights in interrogations were mostly concerned with psychological pressures.[407]

These substantive due process cases do not concern themselves with analysing severity in the way that we have seen for other jurisdictions, nor do they specifically determine that a certain conduct during interrogation amounted to torture or to inhuman treatment. They will refer to brutal interrogation methods as "gross coercion"[408] or methods that "shock the conscience."[409] Exceptionally, the U.S. Supreme Court might refer to certain acts as torture, as it did for instance in *Brown v. Mississippi,* where the Court referred to severe whipping as physical torture.[410] In the majority of cases however, a violation of due process is found for obtaining a confession involuntarily (in violation of the voluntariness test), a standard which is lower than the "shock the

[405] *Brown v. Mississippi*, 297 U.S. 278 (1936).
[406] *White v. Texas*, 310 U. S. 530 (1940).
[407] See, among others, *Ward v. Texas*, 316 U. S. 547 (1942) (threats of violence); *Chambers v. Florida*, 309 U. S. 227 (1940) (continuous questioning in isolation for five days); *Ward v. Texas*, 316 U. S. 547 (1942) (threats of violence and continuous questioning); *McNabb v. United States*, 318 U.S. 332 (1943) (two continuous days of interrogation); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (continuously interrogated while held incommunicado for 36 hours and sleep deprived); *Watts v. Indiana*, 338 U.S. 49 (1949) (almost a week of solitary confinement with no place to sleep and interrogated almost continuously); *Harris v. South Carolina*, 338 U. S. 68 (1949) (threats against family); *Fikes v. Alabama*, 352 U. S. 191 (1957) (mental and emotional coercion); *Spano v. New York*, 360 U. S. 315 (1959) (mental pressure during questioning taking place during the night for uninterrupted eight hours); *Blackburn v. Alabama*, 361 U. S. 199 (1960) ("prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror"); *Reck v. Pate*, 367 U.S. 433 (1961) (held incommunicado without food, counsel or contact with family, and without adequate food); *Haynes v. Washington*, 373 U. S. 503 (1963) (use of threats while held incommunicado); *Davis v. North Carolina*, 384 U. S. 737 (1966) (also held incommunicado for 16 days and subjected to repeated interrogations); *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (threats of killing the suspect); *Darwin* v. *Connecticut*, 391 U. S. 346 (1968) (interrogated for 48 hours incommunicado while being denied access to counsel); *Mincey v. Arizona*, 437 U. S. 385 (1978) (pressure of interrogation conducted while the suspect was lying almost unconscious in hospital, without a lawyer, and despite repeated requests to stop the interrogation); *Miller v. Fenton*, 474 U.S. 104 (1985) (use of deception).
[408] *Beecher v. Alabama,* 408 U.S. 234 (1972).
[409] *Rochin v. California*, 342 U.S. 165 (1952).
[410] *Brown v. Mississippi*, 297 U.S. 278 (1936), 279.

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conscience" threshold of substantive due process.[411] The judgments essentially analyse whether the evidence or confessions used at trial are tainted by an involuntary admission in violation of the Fourteenth Amendment due process rights. The higher purpose is not the conduct or the right not to be subjected to such treatment but rather the consequence on procedural due process. In this logic, the Court held in *Brown* that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[412] The emphasis was on offending the principle of justice considered fundamental to the traditions and conscience of the people.[413]

What is also noteworthy is that the U.S. Supreme Court does not particularly concern itself with a quantification of pain by looking at the effects on the health of the petitioner. The U.S. Court of Appeals for the Fourth Circuit has held in *Gray v. Spillman* that subjecting a suspect to beatings and threats violates his Fifth and Fourteenth Amendment rights even in the absence of serious physical injury.[414] The U.S. Supreme Court might mention physical effects on the health of the petitioner where especially relevant, as it did in *Reck v. Pate*, where petitioner was "weakened by illness, pain, and lack of food."[415] However, the reasoning turns on whether the will of the person was overborne at the moment of confession[416] and whether the confession was "the product of a

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[411] Susan R. Klein, "Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide," *University of Pennsylvania Law Review*, Vol. 143, (1994): 471.
[412] *Brown v. Mississippi*, 297 U.S. 278 (1936), 286.
[413] Ibidem, 285.
[414] *Gray v. Spillman*, 925 F.2d 90, 93 (Cir. 4th 1991). The action was based on 42 U.S. Code § 1983 (civil action for deprivation of rights).
[415] See *Reck v. Pate*, 367 U.S. 433 (1961) where petitioner was "weakened by illness, pain, and lack of food."
[416] *Chambers v. Florida*, 309 U. S. 227 (1940); *Reck v. Pate*, 367 U.S. 433 (1961).

rational intellect and a free will."[417] This is the "voluntariness test,"[418] employed to deter coercion, to verify the reliability of a confession, and also to protect the suspect's choice of whether to confess.[419] Using this test to analyse whether statements were made involuntarily during questioning might be considered a more adequate way of determining ill-treatment, especially when it is of a psychological kind, intertwined with abuse of police procedures. Consider *Ashcraft v. Tennessee*, where there was no visible physical injury, the plaintiff had been held incommunicado for 36 hours, while deprived of sleep, and interrogated continuously by officers and investigators.[420] According to the majority of the Court, this constituted an inherently coercive situation whose "very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."[421] Furthermore, to determine whether a confession was voluntary, the Court will look at the totality of the circumstances of the case,[422] so it takes an approach quite close to the ECtHR's analysis of severity. But even so, the injuries are not the focal point in the analysis where such injuries occur[423] and the long-term effects possibly resulting from psychologically coercive interrogation are also not highlighted by the Court.

However, as mentioned above, the word "torture" is rarely used in U.S. Supreme Court cases, and for that matter "severity" as well. Out of at least twenty cases analysed by the U.S. Supreme Court

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[417] *Blackburn v. Alabama,* 361 U. S. 199 (1960), at 208.
[418] Joseph D. Grano, "Voluntariness, Free Will, and the Law of Confessions," *Virginia Law Review* Vol. 65, No. 5 (1979): 859-945; Mark A. Godsey, "Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination," *California Law Review,* Vol. 93, Issue 2 (2005): 465-540; Eve Brensike Primus, "The Future of Confession Law: Toward Rules for the Voluntariness Test," *Michigan Law Review,* Vol. 114, Issue 1 (2015): 1-56.
[419] See *United States v. Byram,* 145 F.3d 405 (1st Cir. 1998).
[420] *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).
[421] Ibidem, 154.
[422] *Blackburn v. Alabama,* 361 U. S. 199 (1960); *Frazier v. Cupp*, 394 U. S. 731, 394 U. S. 739 (1969).
[423] See *Brown v. Mississippi*, 297 U.S. 278 (1936); *White v. Texas*, 310 U. S. 530 (1940).

in regard to interrogations, I have identified only two, both already mentioned above, in which "torture" is used to refer to the ill-treatment inflicted on the plaintiff. The first is in *Brown v. Mississippi*, where the ill-treatment consisted of violent whipping; the second is in *Ashcraft v. Tennessee*[424] where, as mentioned above, the police used continuous interrogation for 36 hours of incommunicado detention and sleep deprived. In this latter case, Justice Black singled out sleep deprivation as torture known to be the most effective since the year 1500. For the rest of the cases, torture has been mentioned but in order to state general principles.[425] Then, in the absence of an explicit mention of torture in relation to the ill-treatments analysed, could it still be said that in all these cases the ill-treatment amounted to torture? Is deception used by police officers in *Miller v. Fenton*[426] severe enough to amount to torture since it was found to be in violation of the Fourteenth Amendment Due Process Clause? Justice Jackson for instance referred to the use of confessions obtained from suspects overcome by "torture, mob violence, fraud, trickery, threats, or promises,"[427] therefore separating torture from other mental pressures. The Court of Appeals for the First Circuit held that trickery or deception might not automatically be coercion,[428] while the Court of Appeals for the Ninth Circuit held that "torture is not necessary to render "coercive" police conduct in the pursuit of a confession. Psychological coercion can suffice."[429] Therefore, not every violation of due process by interrogational ill-treatment that shocks the conscience will be so severe as to amount to torture.

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[424] *Ashcraft v. Tennessee*, Footnote 6.
[425] See, among others, *Watts v. Indiana*, 338 U.S. 49 (1949); *Culombe v. Connecticut*, 367 U.S. 568 (1961).
[426] *Miller v. Fenton*, 474 U.S. 104 (1985).
[427] Justice Jackson dissenting opinion in *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944), 156.
[428] *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998).
[429] *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

2.6.2 DAMAGES LITIGATION AND EXTREME SEVERITY

Courts dealing with claims for damages for torture have been the ones usually interpreting the definition of torture and severity, as they provide a more detailed and "conventional" determination of severity since the actual damages awarded will depend on the injuries sustained and on the severity of the ill-treatment. At the same time, since in these cases the complaints concern torture in the form of very brutal ill-treatment (taking place for instance during armed conflict in Iraq), the effect has been to push the finding of torture towards extreme ill-treatments.

The perfect summary of elements taken into consideration by the courts in tort claims cases is offered in *Price v. Socialist People's Libyan Arab Jamahiriya*.[430] As the U.S. Court of Appeals for the District of Columbia Circuit did not have all the details regarding the alleged torture of the plaintiffs, it explained what aspects regarding the severity of the alleged beatings they had to indicate in order to state a torture claim. These included the beatings' "frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out."[431] The level of severity necessary to reach torture is considerably high in these cases given that the courts would consider relevant what parts of the body were aimed and what types of instruments were used in the abuse. In *Price* it was also highlighted that "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture."[432] The word extreme, which was specific of the Torture Memo, is also employed by the courts, as it was stated that acts must be "unusually cruel or sufficiently extreme and outrageous"[433] in order to constitute torture, so that not every "direct physical assault

[430] *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).
[431] Ibidem, at 93.
[432] *Ibidem*, at 93.
[433] *Simpson v. Socialist People's Libyan Arab Jamahiriya,* 326 F.3d 230 (D.C. Cir. 2003). For a more detailed account of the facts and merits of this case, which is illustrative of the understanding of "unusual cruelty" by the U.S. courts, see the end of section 2.6.3.

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[…], police brutality, not every instance of excessive force" will amount to torture.[434] Another example of the high threshold for torture is offered in *Hilao v. Estate of Marcos*, where the U.S. Court of Appeals for the Ninth Circuit held that an interrogation which included the severe beating of the petitioner, his blindfolding, denial of sleep and repeated threats of death, as well as six hours of waterboarding during which the petitioner was also threatened with electric shocks and death (all of these acts within a detention of eight years of almost complete solitary confinement), amounted to torture.[435]

The effects on the health of plaintiffs, whether physical or psychological, are a central element of the analysis in these cases, not so different from the perspective of the ECtHR and the UN bodies. In *Paul v. Avril*[436] plaintiffs brought claims for torture inflicted on them in Haiti during a military rule from September 1988 to March 1990. The effects on their health resulting from brutal beatings and suspension included several fractures, including to the back, so that one of the plaintiffs was confined for one year to a wheelchair. They also included a paralyzed arm, detached retina, loss of hearing in one ear and loss of vision in one eye.[437] In *Doe v. Qi*,[438] the U.S. District Court for the Northern District of California analysed claims under the ATCA and TVPA and found that four of the plaintiffs had been subjected to torture by Chinese authorities. The court held that to determine the severity of the treatment it must look at the intensity of suffering, the duration of the treatment and the "heinousness of the agony inflicted."[439] With regard to the intensity of suffering, the effects on the health of the plaintiffs were noted by the court, effects which included severe

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[434] *Price v. Socialist People's Libyan Arab Jamahiriya*, at 93.
[435] *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).
[436] *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).
[437] *Ibidem*, at 332, 335.
[438] *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal 2004).
[439] *Ibidem*, citing *Price v. Socialist People's Libyan Arab Jamahiriya,* at 93.

head injury, the victim's body being covered with dark bruises, not being able to walk by herself, or losing the ability to eat.[440] In *Nikbin v. Islamic Republic of Iran,* the plaintiff had suffered numerous acts of ill-treatment which led to numbness in his feet due to the use of electrical shocks, physical injuries that included the loss of five teeth and other physical injuries that necessitated three operations.[441]

In one of the few cases in which every element of the definition of torture was analysed in detail, *"Mehinovic v. Vuckovic,* the U.S. District Court for the Northern District of Georgia considered torture claims brought under TVPA and ATCA. It concluded that beatings to the face which resulted in the plaintiff being unable to eat for ten days and two to three hours of interrogations that included beatings with a baton and a baseball bat to different parts of the body (resulting in broken ribs and loss of consciousness) and to the genitals amounted to torture as understood under international law.[442] Another incident that was found to amount to torture was the interrogation session during which Mehinovic's hand was beaten with a rifle butt, resulting in the dislocation of a finger and a swollen hand for two to three months.[443] Therefore, the main elements that determined the severity of pain and suffering specific for torture were the method of ill-treatment (beatings) and the effects on the health of the victim (long-term effects such as broken ribs, dislocated finger, and swollen hand). This high threshold for severe physical pain is a very restrictive view of severity,[444] in accordance with the Torture Memo's take on the fact that severe physical suffering had to be "a condition of some extended duration or persistence as well as

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[440] *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal 2004).
[441] *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416 (D.C. 2007) ().
[442] *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), at 23-24.
[443] *Ibidem,* at 26.
[444] See also *Department of Defense, Crimes and Elements of Trials by Military Commission*, codified at 32 C.F.R. 12 (""Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs").

intensity,"[445] "rather than merely mild or transitory"[446] to some extent similar to the ECtHR's standards.

Further relevant cases include *Cronin v. Islamic Republic of Iran*,[447] *Acree v. Republic of Iraq*,[448] *Chavez v. Carranza*,[449] *United States v. Belfast*,[450] *Ahmed v. Magan*,[451] *Moradi v. Islamic Republic of Iran*,[452] in which either the methods inflicted[453] or usually both the methods and the long-term effects on the plaintiffs,[454] are highlighted for a finding of torture.

As for psychological effects of torture, in *Daliberti v. Republic of Iraq*, in which a plaintiff raised a claim of torture against Iraq for having been held in custody for five days in inadequate conditions of detention and being subjected to interrogation with threats of very specific acts of

[445] Memorandum opinion for the Deputy Attorney General, 30 December 2004, available at https://www.justice.gov/file/18791/download last accessed in December 2016.
[446] Ibidem.
[447] *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222 (D.D.C.2002).
[448] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003).
[449] *Chavez v. Carranza*, 413 F. Supp.2d 891 (W.D. Tenn. 2005).
[450] *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).
[451] *Ahmed v. Magan*, No. 2:10-cv-00342, (S.D. Ohio Aug. 20, 2013).
[452] *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015).
[453] *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222 (D.D.C.2002) (four days of beatings and being forced to witness other being beaten in order to force the plaintiff to confess to being a spy); *Chavez v. Carranza*, 413 F. Supp.2d 891 (W.D. Tenn. 2005) (methods included acid burning, beatings, electric shocks, sexual assault); *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015) (the methods included being tied in a painful position, lengthy beatings, sexual assault, being urinated upon, threats of torture or death).
[454] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003) ("The torture inflicted included severe beatings, mock executions, threatened castration, and threatened dismemberment. The POWs were systematically starved, denied sleep, and exposed to freezing cold. They were denied medical care and their existing injuries were intentionally aggravated. They were shocked with electrical devices and confined in dark, filthy conditions exposing them to contagion and infection. The POWs suffered serious physical injuries, including broken bones, perforated eardrums, nerve damage, infections, nausea, severe weight loss, massive bruises, and other injuries."); *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) ("His interrogators would force his head into a five-foot deep pit filled with human waste […] the soldiers mutilated Mr. Kpadeh's penis, raped him, and forced him to sodomize other prisoners. […] As a result of his incarceration and treatment, Mr. Kpadeh suffered permanent physical ailments including deep scars, renal problems, sexual dysfunction, and nerve damage. He also lost more than half of his body weight while at Gbatala, dropping from approximately 185 pounds to less than 90 after his release."); *Ahmed v. Magan*, No. 2:10-cv-00342, (S.D. Ohio Aug. 20, 2013) ("The torturers squeezed his testicles with iron instruments […] they forced a five liter container of water, sand and small stones into his mouth to cut off his air supply. […] The officers beat his body with wooden sticks. […] plaintiff Abukar Hassan Ahmed has suffered and continues to suffer from […] frequent nightmares […] wets his bed. He has flashbacks […]. He has trouble with his leg after sleep.")

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physical torture (cutting of fingers, pulling fingernails, application of electric shocks to the testicles)[455]. The plaintiff had lived for those five days in constant fear of being killed or seriously injured, so that he was later diagnosed with post-traumatic stress disorder and constantly experienced "anger, feelings of detachment and isolation, nightmares, and insomnia."[456] The ill-treatment was held to amount to torture. The element that appears to be central to the finding is the long-term psychological effect of the ill-treatment, which according to a doctor who testified in favor of the plaintiff, could last for the plaintiff's entire life.[457] Also constant treatment for post-traumatic stress disorder was the long-term psychological effect noted by the court in *Cicippio v. Islamic Republic of Iran* in the case of one of the plaintiffs who had been subjected to beatings, blindfolded, threatened to be killed, and held in inadequate conditions of detention for more than 500 days. The court also held that all of the plaintiffs had suffered "profoundly serious and largely permanent personal injury."[458] Lastly, in *Mehinovic v. Vuckovic*, mentioned above, it was explained that "prolonged mental harm" could be confirmed when "anxiety, nightmares, flashbacks, and difficulty sleeping"[459] result from beatings, broken bones or mutilation. Therefore, though for torture the requirement is not permanent harm, a clinically diagnosed mental disorder seems to be the hallmark of prolonged mental harm,[460] actually the same as the long-term mental harm (though not necessarily permanent mental harm) advocated in the Torture Memo.[461]

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[455] This particular complaint was raised by one of the plaintiffs, Clinton Hall, a U.S. citizen.
[456] *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001).
[457] *Ibidem.*
[458] *Cicippio v. Islamic Republic of Iran,* 18 F. Supp. 2d 62 (D.D.C. 1998), at 69.
[459] *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), at 1346.
[460] See *Department of Defense, Crimes and Elements of Trials by Military Commission*, codified at 32 C.F.R. 11.6 (""Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder").
[461] *Memorandum for William J. Hayne II, General Counsel of the Department of Defense, Military Interrogation of Alien Unlawful Combatants Held Outside the United States,* Washington, March 14, 2003, p. 39-40, available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf, last accessed in September 2010.

2.6.3 THE ARMY FIELD MANUAL: RULES FOR INTELLIGENCE INTERROGATIONS

Of relevance here are also the guidelines with regard to the prohibition of ill-treatment provided in the Army Field Manual concerning Human Intelligence Collector Operations or HUMINT (FM2-22.3),[462] to be used during the interrogation of detainees in an armed conflict. First, with regard to prohibited actions that cannot be used during interrogations, the manual contains a list of prohibited actions: waterboarding, nudity, sexual acts, poses of sexual acts, hooding, use of duct tape over the eyes, burns, beatings, electric shocks, other forms of infliction of physical pain, use of military dogs, hypothermia, heat injury, mock executions, deprivations of food, water or medical care.[463] The list is supplemented by further prohibitions throughout the manual, such as the prohibition of inhuman treatment, mental torture, threats and intimidation.[464] Further, the manual provides a doubtful indicative test to be used by the military: first, an imagination exercize, asking the military to envisage the same technique applied by the enemy on a fellow and decide if it would be considered abuse; second, whether a law or regulation would be violated if the technique would be used.[465] The test appears to be meant for borderline cases, where doubts already exist with regard to the legality of the method envisioned, so the second limitation will not be of much help. As for the first proviso, it looks reminiscent of ethical, religious, and even utilitarian considerations. Appealing to the personal convictions and common sense of the individual in borderline situations has not proven very effective and empirical research[466] might

[462] US Army Field Manual, FM2-22.3 (2006). The manual expressly prohibits "violence, threats, or impermissible or unlawful physical contact" (par. 8-68). Following President Obama's Executive Order 13491 of January 22, 2009 (at http://www.presidency.ucsb.edu/ws/?pid=85669 accessed in December 2016) the provisions of this manual apply to all HUMINT interrogations in any armed conflicts and for all detainees.
[463] US Army Field Manual, FM2-22.3, par. 5-75.
[464] Ibidem, par. 5-77 and 5-89.
[465] Ibidem, par. 5-76.
[466] Philip G. Zimbardo, Christina Maslach, and Craig Haney, "Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences" in Thomas Blass, ed., *Obedience to Authority: Current Perspectives on the Milgram Paradigm,* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2000), 193-237.

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be informative on the factors that affect individuals in a military or prison-like setting where they are responsible for and in total control of others.

As for permitted acts, the manual provides a list of eighteen interrogation techniques whose purpose is to exploit a source's weaknesses (low self-esteem, fears, helplessness, high ego, etc).[467] The issue with these techniques is that some of them can easily turn into humiliating treatment. For instance, the use of religion is acceptable in all interrogations but the line is drawn at denigrating religious symbols or violating religious tenets.[468] Demeaning a racial group is acceptable, though supervisors "should question [its] appropriateness."[469] Although threats and coercion are explicitly prohibited,[470] the manual makes clear that indirect threats could be considered legal and that the psychological well-being of the source is not the interrogator's concern.[471] Furthermore, to the eighteen methods of interrogation the manual adds in an appendix one restricted interrogation technique called "separation"[472] which cannot be applied on enemy prisoners of war,[473] but it is applicable to what the U.S. considers unlawful combatants. The technique is distinguished from sensory deprivation, which is prohibited, and from segregation, which according to the manual, is used for legitimate purposes, other than interrogation.[474] Separation consists of physically separating a source from other persons in order to "foster a

[467] US Army Field Manual, FM2-22.3, Chapter 8, par. 8.50. The methods are: the direct approach, the incentive approach, several emotional approaches, and finally several approaches categorized as Other Approaches (We Know All, File and Dossier, Establish Your Identity, Repetition, Rapid Fire, Silent, Change of Scenery, Mutt and Jeff).
[468] Ibidem, par. 8-25.
[469] Ibidem, par. 8-26.
[470] For instance the use of dogs during interrogation or "to harass, intimidate, threaten, or coerce a detainee for interrogation purposes" is prohibited (US Army Field Manual, FM2-22.3, Chapter 8, par. 8.2.).
[471] US Army Field Manual, FM2-22.3, Chapter 8, par. 8-35 - 8-41.
[472] US Army Field Manual, FM2-22.3, Appendix M.
[473] Paradoxically, the manual eliminates the use of what could be a legitimate method employed for the protection of a detainee from the rest of his fellow detainees (see Human Rights First, The U.S. Army Field Manual on Interrogation: A Strong Document in Need of Careful Revision, available at https://www.humanrightsfirst.org/wp-content/uploads/pdf/Army_Field_Manual.pdf last accessed in December 2016).
[474] US Army Field Manual, FM2-22.3, M-2 and M-26.

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feeling of futility"[475] for a maximum of 30 days with possibility of extension after the measure has been reviewed. Essentially then, it is solitary confinement, which could amount to psychological ill-treatment and cause severe psychiatric harm.[476] According to the manual, this measure should not prevent the detainee from getting at least four continuous hours of sleep every 24 hours,[477] so sleep deprivation is also allowed as a method of interrogation, possibly coupled with solitary confinement. Furthermore, in the usual spirit of the manual, it is provided that where physical separation is not possible, a "perception of separation" can be achieved by the use of goggles or blindfolds coupled with earmuffs,[478] which devoids the prohibition of sensory deprivation of any content. These two methods provided in Appendix M, sleep deprivation and isolation, could theoretically be the source of psychological torture or inhuman treatment during an interrogation process,[479] especially when they are applied in combination.

By comparatively analysing these methods with the findings of U.S. courts however, torture might not be the conclusion. In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, the plaintiff's interrogation included being held incommunicado, being threatened with death, and unable to learn of her husband's wellbeing. The plaintiff's claim of torture was rejected by the D.C. Circuit Court, which found that the treatment was cruel but the acts were not "in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture."[480] "Unusual cruelty" as a legal

[475] US Army Field Manual, FM2-22.3, M-26 – M-28.
[476] See Stuart Grassian, "Psychiatric effects of solitary confinement," *Washington University Journal of Law and Policy*, Vol. 22, (2006): 325-383; Craig Haney, "Mental health issues in long-term solitary and "supermax" confinement," *Crime & Delinquency*, Vol. 49, No. 1, (Jan. 2003): 124-156.
[477] US Army Field Manual, FM2-22.3, M-30.
[478] US Army Field Manual, FM2-22.3, M-27.
[479] Declassified Pentagon documents show that these techniques were approved as it was considered that they would amount to torture only if they are applied in a prolonged manner and if they cause severe mental suffering. Furthermore, it was also stated that separation would not amount to cruel and inhuman treatment since it does not shock the conscience. Sleep deprivation is not addressed in these documents (see Talking points on Separation and Common Article 3, at https://cdn.muckrock.com/foia_files/2016/03/23/3-18-16_MR10458_RES_ID14-F-0444.pdf accessed December 2016).
[480] *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003).

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standard for finding torture allows the setting of very high thresholds, in this case leading the court towards extreme acts. Furthermore, in *Wilkins v. May*,[481] the Seventh Circuit Court of Appeals referred to the treatment in *Rochin*[482] as "not so severe bodily harm, to which severe mental distress can reasonably be compared."[483] It also held that plaintiffs must "show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering."[484]

2.7 DEATH AS A RESULT OF ILL-TREATMENT DURING INTERROGATION

In this section a comparative analysis if provided of cases in which the victim of ill-treatment has died. Only the ECtHR and the UN bodies are compared given that for the U.S. I could not identify a case with such a situation.

2.7.1 THE ECTHR: DEATH AS A RESULT OF ILL-TREATMENT MEETS BEYOND REASONABLE DOUBT HURDLE

The highest degree of severity that can be found in interrogational torture and the gravest of damages to health is the death of the victim. When it is established that the effect of the treatment inflicted was injuries of such gravity that they actually led to the death of the victim or to the loss of an organ it is quite delicate not to conclude that the treatment amounted to torture. In these

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[481] *Wilkins v. May*, 872 F.2nd 190 (7th Cir. 1989).
[482] *Rochin v. California*, 342 U.S. 165 (1952).
[483] *Wilkins v. May*, 872 F.2nd 190 (7th Cir. 1989).
[484] *Ibidem.*

situations the effects of the treatment, even when unacknowledged by the ECtHR, become the central element in the distinction between torture and inhuman treatment.

There are a few examples in the ECtHR's case law in which a finding of torture was made in cases where the victim died as a result of the ill-treatment during questioning. Among them, in the case of *Aktas v. Turkey,* the applicant's brother died while being subjected to "pinioning the chest so as to prevent breathing, crucifixion or "Palestinian hanging".[485] In *Salman v. Turkey* [GC] the applicant's husband died as a result of *falaka* and a blow to the chest to which he was subjected during police interrogation.[486] In *Carabulea v. Romania* the victim died as a result of torture being inflicted by police in order to obtain a confession.[487] In *Isayev and others v. Russia* the applicants' relative had died as a result of, among others, beatings and electric shocks inflicted during interrogation.[488] In these cases the ECtHR frequently recognizes that the ill-treatment is considered particularly severe as to amount to torture because it resulted in the victim's death[489] and whenever the factual basis is clearly established by medical documents, then one common trait of these judgments is the succinct reasoning on the qualification of the ill-treatment. Merely one sentence is the usual length of the Court's argument, since death resulting from ill-treatment normally leaves no doubt as to the degree of the abuse.

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[485] *Aktas v. Turkey*, no. 24351/94, 24 April 2003, par. 319.
[486] *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, par. 115.
[487] *Carabulea v. Romania*, no. 45661/99, 13 July 2010, par. 148.
[488] *Isayev and others v. Russia*, no. 43368/04, 21/06/2011, par. 166.
[489] *Aktas v. Turkey*, no. 24351/94, 24 April 2003, par. 319 ("There can be no doubt that the maltreatment was particularly serious, since it resulted in Yakup Aktaş's death."); *Carabulea v. Romania*, no. 45661/99, 13 July 2010, par. 148 ("In the present case there is no doubt that the ill-treatment perpetrated upon Mr Carabulea was particularly cruel and severe since it resulted in his death"); *Isayev and others v. Russia*, no. 43368/04, 21/06/2011, par. 166 ("The Court finds that in the instant case the existence of physical pain and suffering is attested by the medical documents concerning Zelimkhan Isayev and furnished by the applicants (see paragraphs 36 and 37 above). It also considers that the ill-treatment inflicted upon Zelimkhan Isayev was particularly cruel and severe since it resulted in his death.").

However, in two interrogation cases the ECtHR held that only inhuman treatment had taken place despite the death of the victim: *Süheyla Aydin v. Turkey*[490] and *Kişmir v. Turkey.*[491] These two judgments were both adopted in May 2005 (a difference of one week between them) and they were both unanimous on finding inhuman treatment. In both cases the Turkish Government could not provide convincing explanations for all the injuries noted on the bodies of the victims. In the first case, the ECtHR expressed doubts as to the alleged purpose, to obtain information or to punish for certain activities.[492] In the second case, the ECtHR appears to be more convinced that the purpose of the ill-treatment was to obtain information from the applicant's son.[493] Nonetheless, in both cases the outcome depended clearly on severity (the nature and degree of the ill-treatment in *Süheyla Aydin* and the injuries in *Kişmir*[494]) and the ECtHR hesitantly concluded that the ill-treatment amounted to *at least* inhuman treatment. Although at first sight one might be inclined to believe that these are exceptional cases, the explanation for the Court's finding most probably lies in the fact that the standard of proof in these cases is quite high, requiring medical evidence to conclude that torture took place. In *Tanli v. Turkey,* a case in which the applicant's son died during interrogation concerning PKK (the Kurdish Workers' Party) activities, the Court accepted this defence argument from the Government and refused to find a violation in the absence of reliable

[490] *Süheyla Aydin v. Turkey*, no. 25660/94, 24 May 2005.
[491] *Kişmir v. Turkey*, no. 27306/95, 31 May 2005.
[492] *Süheyla Aydin v. Turkey*, no. 25660/94, 24 May 2005, par. 196 ("Although it cannot be excluded that Necati Aydın was subjected to such treatment in order to extract information from him or to punish him for his trade union activities, the Court considers that there is insufficient evidence to reach that conclusion.").
[493] *Kişmir v. Turkey*, no. 27306/95, 31 May 2005, par. 130 ("The Court cannot exclude that the injuries on Aydın's body were the result of ill-treatment to which he was subjected in order to extract information from him. In this connection the Court, noting that no explanation has been given by the Government to justify the detention of Aydın from 6 October 1994 until his death on 12 October 1994, is not convinced by the Government's submission that it was not necessary to question Aydın since there was already sufficient evidence to link him and his friends to terrorism.").
[494] *Süheyla Aydin v. Turkey*, no. 25660/94, 24 May 2005, par. 197 ("However, having regard to the nature and degree of the ill-treatment, the Court finds that it amounted to at least inhuman treatment within the meaning of Article 3 of the Convention."); *Kişmir v. Turkey*, no. 27306/95, 31 May 2005, par. 131 ("Having regard to its findings above, the Court concludes that the injuries on Aydın's body were caused by ill-treatment which could, at least, be qualified as inhuman, within the meaning of Article 3 of the Convention.").

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medical evidence that would show the consistency between the injuries and the alleged torture techniques (electric shocks and water hosing).[495] This conclusion was made even though the Court had established that the applicant's son did not die from natural causes, that fundamental shortcomings were noted with regard to the post mortem examination, and despite the fact that under Article 2 (substantive aspect) of the Convention the Government was found responsible for the unexplained death which took place during interrogation.[496] Unlike cases concerning disappeared persons, where the ECtHR will exceptionally accept witness statements as the sole evidentiary basis of a finding of torture even in the absence of medical evidence,[497] when the person is released from custody then medical documents are necessary to prove that torture took place.

This inflexible rule of requiring reliable medical evidence to prove the causal link between injuries and alleged interrogation methods is understandable as it is reminiscent of domestic criminal law rules, but the downside is that it can transform the analysis into a difficult task of distinguishing between injuries present on the body of the deceased. In the case of *Ognyanova and Choban v. Bulgaria*, the facts of the case had not been so straightforward and resulted in a finding of inhuman treatment. In this case, the applicants' relative (husband and son respectively) had been taken into police custody for questioning but died as a result of a fall from a window of the police station. The ECtHR considered that the Government had not provided an adequate explanation *for all* the injuries and concluded that the remaining unexplained injuries "were indicative of inhuman treatment beyond the threshold of severity under Article 3 of the Convention."[498] In *Tanli,*

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[495] *Tanli v. Turkey*, no. 26129/95, 10 April 2001, par. 158.
[496] *Ibidem*, par. 143-147.
[497] *Çakıcı v. Turkey*, no. 23657/94, 8 July 1999, par. 92.
[498] *Ognyanova and Choban v. Bulgaria* no. 46317/99, 23 February 2006, par. 122.

mentioned above, where electric shocks were alleged, the medical evidence (confirmed by the ECtHR to have been deficient) did not find signs of such method being used. But according to specialized sources[499] injuries resulting from electric shocks might be easily missed or confused with other type of injuries, such as post mortem changes. My point is that requiring medical evidence to attest visible injuries when death occurred during interrogation is a very high standard of proof resting solely on the applicants, despite the state's failure to account for the death and to provide an effective investigation. The consequence is that for such cases to amount to torture they must necessarily involve extremely violent physical ill-treatment. This is not unlike what the U.S. torture memos were proposing for the definition of torture. Furthermore, there might also be an inconsistency in the use of presumptions when the victim presents injuries as a result of the custody and when the victim dies subsequent to being held in custody.

2.7.2 THE UN BODIES: DECREASED STATE COOPERATION BENEFITS THE COMPLAINANTS

The death of the victim was the central element for determining the severity and the qualification of the ill-treatment as torture in the case of *Hanafi v. Algeria*. Here, the UNCAT found a violation of Article 1 of the Convention by relying on concurring witness statements and the State's failure to provide an "immediate investigation."[500] Like the Government in the ECtHR case of *Tanli v. Turkey*, here the State claimed that the death resulted from natural causes, a heart attack, and that there were no marks of the alleged beatings.[501] The UNCAT however rejected these arguments

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[499] *Istanbul Protocol*, par. 212 ("Torturers often use water or gels in order to increase the efficiency of the torture, expand the entrance point of the electric current on the body and prevent detectable electric burns. Trace electrical burns are usually a reddish brown circular lesion from 1 to 3 millimetres in diameter, usually without inflammation, which may result in a hyperpigmented scar. Skin surfaces must be carefully examined because the lesions are not often easily discernible.").
[500] UNCAT, *Hanafi v. Algeria*, Communication no. 341/2008, 3 June 2011, par. 9.3.
[501] Ibidem.

focusing more on the death of the victim and not at all on the injuries. A further case in which the ill-treatment at the hands of public officials resulted in death and was held to amount to torture was that of *Hammouche v. Algeria.*[502] In this case the complainant (the mother of the victim) did not present an official medical document but given that the State did not submit any information on admissibility or merits, the UNCAT relied on the uncontested witness statements and on the claims of the complainant.[503]

Although it rarely provides a qualification for the ill-treatment, in the case of *Akmatov v. Kyrgyzstan* the Human Rights Committee held that the author's son was subjected to torture which resulted in his death.[504] The Committee's conclusion was based on the lack of an adequate investigation by the State and on the fact that the author's allegation had been properly substantiated by a forensic examination and autopsies which confirmed numerous injuries.[505] The UNHRC paid particular attention to detailing the location and types of injuries found on the body of the victim. It should then be noted that in the absence of adequate medical evidence, it is unlikely that such a finding would be made.

2.8 PSYCHOLOGICAL SUFFERING AND TORTURE

In what follows, a comparative assessment of evaluations of mental suffering caused by ill-treatment in interrogations is made. It is shown the ECtHR has more recently shown more consideration of psychological suffering, although there are still judgments in which psychological

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[502] UNCAT, *Hammouche v. Algeria,* Communication No. 376/2009, 08 April 2013, par. 6.2.
[503] Ibidem, par. 3.2 ("According to the consistent accounts of Mounir Hammouche's close friends and relatives, his corpse, which was returned to his family with an official order for immediate burial, bore signs of torture, including a head injury and bruises on his hands and feet") and 6.2.
[504] HRC, *Akmatov v. Kyrgyzstan*, Communication no. 2052/2011, 29 October 2015, par. 8.8.
[505] *Ibidem*, par. 8.2.

suffering is sidelined. For the U.S., civil damages cases are mostly concerned with psychological suffering, during and after the abuse, since this is relevant for the award of damages. For the UNCAT, psychological suffering is dealt with to the extent that long-lasting consequences can be proven. The UNHRC is represented in this section by its most representative case, *Estrella v. Uruguay*,[506] considered in section 2.8.1 together with the ECtHR case of *Gäfgen v. Germany*,[507] since they both concern the topic of threats of ill-treatment. For further elaboration on the issue of threats and psychological suffering see also Chapter 4, Section 4.3.1.

2.8.1 THE ECTHR: GENERIC EVALUATIONS V. SPECIFIC ANALYSIS

The ECtHR's consideration of psychological suffering in assessing severity has gone through several paradigm shifts. In the incipient case law on Article 3, in *Ireland v. United Kingdom*, the Court found acute psychiatric disturbances in the case of individuals subjected to the five techniques.[508] Though acute suffering might be considered synonymous to severe mental suffering, the Court considered the actions were inhuman treatment. The 1990s case law on interrogation was also not particularly anxious about psychological suffering. In 1992 in *Tomasi* and then in 1995 in *Ribitsch*, both applicants had invoked mental ill-treatment and suffering[509] resulting from beatings and insults. The Court however did not make any comment on these allegations. It merely focused on the physical acts and injuries in order to conclude that inhuman treatment had taken place. The exception in this period is the case of *Aydin* which concerned sexual abuse and in which the Court emphasized that "rape leaves deep psychological scars which do not respond to the

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[506] HRC, *Estrella v. Uruguay*, Communication No. 74/1980, 29 March 1983.
[507] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.
[508] *Ireland v. the United Kingdom*, par. 167.
[509] *Tomasi v. France*, par. 112; *Ribitsch v. Austria*, par. 35.

passage of time as quickly as other forms of physical and mental violence."[510] Since 1999, with the judgment of *Selmouni* the Court has reintroduced the standard formula devised in *Ireland v. the United Kingdom* to state that the ill-treatment caused the applicant "feelings of fear, anguish and inferiority capable of humiliating and debasing and possibly breaking physical and moral resistance."[511] It has used it ever since to provide an overall consideration of mental suffering inflicted in the case under examination[512] and often to refer to the suffering specific of acts that amount to degrading treatment.[513] The phrase has also served the Court's avoidance of analyzing psychological suffering or in general of providing more elaborate analyses[514] but it has also served the applicants who do not submit evidence of psychological harm.[515]

Another generic evaluation of psychological suffering is present in the line of cases in which the Court notes the state of permanent fear and anxiety due to the uncertainty in which the victim had been kept.[516] To a certain extent this has spilled over from cases concerning rape, as the first such reference to the uncertainty of the applicant's fate was made in *Aydin*. Cases concerning rape and sexual assault are actually an exception from the usual avoidance of analysing psychological suffering. The Court has relentlessly insisted that rape leaves the victim emotionally and not just

[510] *Aydin v. Turkey*, par. 83.
[511] *Ireland v. the United Kingdom*, par. 167; *Selmouni v. France*, par. 99. Note that the same phrase appears in *Tomasi v. France* (par. 112), but only within the applicant's claims.
[512] See, among others, *Büyükdağ v. Turkey*, no. 28340/95, 21 December 2000, par. 55; *Batı and others v. Turkey*, par. 119; *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, par. 51; *Menesheva v. Russia*, par. 59; *Carabulea v. Romania*, no. 45661/99, 13 July 2010, par. 147.
[513] See, among others, *Barabanshchikov v. Russia*, no. 36220/02, 8 January 2009, par. 51; *Ochelkov v. Russia*, no. 17828/05, 11 April 2013, par. 94; *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 86.
[514] *Fartushin v. Russia*, no. 38887/09, 8 October 2015, par. 43.
[515] *Selmouni v. France*, par. 98 and 105.
[516] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 84; *Dikme v. Turkey*, no. 20869/92, 11 July 2000, par. 95; *Chitayev and Chitayev v. Russia*, no. 59334/00, 18 January 2007, par. 158; *Gelayevy v. Russia*, no. 20216/07, 15 July 2010, par. 127; *Gisayev v. Russia*, no. 14811/04, 20 January 2011, par. 144; *El-Masri v. "the Former Yugoslav Republic of Macedonia"*, no. 39630/09, 13 December 2012, par. 202; *Hajrulahu v. "The Former Yugoslav Republic of Macedonia*", no. 37537/07, 29 October 2015, par. 101.

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physically violated, that rape leaves "deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence."[517]

On the other hand, in more recent cases, for instance in *Gäfgen v. Germany*, which dealt with threats of physical torture,[518] and especially after the torture scandals of Abu Ghraib and Guantanamo were fully grasped, the ECtHR appears more mindful of the psychological effects of ill-treatment,[519] a change that could also be due to its increased focus on the exploitation of the victim's vulnerabilities when assessing severity and torture. However, this is no guarantee for a finding of torture. In *Gäfgen* the ECtHR analysed a claim of torture that had allegedly taken place during a classic ticking bomb scenario. The applicant had kidnapped a child and had been arrested by the authorities. In order to obtain information about the exact location of the boy, the detective officer, acting at the orders of the deputy chief of police, threatened the applicant (who had been handcuffed in the interrogation room) with "intolerable pain" inflicted by an experienced professional who would not leave any physical traces and would apply torture under the medical supervision of a police doctor. The threat of torture, as the applicant was informed, was imminent, since the professional was going to be flown in by helicopter.[520] The ECtHR concluded that the imminent threat of physical torture amounted to inhuman treatment. It also clarified what appears to be a two-pronged test for classifying threats of physical torture as torture. Contextually, the

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[517] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 83; *Maslova and Nalbandov v. Russia*, no. 839/02, 24 January 2008, par. 107; *Zontul v. Greece*, no. 12294/07, 17 January 2012, par. 88-89.
[518] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.
[519] *El-Masri v. "the Former Yugoslav Republic of Macedonia"*, no. 39630/09, 13 December 2012, par. 208; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, par. 515; *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 102 and 110; *Hajrulahu v. "The Former Yugoslav Republic of Macedonia"*, no. 37537/07, 29 October 2015, par. 101; *Fartushin v. Russia*, no. 38887/09, par. 52-54, 8 October 2015, par. 43. See also Concurring opinion of Judge Motoc in *Nalbandyan v. Armenia*, par. 2 ("[…]the intense psychological suffering arising from the very close family ties between the two victims was considered sufficient to find that the physical violence which occurred during the period in custody had amounted to an act of torture").
[520] *Gäfgen v. Germany* [GC], par. 15, 47, and 94.

ECtHR would look at all the circumstances of the case but more specifically it would look, first, at the "severity of the pressure exerted" on the victim (namely whether the threat of imminent ill-treatment was real and immediate), and second, at the "intensity of the mental suffering,"[521] which should be at the level of cruel suffering to reach the level of torture. On the facts of the case, the threat of physical torture had fulfilled the first prong, but not the second. The ECtHR most probably compared the facts of the case with its own case law on torture but also with cases from other jurisdictions referred to in its judgment, specifically *Maritza Urrutia v. Guatemala* and *Estrella v. Uruguay*.[522] *Maritza Urrutia* had been pronounced by the Inter-American Court of Human Rights and concerned torture and death threats of the complainant and her family, along with sleep deprivation, and disorientation methods.[523] The second, *Estrella v. Uruguay*, pronounced by the UNHRC, concerned a pianist threatened that his hands would be cut with an electric saw. The Committee found torture and observed that the threats of amputation had left the author with long-lasting physical effects (loss of sensitivity in the arms and hands for eleven months).[524] By comparison, as the ECtHR observed, Gäfgen, who found himself in a vulnerable and constraining situation, had experienced "considerable fear, anguish and mental suffering" but he did not present medical evidence of "long-term adverse psychological consequences."[525] For

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[521] Ibidem, par. 108.
[522] Although not mentioned by the ECtHR in *Gäfgen*, the Human Rights Committee had found inhuman treatment in a case concerning incommunicado detention and, alleged by the author, also threats of torture. It was in a decision pronounced one year before *Estrella*. However, the decision in *de Bouton v. Uruguay* is unclear as to whether the threats were taken into account in the final assessment by the UNHRC or whether only the incommunicado detention to which the author had been subjected made the object of the finding (see *De Bouton v. Uruguay*, Communication No. 37/1978, 27 March 1981, par. 10-13). Therefore this decision is not very instructive for the purposes of this thesis, considering that the UNHRC does not explicitly state whether any ill-treatment took place during interrogation.
[523] Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*, Series C No. 103, 27 November 2003.
[524] HRC, *Estrella v. Uruguay*, Communication No. 74/1980, 29 March 1983, par. 8.3.
[525] *Gäfgen v. Germany* [GC], 103.

the ECtHR this meant that the actual mental suffering due to the anticipated pain did not reach the severity of torture.

Also, in 2015, in *Fartushin v. Russia* the ECtHR concluded that the applicant was subjected to inhuman and degrading treatment while being questioned by police officers.[526] In this case the applicant had been shackled, beaten up, kicked and punched on various parts of the body and suffered injuries which included "a bruise on his back measuring 3 to 4 cm, an abrasion measuring 4 to 10 cm on his left forearm and an endermic haemorrhage on his chest."[527] These physical effects were not mentioned in the final analysis of the qualification of the ill-treatment. The severity of the ill-treatment was focused on psychological suffering, as the Court stated that the ill-treatment caused the applicant "considerable fear, anguish and mental suffering."[528] The "considerable fear" concise language also appears in *Turbylev v. Russia*,[529] noted with the vulnerability of the applicant and the nature and circumstances of the ill-treatment, and in *Gorshchuk v. Russia*,[530] coupled with the nature of the ill-treatment.

Psychological suffering is more prominent in recent cases although the Court's reasoning does not include references to scientific evidence or medical reports. In *El-Masri v. the Former Yugoslav Republic of Macedonia,* where the applicant had been subjected to solitary confinement for 23 days and threats of death, it led the Court to consider that he had suffered "emotional and psychological distress."[531] The reasoning makes no references to an expert opinion so in the absence of any further explanation it could be inferred that the nature of the ill-treatment and its

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[526] *Fartushin v. Russia*, par. 43.
[527] *Ibidem*, par. 9 and 21.
[528] *Ibidem*, par. 43. For a similar holding, see also
[529] *Turbylev v. Russia*, no. 4722/09, 6 October 2015, par. 65.
[530] *Gorshchuk v. Russia*, no. 31316/09, 6 October 2015, par. 33.
[531] *El-Masri v. "the Former Yugoslav Republic of Macedonia" [GC]*, par. 202-203.

perceived seriousness were the reasons for the Court's extrapolation that psychological distress had indeed occurred. "Common knowledge" might also be cited for instance to explain the victim's suffering and hesitation in contacting the authorities immediately after ill-treatment.[532] In this line of reasoning, common knowledge or intuitive estimations of what the public believes could then also be used to argue that psychological ill-treatments are a second-class type of treatment which could never amount to torture. At this point I should mention that I do not disagree with the fact that in these cases the consideration of psychological effects was warranted, but my intention is merely to point at the ECtHR's habit of inferring certain aspects without adequately strengthening its arguments or placing psychological ill-treatments on a secondary position (sometimes ignoring them altogether) when other treatments causing visible injuries have been proven.[533] If it did provide stronger arguments, it would then respond to the criticism that legal and psychological experts have eagerly pointed at for so long and it would enable the victim to effectively receive the consideration and recognition of her mental suffering.

2.8.2 THE UNCAT: LACK OF FOCUS ON PSYCHOLOGICAL SUFFERING, UNLESS MEDICAL EVIDENCE IS PROVIDED

Although the UNCAT appears to focus more and more on the nature of the ill-treatment, the analysis of complaints concerning psychological suffering is almost completely absent from the UNCAT views. In *Slyusar*, although the applicant invokes this issue,[534] no detailed analysis is

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[532] See *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 102.
[533] *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 115 (in this case the applicants presented medical documents for some of the treatments such as suspension, beatings, spraying with water, and falaka, and the Court held that for the rest of the treatments alleged, there was no need to assess their veracity given the difficulty of proving them. In this category of treatments that did not need further assessment were included those methods that inflict mental suffering such as sleep deprivation, insults, and threats with death or rape).
[534] UNCAT, *Slyusar v. Ukraine*, Communication no. 353/2008, 14 November 2011, par. 2.4.

provided, presumably because he did not provide any supporting evidence of a mental disorder resulting from such methods. In *Evloev* the complainant alleged psychological pressure[535] used by the authorities in order to determine him to confess to having committed multiple crimes, but this type of ill-treatment is not discussed by the Committee and the reference made only to the physical injuries suggests that this would in any case be of a negligible importance in the Committee's analysis, since psychological suffering lacks the visibility of physical injuries. Also, in *Abdelmalek* the complainant invoked psychological suffering resulting from insults, threats of rape against him and his sister, and being kept blindfolded.[536] The Committee again does not provide any indication that these allegations were relevant for the assessment of severity. Furthermore, in *Niyonzima v. Burundi,* although brutal physical ill-treatments were inflicted on the complainant, all of them highlighted with particular detail in the Committee's analysis, the greatest impact on the complainant was his humiliation, which broke his will and made him confess to all the alleged crimes.[537]

On the other hand, the psychological damage to health, resulting from physical or psychological methods of interrogation, is mentioned in the Committee's analysis to the extent that relevant medical evidence is provided. In *Gerasimov v. Kazakhstan,* the long-lasting psychological effects (post-traumatic stress disorder) are mentioned on an equal footing with the physical injuries

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[535] UNCAT, *Evloev v. Kazakhstan,* Communication no. 441/2010, 5 November 2013, par. 2.1.
[536] UNCAT, *Abdelmalek v. Algeria,* Communication no. 402/2009, 23 May 2014, par. 2.10.
[537] UNCAT, *Niyonzima v. Burundi*, Communication no. 514/2012, 21 November 2014, par. 2.6 ("the Deputy Administrator-General told Maregaregare to give the complainant "the bread", namely, a filthy stone placed in the mouth to stifle the victim's cries. The officers held the complainant's head still and forced his mouth open to put in the stone. At the same time, they gave him a blow to the spine with a hose. The complainant spat the stone out, so Maregaregare brought in a plastic bag full of excrement in which to put the stone. This prospect made the complainant admit to everything of which he was accused, and a series of questions were put to him to get him to admit to his involvement in the coup d'état, to all of which he answered in the affirmative. With that, the torture session finished and the complainant signed a statement attesting to his involvement in the alleged attempted coup d'état. The 3 hours of agony inflicted on the complainant during the torture session had been filmed by an intelligence officer, thereby compounding the humiliating and degrading nature of the physical suffering").

inflicted on the complainant during the police interrogation.[538] A quick mention of psychological long-term sequelae on the health of the complainant is also made in *Taoufik Elaiba v. Tunisia*,[539] but no further details are provided as to what kind of effects were confirmed and what is the significance of this element in assessing severity. The fact that psychological effects appear in more recent cases might not be due to a change in the way that severity is assessed by the UNCAT, it might simply be due to the complainants becoming more informed, diligent, or being supported with quality legal advice when presenting evidence for their claims. Nonetheless, given the evolution of the UNCAT views, with increasingly detailed analysis being provided from one year to another, this factor might have also affected the assessment of severity.

2.8.3 THE U.S.: PSYCHOLOGICAL SUFFERING MAY CONSTITUTE MENTAL TORTURE

For the U.S., psychological suffering is mostly highlighted as such in cases concerning damages for torture. Courts will emphasize the mental suffering while the events took place but also how the trauma has affected the lives of plaintiffs in all relevant aspects, and how it continues to affect them their entire life, their relationship with their family and friends, as well as their performance at work or impossibility to continue working because of the ill-treatment.[540] For instance, in 2003, in *Acree v. Republic of Iraq*, the U.S. District Court for the District of Columbia noted the lasting effects on the mental health of all the plaintiffs, prisoners of war tortured in Iraq, many diagnosed with PTSD. The court noted the "lasting emotional harm" on their personal and professional lives.[541] Going even further, in the same year, in *Price v. Socialist People's Libyan Arab*

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[538] UNCAT, *Gerasimov v. Kazakhstan* Comm Number: 433/2010, 24 May 2012, par. 2.7 and 12.2.
[539] UNCAT, *Taoufik Elaiba v. Tunisia*, Communication no. 551/2013, 6 May 2016, par. 7.4.
[540] See, among others, *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), at 332-333; *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C.2002), at 227; *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015).
[541] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), at 190.

Jamahiriya, the U.S. District Court for the District of Columbia held that forcing plaintiffs, on three occasions, to watch fellow prisoners being beaten (including being beaten to death) under the threat of being themselves subjected to the same treatment unless they confessed, would satisfy the requirements necessary to state a claim of mental torture.[542]

2.9 The Duration or Length of the Ill-Treatment as a Factor in Determining Torture

In this section, an overview is provided on the role of the duration or length of ill-treatments in determining the severity of suffering and implicitly torture. It is shown that for the ECtHR this criteria is very often mentioned in its judgments, though at the level of general principle, when in fact a closer look at the case law shows that it is of limited importance. For the UN bodies, an opposing trend can be discerned, an increased consideration by the UNCAT and a decrease for the UNHRC. As for the U.S., length is always of relevance, in both due process cases and in civil damage litigation, in the latter especially for the establishment of damages.

2.9.1 The ECtHR: Length is theoretically relevant though used arbitrarily

The duration of the ill-treatment is always mentioned by the ECtHR among the factors that are taken into account for determining the severity of ill-treatment. The stated rule is that ""severity" is, like the "minimum severity" required for the application of Article 3, 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."[543]

[542] *Price v. Socialist People's Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20 (D.D.C. 2003), at 25-26.
[543] *Selmouni v. France*, par. 100. (see, among others,; *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005)

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The test for the minimum level of severity was introduced in *Ireland v. United Kingdom*,[544] then used in the same wording in *Akkoç v. Turkey*.[545] In 1992, in *Tomasi v. France*, where the ill-treatment during interrogation sessions (three sessions during the night) lasted for maximum fourteen hours in total, the Court implied that the length and timing of interrogation pertains to the domestic regulation of police custody and refused to look at these elements.[546] Then in *Selmouni*, pronounced in 1999, the Court introduced this phrase to assess severity specific of torture, and with it the length of the ill-treatment as a relevant factor. However, by carefully analysing the case law it does not actually prove to be a significant element for determining the severity of the treatment or the overall qualification of the ill-treatment.

The repeated mention of this general principle has perpetuated its alleged importance when in fact, if a review of the judgments on interrogational torture and inhuman treatment is carried out it can be concluded that in very few of them the element is actually of relevance. To illustrate this, I have included a table at the end of this sub-section with examples of ECtHR cases and the respective length of the ill-treatment (and its relevance where applicable). Out of sixty-nine cases concerning torture and inhuman treatment, the length of the ill-treatment was mentioned in nine cases in various instances. In three of these cases length is mentioned in the final conclusion, though it was not actually mentioned in the reasoning; in one case length is mentioned in the analysis though only as a matter of fact; and finally, in five cases it appears to have been relevant for the assessment of severity (though even in some of these five cases, it might be debatable). What is however

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[544] *Ireland v. the United Kingdom*, par. 162.
[545] *Akkoç v. Turkey*, Applications nos. 22947/93 and 22948/93, 10 October 2000, par. 114.
[546] *Tomasi v. France*, par. 115.

notable is that length was considered relevant in four torture cases and only in one case concerning inhuman treatment.

To further exemplify, there are cases in which length is mentioned in the analysis but no significant value is given to it for the assessment. In *Gäfgen* [GC], the Court mentioned the duration of the ill-treatment, ten minutes, to be one of the fourt elements considered,[547] but in a matter-of-fact way, without providing any indication whether this is too short for severity specific of torture and without explaining the bearing of this factor on the final qualification. On the other hand, in the Fifth Section judgment of the same case, the fact that "the questioning lasted for some ten minutes only"[548] was clearly an element in support of the argument that the treatment was only inhuman treatment. In *Myumyun v. Bulgaria*, the length of the ill-treatment, several hours, was mentioned in the final analysis of the qualification, but no specific importance appears to have been given for the finding of torture. [549] More recently, in the 2017 judgment of *Ovakimyan v. Russia*, the Court mentioned the duration of the ill-treatments to which the applicant was subjected during interrogation with specific details of time and date.[550] In this case, the ill-treatments had taken place in two sessions of approximately six hours each (overall approximately twelve hours). However, no further analysis is provided as to the importance of this detail in the overall assessment of the severity. There is no mention of whether this is particularly prolonged ill-treatment, so in the absence of any significance being attributed to it, the element becomes redundant.

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[547] *Gäfgen* [GC], par. 102.
[548] *Gäfgen v. Germany* [Fifth Section], no. 22978/05, 30 June 2008, par. 69.
[549] *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015, par. 62.
[550] *Ovakimyan v. Russia*, no. 52796/08, 21 February 2017, par. 47.

To conclude, the length of the ill-treatment is not and should not be an indicator of severity of ill-treatment. The same duration (hours/days/weeks/months) for which the ill-treatment is carried out may well be encountered in torture or in inhuman treatment cases. Furthermore, the use of this element leads to arbitrary determinations as to what constitutes for instance prolonged ill-treatment. It also paves the way for public authorities to argue that a short duration is not indicative of torture and sometimes not even ill-treatment.

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TABLE CONCERNING THE LENGTH OF THE ILL-TREATMENT IN THE ECTHR CASE LAW[551]		
TORTURE	**Year decided**	**INHUMAN TREATMENT**
	1978	**Several days or more than a week** - *Ireland v. the UK*
	1992	**14 hours** - *Tomasi v. France*
3 days - [GC] *Aydin v. Turkey*	1997	
3 days - *Selmouni v. France* **Approx. 1 month** - [GC] *Cakici v. Turkey – length is not mentioned as relevant*	1999	
10 days - *Akkoç v. Turkey* **5 days** - *Dikme v. Turkey* – "95. In the instant case the first applicant undeniably lived in a permanent state of physical pain and anxiety owing to his uncertainty about his fate and to the blows repeatedly inflicted on him during the **lengthy interrogation sessions** to which he was subjected throughout his time in police custody."	2000	**15 days** - *Büyükdağ v. Turkey*
Max. 5 days - *Aktas v. Turkey* **17-25 days** - *Elçi and Others v. Turkey*	2003	**1 day** - *Hulki Güneş v. Turkey* **17-25 days** - *Elçi and Others v. Turkey*
8-11 days - *Batı and others v. Turkey – length is mentioned in the final conclusion, though it was not actually mentioned in the reasoning*	2004	**1 day** - *Toteva v. Bulgaria* - *Rivas v. France*
1 day - *Corsacov v. Moldova* - *Menesheva v. Russia* **3 days** - *Sheydayev v. Russia - length is mentioned in the final conclusion, though it was not actually mentioned in the reasoning* - *Mikheyev v. Russia* **8 days** - *Hüseyin Esen v. Turkey – length is mentioned as relevant in the final conclusion, though it was not actually mentioned in the reasoning*	2006	**1 day** - *Jalloh v. Germany*

[551] Note that comments are included for those cases in which the length – duration or durée – of the ill-treatment was mentioned, not as a general principle, but with reference to the ill-treatment under examination.

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App. 10 days - *Ölmez v. Turkey* **1 day** - *Mammadov (Jalaloglu) v. Azerbaijan*	2007	
1 day - *Maslova and Nalbandov v. Russia* **Less than 5 days** - *Erdal Aslan v. Turkey*	2008	**1 day** - *Nadrosov v. Russia*
4 days - *Buzilov v. Moldova* **2 days** - *Polonskyi v. Russia* **Approx. 1 month** - *Gurgurov v. Moldova*	2009	**1 day** - *Barabanshchikov v. Russia*
1 day - *Nikiforov v. Russia* **3 days** - *Carabulea v. Romania* **4 months** - *Kopylov v. Russia – length is relevant:* "126. Given the purpose, length and intensity of the ill-treatment and the particularly serious health damage caused by it, the Court concludes that it amounted to torture within the meaning of Article 3 of the Convention."	2010	**10 Minutes** - *Gäfgen v. Germany – length is mentioned* **At least 1 day** - *Kovalchuk v. Ukraine* **Approx. 10 days** - *Eldar Imanov and Azhdar Imanov v. Russia*
1 day - *Isayev and others v. Russia* **16 days** - *Gisayev v. Russia*	2011	**Max. 3 days** - *Dushka v. Ukraine*
Unspecified length (less than 1 day) - *El-Masri v. "the Former Yugoslav Republic of Macedonia" (treatment at the Skopje Airport)* **1 day** - *Grigoryev v. Ukraine* - *Lenev v. Bulgaria* **2 days** - *Savin v. Ukraine* **Max. 4 days** - *Kaverzin v. Ukraine* (pilot judgment)	2012	**Approx. 2 days** - *Nitsov v. Russia* **Max. 2 days** - *Hajnal v. Serbia* **11 days** - *Alchagin v. Russia* **23 days** - *El-Masri v. "the Former Yugoslav Republic of Macedonia" (treatment at the hotel)*
1 day - *Kaçiu and Kotorri v. Albania* **12 days** - *Tarasov v. Ukraine*	2013	**Several hours** - *Nasakin v. Russia* **1 day** - *Samartsev v. Russia* - *Ryabtsev v. Russia* **2 days** - *Ochelkov v. Russia*
1 day - *Lyapin v. Russia* **3 sessions during an overall period of 2 months** - *Bulgaru v. Moldova*	2014	**1 day** - *Bobrov v. Russia* - *Mostipan v. Russia*

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6 months - *Al Nashiri v. Poland*		
Approx 1 month, on and off (2^{nd} and 3^{rd} applicants) - *Nalbandyan v. Armenia – length is not mentioned as relevant* **12 hours/several hours** - *Razzakov v. Russia – length is mentioned as relevant*: "54. The applicant endured **the sequence of these abhorrent acts** of physical and psychological violence during a **prolonged period of time**, […], for **at least twelve hours**." - *Myumyun v. Bulgaria - length is mentioned in the analysis but no specific importance appears to have been given*: "62. Here, the ill-treatment lasted intermittently for **several hours** and consisted of […]" **3 days** - *Hajrulahu v. "The Former Yugoslav Republic of Macedonia*"	2015	**Max. 11 hours** - *Gorshchuk v. Russia* **1 day** - *Turbylev v. Russia* - *Asllani v. "the former Yugoslav republic of Macedonia*" - *Fartushin v. Russia*
	2016	**12 hours** - *Shlychkov v. Russia*
Approx. 12 hours - *Ovakimyan v. Russia - length is mentioned with details of exact date and time intervals apparently to suggest that the interrogation was during the evening and night*	2017	

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2.9.2 THE UN BODIES: LENGTH MIGHT BE IMPORTANT THOUGH IT IS RARELY EMPHASIZED

For the UN bodies the length of the ill-treatment does not seem to be of great importance, though at the same time it has to be admitted that the concise way of drafting their views can make it difficult to distinguish between factual information and actual legal argument. The UNCAT has not mentioned the duration of the ill-treatment in its assessment on the merits until 2014 in the case of *Abdelmalek v. Algeria*[552] where the applicant had been subjected to several ill-treatment sessions during a period of four years, but even in this case it was mentioned rather factually, without insisting further on its significance. Other cases in which the length was mentioned by the UNCAT include *Taoufik Elaiba v. Tunisia*,[553] six days, and *Kabura v. Burundi*,[554] four hours. Essentially, out of fifteen cases in which a violation of Article 1 of the Convention was found, only these three mention the duration of the ill-treatment in the assessment of the merits. All three decisions are quite recent, pronounced after 2014, after the decisions of the UNCAT have started to offer a more detailed analysis.

Unlike the UNCAT, the UNHRC mentioned the duration of the ill-treatment quite early in its analysis on the merits, though in the same style as it generally presented its statement-like reasoning. In the 1980s, the Committee mentioned the duration in a factual manner in *Motta v. Uruguay*[555] (fifty days), *Muteba v. Zaire*,[556] (nine days), in *Arzuada v. Uruguay*,[557] (fifteen days), and in *Cariboni v. Uruguay*,[558] (seven days). Since then however, this element has been mostly absent from the analysis. In *Giri v. Nepal*, in which the Committee clarified that the purpose is the

[552] UNCAT, *Abdelmalek v. Algeria,* Communication no. 402/2009, 23 May 2014, par. 11.2.
[553] UNCAT, *Taoufik Elaiba v. Tunisia*, Communication no. 551/2013, 06 May 2016, par. 7.3.
[554] UNCAT, *Kabura v. Burundi*, Communication no. 549/2013, 16 November 2016, par. 7.2.
[555] HRC, *Motta v. Uruguay*, no. 11/1977, 29 July 1980, par. 14.
[556] HRC, *Muteba v. Zaire*, no. 124/82, 24 March 1983, par. 10.2.
[557] HRC, *Arzuada v. Uruguay*, no. 147/1983, 1 November 1985, par. 13.2 and 14.
[558] HRC, *Cariboni v. Uruguay*, no. 159/1983, 27 October 1987, par. 9.2.

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determinant element in categorizing an ill-treatment as torture, it also clearly referred to the duration of the ill-treatment (thirteen months)[559] more than in a factual way, as it used to do in the previous cases. It then followed the same line in *Chiti v. Zambia*[560] (nine days). What is then notable is a decrease in the mentioning of this element in the analysis, even when the length is considerable.[561]

2.9.3 THE U.S.: LENGTH IS CONSTANTLY A RELEVANT CRITERIA

The U.S. is apparently the only jurisdiction in this study in which the length of coercive interrogation is constantly an important criteria for determining whether a violation of the victim's rights took place. This element is always mentioned in due process cases brought before the U.S. Supreme Court. In *Chambers v. Florida* the U.S. Supreme Court highlighted the length of coercive interrogation, five days from which the last one was an all-night interrogation in coercive circumstances.[562] In *Ashcraft v. Tennessee*, the length was also relevant as the petitioner had been held incommunicado during continuous interrogation for 36 hours with only five minutes break throughout this time.[563] When the accused also presents a mental illness or there are doubts as to his mental illness, an interrogation of even a couple of hours will be deemed coercive when the person is isolated from family and lawyer. Such was the case in *Backburn v. Alabama*,[564] where the accused had been interrogated for approximately nine hours, in *Fikes v. Alabama*,[565] where he had been interrogated for several hours while isolated from the rest of the world, and in *Spano v.*

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[559] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, 7.2.
[560] HRC, *Chiti v. Zambia*, Communication No. 1303/2004, 26 July 2012, par. 12.2.
[561] HRC, *Acosta v. Uruguay, no. 162/1983, 25 October 1988;* HRC, *Jumaa v. Libyan Arab Jamahiriya*, no. 1755/2008, 19 March 2012.
[562] *Chambers v. Florida*, 309 U. S. 227, 309 U. S. 235-238 (1940).
[563] *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).
[564] *Blackburn v. Alabama*, 361 U. S. 199 (1960).
[565] *Fikes v. Alabama*, 352 U. S. 191 (1957).

New York,[566] where the accused had been interrogated for eight hours, mostly during the night and by a large group of officials who overbore his will in the early hours of the morning. In 1963 in *Haynes v. Washington* the U.S. Supreme Court considered incommunicado detention during interrogation for five to seven days as a violation of due process rights. In 1966 in *Davis v. North Carolina* the U.S. Supreme Court reversed a conviction after the accused had been subjected to interrogations repeated every day for 16 days without access to any outside contact.[567] In *Reck v. Pate*,[568] the Court explicitly recognized that the length of detention without being presented to a magistrate (and implicitly the length of the interrogation) is a relevant indicator of the coerciveness of an interrogation, one of three elements under consideration, besides the method used (being held incommunicado) and the manner of interrogation.

In cases concerning tort claims, the duration of the ill-treatment is also relevant, maybe more so because it will contribute to determining the amount of damages awarded. The exact number of days of torture or detention will be determined, since the damages are calculated for lost wages, business opportunities and compensatory damages for pain and suffering per day. For this purpose, in *Cicippio v. Islamic Republic of Iran* the court calculated exactly the number of days of detention even though the length went well beyond 1000 days for two of the plaintiffs.[569]

Furthermore, the court in *Doe v. Qi*[570] retained this element as one of the three elements in determining the severity of the treatment. It found that detention and coercive interrogation ranging from approximately 100 days to 20 days, in the case of the latter with three hours for each ill-

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[566] *Spano v. New York*, 360 U. S. 315 (1959).
[567] *Davis v. North Carolina*, 384 U. S. 737 (1966).
[568] *Reck v. Pate*, 367 U.S. 433 (1961) citing *Turner v. Pennsylvania*, 338 U.S. 62 (1949).
[569] *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).
[570] *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal 2004).

treatment and interrogation session is specific of torture. In *Xuncax v. Gramajo*[571] the U.S. District Court for the District of Massachusetts held for one of the petitioners that interrogation which included beatings with the hands and guns, being placed in thick plastic bags and threatened with death for fourteen hours by the military amounted to torture.

However, what is noticeable is that even when the ill-treatment is lengthy, if the severity is not of a certain level, caused by an egregious and cruel method or causing very serious injuries, in all likelihood the ill-treatment would not amount to torture. In *Xuncax v. Gramajo*, mentioned above, the second petitioner for which the U.S. District Court for the District of Massachusetts held that torture had been inflicted, had been subjected to blindfolding, burning with cigarettes, repeated beatings and rapes, and had been lowered into a pit filled with bodies and rats. No mention is made of the length of the ill-treatment although usually courts calculate the precise number of days for the duration of an ill-treatment. Here, the repetition of certain acts is highlighted not with the intention of focusing on the duration but rather to emphasize the amount of cruel acts to which she had been subjected.

Lastly, it should be noted that this element was essential in the Torture Memo, which emphasized that physical suffering should be "of some extended duration or persistence"[572] "rather than merely mild or transitory."[573]

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[571] *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995).
[572] Memorandum opinion for the Deputy Attorney General, 30 December 2004, available at https://www.justice.gov/file/18791/download last accessed in December 2016.
[573] Ibidem.

2.10 CONCLUSION

In this chapter I have analysed the case law concerning interrogational torture from the point of severity determined by a quantitative approach. I have looked at the effects on the victim and the length of the ill-treatment, essentially to elements that denote a quantification of the ill-treatment. Though in a more limited manner, for some jurisdictions, I have also touched upon the nature of the acts. What can be concluded from this chapter is that for the ECtHR, the effects of the treatment has been a widely used approach to determine the boundary between torture and inhuman treatment. Treatment that resulted in the death of the victim, in the loss of an organ or in long-lasting effects upon the health of the applicant would very likely be considered torture. Furthermore, the number of acts inflicted (combinations of several methods of ill-treatment) and the number of injuries is also a factor used to determine severity specific of torture or inhuman treatment. While in 1999, in *Selmouni*, the Court lowered the threshold for torture,[574] it still continued to find torture when the number of acts inflicted or the number of injuries was elevated and cruel, sometimes covering the entire body (as was actually the case in *Selmouni*). A further lowering of the threshold took place at least since 2009, when the Court explicitly stated that torture does not depend on long-term consequences on the health of the applicant. Since then it has also focused more on psychological suffering and the 'war on terror' cases brought to the Court have further contributed to giving more attention to psychological ill-treatments.

For the U.S., although by law torture and inhuman or degrading treatment is prohibited during interrogations, the scarcity of cases that actually deal with torture on the merits has created a case

[574] *Selmouni v. France*, par. 101 ("certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future").

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law that considers torture the extreme of ill-treatments. The U.S. Supreme Court does not go through a detailed process of determining whether torture took place during interrogations (only rarely it would make such findings), nor does it look at the four classical elements we know from the UNCAT definition or focus on injuries. Any method by which a confession is obtained against the will or the integrity of the suspect will be a violation of substantive due process and could give rise to a civil claim under Section 1983. However, the use of due process as an umbrella for various rights and the case law's emphasis on procedural due process has meant that indicating whether torture or inhuman treatment took place during coercive interrogation is side-lined in constitutional law. Therefore, courts considering damages for torture remain the main source for an interpretation of its meaning and they do not shy away from specifically stating that the more cruel and severe, the likelier that the treatment will amount to torture. Furthermore, they consider that not every physical trauma will suffice to be severe enough for torture, so the threshold for torture is kept quite high. In this context, as it has already been argued in the literature, relying on civil remedies to curb abuses by police is inadequate.[575] Moreover, the U.S. Supreme Court's continued reluctance to indicate where torture has taken place and its support for avenues of avoiding the merits of the war on terror cases (political question doctrine, immunities, state secrets and national security doctrine, etc.) is inadvertently supporting a restrictive understanding of torture.

With regard to the approach of the UN bodies, their conclusions are formulated on the basis of whether the facts have been ascertained and on the whole it appears much easier to conclude that torture was inflicted during interrogations. However, unlike the other jurisdictions, they do not offer detailed analyses of the treatments and this has been a point of constant criticism in the

[575] See Paul G. Kauper, "Judicial Examination of the Accused: A Remedy for the Third Degree," *Michigan Law Review,* Vol. 73, No. 1 (Nov., 1974): 39-70; John T. Parry, "Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez," *Georgia Law Review,* Vol. 39 (2005): 739-740.

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literature.[576] Essentially, what we know as the second part of the analysis typical to the ECtHR case law on interrogational torture, where a qualification is provided, is completely absent in UNHRC and UNCAT views. Although from their succinct reasoning it can be inferred that the effects of the ill-treatment and its nature are the main elements when determining severity, for the Human Rights Committee for instance there is hardly any discussion of thresholds of pain or suffering or implying any correlation between the amount of bruising/injuries and the seriousness of the treatment alleged. Though at a first glance this does not appear like an outrageous approach, it might be argued that the discretion of the Committee in choosing whether to provide a qualification has also resulted in a case law that is devoid of any uniformity and predictability when it comes to determining what is essential in finding torture in interrogation cases. The Committee's decision in *Giri v. Nepal*, clarifying that the essential element is the purpose of ill-treatment is at least doubtful, since in that very case the Committee does nothing but to state this principle and then move on to other issues, without giving any bearing to this principle in the actual facts of the case. Therefore, as I have shown, more recently the UN bodies appear to be undergoing a process of providing more detailed reasoning for their views but further development is still necessary.

Finally, two general remarks. With regard to psychological suffering, since a quantitative approach relies on visible injuries, bruises, haematomas and other physical marks, psychological suffering and the emotions induced by pain[577] are not an easily discernible factor as it is almost exclusively

[576] See the remark of Edouard Delaplace about the reporting procedure at the UNCAT (which I believe is also illustrative for the UNCAT decisions) cited in Tobias Kelly, "The cause of human rights: doubts about torture, law, and ethics at the United Nations," *Journal of the Royal Anthropological Institute* (N.S.) 17, p. 733 ("so many good people put so much work into the process, but at its heart, the committee is simply not up to the job").

[577] Bernard Baertschi, "Human dignity as a component of a long-lasting and widespread conceptual construct," *Journal of bioethical inquiry,* Vol. 11, Issue 2 (2014): 206 (the author argues that torture is a paradigm of degrading treatment not because of the pain inflicted through ill-treatment but because pain induces "emotions and behaviors that are in contradiction to what the victim wants to feel and to be as a free and rational person").

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within the subjective experience of the victim of torture. The legal literature criticizes the courts for focusing preponderantly on physical ill-treatment rather than on mental suffering, which marginalizes the subjective experience of the victim.[578] While I consider this criticism partially accurate, I believe that courts are largely powerless if the complainants do not submit adequate evidence (witness statements, medical evidence) to prove their claims. Finally, I would note that analysing severity predominantly on the basis of a quantitative approach, by looking at the consequences on the health of the victim (long-term damage to health), the accumulation of various methods, the length of the application of a method is what made it possible for the Torture Memos' authors to argue that waterboarding is not torture. They essentially exploited each of these criteria in determining severity that is specific of torture, so a quantitative approach could be counterbalanced by other options to determine torture. Further chapters will look into cruelty as an indicator of torture and the vulnerability of the victim as an emerging approach for interrogational torture.

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[578] See, among others, Pau Perez Sales, *Psychological Torture: Definition, Evaluation and Measurement*, Routledge, 2016; Kimberly Alexa Koenig, "Indefinite Detention / Enduring Freedom: What Former Detainees' Experiences Can Teach Us About Institutional Violence, Resistance and the Law" (PhD diss., University of California, Berkeley, Fall 2013): 34; Brian H. Bornstein and Samantha L. Schwartz, "Injured body, injured mind: Dealing with damages for psychological harm," *The Jury Expert*, Vol. 21, No. 2 (2009): 33-39.

3 CRUELTY AND THE NATURE OF ILL-TREATMENT

3.1 INTRODUCTION

Another indicator used for determining severity of pain or suffering specific to torture is the cruelty of the ill-treatment. It pertains to the nature of the treatment so my understanding is that if an ill-treatment is considered cruel it is so irrespective of the victim's subjective characteristics or the actual effects on the victim. However, the term "cruel" has been so overly-used when speaking of torture and inhuman treatment that it has not surprisingly become a vague one, the term being used sometimes without an explanation of why it is suited in a particular context. In the legal literature scholars naturally use "cruel" or "cruelty" to refer to torture,[579] (frequently without explaining why they do so), to discuss other categories of ill-treatment outside torture,[580] or to designate both torture and other types of ill-treatment.[581]

The word cruel appears in two main phrases that have become by now very well known when speaking of ill-treatment. The first is the phrase "cruel and unusual punishment" and the second is "cruel, inhuman and degrading treatment." These two phrases illustrate the evolution of the meaning of "cruel." With regard to the latter however, there is much confusion over the meaning of cruel, as sometimes it is used as the equivalent of torture while other times as the equivalent of inhuman treatment. As it will be shown, the ECtHR uses cruelty in relation to torture while the

[579] Tobias Kelly, "The UN Committee against Torture: Human rights monitoring and the legal recognition of cruelty," *Human Rights Quarterly* Vol. 31, No. 3 (2009): 777-800; Tobias Kelly, *This side of silence: Human rights, torture, and the recognition of cruelty*, (Philadelphia: University of Pennsylvania Press, 2011), 4; Anthony J. Langlois, "Human rights: the globalisation and fragmentation of moral discourse," *Review of International Studies* Vol. 28, No. 3 (2002): 483; Günter Frankenberg, "Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty," *The American Journal of Comparative Law*, Vol. 56, No. 2, (2008): 403.

[580] David Sussman, "What's wrong with torture?" *Philosophy & Public Affairs* Vol. 33, Issue 1 (2005): 3, 30; Manfred Nowak and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment," *Torture*, Vol. 16, No. 3 (2006): 147.

[581] Jane Mayer, *The dark side: The inside story of how the war on terror turned into a war on American ideals*, (New York: Anchor, 2009), 245, 277, 328.

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UN uses cruel as a totally different category from torture, placing it in the same category as inhuman and degrading treatment. In between, the U.S. has used "cruel" in its well-known Eighth Amendment Cruel and Unusual Punishment Clause, it has used it to refer to ill-treatment of extreme cruelty which amount to torture and, differently from the other jurisdictions, it has included cruelty as a distinct crime under the Uniform Code of Military Justice.[582] Before delving into the use of cruelty as an indicator of the harm specific of torture in the jurisdictions under analysis here, I will first analyse the historical origins of this term, to provide a more complete view of its meaning and its evolution, followed by an analysis of each jurisdiction and its understanding of the term. Conclusions for the chapter will resume the findings.

3.2 *How did the term "cruel" appear in the prohibition of torture and inhuman or degrading treatment?*

As it was mentioned in the first chapter (section 1.2), it was Judith Shklar who noted that Montaigne and his disciple Montesquieu were the ones who "put cruelty first [among vices]"[583] meaning that they considered it the extreme of all vices, at a time when torture was not unthinkable and moral and ethical values needed an infusion of humanity. With Montaigne and Montesquieu, cruelty became "a powerful part of the liberal consciousness."[584] In legal instruments, the term "cruel" appears to have chronologically originated at about the same time that Montaigne was shaping the ethical values of the sixteenth century, and inspiring those that subsequently used the term cruel as a legal category.

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[582] 10 U.S. Code Chapter 47.
[583] Judith N. Shklar, *Ordinary vices*, (Cambridge, Massachusetts and London: The Belknap Press of Harvard University Press, 1984), 1-43.
[584] Ibidem, 43.

One of the first mentions of cruel in a document outlining individual liberties is in the Massachusetts Body of Liberties of 1641,[585] a code drafted by Nathaniel Ward[586] after the model of the Magna Carta for use by the General Court of Massachusetts. It appears that the code was officially enacted in Massachusetts and never published in England, where it might have offended the law and royal prerogative.[587] The relevant clause of the Body of Liberties is Clause 46, which stated that "[f]or bodilie punishments we allow amongst us none that are inhumane, Barbarous or cruel."[588] Its purpose was to control the discretionary power of judges in imposing penalties.[589]

Cruel was consequently used in the English Bill of Rights of 1689, which stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[590] As for its meaning at the time, Anthony F. Granucci, who wrote about the history of the cruel and unusual punishment clause in the U.S. Bill of Rights, states that the meaning of cruel in the seventeenth century was that of "severe" or "hard" and also cites Sir William Blackstone who referred to cruel as "severe or excessive."[591] Granucci highlights however that in England the clause did not prohibit barbarous punishments (such as mutilation, flogging, dismembering). That

[585] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," *California Law Review* Vol. 57, Issue 4 (1969): 850. The 1641 Massachusetts Body of Liberties is available at http://www.mass.gov/anf/docs/lib/body-of-liberties-1641.pdf accessed in March 2017.

[586] Nathaniel Ward was born in England, the son of a Puritan minister. He studied law and later became a minister himself (see http://www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html last accessed March 2017). Anthony F. Granucci, mentioned above, argues that Ward might have been influence by Sir Robert Beale (born in 1541 in London), a member of the English Parliament. He had studied law at Oxford and like Nathaniel Ward, he was of Puritan belief. In one of his published manuscripts he condemned the use of torture and cruel punishments, even by royal prerogative (see Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 848-849).

[587] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 851.

[588] Clause 46 of the 1641 Massachusetts Body of Liberties at http://www.mass.gov/anf/docs/lib/body-of-liberties-1641.pdf accessed in March 2017.

[589] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 850.

[590] The English Bill of Rights of 1689, An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, at http://avalon.law.yale.edu/17th_century/england.asp last accessed in March 2017.

[591] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 860 citing Blackstone, *Commentaries on the Laws of England* (8th ed. 1778): 16-17.

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was not its purpose; its purpose was to limit any arbitrary punishment applied by English judges, meaning punishments not provided by statute and disproportionate punishments.[592]

Almost a century later, the "cruel and unusual punishment" clause migrated to the 1776 Virginia Declaration of Rights and in 1789 to the Eighth Amendment of the U.S. Bill of Rights: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[593] The clause attracted criticism in very blunt terms. Mr. Smith, Congressman of South Carolina, objected to the phrase arguing that it was too indefinite, while Mr. Livermore, Congressman of New Hampshire stated that "the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it."[594] This latter observation regarding the exact meaning of "cruel" shows that doubts as to the clarity of the term existed from its inception. According to Granucci, the framers interpreted the clause as referring to torturous punishments, not as disproportionate, like the English did,[595] so they unintentionally provided a wider meaning for cruel, including torturous methods of punishment.

After almost two centuries, the term "cruel" re-appears in legal provisions under a different and more encompassing form, changing its field of application from punishment to the more general scope of treatment. It appears in Article 5 of the 1948 Universal Declaration of Human Rights as "cruel, inhuman and degrading," which was mentioned as a separate category from torture.[596]

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[592] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 860, 862-863 (citing also Blackstone, *Commentaries on the Laws of England, 369-372*). See also Richard L. Perry and John C. Cooper ed. *Sources of Our Liberties. Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights*, (American Bar Foundation, 1959): 236.
[593] Eighth Amendment of the US Bill of Rights available at https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/ last accessed in March 2017.
[594] Annals of Congress 782-83 (1789), quoted in *Weems v. United States*, 217 U.S. 349 (1910), 368-69.
[595] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," 839-840.
[596] Article 5 of the Universal Declaration of Human Rights states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

From the *travaux préparatoires* of the Declaration it can be seen that the original draft, the one authored by John P. Humphrey[597] does not mention the term "cruel." His version of the prohibition of torture states that "[n]o one shall be subjected to torture, or to any unusual punishment or indignity,"[598] clearly drawing inspiration from the US clauses. It appears that it was the suggested French version, drafted by René Cassin, that introduced this term in the final version of the Declaration, while omitting the term 'inhuman:' "[n]o person, even if found guilty, may be subjected to torture, cruelty, or degrading treatment."[599] The term 'cruel' has remained in the UN system, where it is also found in the 1966 ICCPR, in Article 7 prohibiting besides torture also "cruel, inhuman or degrading treatment or punishment."[600] The meaning that the framers wanted to convey by the use of 'cruel' joined to 'inhuman or degrading' in these UN provisions is however impossible to determine as the *travaux préparatoires* do not contain any indication on this matter.

Taking a separate path from the UN, the term has not appeared in the final version of the 1950 European Convention on Human Rights. The *travaux préparatoires* on Article 3 of the Convention reveal that the term 'cruel' appeared in a proposal of Sir Oscar Dowson from the United Kingdom, after other proposals made in the Consultative Assembly of the Council of Europe were considered

[597] John P. Humphrey was a Professor of Law at McGill University and Director of the United Nations Human Rights Division (appointed in 1946) whose essential contribution to the drafting of the Universal Declaration of Human Rights was only belatedly recognized (for further details see http://www.mcgill.ca/about/history/mcgill-pioneers/humphrey and http://news.library.mcgill.ca/mcgills-john-peters-humphreys-legacy-work-original-draft-of-declaration-of-human-rights-featured-at-canadian-museum-of-human-rights-grand-opening-exhibit/ last accessed in November 2016).

[598] See the picture of a page of Mr. Humphrey's original draft for the Universal Declaration of Human Rights at http://news.library.mcgill.ca/wp-content/uploads/2014/09/1988-0102.01.4.T1.jpg last accessed in November 2016.

[599] The original text in French states the following: "[a]ucun individu, même coupable, ne peut être soumis à la torture, à des peines cruelles ou à des traitements degradants." Whether this text belonged to Article 6 or to Article 7 in Cassin's draft is unclear, as different sources provide different accounts (see William A. Schabas, Ed. *The Universal Declaration of Human Rights: The Travaux Préparatoires,* Cambridge University Press, New York, 2013; and https://search.archives.un.org/copy-of-handwritten-first-draft-of-universal-declaration-of-human-rights-by-prof-rene-cassin last accessed in November 2016).

[600] ICCPR, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx last accessed in November 2016.

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to have limiting effects on the range of treatments to be prohibited under torture.[601] The text proposed by Sir Dowson in the Committee of Experts on Human Rights was an amendment to the provision on the right to security of person (the then Article 2). His amendment stated that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[602] As it can be observed, the text was identical to Article 5 of the 1948 Universal Declaration. Sir Dowson then made a second proposal, eliminating the words "cruel" and "degrading". The draft Convention submitted by the Committee of Experts to the Committee of Ministers included the two proposals of Sir Dowson. The Conference of Senior Officials held between the 8th and the 17th June 1950 merged the two proposals into today's Article 3, omitting the term "cruel" from the provision.

According to the *travaux préparatoires*, during the works for the draft Convention and probably at the later stages of drafting when the final proposal for Article 3 had been made, it was observed that the text of this provision was very similar to the proposed Article 7 of the Draft ICCPR prepared by the UN. Annotations drafted by the UN Secretary General in 1955 to the Draft ICCPR, explained in detail the terms and expressions used in Article 7.[603] Surprisingly though, the term

[601] As an amendment to the provision on the right to security of person, Mr Cocks, also of United Kingdom, had proposed the following amendment: "In particular no person shall be subjected to any form of mutilation or sterilization, or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering" (see European Commission of Human Rights, *Preparatory work on Article 3 of the European Convention of Human Rights, Memorandum prepared by the Secretariat of the Commission*, Strasbourg, 22 May 1956, p. 2, at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf last accessed in November 2016).

[602] European Commission of Human Rights, *Preparatory work on Article 3 of the European Convention of Human Rights, Memorandum prepared by the Secretariat of the Commission*, Strasbourg, 22 May 1956, p. 14, available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf last accessed in November 2016.

[603] European Commission of Human Rights, *Preparatory work on Article 3 of the European Convention of Human Rights, Memorandum prepared by the Secretariat of the Commission*, Strasbourg, 22 May 1956, pp. 18-19, available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf last accessed in November 2016.

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"cruel" is not even mentioned in these annotations. Furthermore, the discussions that took place during the drafting of the European Convention reveal, at least with regard to the prohibition of torture, the intention to avoid any language that would limit the scope of the provision, as well as any words that were unnecessary.

Therefore, the omission of the term "cruel" from the European Convention could be explained by the fact that the term did not add something new to the prohibition. Everything intended to be prohibited had already been included in the terms "torture", "inhuman" and "degrading" used in Article 3. Therefore, under the European Convention there is no "cruel, inhuman or degrading treatment" category (or CIDT as many legal scholars like to abbreviate it) and there is no category of "cruel treatment"; there is only "inhuman or degrading treatment." For cases concerning interrogations, the expression CIDT was used by the Court only in *Al Nashiri v. Poland*[604] and in *El-Masri v. the Former Yugoslav Republic of Macedonia*,[605] to refer to extra-judicial transfer of persons.[606] It appears that for the category of cases concerning allegations of risk of torture after extradition the category of CIDT spilled over from the UN (sometimes also from the U.S.) into the ECtHR case law[607] but this is not the case for interrogational torture.

To conclude this historical tour on the meaning of "cruel" I would mention that this difference resulting from whether to include "cruel" in the UN and CoE instruments has also had effects with regard to the meaning of the term in the two systems. While in the UN, "cruel" designates a

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[604] *Al Nashiri v. Poland*, par. 508 and 518.
[605] *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012, par. 221.
[606] Searches in HUDOC for Article 3 cases that contain in the Law section the phrases "cruel, inhuman", "cruel and inhuman" and "cruel or inhuman" have resulted in 92 cases, out of which in 77 there was a violation of Article 3 (last updated search was done on 20 July 2017).
[607] The source appears to be the Human Rights Committee General Comment no. 2 of 10 March 1992, which states that: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."

separate category from torture, in the Council of Europe it seems that the term "cruel" is mostly used in relation to torture. Strangely, if "CIDT" were to be used when speaking of the European Convention, as some scholars do,[608] the abbreviation would then also incorporate ill-treatment that amounts to torture.

Further analysis on these various takes on "cruel" is provided in the following sub-sections.

3.3 THE ECTHR: "CRUEL" USED IN RELATION TO TORTURE

Although "cruel" was not included in Article 3 of the Convention, the ECtHR still makes use of it in its case law and it has confirmed in the Grand Chamber judgment of *Gäfgen v. Germany* that torture actually requires a level of cruelty. It stated that the threats of use of torture to which the applicant had been subjected did not reach the level of cruelty required to attain the threshold of torture"[609] and the ill-treatment was categorized as inhuman treatment.

The Court makes use of "cruel" in two instances: first, in relation to ill-treatment that by its nature is considered to be cruel[610] or will surely cause cruel suffering and amount to torture, sometimes irrespective of whether it causes long-term health damage; second, it also uses the term "cruel" in relation to particularly reprehensible ill-treatment that "presupposes an intention to obtain information, inflict punishment or intimidate."[611] As this second use of cruelty refers to the intention of the perpetrator, it will be the subject of analysis of another chapter. In the current

[608] See Erin Huntington, "Torture and Cruel, Inhuman or Degrading Treatment: A Definitional Approach," *U.C. Davis Journal of International Law & Policy*, Vol. 21, no. 2, (2015): 279-300. Furthermore, in the official commentary (footnote 396) of Common Article 3 to the Geneva Conventions, "cruel treatment" is wrongly referenced as being included in Article 3 of the ECHR (the commentary is available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#396 last accessed in November 2016).
[609] *Gäfgen v. Germany* [GC], par. 108.
[610] *Batı and others v. Turkey*, par. 123; *Chitayev v. Russia*, par. 159; *Huseyin Esen v. Turkey*, par. 44.
[611] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 65; *Buzilov v. Moldova*, no. 28653/05, 23 June 2009, par. 32; *Bulgaru v. the Republic of Moldova*, no. 35840/09, 30 September 2014, par. 20.

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section I will look into the use of "cruel" with reference to ill-treatment that by its nature was held by the ECtHR to amount to torture.

The term "cruel" first appeared in the Greek case, in the submissions of the applicant Governments referring to the ill-treatment suffered by some of the victims. They used the term in relation to torture, more specifically in the phrase "cruel torture"[612] to refer to ill-treatment applied during interrogations: the practice of falaka (or "falanga" as it is mentioned in the text), beatings all over the body and threats of death applied on a victim already suffering from haemorrhage. Another reference to "cruel" in the same case is made by one of the victims who had been subjected to the practice of falaka, repeated beatings, electric shock, threats of drowning during interrogations, and not being allowed to wash. She specifically refers to one of the ill-treatments in the following words: "the *cruellest* of all - I was only given two glasses of water per day. All this was intended to break my physical and moral resistance so that I should confess all that my interrogators demanded of me to confess."[613] "Cruel" was therefore used from the very beginning in relation to torture to refer to the very nature of the act itself.

The term is subsequently used for the first time in the Court's analysis in the case of *Ireland v. the United Kingdom*, where the Court distinguished between torture and inhuman treatment and defined the first as "deliberate inhuman treatment causing very serious and cruel suffering."[614] The level of the suffering inflicted by torture was said to be implied as "particular intensity and cruelty."[615] Since then the expression "very serious" or "severe pain and cruel suffering" [616] has

[612] The *Greek* case, Parts III and IV of V of the European Commission's Report, pp. 221 and 365.
[613] The *Greek* case, Part V of V of the European Commission's Report, p. 388.
[614] *Ireland v. the United Kingdom*, par. 167.
[615] *Ireland v. the United Kingdom*, par. 167.
[616] See among others *Nechiporuk and Yonkalo v. Ukraine, Nikiforov v. Russia, Aydin v. Turkey, Akkoc v. Turkey, Al Nashiri v. Poland, Batı and others v. Turkey, Mammadov (Jalaloglu) v. Azerbaijan* (par. 68); *Aktas v. Turkey* (par.

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become a staple of severity characteristic of torture, repeated numerous times in the ECtHR case law to refer to the suffering inflicted on the victim.

The most frequent use of "cruel" in the ECtHR cases emphasizes the nature of the ill-treatment as being specific of torture. The first case in which the phrase "very serious and cruel suffering" employed in *Ireland v. the United Kingdom* becomes "serious and cruel nature" to emphasize the very nature of the act is *Aksoy v. Turkey*, which concerns the Palestinian hanging (to be analysed in more detail below). After *Aksoy*, it also appears in *Selmouni v. France*, where the Commission refers to the "serious and cruel nature" of the treatment inflicted on the applicant (a large number of blows, being dragged by the hair, humiliating acts with sexual connotations and threats).[617] The Court pointed to the violent nature of the acts themselves, calling them "heinous and humiliating for anyone, irrespective of their condition."[618] In these cases the assessment of severity is therefore unrelated to the victim's characteristics but strictly dependant on the nature of the acts. Later on, these two expressions, "serious and cruel nature" and "very serious and cruel suffering" are used inter-changeably.[619] Also, possible alternative phrases to "cruel" in the ECtHR case law include "particularly reprehensible,"[620] "particularly serious form,"[621] "particularly painful form"[622] of ill-treatment, "abhorrent acts of physical and psychological violence"[623] or "heinous and humiliating"[624] acts. The particularity of this type of treatment is that it makes the subjective

313), *Egmez v. Cyprus* (par. 77), *Salman v. Turkey* (par. 114), *Dikme v. Turkey* (par. 96), *Corsacov v. Moldova* (par. 66), *Buzilov v. Moldova* (par. 32).
[617] *Selmouni v. France*, par. 92.
[618] *Ibidem*, par. 103.
[619] *Mammadov (Jalaloglu) v. Azerbaijan*, par. 68-69.
[620] *Buzilov v. Moldova*, no. 28653/05, 23 June 2009, par. 32 (with regard to electric shocks); *Corsacov v. Moldova*, par. 65 (with regard to falaka); *Bulgaru v. the Republic of Moldova*, par. 20 (with regard to suspension).
[621] *Nechiporuk and Yonkalo v. Ukraine*, par. 157.
[622] *Polonskiy v. Russia*, no. 30033/05, 19 March 2009, par. 124.
[623] *Razzakov v. Russia*, par. 54.
[624] *Selmouni v. France*, par. 103.

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features of the victim irrelevant because any victim would experience that particular ill-treatment as being in its nature cruel and torture. Some of the ill-treatments to which the Court explicitly referred as "cruel" (or in combination with these alternative expressions) include the Palestinian hanging, the falaka, electric shocks, and rape.

Certain coercive methods of interrogation are specifically designed to inflict a high amount of pain and suffering, whether physical or mental, and presumptions are drawn that whenever it is proven that such a method was indeed inflicted on a victim, the qualification of the ill-treatment is that of torture. As Judge Zupančič stated in *Jalloh v. Germany*, "except in extreme cases of mistreatment (electroshocks, Palestinian hanging, *falaka*, etc.), it is impossible to generalise."[625] Such presumptions were confirmed by the ECtHR with regard to the use of electric shocks during interrogations, which "is a particularly painful form of ill-treatment,"[626] the falaka,[627] waterboarding,[628] Palestinian hanging,[629] and rape ("an especially grave and abhorrent form of ill-treatment").[630]

3.3.1 SUSPENSION AS A CRUEL METHOD

According to the Istanbul Protocol, suspension is a method of torture that can cause extreme pain while leaving little or no visible injuries.[631] Varieties of suspension range from "cross suspension" (arms spread and tied to a metal bar), "butchery suspension" (arms fixed upward), "reverse butchery suspension" (feet fixed upward), "parrot perch" suspension" (the victim is suspended by

[625] Concurring opinion of Judge Zupančič, *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.
[626] *Polonskiy v. Russia*, no. 30033/05, 19 March 2009, par. 124.
[627] *Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007, par. 69-70; *Corsacov v. Moldova,* no. 18944/02, 4 April 2006, par. 65.
[628] *Erdal Aslan v. Turkey*, nos. 25060/02 and 1705/03, 2 December 2008, par. 73 ("pareille violence").
[629] *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, 14 October 2008.
[630] *Maslova and Nalbandov v. Russia, no. 839/02,* 24 January 2008, par. 106-108.
[631] *The Istanbul Protocol*, par. 206.

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her flexed knees on a bar with her wrists tied to the ankles), and finally, the "Palestinian hanging" (suspension with the arms tied behind the back).[632]

With regard to suspension (often encountered in the Court's case law in the form of Palestinian hanging), the Court in *Aksoy v. Turkey* held that this method is *by itself* of a grave and cruel nature which can only be qualified as torture. The applicant had been subjected to this method while naked, blindfolded, electrocuted, verbally abused and threatened.[633] Subsequent cases, especially concerning Turkey,[634] confirmed this assessment, although very often in regard to multiple treatments analysed as a whole. In a judgment pronounced in 2003, *Aktaş v. Turkey*, the Court referred to the suffering inflicted on Yakup Aktaş as a result of the mechanical asphyxiation "from pinioning the chest […], crucifixion or "Palestinian hanging"" as "particularly severe and cruel."[635] In 2004, in *Batı and Others v. Turkey* the Court held that the acts of violence which included suspension, repeated beatings, being sprayed with water, subjected to falaka, deprived of sleep, threatened with death or rape, and insulted were "particularly serious and cruel" and amounted to torture.[636] In 2007, in *Ölmez v. Turkey*, the Court considered that the treatment of the applicants, namely suspension, cold water hosing, electric shocks, sexual assault, and falaka for the first applicant, and suspension, electric shocks, and cold water hosing for the second, were particularly violent and amounting to torture.[637] In 2008, in *Erdoğan Yılmaz and Others v. Turkey*, the Court held that the ill-treatment inflicted on the applicant, specifically suspension by the arms, electric shocks and beatings, "was particularly serious and cruel and capable of causing severe

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[632] *The Istanbul Protocol*, par. 206.
[633] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, par. 14-15, 60-64.
[634] See also *Koçak v. Turkey*, no. 32581/96, 3 May 2007, par. 42-49; *Kemal Kahraman v. Turkey*, no. 39857/03, 22 July 2008, par. 33-36; *Serdar Güzel v. Turkey*, no. 39414/06, 15 March 2011, par. 37-38.
[635] *Aktaş v. Turkey*, par. 319.
[636] *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 113-123.
[637] *Ölmez v. Turkey*, no. 39464/98, 20 February 2007, par. 60.

pain and suffering" amounting to torture.[638] In the 2010 judgment of *Arif Çelebi and Others v. Turkey* the Court analysed ill-treatment that included among others Palestinian hanging, blindfolding, beatings and hosing with cold water. It considered that "the treatment […] was particularly serious and cruel and capable of causing severe pain and suffering"[639] amounting to torture. A finding of torture was also made for Palestinian hanging by itself in *Karagöz and Others v. Turkey*, where the Court held that this act is "particularly serious and cruel and capable of causing severe pain and suffering."[640]

The Court does not provide extensive explanations as to why it considers this method to be of a cruel nature. It usually states that the method is "capable of causing severe pain and suffering,"[641] so by its nature even if it does not inflict severe pain or suffering it had the potential to do so. The method however, usually causes long-lasting injuries to the victim, such as a paralysis in both of the arms which took a long time to heal in *Aksoy v. Turkey*,[642] bruises and lesions in *Dikme v. Turkey*[643] and in *Erdoğan Yılmaz and Others v. Turkey*,[644] pain and numbness in the arms in *Durmuş Kurt and Others v. Turkey*,[645] broken rib in *Razzakov v. Russia*.[646] Severe injuries were also found by the ECtHR in *Bulgaru v. the Republic of Moldova*, where the applicant had been suspended by the arms and although they were not tied to his back it still caused him "severe radial neuropathy of the right arm"[647] meaning damage to the nerve in the arm which controls the extension of the wrists and fingers and the movement of the triceps. The Court referred to this

[638] *Erdoğan Yılmaz and Others v. Turkey*, par. 48-51.
[639] *Arif Çelebi and Others v. Turkey*, nos. 3076/05 and 26739/05, 6 April 2010, par. 6-11, 59.
[640] *Karagöz and Others v. Turkey*, nos. 14352/05, 38484/05, and 38513/05, 13 July 2010, par. 47-52.
[641] *Erdoğan Yılmaz and Others v. Turkey*, par. 48-51; *Arif Çelebi and Others v. Turkey*, par. 59.
[642] *Aksoy v. Turkey*, par. 64.
[643] *Dikme v. Turkey*, par. 76.
[644] *Erdoğan Yılmaz and Others v. Turkey*, par. 48-51.
[645] *Durmus Kurt and Others v. Turkey*, no. 12101/03, 31 May 2007, par. 8.
[646] *Razzakov v. Russia*, no. 57519/09, 5 February 2015, par. 54.
[647] *Bulgaru v. the Republic of Moldova*, no. 35840/09, 30 September 2014, par. 9.

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treatment as "particularly reprehensible" and "of a particularly serious nature, capable of provoking severe pain and cruel suffering" amounting to torture.[648]

To try to explain why this treatment would be considered cruel a short description of the method and its effects is in order. As stated above, the Palestinian hanging is a method by which the victim is held suspended by a rope with her arms tied and hyperextended behind the back. The victim might also be suspended by the arms, not necessarily tied to the back, and the effects would still be severe on her health. The injuries at the area of the arms will range from weakness, numbness, reduced sensitivity, tingling, or in most serious cases the injury or breaking of the brachial plexus (the nerve system running from the spine through the arms) which may lead to paralysis of the arms. Aside from neurological injuries, the method can also lead to shoulder ligaments being torn, scapula dislocation, muscle injury,[649] or contribute to restricted breathing, due to the hunched forward position of the victim and cause in extreme cases even death.[650]

Aside from the severe injuries that could potentially be caused by the use of this method, I would advance several reasons or explanations why the "Palestinian hanging" is considered cruel, which are however not spelled out in the ECtHR case law. First, because it is a disturbingly close representation of the way executions were (and in some countries still are) performed[651] so it is a

[648] *Bulgaru v. the Republic of Moldova*, par. 20.
[649] *Istanbul Protocol*, par. 207.
[650] Eric Stover, Victor Peskin, Alexa Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror*, (Oakland, California: University of California Press, 2016): 352 (referring to the death of Manadel al-Jamadi during interrogation in Abu Ghraib, while being subjected to the Palestinian hanging which caused his breathing to be restricted and further complicated the trauma to his torso).
[651] Hanging was the main method of execution in the U.S. before 1890, when New York introduced electrocution as a more humane method when compared to hanging and shooting (for further details see Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century," *William & Mary Law Review*, Vol. 35, Issue 2, (1994): 551-692). See http://www.deathpenaltyworldwide.org/methods-of-execution.cfm last accessed in November 2016, listing the states that still use hanging as a method of execution ("Afghanistan, Antigua & Barbuda, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Democratic Republic of the Congo, Dominica, Egypt, Equatorial Guinea, Eritrea, Gambia, Ghana, Grenada, Guyana, India, Iran, Iraq, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Malawi, Malaysia,

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close reminder of a primitive and barbaric practice. Second, because the visually similar practice of execution by hanging was clearly rejected by a civilized society when it was declared a "cruel and unusual punishment" by the U.S. Supreme Court.[652] Thirdly, the effects of this method may reach the same effects as hanging. Certain death is the result of hanging as a method of execution, while the Palestinian hanging is a threat to life and bears the possible and uncertain risk of resulting in death. Finally, the Palestinian hanging is a debasing method of interrogation. The pain caused by the Palestinian hanging is prolonged for the victim forced to stay in an uncomfortable and humiliating position, slightly hunched before the perpetrator and totally unable to change her position. Of course this is only my opinion on why this method is considered cruel. The ECtHR has never gone beyond the physical effects to explain why it finds it a cruel method of interrogation, either in the part of the judgments concerning "the law" or by making any references to international legal sources and materials.

In the abstract we can therefore consider that the Palestinian hanging subjects the victim to a high level of pain or suffering which may reach the severity and cruelty of torture. So would this lead the Court to automatically make a finding of torture? Yes, to the extent that an expert medical report confirms that the injuries correspond to the method of ill-treatment; otherwise, the treatment may well be considered only inhuman treatment.[653] The case of *Algür v. Turkey*[654] confirmed this

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Myanmar/Burma, Nigeria, North Korea, Oman, Pakistan, Palestine, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sierra Leone, Singapore, South Korea, South Sudan, Sri Lanka, Sudan, Swaziland, Syria, Tanzania, Tonga, Trinidad and Tobago, Tunisia, Uganda, United States, Zambia, and Zimbabwe").

[652] *Furman v. Georgia*, 408 U.S. 238 (1972).

[653] If there is no injury specific of the method of ill-treatment attested by medical evidence there will be no violation (see *Dağ and Yaşar v. Turkey*, no. 4080/02, 8 November 2005, par. 87-90; *Devrim Turan v. Turkey*, no. 879/02, 2 March 2006, par. 40-42). Also note *Sevtap Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000 (also involved suspension among other methods) and Dissenting opinion of Judge Bonello. In this case the Court held that, on the basis of the evidence submitted, it is impossible to decide whether there was a violation of the substantive aspect of Article 3.

[654] *Algür v. Turkey*, no. 32574/96, 22 October 2002.

possible outcome. The applicant had been allegedly subjected to beatings, insults, threats with rape and death, electric shocks and Palestinian hanging. In the custody of the state, she was examined on the same day by two doctors; the first, a medico-legal expert, did not find any trace of violence while the other, apparently a general practitioner, found certain injuries consistent with her account, noted pain in the arms, and advised further examination by an expert.[655] However, she was not examined by a medico-legal expert to confirm the connection between the injuries and the alleged treatments, a gap in the evidentiary file that affected the Court's consideration of the gravity of the treatment. Despite the applicant's young age, twenty-two at the time of events, the treatments as a whole could not be considered of such a gravity that only torture would entail. Inhuman treatment was the Court's conclusion on the basis of the evidentiary file.[656] In a recent judgment pronounced in 2015, *Serikov v. Ukraine*, the Court also concluded that inhuman treatment had taken place for alleged threats of rape, beatings, and Palestinian hanging, allegedly inflicted by police to force the applicant to confess to a crime. Although there was evidence of injuries to the head, rib cage, and shoulders, and the Court held that police were responsible for the injuries, there was not enough information for the Court to conclude beyond reasonable doubt that the injuries had been inflicted by the methods and force alleged and during questioning of the applicant.[657]

Furthermore, the Court might decide not to specify the qualification of the ill-treatment. On very similar complaints as the ones raised in *Algür v. Turkey,* the Court found that Article 3 had been breached, without specifying whether the treatment amounted to torture or inhuman treatment. In two cases pronounced in 2003, *Yaz v. Turkey* and *Ayşe Tepe v. Turkey* involving the Palestinian

[655] *Algür v. Turkey*, par. 14-16, 39-47.
[656] *Ibidem*, par. 46.
[657] *Serikov v. Ukraine*, no. 42164/09, 23 July 2015, par. 9, 14-16, 69-73.

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hanging, beatings, electric shocks, insults and humiliations by threats of death and rape, the Court found a violation of Article 3 but made no mention of cruelty or torture.[658] Also, in the case of 2005 brought by Hasan Kılıç against Turkey,[659] the applicant presented medical evidence for the effects of the Palestinian hanging. In the absence of a plausible explanation from the Government, the Court found them to be conclusive enough to reach a violation of Article 3, without specifying the type of treatment sustained or analysing the rest of the ill-treatments due to doubts as to whether the injuries had indeed been caused by Palestinian hanging.[660]

To conclude, the Court has repeatedly found that suspension is a cruel treatment amounting to torture, especially in cases originating in Turkey, where PKK suspects were the main target of such treatment. However, while there is a generalization with regard to the qualification of this ill-treatment, as Judge Zupančič recognized, medical evidence of injuries corresponding to the alleged ill-treatment is still necessary for a finding of torture.

3.3.2 ELECTRIC SHOCKS

The use of electric shocks is a method by which electric current is transmitted through electrodes placed on the body of the victim, often on sensitive parts such as fingers, lips, feet, ears, nipples, or the genital area.[661] When placed on sensitive parts of the body, electric shocks cause severe or even excruciating pain, high levels of distress, agony, and fear. To increase the efficiency of this method, substances such as water or gels are used by torturers to expand area on which the current

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[658] *Yaz v. Turkey*, no. 29485/95, 22 July 2003, par. 25-32; *Ayşe Tepe v. Turkey*, no. 29422/95, 22 July 2003, par. 15 and 18. See also *Muhammet Şahin v. Turkey*, no. 7928/02, 25 September 2007, par. 35-40.
[659] *Hasan Kılıç v. Turkey*, no. 35044/97, 28 June 2005.
[660] *Ibidem*, par. 38-42.
[661] *The Istanbul Protocol*, par. 212.

enters the body but also to prevent noticeable electric burns.[662] Therefore this method gives torturers the possibility of inflicting pain and suffering without leaving numerous and obvious physical traces. The method will also not leave conspicuous marks if for instance the voltage is not high or applied for too long. Since lesions might not be easily detectable, medical personnel that do not examine carefully the injuries might omit or misdiagnose such injuries. This is one of the risks in the evidentiary file that torturers might exploit to obtain impunity and the States to argue that the allegations are unsubstantiated.[663] However, if physical traces are left on the body of the victim, these will generally include electrical burns, "reddish brown circular lesion from 1 to 3 millimetres in diameter, usually without inflammation, which may result in a hyperpigmented scar."[664] Furthermore, in high voltages the method may cause internal organ damage, neurological impairment or even death, as exemplified in the fact that electric shocks were also used as a way of executing persons sentenced to death and is still a legal method of execution in some of the U.S. states.[665]

Electric shocks are generally applied in combination with other methods but their severity has led the European Court to conclude that even if a person is subjected only to electric shocks the treatment will amount to torture. From the Court's case law it is not clear whether the initial intention was to place this ill-treatment on the highest level of severity, as the Court first considered

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[662] *The Istanbul Protocol*, par. 212.
[663] For instance, in *Dikme v. Turkey* the applicant alleged electric shocks applied to his feet, tongue, ears, and genitalia, as part of the ill-treatment inflicted on him during police interrogation, but the medical evidence did not mention electric burns. The ECtHR invited the applicant to specify which of the injuries mentioned in the medical report corresponded to this method but in the absence of a reply from him it considered that this allegation was not proven (par. 85).
[664] *The Istanbul Protocol*, par. 212.
[665] In the U.S. the states of Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, South Carolina, Tennessee, and Virginia still authorize the use of the electric chair as an alternative to the primary method, the lethal injection. The last execution by electric chair in the U.S. took place in 2013 but the use of this method might increase due to a shortage of the drugs necessary for the lethal injection (see https://deathpenaltyinfo.org last accessed in November 2016).

the suffering caused by this treatment in combination with other acts. In the judgment of *Akkoç v. Turkey* pronounced in 2000 the applicant had been subjected to electric shocks, blows to the head, hot-and-cold water treatment, and threats of ill-treatment to her children. The suffering inflicted by this combination of treatments was considered "very serious and cruel" specific of torture.[666] In 2006, in *Hüseyin Esen v. Turkey,* the ill-treatments to which the applicant had been subjected, electric shocks combined with beatings, cold water hosing, Palestinian hanging, and death threats were held to be "very serious and cruel."[667] In 2008 in *Erdoğan Yılmaz and Others v. Turkey*, the Court held that the ill-treatment inflicted on the applicant, specifically suspension by the arms, electric shocks and beatings, "was particularly serious and cruel and capable of causing severe pain and suffering" amounting to torture.[668]

It was only in June 2009 that the ECtHR held that electric shocks in themselves amount to torture, in *Buzilov v. Moldova*,[669] a case in which the Court examined ill-treatments consisting of beatings and electric shocks administered while cold water was poured upon the applicant and the air he was breathing through an air mask was being constantly blocked by police officers.[670] On the basis of medical evidence, the Court found that the injuries caused by electric shocks, yellow marks on the applicant's ears, matched the applicant's account that electric wires had been placed on that part of his body.[671] The Court held that the violence inflicted through electric shocks "was of a particularly serious nature, capable of provoking severe pain and cruel suffering and that it falls to be treated as acts of torture."[672] However, the Court further noted that "this form of ill-treatment

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[666] *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, par. 116-117.
[667] *Hüseyin Esen v. Turkey*, no. 49048/99, 8 August 2006, par. 44.
[668] *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, 14 October 2008, par. 48-51.
[669] *Buzilov v. Moldova*, no. 28653/05, 23 June 2009.
[670] *Ibid.*, par 7.
[671] *Buzilov v. Moldova*, par. 32.
[672] *Ibidem*, par. 32.

is particularly reprehensible as it presupposes an intention to obtain information, inflict punishment or intimidate."[673] One may wonder however why the distinction between this method and beatings for instance, is made. Why would beatings (excluding falaka) not disclose in themselves the same intention of the perpetrator? The reasoning is therefore partially unconvincing. The main point though is that the method itself, its very nature, makes one conclude that it must amount to torture.

The Court's decision that electric shocks amounts to torture was later confirmed by similar conclusions in cases lodged against Ukraine. In *Nechiporuk and Yonkalo v. Ukraine*[674] pronounced in 2011, the factual situation was fairly similar, as electric shocks combined with beatings and threats against the applicant's wife were administered by police in order to obtain his confession about a murder. Again, the Court expressly concluded that electric shocks as such are "a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering and therefore falling to be treated as torture, even if it does not result in any long-term health damage."[675] Extensive forensic medical documents were made available to the Court by the applicant, material which could not be challenged by the Government, thus proving that he sustained injuries specific to electric shocks.[676] One year later, in *Grigoryev v. Ukraine,* in which the applicant had been subjected to beatings, electric shocks, and handcuffing, the Court held specifically with regard to electric shocks that it is "a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering, and therefore falling to be treated as torture even if it does not result in any long-term damage to health."[677] Although in *Buzilov* the issue of long-term injuries was not discussed and observations were made only with regard to the numerous

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[673] *Buzilov v. Moldova*, par. 32.
[674] *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011.
[675] *Ibidem*, par. 157.
[676] *Ibidem*, par. 151-154.
[677] *Grigoryev v. Ukraine*, no. 51671/07, 15 May 2012, par. 64-65.

bruises and scars found all over the applicant's body (qualified as light bodily injuries in the medical documents),[678] in *Grigoryev* the Court strengthened its position on qualifying electric shocks as torture even in the absence of long-term health damage. In 2015, in *Myumyun v. Bulgaria*, the nature of the treatment appears to have been important in holding that repeated blows, kicks and electric shocks amounted to torture even in the absence of long-term damage.[679]

As it was shown above with regard to suspension, specific medical evidence (confirming burn injuries) is needed when electric shocks are alleged. When such injuries are not confirmed by the medical reports, the Court will either find torture (if other methods had inflicted severe injuries), inhuman treatment[680] or no violation where there is no evidence of injuries specific to electric shocks. Cases in which allegations of electric shocks were made but only inhuman treatment was found include for instance *Alchagin v. Russia* and *Ochelkov v. Russia.* In *Alchagin v. Russia* there was no mention of burn injuries in the medical report despite the allegation of electric shocks inflicted by police to obtain a confession, so the Court focused only on the beatings inflicted. The Court mentions the "nature and the extent of the applicant's injuries" to conclude that inhuman treatment had been inflicted on the applicant.[681] In *Ochelkov v. Russia* the applicant alleged beatings, electric shocks and use of a mask to cut the air supply. The medical evidence submitted did not support the allegation concerning the gas mask and the use of electricity, so similar to *Alchagin*, the final assessment was based on the injuries specific to beatings.[682]

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[678] *Buzilov v. Moldova*, par. 7.
[679] *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015, par. 62-63.
[680] *Alchagin v. Russia*, no. 20212/05, 17 January 2012; *Ochelkov v. Russia*, no. 17828/05, 11 April 2013, par. 118. Also note *Nasakin v. Russia* where the applicant presented medical evidence which attested abrasions but not burns and the Court considered that the severity of the ill-treatment amounted to inhuman treatment (no. 22735/05, 18 July 2013, par. 51-55).
[681] *Alchagin v. Russia*, par. 52-57.
[682] *Ochelkov v. Russia*, par. 119.

Also note that there are cases that involved electric shocks as a method of torture but given the special circumstances of the case the Court does not specifically focus on the nature of the ill-treatment. In 1999, in the case of *Çakıcı v. Turkey*[683] the Court analysed a treatment consisting of beatings and electric shocks inflicted on the applicant's brother by security forces with the purpose of obtaining a confession. The combination of treatments was considered as a whole to amount to torture, especially considering that the ill-treatment resulted in the death of the victim.[684] In 2006, in *Mikheyev v. Russia* there is no mention of "cruel" although electric shocks had been applied on the applicant during interrogation. Nonetheless, the finding of torture was made since the ill-treatment, including beatings, electric shocks and threats of ill-treatment, determined the applicant to attempt suicide in order to escape it. In 2013, in *Tarasov v. Ukraine*, the Court referred to the "serious nature" of the injuries but not to their cruelty although the applicant had been subjected to electric shocks to genitalia, among other ill-treatments, and had possibly resulted in a disability.[685] Most recently, in the 2017 case of *Ovakimyan v. Russia*, the ECtHR enumerated the series of ill-treatments to which the applicant had been subjected ("being handcuffed, put a plastic bag over the head, taken to a forest, punched and kicked, subjected to electric shocks, strangled, tied up, threatened with a revolver, thrown in a pit and threatened to be buried alive"[686]) but since there is absolutely no comment as to the intensity, cruelty or any such characteristic of the ill-treatment, it appears that the determinant for finding torture was the large amount of ill-treatment methods resulting in numerous injuries. Therefore, there might be cases in which the unusually

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[683] *Çakıcı v. Turkey*, no. 23657/94, 8 July 1999.
[684] *Ibid.*, par. 89-92.
[685] *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, par. 63-65, 100.
[686] *Ovakimyan v. Russia*, no. 52796/08, 21 February 2017, par. 47.

grave consequences of the ill-treatment might trump the nature of ill-treatment just as the barbarous and cruel nature of a certain method might trump the consequences of the ill-treatment.

Further clarifications as to why electric shocks are certainly considered to amount to torture were provided in more recent cases, in 2014, in *Lyapin v. Russia* and one year later in *Razzakov v. Russia*. For this purpose, the Court used a formula that had been originally employed in *Aksoy* with regard to the Palestinian hanging[687] and subsequently used with regard to *falaka* in *Mammadov (Jalaloglu) v. Azerbaijan.*[688] It held that "[t]o have subjected the applicant to electric shocks by using a special device and tying him up in a painful position would have required a certain preparation and knowledge on the part of the police officers."[689] This focus on the acts of the perpetrator coupled with observing the "entirely vulnerable" position of the applicant vis-à-vis the police officers who denied him fair trial rights[690] gives more attention to the parties involved. This perspective was employed in an identical manner in 2015 in *Razzakov v. Russia,* a case in which the applicant "endured [a] sequence of […] abhorrent acts of physical and psychological violence"[691] which required "a certain preparation and knowledge on the part of the police officers and the use of special devices."[692] These two judgments essentially make references to the intention of the perpetrator, though this is not spelled out, as it was in *Aksoy* and *Mammadov*. Here, the intention is concealed within a factual statement about the elaborate nature of an abhorrent method of torture.

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[687] *Aksoy v. Turkey*, par. 64.
[688] *Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007, par. 69.
[689] *Lyapin v. Russia*, no. 46956/09, 24 July 2014, par. 119.
[690] *Ibidem,* par. 119.
[691] *Razzakov v. Russia*, no. 57519/09, 5 February 2015, par. 54 (""punching him, hitting him on the head with a glass bottle, undressing him, tying him up and hanging him in painful positions from a metal bar and a door, head down and naked, pulling his penis, squeezing his testicles, threatening him with an intravenous injection and subjecting him to electric shocks").
[692] *Ibidem,* par. 54.

This leads me to consider the role of the definition of torture in cases that involve a cruel method of torture. If ill-treatment capable of causing cruel suffering is very likely to be qualified as torture even in the absence of long-term consequences on the health of the victim, then is cruelty leading to an easiness in finding torture? The Court's case law shows that if there is a precedent for a certain cruel ill-treatment amounting in itself to torture (as it is the case for suspension and electric shocks), then the Court will routinely make such findings as long as there is specific evidence of the alleged ill-treatment. Finding support in previous case law is perhaps the easiest way of decision making in a new case. As Jeremy Waldron argues with regard to the meaning of inhuman and degrading treatment, the ECtHR creates lists of prohibited practices, which it identifies descriptively rather than by evaluative terms, and in time "the list supplants the standard, the list becomes the effective norm in our application of the provision."[693] This type of practice leads to a disconnection from the definition of torture also because severe suffering is not necessary to have been actually inflicted as long as the method is perceived as having the potential to do so.

3.3.3 THE FALAKA

The third method of ill-treatment for which the ECtHR uses the word "cruel" is the falaka, *falanga* or *bastinado* as mentioned in different sources. The method inflicts pain through repeated beating of the soles of the feet (or rarely of the hands and hips) with a truncheon. It inflicts a high amount of pain on the feet, disproportionate by comparison to the limited physical scarring[694] of the body. Persons subjected to falaka experience pain in the lower legs and feet, a distinctive pattern while walking with apparent difficulty and pain, disruption of tactile senses due to possible nerve

[693] Jeremy Waldron, "Inhuman and degrading treatment – the words themselves," *Canadian Journal of Law and Jurisprudence*, Vol. XOXIII, No. 2 (July 2010): 272.
[694] The apparent physical injuries mainly include a hematoma on the heel.

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injuries,[695] and depending on the severity of the treatment, temporary or even chronic walking disability. The most severe complication of this ill-treatment is the closed compartment syndrome (a necrosis of the muscle, obstruction of the blood vessels or gangrene), and rarely bone fracture.[696]

The Turkish authorities were well known for the use of this method during interrogation and the first case in which the ECtHR assessed the severity of this treatment was *Salman v. Turkey.*[697] The Grand Chamber examined the use of the falaka in combination with a blow to the sternum by the Turkish security forces on a person suspected of being involved in the activities of the PKK and who died as a result of the treatment. According to the medical evidence presented in the case, the body of the deceased victim presented injuries to one ankle, bruises and swellings on one foot, a bruise on the chest and a broken sternum.[698] It was determined that the injuries on the feet were a sign of the use of the falaka, a method which had already been reported by the European Committee for the Prevention of Torture as commonly being used in Turkey.[699] It was also determined that the treatment to which the victim had been subjected, including falaka and a blow to the sternum, amounted to "very serious and cruel suffering" and that given its purpose it may be considered to have amounted to torture.[700] Furthermore, as already mentioned in the section concerning the Palestinian hanging, in 2004 in the case of *Batı and Others v. Turkey* the Court held that falaka

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[695] K. Prip and A.L. Persson, "Clinical findings in men with chronic pain after falanga torture," *The Clinical Journal of Pain*, Vol. 24, No. 2, (February 2008): 135-141.
[696] The Istanbul Protocol, par. 203. Also, in order to correctly diagnose soft tissue injuries, MRI or scintigraphy should be used because they can detect bone injury specific to falaka better than radiographs.
[697] *Salman v. Turkey*, no. 21986/93, 27 June 2000. Note that in the *Greek* case the Commission had examined allegations of falaka and beatings all over the body and concluded that torture or ill-treatment had been inflicted (see *Greek* case, 498-500).
[698] *Ibid.*, par. 102, 111.
[699] *Ibid.*, par. 113.
[700] *Ibid.*, par. 115.

applied in combination with other ill-treatment is a "particularly serious and cruel" treatment amounting to torture.[701]

While *Salman* and *Batı and Others* still left doubts as to whether *falaka by itself* could be considered torture, the Court made this clear in *Corsacov v. Moldova*.[702] In this case the applicant proved that he was subjected to beatings in the head area and to falaka, treatments which led to him suffering an acute trauma at the head, a perforation of the tympanic membrane, deafness and diminished hearing, and deteriorated health in general which reduced his working capacity by at least 50 percent.[703] These injuries were qualified by the Court as very serious as they permanently affected the applicant's health and they were caused to a young person of seventeen.[704] But most importantly, the Court explicitly stated that the decisive element in the classification of his ill-treatments as torture was the treatment of falaka, considered a "particularly reprehensible form of ill-treatment which presupposes an intention to obtain information, inflict punishment or intimidate."[705] As already mentioned above with regard to the use of electric shocks during interrogations, for the same reasons, this argumentation could be considered unconvincing. It introduces an unwarranted distinction between falaka and beatings for instance in terms of intention and purpose, whereas this element remains unchanged in both cases. Behind the "particularly reprehensible" language, it appears to me, is a basic appearance of the unwarranted violence and cruelty that has great dehumanizing potential. Premeditation might also be an idea

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[701] *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 113-123.
[702] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006.
[703] *Ibid.*, par. 61.
[704] *Ibid.*, par. 64.
[705] *Ibid.*, par. 65.

behind this language, with connection to the cruel nature of the ill-treatment but also with undertones of the cruelty of the perpetrator capable to meticulously plan the abuse.

The severity of the falaka was further confirmed to amount by itself to torture in the case of *Mammadov (Jalaloglu) v. Azerbaijan*.[706] The applicant, a member of the opposition party, was interrogated for five days in police custody and was subjected to the falaka which temporarily hindered him from walking, to occasional beatings on other parts of the body with the same truncheon, to threats with rape and held in inadequate conditions of detention, with poor ventilation, deprived of food and clean drinking water.[707] A forensic report found a hematoma on one of the applicant's heels and bruising on his body, evidence corroborated with the applicant's statements and the inability of the Government to provide an explanation for the injuries sustained while in the authorities' custody.[708] From the Court's analysis, it can be determined that the qualification of falaka as severe ill-treatment is determined by the nature of the act itself.[709] The Court continued in the same line with upholding falaka as a particularly serious and cruel treatment, amounting by itself to torture, for example in *Levinta v. Moldova* and *Valeriu and Nicolae Roşca v. Moldova,*[710] while also still finding it to amount to torture when used in combination to other methods, for example in *Ateşoğlu v. Turkey,* where falaka was inflicted in combination with beatings. [711] However, unlike in the case of electric shocks, the ECtHR did not make clear statements about finding torture even in the absence of long-term health damage. This possibility is of course not excluded.

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[706] *Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007.
[707] *Ibid.*, par. 14, 46, 56-57.
[708] *Ibid.*, par. 66.
[709] *Ibid.*, par. 69.
[710] *Levinta v. Moldova*, no. 17332/03, 16 December 2008, par. 71; *Valeriu and Nicolae Rosca v. Moldova*, no. 41704/02, 20 October 2009, par. 64.
[711] *Ateşoğlu v. Turkey*, no. 53645/10, 20 January 2015, par. 20.

One last observation to be made in this sub-section is that the nature and cruelty of ill-treatment might take second place when the special vulnerability of the victim is obvious, an element used more frequently in recent cases. This can be observed for the second applicant in *Nalbandyan v. Armenia*, who was subjected to falaka and presented medical evidence confirming this ill-treatment.[712] Although the Court noted the "particularities of the treatment"[713] it did not insist on the nature or cruelty as it would have usually, nor did it make any specific observations with regard to the severity of the ill-treatment, besides noting that it reached the minimum level of severity to fall under Article 3 of the Convention. It rather focused on the vulnerability of the victims resulting from their special connection as mother and daughter and classified the treatment as torture.

3.3.4 RAPE AS CRUEL TREATMENT

Although all coercive methods described above can generally be considered to amount to a rape of the body as they all assault the body and the mind, rape is considered here as the sexual assault in various forms by which both physical pain and mental suffering is inflicted on the victim. Rape is commonly used during armed conflicts or in cases connected with a background of conflict, but can also be encountered during interrogations.

The first judgment in which the court has found a violation for acts of rape during interrogation was *Aydin v. Turkey*, pronounced in 1997. In a background of internal conflict between two groups, the security forces and the PKK, the applicant alleged that she had been subjected to beatings and raped by an agent of the security forces. The Court highlighted both the physical and the psychological pain caused by rape but placed an important accent on the severity of psychological

[712] *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 13.
[713] *Ibidem*, par. 110.

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effects, observing that the healing time can be longer than in the case of other forms of physical or psychological ill-treatment and that the victim will experience a feeling of debasement.[714] The rest of the ill-treatments to which the applicant had been submitted included being kept blindfolded, paraded naked and hosed with high-pressure water while being rolled in a tyre. In relation to these ill-treatments, the Court took into consideration the age of the victim, seventeen, as an aggravating factor. A second factor, the sex of the victim, was also considered as aggravating, as she was held naked before security officers.

The Court appears to have intentionally separated these aggravating factors from the act of rape and mentioned them only in regard to the other ill-treatments, to emphasize the grave nature of this ill-treatment perpetrated by state officials irrespective of the characteristics of the victim. The Court held that "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim."[715] Therefore, a special emphasis is placed by the Court on the status or position of the victim in relation to the perpetrator, an issue that I will further consider in the next chapter concerning vulnerability.

Though in *Aydin* the finding of torture was the result of the accumulation of treatments to which the applicant had been subjected, in its conclusion, the Court expressly noted rape as an "especially cruel act"[716] and stated that a finding of torture would have been made even if the act of rape had been separated from the rest of the ill-treatments.[717]

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[714] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 83.
[715] *Ibidem*, par. 83-85.
[716] *Ibidem*, par. 86.
[717] *Ibidem*, par. 86.

The same line of argument was applied ten years after *Aydin*, in the case of *Maslova and Nalbandov v. Russia,*[718] with very similar facts concerning an applicant who was also subjected to rape and other ill-treatments during questioning by police. The suffering caused by rape, beatings, suffocation, and electrocutions was considered to amount to torture.[719] Although the Court did not explicitly restate the possibility of finding torture only on the basis of the suffering caused by rape, it did reiterate the paragraph of the *Aydin* judgment in which the suffering caused by rape was addressed separately and emphasized in its conclusion the "especially cruel acts of repeated rape."[720] Furthermore, in *Zontul v. Greece*[721] reiterated the cruel nature of the act of rape amounting to torture.

Therefore, it can be observed that rape during interrogations always amounts to torture. The UN Special Rapporteur on Torture confirmed this approach to rape as torture, stating that all forms of sexual assault perpetrated against women in detention violate their inherent dignity and physical integrity.[722] With regard to the specific elements of rape as torture, it can be concluded that the level of severity of the pain inflicted is considered to be implicit in the act itself, while the intent and purpose are not subject to vital and altering analysis.

Furthermore, the Court's finding in *Aydin* that rape is a cruel act that amounts to torture might have been influenced by the developments taking place at the time in international humanitarian law, when an increased preoccupation for rape as a gender-based crime was emerging, especially in the 1990s after the Rwandan genocide and the atrocities that took place during the war in the

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[718] *Maslova and Nalbandov v. Russia,* no. 839/02, 24 January 2008.
[719] *Ibidem*, par. 104-106.
[720] *Maslova and Nalbandov v. Russia,* par. 108.
[721] *Zontul v. Greece,* no. 12294/07, 17 January 2012, par. 88.
[722] Nigel S. Rodley, UN Special Rapporteur on Torture Report to the Commission on Human Rights, E/CN.4/1992/SR.21, 1992, par. 35.

Former Yugoslavia.[723] Previously, rape had been listed as a war crime in the Lieber Code of 1863,[724] a document considered the precursor of the Hague Conventions.[725] Sexual violence also featured implicitly as acts amounting to torture during the Nuremberg trials or as acts amounting to inhuman treatment in the Tokyo Tribunal trials, although rape had not been listed separately in either of the Nuremberg or Tokyo Charters.[726]

Later on, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War[727] and the Additional Protocols[728] included rape among the prohibited conducts in international humanitarian law as attacks on women's honour. Although it might be argued that this perspective is suggestive of and sensitive to the impact of society's stigmatization on rape

[723] Kelly D. Askin, "Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles," *Berkeley Journal of International Law* Vol. 21, Issue 2, (2003): 294-300, 305-308.
[724] Articles 44 and 47 of the Lieber Code (also known as Instructions for the Government of Armies of the United States in the Field, stated in Article 44 that "[a]ll wanton violence committed against persons in the invaded country, […] all rape, […], are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. […]" and Article 47 stated that "[c]rimes punishable by all penal codes, such as […] rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred"). The Code was prepared during the American Civil War by a Professor at Columbia College of New York, Mr Francis Lieber, and promulgated by President Lincoln in April 1863, during the American Civil War. The Lieber Code is available at https://ihl-databases.icrc.org/ihl/INTRO/110 last accessed in November 2016.
[725] The Hague Conventions of 1899 and 1907 on the laws and customs of war on land do not make reference to torture, inhuman treatment, or cruel treatment, they only provide that prisoners of war are to be treated humanely (Article 4 of both conventions). Furthermore, with regard to rape, it could be said that they implicitly prohibit rape by providing that "family honour" must be respected (see Article 46 of the 1907 Hague Convention, available at http://www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf last accessed in November 2016).
[726] Kelly D. Askin, "Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles," 301-302 (citing from documents of the International Military Tribunal: "Many women and girls in their teens were separated from the rest of the internees ... and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, […]").
[727] Article 27 of the Fourth Geneva Convention states that "Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution or any form of indecent assault" (at https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5 last accessed in November 2016).
[728] Articles 4(2)(e) of both Additional Protocols (adopted on 8 June 1977) to the Geneva Conventions of 12 August 1949 prohibit outrages upon personal dignity, among which rape is also included (see the Additional Protocol II at https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17513-english.pdf last accessed in November 2016). Also, Article 76(1) of the Additional Protocol I states that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault" (see the Additional Protocol I at https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf last accessed in November 2016).

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victims, it also discounts the condemnation of rape as a violent and aggressive crime that causes physical and psychological harm that is difficult to detect[729] as well as the fact that rape is an "expression of dominance, power, and contempt" over the victim.[730] These latter aspects however are not central to decisions dealing with rape as torture.

In 1976, The European Commission of Human Rights found in *Cyprus v. Turkey* that rape committed systematically amounted to inhuman treatment.[731] Apart from stating this as a conclusion, the Commission did not provide any further reasoning. In 1986, a report concerning torture drafted by the UN Special Rapporteur Kooijimans listed rape as a method of torture,[732] also without any further considerations.

On 25 May 1993, when the International Criminal Tribunal for the former Yugoslavia was established by UN Security Council resolution, rape was noted as having been systematically perpetrated and the Statute of the Tribunal, adopted through the same resolution, included rape as a crime against humanity, along with torture and other inhumane acts.[733] In a similar manner, in 1994, the Statute of the International Criminal Tribunal for Rwanda included rape as a crime against humanity, with torture and other inhumane acts. Furthermore, it provided that rape amounts

[729] Cherif M. Bassiouni, *Crimes against humanity: historical evolution and contemporary application,* (New York: Cambridge University Press, 2011), 426, footnote 338; Kelly D. Askin, "Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles," 304; Rhonda Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law," *Hastings Women's Law Journal,* Vol. 5, Issue 2 (1994): 249; Alice Edwards, "The 'Feminizing' of Torture under International Human Rights Law," *Leiden Journal of International Law* Vol. 19, Issue 2 (2006): 379.

[730] Catherine N. Niarchos, "Women, war, and rape: Challenges facing the international tribunal for the former Yugoslavia," *Human Rights Quarterly* Vol. 17, No.4 (1995): 650, 673-675.

[731] *Cyprus v. Turkey*, Report of the European Commission of Human Rights, nos. 6780/74 and 6950/75, 10 July 1976, par. 374.

[732] UN Special Rapporteur against Torture, Mr. Kooijimans, Torture and Other Cruel, Inhuman or Degrading Punishment, UN Doc. E/CN.4/1986, par. 119, 19 February 1986, at http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf last accessed in November 2016.

[733] UN Resolution 827 of 1993 adopted by the Security Council at its 3217th meeting, 25 May 1993, and Article 5 of the Statute of the International Tribunal for former Yugoslavia, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf last accessed in November 2016.

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to a serious violation of Common Article 3 of the Geneva Conventions, together with humiliating and degrading treatment, as outrages upon personal dignity.[734]

In a cross-fertilization process, these international developments concerning the crime of rape used systematically in order to punish, intimidate, and destroy civilian populations reached the international human rights cases. The ECtHR's judgment in *Aydin* was clearly motivated by these advancements, although in the case presented to the Court there was no established policy of a systematic use of rape and the Court had dismissed the applicant's claim concerning an administrative practice of ill-treatment.[735] A direct evidence of this influence is the submission made by Amnesty International before the Court, in which it pointed at bills of indictment approved by the International Criminal Tribunal for former Yugoslavia for the crime of torture perpetrated by individuals that had raped women in detention.[736] It also pointed to the finding of the Inter-American Commission on Human Rights that rape amounted to torture, in *Mejía v. Peru*, decided in 1996.[737]

In its turn, the Inter-American Commission on Human Rights had been influenced by the work of NGOs such as Human Rights Watch and Amnesty International in Peru and in finding that rape amounts to torture it had made references to international humanitarian law (the Geneva Conventions of 1949 and Additional Protocols referencing sexual abuse).[738] The Inter-American Commission was also inspired by an editorial comment drafted by Judge Theodor Meron, in which

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[734] Articles 3 and 4 of the Statute of the International Criminal Tribunal for Rwanda, adopted by Security Council Resolution 955, 8 November 1994, at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf last accessed in November 2016.
[735] *Aydin v. Turkey*, par. 121-124.
[736] *Ibidem*, par. 51.
[737] Amnesty International citing the Inter-American Commission on Human Rights, *Raquel Martí de Mejía v. Perú*, Report no. 5/96 Case 10.970, 1 March 1996.
[738] See the Inter-American Commission on Human Rights, *Raquel Martí de Mejía v. Perú*, Report no. 5/96 Case 10.970, 1 March 1996.

he supported the prosecution of rape as a war crime by the International Criminal Tribunal for former Yugoslavia, a normative development that he believed could advance the recognition of rape as torture or as inhuman treatment in international human rights law.[739] Furthermore, although not mentioned in the *Mejía* decision, systematic abuses against civilian populations might have also prompted the Commission to find that rape amounted to torture, since the *Mejía* case was decided one year after a report published by the same Inter-American Commission held that the systematic sexual abuses perpetrated against Haitian women amounted to torture.[740]

Therefore, a clear link can be established between the Court's conclusion in *Aydin* and the developments in international law (human rights law, criminal law, and humanitarian law). One year after *Aydin*, the international criminal tribunals adopted *Akayesu*[741] *and Delalić*,[742] in which it was held that rape constitutes genocide and torture, further increasing the status of the crime of rape in international criminal law. Therefore, with regard to the ECtHR's decision to hold that rape is a cruel act amounting to torture it can be said that it was not taken in a vacuum, that there were influences and an indirect incentive from international humanitarian and criminal law dealing with systematic use of rape. What is unfortunate is that no further consideration of these wider influences has been made, nor was there any apparent reflection on the symbolic and normative consequences of equating the crime of rape to that of torture. Perhaps unintentionally, by

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[739] Theodor Meron, "Rape as a Crime Under International Humanitarian Law," *The American Journal of International Law*, Vol. 87, No. 3 (July 1993): 428.
[740] The Inter-American Commission on Human Rights, *The Situation of Human Rights in Haiti*, https://www.cidh.oas.org/women/Haiti95women.htm last accessed in November 2016. See also Hannah Pearce, "An examination of the international understanding of political rape and the significance of labeling it torture," *International Journal of Refugee Law*, Vol. 14, No. 4 (2002): 549.
[741] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, 2 September 1998, par. 597.
[742] *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, 16 November 1998.

emphasizing the cruel nature of the act of rape, the ECtHR maintains the harm and the violation focused equally on rape and torture, rather than subsuming it entirely under torture.

3.3.5 OTHER "CRUEL ILL-TREATMENTS" AMOUNTING TO TORTURE

Rarely, in the case law of the ECtHR there are also cases not involving suspension, falaka or electric shocks, where the cruel nature of the ill-treatment (or of the suffering inflicted) was (indirectly) held to determine a finding of torture.

In 2003 the Court decided the case of *Elçi and others v. Turkey*,[743] in which nine Turkish applicants complained that they had been subjected to treatments contrary to Article 3 of the Convention during a period in which they were kept in custody for questioning on their human rights work and connections with the PKK.[744] The case is relevant here especially because the Court expressly concludes that severity is the distinguishing element for finding that four applicants (two of which were women) were subjected to torture while five were subjected to a less severe ill-treatment amounting to inhuman treatment.[745] The applicants had a similar professional background, they

[743] *Elçi and others v. Turkey*, nos. 23145/93, 25091/94, 13 November 2003. In the absence of clear evidence, the Court based its findings mainly on the constant statements of the applicants, of witnesses, limited medical evidence presented by two of the applicants and on the previous reports of the CPT.
[744] *Ibidem.*
[745] *Ibidem,* par. 646-647 ("646. In the light of the circumstances of the case as a whole, the Court finds it established that the applicants Tahir Elçi, Niyazi Çem, Meral Daniş Beştaş and Hüsniye Ölmez suffered physical and mental violence at the hands of the gendarmerie during their detention in November and December 1993. Such ill-treatment caused them severe pain and suffering and was particularly serious and cruel, in violation of Article 3 of the Convention. It must therefore be regarded as constituting torture within the meaning of that Article. 647. The Court further finds that the applicants Şinasi Tur, Sabahattin Acar, Mehmet Selim Kurbanoğlu, Mesut Beştaş and Vedat Erten were also subjected during their detention to ill-treatment in violation of Article 3, although of somewhat less severity. The Court finds that the treatment to which these five applicants suffered was sufficiently serious to render it inhuman and degrading").

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were arrested for a similar length of time, kept in the same facility, they were largely subjected to the same methods of interrogation, and they presented similar evidence before the Court.[746]

Findings of torture involved both physical and mental ill-treatment, including blindfolding, pouring pressurized cold water over the naked body, being kept naked, threats with being tortured or killed, mock executions, limited schedule for using the toilet, deprivation of food, squeezing of the testicles, beatings, use of loud music, sleeping on concrete, being kept standing facing a wall.[747] The inhuman and degrading treatment involved severe beatings, threats with death, executions or torture of relatives, deprivation of sleep and food, blindfolding, limited use of the toilet, use of loud music, and being kept naked on the cold concrete floor.[748] Almost the same types of methods of interrogation appear to have been applied in both instances. However, the number of methods applied in the case of applicants subjected to torture were higher than in the case of those exposed to inhuman treatment and included the use of pressurized cold water, mock executions, squeezing of testicles, threats concerning the victim's persons (not her relatives, as it was in the case of inhuman treatment).

The most noticeable explanation for the different outcomes regarding the two groups is the use of cold pressurized water hosing, on those that were victims of torture. Such a treatment could be considered either by its nature a cruel treatment or that its effects added great physical pain to the amount of pain and suffering already inflicted by beatings, threats and dire conditions of detention and had grave consequences on the health of the applicants. Furthermore, the importance of this

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[746] The evidence taken into consideration for both groups of applicants included their "credible and consistent" statements (par. 641 of the judgment in *Elçi and others v. Turkey)*, which remained the same throughout the proceedings, and the CPT's previous reports confirming the use of coercive methods of interrogation in the same detention centre. Therefore, from the point of view of the evidentiary basis of the Court's findings, there are no notable differences.
[747] *Elçi and others v. Turkey*, par. 16, 46-47, 53-55, 69.
[748] *Ibidem*, par. 35, 39, 51, 58, 60-61.

method is also evident in the statements given by at least five applicants whose subjective perspective emphasized that the others were subjected to cold water hosing.[749] Although it is nowhere explicitly stated, if the case was presented from this perspective to the Court, with an already in-built differentiation between the methods applied to each applicant, this could have influenced the Court in its assessment. The intention of these applicants might not have been to claim that they themselves were not subjected to torture, as evident in the naming of cold water hosing as just "a different form of torture,"[750] but it in fact produced the effect of separating the two groups.

3.4 THE UN BODIES: "CRUEL" AS THE EQUIVALENT OF INHUMAN TREATMENT

Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment […]"[751] As mentioned above with regard to the *travaux préparatoires* for Article 7 of the ICCPR, the terms and expressions used in this provision were explained in detail in the UN Annotations drafted by the UN Secretary General in 1955 for the Draft ICCPR.[752] The term "cruel" was however the only one omitted from these Annotations

[749] *Elci and others v. Turkey*, par. 60, 153, 177, 31, 35 (Par. 60: "His colleagues - MM. Elçi and Çem and Mmes Beştaş and Ölmez - were stripped naked and doused with cold water." Par. 153: "Tahir Elçi, Niyazi Çem who had been brought from İstanbul, Meral Daniş Beştaş and Hüsniye Ölmez were subjected to a different form of torture than him - cold water hosing. He could tell from their screams and moaning." Par. 177: "Tahir Elçi and Niyazi Çem were held with him. They were taken to the toilet, from where he heard them screaming and shouting. They were beaten up and hosed with cold water. Mr Çem returned soaking wet and the applicant tried to dry his hair for him." Par. 35: "He stated that Tahir Elçi, Niyazi Çem and Meral Daniş Beştaş had been tortured with cold water." Par. 31: "Because of the bad state of health of his colleagues - MM. Elçi and Çem and Mmes Beştaş and Ölmez - on 9 December 1993, no one was taken to court that day.")

[750] *Elci and others v. Turkey*, par. 153 (Mr. Acar stated that "Tahir Elçi, Niyazi Çem who had been brought from İstanbul, Meral Daniş Beştaş and Hüsniye Ölmez were subjected to a different form of torture than him - cold water hosing. He could tell from their screams and moaning.").

[751] Article 7 of the ICCPR, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx last accesed in November 2016.

[752] European Commission of Human Rights, *Preparatory work on Article 3 of the European Convention of Human Rights, Memorandum prepared by the Secretariat of the Commission*, Strasbourg, 22 May 1956, pp. 18-19, available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf last accessed in November 2016.

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without any comment or definition provided. The absence of any definition in this provision was partially remedied by Article 16 of the UNCAT which stipulates the obligation on the State Parties to prevent that "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture […] when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[753]

Unfortunately, in the interrogation cases presented before the UNCAT and the UNHRC, these bodies have not attempted to explain the meaning of "cruel" in "cruel, inhuman or degrading treatment." They clearly distinguish between "torture" and "cruel, inhuman or degrading treatment" (admittedly, the UNHRC makes such a distinction only in some but not all cases in which a violation of Article 7 ICCPR is found). The distinction between these two categories is probably why the term "cruel" has not been clearly defined in the case law of these bodies, as it must have been presumed that if it is the equivalent of "inhuman" it would encompass the same ill-treatments. It will have the same meaning as "inhuman," as defined in Article 16 of the UNCAT (acts which do not amount to torture, committed by an official - instigation, consent, etc., included) or respectively in Article 7 of the ICCPR. In interrogation cases the UNCAT has either reached the conclusion that the ill-treatment amounted to torture or that there was no violation of Article 1 of the Convention against Torture. It has actually never found a coercive interrogation method to amount to inhuman treatment although the complainants usually invoke both relevant provisions of the Convention (Article 1 and Article 16), in order to anticipate the possibility of a rejection of their complaint under Article 1 and make sure that they still have a chance under Article 16 prohibiting inhuman treatment. It appears they need not worry about this if their complaint is

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[753] Article 16 of the UNCAT, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx last accessed in November 2016.

substantiated. On the other hand, the Committee makes a clear separation between conditions of detention of a person being interrogated and the coercive method(s), as though the conditions of detention could not be part of the overall ill-treatment during the interrogation process. Under Article 1 of the Convention, the Committee has either classified conditions of detention as inhumane (in *Abdelmalek v. Algeria* for instance)[754] or it has not used any qualification (in *Ramiro Ramírez Martínez et al v. Mexico).*[755] It has also analysed conditions of detention separately under Article 16 in *Asfari v. Morocco*.[756] Therefore, the prohibition of "cruel, inhuman or degrading treatment" has a limited significance (and is largely irrelevant) for ill-treatment during interrogation and indicates a very wide understanding of the types of ill-treatment (physical and psychological) that amount to torture. The situation for the UNHRC is not significantly different. As already stated in Chapter 2, Section 2.5, in interrogation cases, the UNHRC commonly reaches three outcomes: torture, violation without determination of the type of ill-treatment,[757] and no violation.[758] Therefore, like the UNCAT, the UNHRC does not give a particular meaning to "cruel" in interrogation cases. From the cases that I have analyzed there was no case with a finding of "cruel, inhuman or degrading treatment" in a clear interrogation case. Lastly, unlike the ECtHR

[754] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.3
[755] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015, par. 17.4.
[756] UNCAT, *Asfari v. Morocco*, Communication no. 606/2014, 15 November 2016, par. 13.9.
[757] See, among others, HRC, *Juan Fernando Terán Jijón v. Ecuador*, no. 277/1988, 26 March 1992; HRC, *Blanco v. Nicaragua*, no. 328/1988, 20 July 1994; HRC, *Chung v. Jamaica*, no. 591/1994, 9 April 1998; HRC, *Kennedy v. Trinidad and Tobago*, no. 845/1998, 26 March 2002; HRC, *Kurbanova v. Tajikistan*, no. 1096/2002, 6 November 2003; HRC, *Tarasova v. Uzbekistan*, no. 1057/2002, 20 October 2006; HRC, *Njaru v Cameroon*, no. 1353/2005, 19 March 2007; HRC, *Khuseynov and Butaev v. Tajikistan*, nos. 1263/2004 and 1264/2004, 20 October 2008; HRC, *Koreba v. Belarus*, no. 1390/2005, 25 October 2010; HRC, *Oleg Pustovalov v. Russian Federation*, no. 1232/2003, 23 March 2010; HRC, *Kirpo v. Tajikistan*, no. 1401/2005, 27 October 2009; HRC, *Akwanga v. Cameroon*, no. 1813/2008, 22 March 2011; HRC, *Andrei Khoroshenko v. Russia*, No. 1304/2004, 29 March 2011; HRC, *Mohamed v. Libya*, no. 2046/2011, 17 October 2014; HRC, *Vasily Yuzepchuk v. Belarus*, no. 1906/2009, 24 October 2014; HRC, *Khadzhiev v. Turkmenistan*, no. 2079/2011, 1 April 2015.
[758] See, among others, HRC, *Kelly v. Jamaica*, no. 253/1987, 8 April 1991; HRC, *Grant v. Jamaica*, no. 353/1988, 31 March 1994; HRC, *Chaplin v. Jamaica*, no. 596/1994, 02 November 1995; HRC, *Errol Johnson v. Jamaica*, no. 588/1994, 22 March 1996; HRC, *Blaine v. Jamaica*, no. 696/1996, 17 July 1997; HRC, *Sahadeo v. Guyana*, no. 728/1996, 1 November 2001; HRC, *Kouidis v. Greece*, no. 1070/2002, 28 March 2006; HRC, *Rajapakse v. Sri Lanka*, no. 1250/2004, 14 July 2006; HRC, *Pustovoit v. Ukraine*, no. 1405/2005, 20 March 2014; HRC, *Soyuzbek Kaldarov v. Kyrgyzstan*, no. 1338/2005, 18 March 2010.

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who uses "cruel suffering," which indirectly suggests that this must be what the victim experiences when tortured, the UN bodies' assessment is much more cursory and impersonal, so they do not use "cruel" to refer to the level of pain and suffering.

3.5 THE U.S.: "CRUEL" AS BOTH TORTURE AND INHUMAN TREATMENT

3.5.1 CRUEL AND UNUSUAL

As already mentioned, the word "cruel" has been used in the U.S. for quite some time, as the Eighth Amendment prohibited "cruel and unusual punishment." Given the wide body of literature discussing in-depth the meaning and application of this clause,[759] as well as the above section on the historical background of the term cruel, for the purposes of this section's analysis it should be sufficient to say that "cruel" has been interpreted to mean "unnecessary suffering"[760] or "gratuitous infliction of suffering,"[761] while "unusual" is seen as something that is "immorally discriminatory"[762] or "not regularly employed."[763] The only legal source that provides a hint about what precise acts would fall under this clause is Article 55 of the Uniform Code of Military Justice (10 U.S. Code Chapter 47) which prohibits "cruel and unusual punishments" by providing an enumeration. Following the meanings of cruel provided above, it prohibits "[p]unishment by flogging, or by branding, marking, or tattooing on the body […] the use of irons, single or double

[759] See, among others, Tom Stacy, "Cleaning Up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* Vol. 14, Issue 2, (2005): 475-553; Laurence Claus, "The Anti-Discrimination Eighth Amendment," *Harvard Journal of Law and Public Policy* Vol. 28, No. 119 (2004); John F. Stinneford, "The original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation," *Northwestern University Law Review* Vol. 102, No. 4, (2008): 1739-1825; Shannon D. Gilreath, "Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent," *Thomas Jefferson Law Review* Vol. 25, (Spring 2003): 559-592.
[760] Tom Stacy, "Cleaning Up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* Vol. 14, Issue 2, (2005): 481.
[761] *Gregg v. Georgia*, 428 U.S. 153 (1976), at 183.
[762] Lawrence Claus, "The Anti-Discrimination Eighth Amendment," *Harvard Journal of Law and Public Policy*, Vol. 28, (2004).
[763] Tom Stacy, "Cleaning Up the Eighth Amendment Mess," *William & Mary Bill of Rights Journal* Vol. 14, Issue 2, (2005): 486.

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[...]."[764] This understanding of the clause, which mostly suggests that a violation would be at the extreme end of grave ill-treatment, has apparently also spilled over in interrogation cases.

3.5.2 EXTREME CRUELTY AS TORTURE

Further indication of the meaning of "cruel" was provided during the process of ratification of the UNCAT by the U.S., a process that spanned through three presidential administrations. The UN Convention against Torture was signed by the U.S. on April 18, 1988, during the Reagan Administration, discussed for final reservations and understandings during the Bush Sr. Administration, and ratified on October 21, 1994, during the Clinton Administration. A report drafted in 1990 by the Senate Foreign Relations Committee reveals in detail the way the U.S. understood torture and cruel treatment and how the meaning of these two acts was faintly changed from the Reagan to the Bush Sr. Administration.

In May 1988 the Reagan Administration had submitted to the Senate 17 conditions for the ratification of the UNCAT, including an understanding that introduced a very high threshold for torture, set at "excruciating and agonizing"[765] pain or suffering. The standard was set so high out of a concern that police brutality might be considered to amount to torture under the Convention, while the Administration considered that the category of torture should be applied only to practices that were extreme and "unusually cruel" such as "sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause

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[764] 10 U.S. Code § 855.
[765] Senate Foreign Relations Committee, Report Together with Additional Views on the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (hereinafter " The Foreign Relations Committee Report"), Executive report no. 101-30, August 30, 1990, pp. 7 and 14, available at http://detaineetaskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No_.pdf last accessed in November 2016.

extreme pain."[766] Moreover, the concept of cruelty was considered by the Reagan Administration an objective criteria that can assist in the determination of the level at which mental pain and suffering constitutes torture.[767]

The Foreign Relations Committee disagreed with the proposed understanding on the threshold for torture since it gave the impression that the U.S. was not committed to ending torture. However, it agreed with the proposed understanding of the Bush Sr. Administration defining mental torture as "prolonged mental harm."[768] Furthermore, with regard to torture and cruel treatment, the Report prepared by the Committee on Foreign Relations highlighted the extremely cruel nature of torture, thus using identical terms that had been used by the Reagan Administration.[769] Despite the elimination of the reference to torture in very strong wording ("excruciating and agonizing"), the Committee virtually kept the same standard as the one proposed by the Reagan Administration. At the same time, the Report considered that both "cruel" and "inhuman" treatment referenced in the UNCAT Article 16 is the rough equivalent of the treatment and punishment prohibited by the Fifth, Eighth and Fourteenth Amendments and should be so understood when interpreting Article 16 of the UNCAT.[770] This became one of the reservations adopted by the U.S. with regard to Article 16 of the UNCAT.[771]

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[766] The Foreign Relations Committee Report, p. 14.
[767] Ibidem, p. 13 ("in determining when mental pain and suffering is of such severity as to constitute torture, it is important to look to other, more objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain and suffering").
[768] Ibidem, p. 9.
[769] The Foreign Relations Committee uses the phrase "an extreme form of cruel and inhuman treatment" (p. 6 of the Foreign Relations Committee Report) while the Reagan Administration "an extreme form of cruel and inhuman treatment" and "an extremely cruel and inhuman nature" (p. 13 and 15 of the Foreign Relations Committee Report).
[770] The Foreign Relations Committee Report, p. 8.
[771] Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, Vol. 28, No. 4 (Nov., 2006), pp. 809-841, citing the *Report of the Committee Against Torture*, 23rd Session (8-19 November 1999), 24th Session (1-19 May 2000), U.N. GAOR, 55th Sess., 179(b), U.N. Doc. A/55/44 (2000).

Although no further detail is provided with regard to the notion of "cruel", in light of the Reagan Administration's consideration of the objectiveness of the concept, it can be considered that "cruel" is seen as a criteria that is surely independent of the victim, outside of her subjective experience. It pertains to the perspective of the external assessor, so somewhere akin to the "shock the conscience" test employed by the U.S. Supreme Court. In this sense, there are references to brutal or revolting treatments specific of medieval accounts of torture in *Brown v. Mississippi*[772] or "brutal and life-changing"[773] in *Daliberti v. Republic of Iraq*.

The case law confirmed this understanding of "cruel" to mean torture when the treatment is extreme, outrageous, or heinous. In *Price v. Socialist People's Libyan Arab Jamahiriya*, the United States Court of Appeals for the District of Columbia Circuit confirmed the meaning of torture as mentioned in the Foreign Relations Committee Report of 1990 and re-affirmed that torture must be of a certain degree of cruelty.[774] It stated that "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture."[775] Furthermore, in 2003, the same court stated in *Simpson v. Socialist People's Libyan Arab Jamahiriya* that although the acts complained of (being held incommunicado and threatened with death while being unable to learn about the husband's welfare) were cruel, they were not "so unusually cruel or sufficiently extreme and outrageous as to constitute torture"[776] within the meaning of the TVPA. In *Doe v. Qi* the court referred to treatments constituting torture as particularly heinous acts, which may include electric shocks, being forced to witness the sexual assault of a friend, waterboarding, or being placed on a special

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[772] *Brown v. Mississippi*, 297 U.S. 278 (1936), at 464, citing the state court decision in *Brown v. Mississippi*.
[773] *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19 (D.D.C. 2001), at 26.
[774] *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), par. 40.
[775] *Ibidem*, par. 37.
[776] *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), par. 10.

torture device to grind the ankles and wrists of the victim.[777] In the same case it also considered claims of "cruel, inhuman or degrading treatment" for acts that included beatings during the interrogation of three other plaintiffs. With regard to this category, it rejected the claims of petitioners specifically because the international decisions cited in support of their claim did not cover similar ill-treatment, essentially holding that being "pushed, shoved, hit, and placed in a chokehold" for one day of detention and interrogation is not cruel, inhuman or degrading treatment.[778]

3.5.3 CRUEL, INHUMAN OR DEGRADING TREATMENT

The term cruel is also used as the equivalent of inhuman or degrading treatment, as in the UNCAT. Some U.S. courts however have considered that the standard for such a claim is too vague and refused the claim.[779] Illustrative for the challenges posed by interpreting cruel and inhuman or degrading treatment in U.S. courts is the 1988 case of *Forti v. Suarez-Mason.*[780] Although it does not concern interrogational torture or inhuman treatment, this case is relevant here because it gave a general perspective on the relativity of this term. The U.S. District Court for the Northern District of California observed that although it is prohibited by so many international and national instruments, none of them provides a recognized universal definition or indicates the specificities of the proscribed act,[781] so that domestic courts could determine whether plaintiffs' claims are actionable. The court stated that "conduct, particularly verbal conduct, which is humiliating or

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[777] *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal 2004).
[778] *Ibidem*, at 1322.
[779] *Hilao v. Estate of Marcos*, 103 F.3d 789, par. 23 (9th Cir. 1996) citing the decision of the U.S. District Court for the District of Hawaii; Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988).
[780] *Forti v. Suarez-Mason*, 694 F. Supp. 707, (N.D. Cal. 1988).
[781] *Ibidem*, at 712.

even grossly humiliating in one cultural context is of no moment in another."[782] The court particularly disagreed with the ECtHR's definition of degrading treatment as treatment which drives the applicant to act against his/her will or conscience, for being too abstract and general, possibly leading to a coverage of legal conduct. This view of degrading treatment by a U.S. court in 1988 is very much in line with the position of the then Reagan Administration, which considered that degrading treatment as viewed by the European Commission of Human Rights would most likely not be prohibited under the U.S. Constitution.[783]

International and European influence was later evident in providing the U.S. category of "cruel, inhuman or degrading treatment" with the same meaning of debasement and humiliation as the one used by the ECtHR. In the 2002 case of *Mehinovic v. Vuckovic* the U.S. District Court for the Northern District of Georgia found that Vuckovic had subjected the plaintiff to cruel, inhuman or degrading treatment. With inspiration from domestic sources (the Foreign Relations Report of 1990, mentioned above) as well as from international sources (the ECtHR case of *Ireland v. the United Kingdom*, the UN Declaration against Torture, and the commentary of UNCAT by Burgers and Danelius), the court defined this treatment as "acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of "torture" or do not have the same purposes as "torture.""[784] Following this definition, it considered that certain acts of ill-treatment inflicted on the plaintiff had amounted to torture while others specifically to cruel and inhuman as they were intended to degrade and humiliate. The latter included the use of anti-

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[782] *Forti v. Suarez-Mason*, 694 F. Supp. 707, (N.D. Cal. 1988), at 712.
[783] The Foreign Relations Committee Report, 25.
[784] *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, (N.D. Ga. 2002), at 1348.

Muslim epithets and forcing the plaintiff to lick his own blood from the walls of the police station, therefore acts that do not involve physical violence.

3.5.4 CRUELTY AS A DISTINCT CRIME IN THE UCMJ

One instance for the use of "cruel" that is specific to the U.S. is cruelty as a distinct crime provided in the Uniform Code of Military Justice,[785] so applicable to acts of ill-treatment carried out by U.S. military personnel (and sometimes by civilians who accompany military personnel in the field), within the U.S. or overseas.[786] The statute prohibits cruelty as a distinct crime in Article 93 but, as practice goes, does not define it: "[a]ny person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."[787] In the context of interrogations, it would be a crime applicable to military carrying out interrogations, as the person being interrogated would be in the military's control and subject to their order. By checking the list of convictions under Article 93 UCMJ,[788] I have identified three cases that concerned trial convictions for cruelty and maltreatment related to interrogation.[789] All three cases[790] concern U.S. military personnel in charge of softening up detainees at Abu Ghraib in Iraq, so that the interrogators would obtain intelligence more easily. These are the cases of the military officers involved in the pictures that reached the media world-

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[785] 10 U.S. Code Chapter 47.
[786] Colonel R. Peter Masterton, "Court-Martial Jurisdiction Over Civilians in Contingency Operations: A New Twist," *New England Journal on Criminal and Civil Confinement*, Vol. 35, No. 1 (2009): 65-117.
[787] 10 U.S. Code § 893.
[788] There are a total of nine convictions under Article 93 of UCMJ, three concerning interrogations (see http://www.armfor.uscourts.gov/newcaaf/digest/IIIA17.htm last accessed in March 2017).
[789] While not all three cases concern interrogation per se, I have decided to include them here as all three individuals were part of a larger interrogation scheme of terrorist suspects.
[790] In total, nine people were convicted for maltreatment of prisoners at Abu Ghraib, five of them entered guilty pleas, and four reached trial in the military justice system (three mentioned above and the fourth, not mentioned, is Lynndie England, for which I could not find the text of the decision).

wide in 2004. The three cases are *United States v. Graner*,[791] *United States v. Harman*,[792] and *United States v. Smith*,[793] all of them convicted for several counts of maltreatment of detainees. From these three decisions it can be concluded that the military courts use cruelty and maltreatment interchangeably and actually prefer to refer to the offence under Article 93 as maltreatment. The acts for which the individuals were convicted included an extreme form of humiliation,[794] though no reference is made to torture. To determine cruelty or maltreatment the military court used an objective test, meaning that there was no need to show that an actual harm took place but rather that from an objective perspective, taking into account all the circumstances, the act had the potential of causing physical or mental harm.[795]

3.6 CONCLUSION

As shown in this chapter, "cruel" is often used but never explained. The ECtHR and the UN bodies have not clearly explained it in interrogation cases and as shown above, differences do exist between the way each of them uses this concept and category of ill-treatment. For the UN bodies, where cruel is used as equivalent to "inhuman" there also seems to be an avoidance of using the actual term, as if in the present legal landscape it would have no place. In this jurisdiction it appears

[791] *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010).
[792] *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010).
[793] *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010)
[794] Graner was a military policeman charged, among others, with "helping to force the unwilling detainees into a naked human pyramid and then posing for a picture with the pyramid of naked Iraqi detainees; taking a picture of a detainee being forced to masturbate while Private First Class (PFC) Lynndie England smiled, pointed at the detainee's genitals, and gave a "thumbs up" sign; placing a detainee in a position so that the detainee's face was directly in front of the genitals of another detainee to simulate fellatio, and then photographing them; and wrapping a tether around a detainee's neck, handing the tether to PFC England, and then taking a picture of PFC England and the tethered detainee" (*United States v. Graner*, 3-4); Harman "took a new detainee, who had been placed on a box with a hood over his head, affixed his fingers with wires, and told him he would be electrocuted if he fell off the box. Appellant then photographed the victim who stood on the box for approximately an hour" (*United States v. Harman*, 7-9); Smith used his trained dog to threaten detainees "in order to make the detainees urinate or defecate on themselves" (*United States v. Smith*, 5).
[795] *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010), 7-9.

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that "cruel" refers to debasement and humiliation, as in some of the U.S. cases. In the U.S. the use of "cruel" is quite extensive since it is employed both for torture, designated as extremely cruel acts, and for inhuman or degrading treatment that is humiliating. Furthermore, a distinct use of cruel is found in the U.S. under the UCMJ, where cruelty is a distinct crime.

The ECtHR uses "cruel" in relation to ill-treatment that by its nature will surely cause cruel suffering and amount to torture, irrespective of whether it causes long-term health damage. ECtHR cases in which inhuman treatment was found (or for that matter where violation of Article 3 is found but no qualification is made[796]) do not make any reference to cruelty,[797] so in the case law of the ECtHR these two terms, "inhuman" and "cruel," are undoubtedly mutually exclusive. The only case I could find on inhuman treatment that might be considered to have included an allusion to cruelty in the Court's reasoning is *Asllani v. "the former Yugoslav republic of Macedonia"*,[798] where the Court held that "the applicant suffered a broken nose and facial bruising due to the use of "brute" force on his face" causing him "physical pain, fear, anguish and mental suffering" that amounted to inhuman and degrading treatment.[799] It is still arguable if "brute force" could be an equivalent of cruel or if it is rather a reference to physical ill-treatment. Therefore, it is unclear why the ECtHR uses this term if it was not mentioned in the Convention and specifically eliminated, as it was shown by the history of the drafting of this provision.

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[796] *Ayse Tepe v. Turkey*, no. 29422/95, 22 July 2003, par. 36-42 ; *Hasan Kiliç v. Turkey*, no. 35044/97, 28 June 2005, par. 36-43; *Breabin v. Moldova*, no. 12544/08, 7 April 2009, par. 50-52; *Yusuf Gezer v. Turkey*, no. 21790/04, 1 December 2009, par. 29-33; *Dvalishvili v. Georgia*, no. 19634/07, 18 December 2012, par. 41-45.
[797] I have analysed over 60 cases in which the term "cruel" appeared in cases concerning inhuman treatment and I could not find any case in which the term "cruel" would refer to ill-treatment qualified by the Court as inhuman and degrading.
[798] *Asllani v. "the former Yugoslav republic of Macedonia"*, no. 24058/13, 10 December 2015, par. 86.
[799] *Ibidem*, par. 87.

As for the role of cruelty in determining findings of torture, two lines of reasoning can be distinguished. The first relates to the nature of the ill-treatment and appears where the methods applied are by their nature so severe and capable of inflicting pain or suffering that the ill-treatment could only amount to torture; in such cases cruelty therefore describes the nature of the ill-treatment. And second, cruelty relates to the perpetrator as the methods reveal the cruelty of the perpetrator, and were undoubtedly planned and carefully selected because they are capable of inflicting severe pain and suffering. What can also be noted is that the statement frequently repeated by the ECtHR, "this act was particularly serious and cruel and capable of causing severe pain and suffering,"[800] (with some variations on the exact wording) is actually a lack of analysis of the severity inflicted by the ill-treatment, since the Court will use it for a particular method and ignore the rest of the ill-treatments.[801] However, I do agree with the position of the ECtHR of using cruel in relation to torture, given that it would be difficult to imagine something more severe than cruel.

Not explaining the meaning of cruel in decisions and judgments can also have consequences on the determination of torture. For the UN bodies, not calling the term "cruel" the equivalent of torture and using it in relation to inhuman or degrading treatment can become an escaping tool, as well as for domestic authorities or international bodies who do not want to outrightly designate certain state practices as torture. Also, the use of cruel might be a way of placing the ill-treatment

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[800] *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, 14 October 2008, par. 50. See, among others, *Selmouni v. France*, par. 105; *Dikme v. Turkey*, par. 96; *Chitayev and Chitayev v. Russia*, par. 159; *Erdoğan Yılmaz and Others v. Turkey*, par. 50; *Al Nashiri v. Poland*, par. 515.
[801] *Olmez v. Turkey*, no. 39464/98, 20 February 2007, 59.

between torture and inhuman treatment,[802] especially at the domestic level,[803] where the relative dimension, culturally dependant, might influence its meaning.

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[802] İrfan Neziroğlu, "A Comparative Analysis of Mental and Psychological Suffering as Torture, Inhuman or Degrading Treatment or Punishment under International Human Rights Treaty Law," *Essex Human Rights Review*, Vol. 4, No. 1, (February 2007): 9.

[803] An example of such an escaping strategy comes from the ECtHR case of *Bekos and Koutropoulos v. Greece* (no. 15250/02, 13 December 2005, par. 23), where in the course of domestic administrative proceedings the Chief of the Greek Police fined the alleged perpetrator for not taking "the necessary measures to avert the occurrence of cruel treatment."

4 THE VULNERABILITY OF THE VICTIM AS AN INDICATION OF SEVERE PAIN OR SUFFERING AND OF TORTURE

4.1 INTRODUCTION

The concept of vulnerability,[804] whether understood as a universal, common, inevitable condition[805] of every human being or as an "individual variation,"[806] has been increasingly used in the human rights discourse. Besides human dignity, vulnerability has been explored as the undervalued basis of human rights and state obligations. Anna Grear argues that the proper foundation of human rights lies in the embodied vulnerability, which played an important role in the creation of the human rights discourse and in the creation of the UDHR.[807] However, the philosophical conception of the eighteenth century, when the rights discourse emerged, was centred on the opposite of a vulnerable subject. The idea was that individuals were autonomous, that their body belonged to themselves and no longer to the community. They could not be abused for higher purposes of redemption or for demonstrations of the sovereign's authority.[808] Universal instruments were conceived on this logic, which made it necessary to adopt subsequent "corrective" and specific instruments aimed at protecting those particularly vulnerable.[809]

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[804] Vulnerability has been defined as exposure to actual or potential harm (see Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law*, (London and New York: Routledge Taylor & Francis, 2017), 1).
[805] Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State*," Emory Law Journal*, Vol. 60 (2010); Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, Vol. 20, Issue 1, (2008): 1-23; Bryan S. Turner, *Vulnerability and Human Rights*, (Pennsylvania: The Pennsylvania State University Press, 2006).
[806] Anna Grear, *Redirecting Human Rights: Facing The Challenge Of Corporate Legal Humanity*, (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2010).
[807] Ibidem, 134, 140-142, 156 -162.
[808] Lynn Hunt, *Inventing Human Rights: A History*, (New York, London: W.W. Norton and Company, 2007), 94.
[809] Anna Grear, *Redirecting Human Rights: Facing The Challenge Of Corporate Legal Humanity*, 98-102, 108.

Going even further, Martha Fineman uses the concept of vulnerability as a heuristic device, which enables us to observe the biases and hidden assumptions of legal practices.[810] She has developed a universal thesis of vulnerability and posits that all individuals are dependent on their environment so they need a responsive state who will react to their vulnerability, by for instance taking up obligations.[811] Fineman's theory essentially challenges autonomy and vulnerability applied only to determined, marginalized groups. She does however moderate her theory by conceding that vulnerability is also a paradoxical concept, in that despite it being a universal condition, it is also very particular; that for example while all individuals are universally vulnerable, everybody is positioned differently within institutional relationships. So vulnerability will manifest itself in a different degree for each individual, depending on the resources and the state's involvement in compensating for our vulnerabilities.[812]

To what extent vulnerability is specific of all the rights or whether vulnerability is specific only to some categories of rights has been a point of contention. Turner argues that it is more relevant for socio-economic rights than for civil and political,[813] while Grear argues that all rights presuppose vulnerability, even though vulnerability might be "less directly interwoven with survival/health issues."[814]

Vulnerability in general is also not without challenges, especially due to its vagueness and tendency to have a metaphorical "raz de marée" effect,[815] becoming fashionable and engulfing a

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[810] Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, Vol. 60 (2010): 28 (note 53).
[811] Ibidem, 9.
[812] Ibidem, 31.
[813] Bryan S. Turner, *Vulnerability and Human Rights*, 36.
[814] Anna Grear, *Redirecting Human Rights: Facing The Challenge Of Corporate Legal Humanity*, 134-135.
[815] Marc-Henry Soulet, "La vulnérabilité, une ressource à manier avec prudence," in Laurence Burgogue Larsen ed., *La vulnérabilité saisie par les juges en Europe*, (Paris: Pedone, 2014), 8.

multitude of legal topics and human rights aspects. The constant broadening of its applicability leads to a lack of coherent meaning for the notion of vulnerability, and criticism has been pointed at situations where it is unclear whether vulnerability refers to a generalized or a particular vulnerability.[816] In the absence of rigour and effective control of its extensive use, it also risks trivializing the notion of vulnerable person, which is fundamental for human rights. As Samantha Besson rightly observes in her article on the use of vulnerability by the ECtHR, vulnerability is on the edge of becoming a mere "oreiller de paresse,"[817] to be used everywhere, even when it might not be warranted to do so. As she also argues, it might inadvertently contribute to stigmatising certain persons by the fact that it favors a paternalistic approach to those who are vulnerable.[818]With specific regard to the prohibition of torture and the use of vulnerability in this context, the UN Special Rapporteur on Torture, Manfred Nowak, stated that, rather than the intensity of the pain and suffering, the powerlessness of the victim, together with the purpose of the treatment, is a decisive criteria in distinguishing between torture and inhuman treatment.[819] In a separate article, Manfred Nowak has restated this position and argued that "[i]t is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned."[820] This inherent vulnerability of detainees was the main tool used in the "war on terror." According to the former head of the CIA's Clandestine Service, Jose Rodriguez, nudity was used because it gives a sense of vulnerability

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[816] Samantha Besson, "La vulnerabilité et la structure des droits de l'homme," in Laurence Burgogue Larsen ed., *La vulnérabilité saisie par les juges en Europe*, (Paris: Pedone, 2014), 80-81.
[817] Ibidem, 81.
[818] Ibidem, 80.
[819] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN Doc. E/CN.4/2006/6, par. 39.
[820] Manfred Nowak, "Challenges to the Absolute Prohibition of Torture and Ill-Treatment," *Netherlands Quarterly of Human Rights* Vol. 23, (2005): 678.

especially for culturally influenced detainees; the "insult slap" was used not with the objective of inflicting pain but to show the detainee that he is inferior and somebody else is in control; methods of this type were used in order to instil a sense of hopelessness and despair so that the detainee would conclude that it was better off cooperating.[821] The hopelessness of the victim during interrogation has also been the subject of psychological studies, which have confirmed that interrogation with the use of manipulations, psychological pressures and ill-treatment share the same psychological mechanism "geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness."[822]

In this overall view of vulnerability and building on Grear's argument that vulnerability is also specific to civil and political rights and on Nowak's position on powerlessness as a central defining criteria of torture, in this chapter I will consider the emergence of vulnerability in interrogational torture cases and its contribution to understanding torture as an abuse of the dependency relation between the individual in custody and the state. As seen above, so far the legal literature on vulnerability and human rights has resulted in general studies, in analyses of the vulnerability case law of the ECtHR and other international bodies[823] or studies focused on traditionally vulnerable

[821] '60 Minutes' CBS radio podcast on 30/04/2012 of the former head of the CIA's Clandestine Service, Jose Rodriguez (talking about 'enhanced interrogation techniques' used during interrogations of high-level al Qaeda detainees), http://audio.cbsradionewsfeed.com/2012/04/29/19/60Minutes042912_1801_2102717.mp3 last accessed in November 2016

[822] Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, "Torture vs Other Cruel, Inhuman, and Degrading Treatment. Is the Distinction Real or Apparent?" *Archives of General Psychiatry* Vol. 64, No. 3 (2007): 277-285.

[823] For studies on ECtHR see A. Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in: M. Fineman & A. Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, (Farnham: Ashgate, 2013): 147-170; I. Truscan, "Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights," *Nordic Journal of Law and Justice* no. 3 (2013): 64-83; Samantha Besson, "La vulnerabilité et la structure des droits de l'homme," in Laurence Burgogue Larsen ed., *La vulnérabilité saisie par les juges en Europe*, (Paris: Pedone, 2014), 59-85. For the UN Committee on Economic, Social and Cultural Rights see A.R. Chapman and B. Carbonetti, "Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 33, No. 3, (2011): 682-732.

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groups such as children, persons with disabilities, victims of domestic violence and rape, members of ethnic minorities, and especially after *M.S.S. v. Belgium and Greece*, on asylum seekers.[824]

The issue of vulnerability and interrogations has not been studied in depth with an eye to the current case law to provide a reflection on the consequences of this concept for interrogational torture and in general for understanding torture. It will be shown that although using vulnerability as a criteria is not a guarantee for finding torture, or a violation for that matter, still, focusing on vulnerability can bring a court's analysis towards the subjective experience of the victim, provide the public a better understanding of her experience, as well as give more substance to claims of psychological harm, and ultimately acts as an aggravating element in assessing ill-treatment.

The analysis in this chapter is organized on the basis of the instances of vulnerability that can be typically identified in interrogations: the general vulnerability resulting from the inherently inferior position of the person placed under the complete control of authorities and her further vulnerability resulting from the ill-treatment itself (the subject of the first section); a particular type of vulnerability as weakness (the second section); vulnerability resulting from the victim's prior state of health (which will be the subject of the third section); mental disability in the fourth section; other demographic characteristics such as the age, sex, ethnic and national origin (the subject of the fourth section). Finally, a section concerning empirical studies has also been included to

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[824] *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011. For further details on the use of vulnerability in these contexts see, among others, Bonita C. Meyersfeld, "Reconceptualizing domestic violence in international law," *Albany Law Review*, Vol. 67 (2003): 371-426; Rhonda Copelon, "Recognizing the egregious in the everyday: Domestic violence as torture," *Columbia Human Rights Law Review*, Vol. 25 (1993): 291-367; Veronika Flegar, "Vulnerability and the Principle of Non-Refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?" *Contemporary Readings in Law and Social Justice*, Vol. 8, Issue 2 (2016): 148-169.

provide further understanding on how vulnerability might bring a positive contribution to the interrogational torture case law.

4.2 Vulnerability as the Powerlessness of the Victim in an inferior position while in custody or control of the perpetrator

4.2.1 The ECtHR: Double Vulnerability or Particularly Vulnerable Group?

A focus on vulnerability can be distinguished in the Strasbourg system since 1992 when the former European Commission was still functioning. The Commission had then stressed in *Tomasi v. France* that the applicant was in a "state of inferiority."[825] The same position was taken in *Ribitsch v. Austria*, in which the Commission emphasized the particular vulnerability of the applicant, who was unlawfully held in police custody.[826] Until 1996 the Court had not made any reference to vulnerability in regard to victims of ill-treatment. In the 1996 case of *Aksoy v. Turkey*, the Court introduced the concept of vulnerability in its reasoning, though it gave it a slightly different meaning than what the Commission was considering. The ECtHR referred to the applicant's circumstances as a whole as giving him cause "to feel vulnerable, powerless and apprehensive,"[827] considering that he had been subjected to the Palestinian hanging, followed by the public prosecutor's choice not to investigate. In line with Fineman's theory of responsive state, the ECtHR then declared in the same case, though under Article 13 of the Convention (so not in the substantive part of the assessment), that torture victims are in an "especially vulnerable position,"[828] which appeared to be a reference to difficulties in proving the

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[825] *Tomasi v. France*, no. 12850/87, 27 August 1992, par. 113.
[826] *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, par. 36.
[827] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, par. 56.
[828] *Ibidem*, par. 98.

abuse and to psychological vulnerability, which imposes on the state the obligation to effectively investigate such complaints. *Aksoy*'s latter statement had not fully sunk in and the case was followed by *Aydin*, where the same perspective of a general feeling was mentioned; the victim experienced an "overall sense of vulnerability."[829]

The ECtHR's perspective changed with *Salman v. Turkey*, where it was stated that all persons held in custody are in "a vulnerable position and the authorities are under a duty to protect them."[830] Though it did not refer particularly to victims of ill-treatment and the statement had been made in the section concerning the substantive analysis of Article 2, it was a definite sign of moving on to analysing the actual position of inferiority the applicants have in state custody. Of course the applicant's subjective feeling of vulnerability still appears in the Court's judgments concerning ill-treatment during interrogations, mostly in the form of feelings of inferiority,[831] since this phrase is part of the standard formula for exemplifying degrading treatment, it is the threshold at which the acts inflicted will come under consideration for an Article 3 violation, and it might also be specific of inhuman treatment.[832]

In the "new" approach the ECtHR focuses especially on the fact that criminal suspects subjected to ill-treatment during interrogations are held in a permanent state of uncertainty which contributes to their vulnerable situation, often cut off from any outside contact with the family or a lawyer and subjected to physical and psychological abuse. From the numerous cases taking this position, one could note *Dikme v. Turkey* in which the ECtHR stated expressly that the applicant had been

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[829] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 84.
[830] *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, par. 99.
[831] See, among others, *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 43; *Olisov and others v. Russia*, nos. 10825/09, 12412/14, 35192/14, 2 May 2017, par. 86 ("Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating […]").
[832] *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, par. 51.

"entirely vulnerable" to the acts of physical torture during questioning[833] or *Chitayev and Chitayev v. Russia* where the ECtHR emphasized the permanent state of anxiety due to the uncertainty of the applicants' fate.[834] Furthermore, in *Gäfgen v. Germany* [GC], the ECtHR appears to repeatedly emphasize the state of vulnerability of the applicant, who was held handcuffed in the interrogation room, so in a situation of constraint, and in a context where his interrogator was growing increasingly anxious and actively planning to use physical torture,[835] so that the applicant must have experienced the loss of total control and mental suffering from the anticipated pain.

A special boost in the use of a victim's particular vulnerability inherent in a situation of interrogation taking place outside of legal norms was provided by the cases concerning war on terror suspects and the subsequent cases. In *El-Masri v. the Former Yugoslav Republic of Macedonia* the Court analysed the treatment inflicted on the applicant at Skopje Airport (qualified as torture) and stated that the applicant was in a "particularly helpless situation."[836] Even more obvious was the Court's use of vulnerability in the same case but with regard to the applicant's treatment at the hotel (qualified as inhuman treatment). The Court referred to the applicant's fear concerning his fate while being kept in secret solitary confinement for 23 days, outside of any judicial framework, which left him "entirely vulnerable."[837] The particular situation of vulnerability resulting from a complete isolation was also considered in *Lyapin v. Russia*[838] and in *Al Nashiri v. Poland*.[839] In the latter, vulnerability was mentioned as a particular aim of the U.S.

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[833] *Dikme v. Turkey*, no. 20869/92, 11 July 2000, par. 82.
[834] *Chitayev and Chitayev v. Russia*, no. 59334/00, 18 January 2007, par. 158.
[835] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, par. 95 and 106.
[836] *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012, par. 208.
[837] *Ibidem*, par. 202-203.
[838] *Lyapin v. Russia*, no. 46956/09, 24 July 2014, par. 119.
[839] *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, par. 515.

authorities, who sought to maximize the applicant's "feeling of vulnerability and helplessness […] to create a state of learned helplessness and dependence."[840]

The "war on terror" cases[841] and in general the U.S. torture scandal may have played an important role in reconsidering the vulnerability of victims of ill-treatment as such, beyond the vulnerability of a person held in custody. This influence is directly noticeable for instance in the 2015 case of *Hajrulahu v. "The Former Yugoslav Republic of Macedonia"* where the Court considered waterboarding as a direct cause of the state of vulnerability of the applicant.[842] Although it had mentioned before that particular remark that the applicant had been kept incommunicado and beaten with rubber tubes and plastic bottles, these specific acts did not prompt the Court to associate them directly to his vulnerability. In a sense then, while the "war on terror" cases might have boosted the use of vulnerability, it might also prove to be a discriminating accomplishment. It has advanced considerations of ill-treatment that do not leave obvious marks on the body but it has done so selectively, which might call into question the validity of the change.

What I hope it is evident from this analysis of vulnerability as powerlessness is that the state of insecurity for a victim of ill-treatment during interrogations is the manifestation of a responsive state failing in its duty towards persons dependent on its protection and placed within its full control. Furthermore, although it is not always easy to distinguish in the Court's case law whether the vulnerability is due mostly to the applicant being held in custody and denied procedural rights, or whether it is due principally to the ill-treatment inflicted, it can be considered that an applicant

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[840] *Ibidem*, par. 515.
[841] See also *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014; *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016.
[842] *Hajrulahu v. "The Former Yugoslav Republic of Macedonia"*, no. 37537/07, 29 October 2015, par. 100 ("the applicant was held on several occasions under water in a swimming pool while his legs and arms were handcuffed, which made him being in a state of vulnerability").

ill-treated during an interrogation is actually attained by a "double vulnerability," his position of inferiority vis-à-vis the police officers and his vulnerability resulting from the ill-treatment.

To correct the failures of the state and to remedy the general power imbalance between the parties, the Court introduced since *Ireland v. the United Kingdom* the use of presumptions and the shifting of the burden of proof where unexplained injuries occur while in state custody.[843] Furthermore, in *Shestopalov v. Russia*, the Court emphasized the perspective of the applicant who believed, like any other individual would, that police officers' duties are to protect persons in their custody and therefore trusted them with his security and protection.[844] The fact that they instead kept the applicant arbitrarily for about ten hours, they denied him all the rights to which he was entitled as a criminal suspect, and subjected him to physical and psychological ill-treatment, made him "particularly vulnerable."[845] The particular vulnerability of persons denied their fair trial rights is also relevant in further strengthening the presumption in favour of the applicants' allegations of torture.[846]

In the 2012 pilot judgment of *Kaverzin v. Ukraine* the Court went as far as to designate criminal suspects as a "vulnerable group,"[847] and possibly the most vulnerable among victims of ill-treatment by police. Whether the Court meant "the most vulnerable" or "one of the most vulnerable" is unclear, given a typing error in the judgment. In any case, subsequent judgments have not confirmed this standing. After a HUDOC search, it appears that from 24 judgments and decisions on Article 3 in which the phrase "vulnerable group" was used, only *Kaverzin* has referred

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[843] *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, par. 100.
[844] *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 46.
[845] *Ibidem*, par. 47.
[846] *Olisov and others v. Russia*, nos. 10825/09, 12412/14, and 35192/14, 2 May 2017, par. 78-79.
[847] *Kaverzin v. Ukraine*, no. 23893/03, 15 May 2012, par. 174 ("criminal suspects appear to be one the most vulnerable group of victims of ill-treatment by the police").

to criminal suspects among victims of ill-treatment in police custody as a vulnerable group. The perspective of considering criminal suspect victims as a vulnerable group per se is possible but the Court's "vulnerable group" theory would mostly be difficult to reconcile with this idea.

The legal literature[848] has shown that the Court's concept of "vulnerable group," introduced in *Chapman v. the United Kingdom*[849] to refer to the Roma minority, is not comprehensively defined. Rather than define a set of indicators for vulnerable groups, the Court has more often referred to international instruments to determine such groups but it has not as such defined group vulnerability.[850] On the basis of its case law, it has been conceded that the Court locates vulnerability in the external social circumstances of the individual, shaped by historical or social forces; that the individual is a member of the group and the particular vulnerability is "shaped by specific group-based experiences"[851] and finally, that vulnerable groups have a harm component, a historical discrimination.[852] Nonetheless, the case law has also been expanding on considerations of material deprivation and living conditions in considering vulnerable groups, with respect for instance to asylum seekers.[853] This is another notable evolution of the case law on Article 3 considering that for instance, in 1947, when the ICCPR was in the drafting process, it was made

[848] L. Peroni and A. Timmer, "Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, Vol. 11, No. 4 (2013): 1063.
[849] *Chapman v. the United Kingdom*, no. 27238/95, 18 January 2001.
[850] Francesca Ippolito and Sara Iglesias Sánchez ed., *Protecting Vulnerable Groups. The European Human Rights Framework*, (Oxford and Portland: Hart Publishing, 2015), 3.
[851] L. Peroni and A. Timmer, 1064.
[852] Ibidem, 1064-1065. See also partly concurring and partly dissenting opinion of Judge Sajó in *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011, arguing that while asylum seekers may be vulnerable, they are not a particularly vulnerable group in the sense used by the Court ("The concept of a vulnerable group has a specific meaning in the jurisprudence of the Court […] such groups were historically subjected to prejudice with lasting consequences, resulting in their social exclusion. […] Asylum-seekers differ to some extent from the above-identified "particularly vulnerable groups". They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group").
[853] See *M.S.S. v. Belgium and Greece* (2011).

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clear that "treatment" should not apply to "degrading situations which might be due to general economic and social factors."[854]

Going back to the subject of this sub-section, how do torture and inhuman treatment victims fit into this expansive framework? They are not historically subjected to prejudice or socially excluded in the sense that ethnic groups might be, nor do they identify as a group. Rather, the experience can be considered specifically individual, as their vulnerability is not influenced by "group based experiences" though it is possible that ill-treatment takes place on a larger scale or the victim witnesses the torture and ill-treatment of others. They are however dependent on the state, though mostly only for the duration of the infliction of ill-treatment, and surely suffer harm and lasting consequences or even impairments caused by the trauma. Most importantly though, vulnerability in these cases results from torture and ill-treatment; vulnerability is not a prior condition to the ill-treatment,[855] thus the Court's use of "vulnerable position" or "vulnerable situation."

Therefore, the vulnerability of victims of ill-treatment does not fit perfectly with the ECtHR's framework for vulnerable groups. In declaring criminal suspects who are victims of ill-treatment a particularly vulnerable group, in *Kaverzin* the ECtHR may have loosely used the phrase "vulnerable group" without a particular intention to classify the victims according to its traditional understanding. It might have also been influenced by the fact that under Article 46 of the Convention it had concluded that a large number of judgments presented the same recurring

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[854] M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: M. Nijhoff, 1987), 150.

[855] For a discussion of vulnerability as cause and effect see A.R. Chapman and B. Carbonetti, "Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 33, No. 3, (2011): 724-725.

problem and the Court had more than one hundred cases pending with similar claims of ill-treatment in police custody.[856] Furthermore, Kaverzin suffered from a disability. Although the ECtHR had not discussed this under the qualification of the ill-treatment, the facts of the case mention that the applicant had been diagnosed with complete blindness allegedly caused by a head injury suffered in police custody.[857] As it will be shown in the following sub-sections, many cases that concern victims of ill-treatment in interrogations also present another individual source of vulnerability, such as the age, sex, or ethnic origin, which makes the applicant "particularly vulnerable," and easily identified with an already established vulnerable group. These inherent vulnerabilities can also side-track the Court's attention from the vulnerability resulting from the ill-treatment and by declaring the victims of ill-treatment a vulnerable group, a further diversion from the individual experience might also take place, which incidentally would be contrary to Fineman's theory of vulnerability.

Though I am not a medical expert, I would also wonder with regard to the consequences of such a categorization on the recovery process, specifically whether the "labelling"[858] as part of a "vulnerable group" would accentuate the helplessness and powerlessness after the ill-treatment has already ended. A careful balancing of the notions of autonomy and vulnerability is therefore necessary in order to avoid transforming vulnerability into an incapacity for action. As the Court has shown, the vulnerability of victims of ill-treatment and their dependency on the state is not without limits. Although it might be ready to provide some concessions on the issue of admissibility and exhaustion of domestic remedies (as it was for instance the case in *Aksoy v.*

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[856] *Kaverzin v. Ukraine*, par. 172.
[857] Ibidem, par. 18-21.
[858] For a similar discussion on the stigmatization of people living with HIV see L. Peroni and A. Timmer, 1072.

Turkey),[859] these concessions will remain within reasonable limits and used only in very "special circumstances". The Court held unanimously in *Ayan v. Turkey* that although the vulnerable position of a victim of ill-treatment in police custody may cause her difficulties in obtaining evidence, eight years and a half after release from custody is an excessively long period for a victim to seek a medical opinion.[860] Concluding that the applicant had not presented evidence to support his claims, the Court dismissed his complaint of torture as unsubstantiated. The Court therefore expects victims of ill-treatment to be diligent. Although it might concede that for a certain period of time they would still be in a vulnerable position,[861] especially immediately after the events, there clearly are limits to the concept of vulnerability that are not specific to the traditional vulnerable groups in the Court's case law.

4.2.2 THE UN BODIES

The case law of the UN bodies on the topic of vulnerability during interrogation is not surprisingly less developed than the ECtHR. I have looked at a total of 34 cases where a specific finding of torture in interrogations was made from both the UNCAT and UNHRC.[862] From 16 cases in which the UNCAT has found a violation of Article 1 in interrogations and at least 18 cases in which the UNHRC has found torture during interrogations, only two cases of the UNCAT mention the word "vulnerability" or "vulnerable": *Dimitrijevic v. Serbia and Montenegro* and *Ramiro Ramírez*

[859] *Aksoy v. Turkey*, par. 56-57.
[860] *Ibidem*, par. 55.
[861] *Nalbandyan v. Armenia*, par. 102.
[862] The UNCAT has referred to vulnerability in cases that concern non-refoulement (see for instance references to "particularly vulnerable" and "vulnerability" in *N. P. v. Australia*, Communication No. 106/1998, 6 May 1999, par. 4.23; also references to the "particular vulnerability" of Roma victims of racially motivated burning of their houses in *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, Communication No. 161/2000, 21 November 2002, par. 9.2). In a similar manner, the UNHRC has also referred to vulnerability in cases on the same subject matter (see for instance a reference to "psychological vulnerability" in *Falcon Rios v. Canada*, Communication no. 133/1999, 23 November 2004, par. 8.5).

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Martínez et al v. Mexico. However, in both of them it was the complainants who were invoking vulnerability, the first with regard to his ethnic origin, a Serbian citizen of Roma origin, which made him particularly vulnerable[863]; in the second case the complainants invoked a position of vulnerability vis-à-vis the authorities who held them in custody in a type of pre-charge detention specific to Mexico (*arraigo*).[864] There is no instance in the cases studied in which the UN bodies would make use of the word "vulnerability."

This does not mean however that vulnerability cannot be inferred from the reasoning but given the detailed nature of the Convention against Torture vulnerability is only hinted at in the form of a state obligation to prevent torture. The aspect that comes close to vulnerability as seen in the ECtHR case law is the isolation of the complainant from the outside world and the lack of procedural safeguards, such as the right to a lawyer during interrogation. In the case of *Gerasimov v. Kazakhstan* the UNCAT specifically referred to the State's failure to provide a lawyer, to have the complainant medically examined and most importantly to officially document the detention of the complainant. The Committee found a violation of Article 2 (1) of the Convention against Torture together with Article 1 as the State failed in its duty to prevent acts of torture within its jurisdiction.[865] The same failures and violations of Articles 1 and 2 of the Convention were recorded in *Bairamov v. Kazakhstan*[866] and more recently in *Ramiro Ramírez Martínez et al v. Mexico,*[867] and in 2016 in *Asfari v. Morocco.*[868] As it is evident from these cases, although in the

[863] UNCAT, *Dimitrijevic v. Serbia and Montenegro,* par. 3.1.
[864] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico,* par. 2.31. Arraigo is a form of detention without charge allowed under Mexican criminal law for at least 40 days and maximum 80, with judicial review, for suspects of organized crime (for further details see Janice Deaton and Octavio Rodríguez Ferreira, Special Report on Detention Without Charge. The Use of Arraigo for Criminal Investigations in Mexico, January 2015, available at https://justiceinmexico.org/wp-content/uploads/2015/01/150112_ARRAIGO_Final.pdf last accessed April 2017).
[865] UNCAT, *Gerasimov v. Kazakhstan,* Communication no. 433/2010, 24 May 2012, par. 12.2.
[866] UNCAT, *Bairamov v. Kazakhstan,* Communication no. 497/2012, 14 May 2014, par. 8.2-8.4.
[867] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico,* par. 17.3-17.5.
[868] UNCAT, *Asfari v. Morocco,* Communication No. 606/2014, 15 November 2016, par. 13.2.

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background of finding a violation of Article 2 of the Convention against Torture is of course an idea of the vulnerability of the criminal suspect during interrogation and criminal investigation, this is not spelled out as such in the decisions of the UNCAT. On this issue the Committee limits itself to the aspects of the case at hand. Furthermore, none of these cases provides any indication that there would be a theory of vulnerability due to the ill-treatment itself (a double vulnerability), as seen in the cases brought before the ECtHR.

As for the UNHRC, the first Article 7 interrogation case in which torture was found, *Motta v. Uruguay* stresses the incommunicado detention and the lack of procedural safeguards provided to the complainant for one month before being brought for a hearing with a military judge.[869] In *Muteba v. Zaire* the Committee again observed that the complainant had been kept incommunicado for nine months, during which time he had no access to a lawyer or to his family and that even after that period of time, his family was only allowed to leave food parcels for him.[870] Therefore, in these cases arising in the 1980s, the only aspect that could be interpreted as making reference to the complainant's vulnerability is the lack of contact with the outside world or the lack of legal assistance. However, besides taking notice of the State's failure to provide procedural safeguards or contact with the family, no comment is made as to the complainants' vulnerability. Furthermore, confirming that incommunicado detention had taken place did not necessarily lead the Committee to provide further details as to the exact procedural safeguards denied to the complainant.[871] Subsequent cases are even more unclear, as they lack a uniform approach to this State obligation: (1) in some cases the Committee strictly differentiates between the abuse taking place during interrogation and the State's obligation to provide legal assistance under Article 14 (3)(d) of the

[869] HRC, *Motta v. Uruguay*, no. 11/1977, 29 July 1980, par. 13.2.
[870] HRC, *Muteba v. Zaire*, no. 124/82, 24 March 1983, par. 10.2.
[871] HRC, Acosta v. Uruguay, no. 162/1983, 25 October 1988, par. 10.4.

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ICCPR (right to legal assistance);[872] (2) in other cases the UNHRC completely overlooks this aspect, although raised by the complainant;[873] (3) yet another option, the Committee appears to include the issue of access to a lawyer under the general umbrella of lack of any contact with the outside world;[874] (4) and lastly, the Committee maintains the 1980s approach in which the access to a lawyer was noted in the analysis of Article 7 ICCPR.[875]

Despite this lack of uniformity, in more recent decisions, such as *Giri v. Nepal*, pronounced in 2011, the UNHRC has been more open to emphasize aspects that could be seen as pertaining to the position of vulnerability of the complainant. In *Giri v. Nepal* the UNHRC repeatedly mentions that the complainant had been held incommunicado for thirteen months, without any contact with the outside world, and specifically underlines the degree of suffering that such a situation might entail.[876] Furthermore, in 2016, in *Askarov v. Kyrgyzstan*, the Committee took note that the State had failed to take special security measures to protect the complainant and had exposed him to an "increased risk of ill-treatment." [877] The complainant had been arrested for complicity in the murder of a police officer and held in the same police station where the deceased officer had worked. To conclude, the UNHRC largely takes a similar approach and analysis to the views of the UNCAT. Although vulnerability is distinguishable in certain cases as a background consideration, it does not feature as prominently as it does in the ECtHR's case law and certainly not as a "double vulnerability" resulting from the custodial measure and the ill-treatment. For these reasons, it rarely adds anything tangible to the qualification of the ill-treatment as torture. The

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[872] *HRC, Mulezi v. Democratic Republic of the Congo*, no. 962/2001, 6 July 2004, par. 4.4; HRC, *Grishkovtsov v. Belarus*, no. 2013/2010, 1 April 2015, par. 8.5.
[873] HRC, *Chiti v. Zambia*, no. 1303/2004, 26 July 2012.
[874] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 2.5 and 7.2.
[875] HRC, *Akmatov v. Kyrgyzstan*, no. 2052/2011, 29 October 2015, par. 8.2.
[876] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 7.2.
[877] HRC, *Askarov v. Kyrgyzstan*, no. 2231/2012, 31 March 2016, par. 8.2.

singular exception is the case of *Askarov*, mentioned above, in which the complainant's security was clearly a relevant element for the UNHRC's consideration of the ill-treatment.

4.2.3 THE U.S.: "A LONE SUSPECT AGAINST WHOM […] FULL COERCIVE FORCE IS BROUGHT TO BEAR"[878]

In the U.S., prolonged interrogations under conditions of stress have been a tool employed by police officers seeking to obtain command over the suspect, to create a state of tension and psychological anxiety, and ultimately to create the pathological need for the suspect to escape the coercive environment by giving in to what the police demands.[879] Due process rights were developed to respond to the inherent coercive nature of interrogations. The fact that police would deny suspects these rights features in many cases before the 1960s. Beginning with *Brown v. Mississippi*, in which the Court referred to the plaintiffs as "helpless prisoners"[880] there have been references to the vulnerability of the suspect resulting from the coercive treatment. Though unlike in the ECtHR case law, there are no direct references to the vulnerability of victims subjected to ill-treatment by police, indirect references are made by mentions of the helplessness and uncertainty in which suspects are placed while confronted with coercive police practices. In *Chambers v. Florida*, a case in which the suspects were held for five days in prolonged interrogations in order to obtain confessions for murder,[881] the helplessness resulting not only from custody but from coercive police practices was considered relevant. The four petitioners, "ignorant young colored tenant farmers,"[882] had been arrested without warrant and subjected to a prolonged

[878] *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).
[879] *Reck v. Pate*, 367 U.S. 433 (1961), Justice Douglas citing Kennedy, *The Scientific Lessons of Interrogation*, Proc. Roy. Instn., Vol. 38, No. 170 (1960).
[880] *Brown v. Mississippi*, 297 U.S. 278 (1936), at 282.
[881] *Chambers v. Florida*, 309 U. S. 227 (1940).
[882] Ibidem, at 238.

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questioning and cross-questioning by state authorities and white citizens, without being provided access to their families or counselors. The U.S. Supreme Court highlighted the setting in which the petitioners had been placed, all intended to "break the strongest nerves and the stoutest resistance" and to "fill petitioners with terror and frightful misgivings."[883] The state of uncertainty and helplessness created through these circumstances and the loss of control over their own lives is central to the U.S. Supreme Court's holding. This is highlighted by the Court as the core to breaking petitioners' will and being mentally (and not only physically) coerced into confessing. Vulnerability was also indirectly pointed at in the case of *Ashcraft v. Tennessee* of 1944, in which the U.S. Supreme Court held that being continuously interrogated while held incommunicado for 36 hours and deprived of sleep and rest throughout this time is mental torture.[884] The Court gave particular attention to the setting in which the petitioner had been placed, an interrogation process run by an entire assembly of people ("officers, experienced investigators, and highly trained lawyers"[885]) against a "lone suspect."[886] This severe and persistent questioning and cross-examination was considered inherently coercive as it placed the petitioner entirely at the mercy of his interrogators. In *Haynes v. Washington*, the petitioner had been held in secret incommunicado detention for five to seven days on suspicion of robbery and was expressly told that he would not be allowed to call his wife unless he gave a confession.[887] The Court referred to the creation of "an unfair and inherently coercive context"[888] during police custody, which included the isolation of the accused from any external contact and a state of uncertainty as to his fate and duration of the custody in the hands of police. The dangers of incommunicado detention were emphasized by

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[883] Ibidem, at 239.
[884] *Ashcraft v.* Tennessee, 322 U.S. 143 (1944).
[885] Ibidem, at 153.
[886] Ibidem, at 154.
[887] *Haynes v. Washington*, 373 U. S. 503 (1963).
[888] *Ibidem*, at 515.

Justices Douglas and Black, who stated in a concurring in *Culombe v. Connecticut* that the use of this measure as used by the law enforcement "breeds oppression" and is the source of brutality.[889] In civil litigation further mentions of vulnerability resulting from ill-treatment are made in *Cicippio v. Islamic Republic of Iran*,[890] *Acree v. Republic of Iraq*,[891] and in *Cronin v. Islamic Republic of Iran*,[892] but considering the overall number of cases that I have analysed in this category (16 tort cases) it does not seem that U.S. courts would give this factor much attention when qualifying the ill-treatment. Considerations of injuries and types of ill-treatment would prevail. As for the cases concerning due process, analysed above, since only *Brown* and *Ashcraft* made references to a qualification of the methods used by police, it is difficult to say to what extent this factor is relevant.

4.3 VULNERABILITY AS AN INDIVIDUAL WEAKNESS

Another instance of vulnerability as powerlessness, which however is not particularly developed to its full potential in the case law is an individual, particular weaknesses of a victim of ill-treatment during interrogation, identified and exploited by the perpetrator. This is particularly evident in cases concerning psychological ill-treatment such as threats or exploitations of sexual autonomy.

4.3.1 THE ECTHR: VULNERABILITY RESULTING FROM THREATS TO RELATIVES

For the ECtHR this particular type of vulnerability was encountered for the first time in *Akkoç v. Turkey*, a judgment pronounced in 2000, where the applicant, while subjected to electric shocks, water hosing and blows to the head during interrogation, had also been threatened with harm to

[889] *Culombe v. Connecticut*, 367 U.S. 568 (1961).
[890] *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62 (D. D.C. 1998), at 65.
[891] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 190 (D.D.C. 2003), at 188 and 218.
[892] *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222 (D.D.C.2002), at 227.

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her children.[893] The Court noted this latter ill-treatment as it had caused her "intense fear and apprehension."[894] In 2011 the Court was again presented with a situation in which threats to a relative had been made, *Nechiporuk and Yonkalo,* which involved a husband and wife, both taken in custody by police for interrogation concerning a murder. While the first applicant was being subjected to violent interrogations by electric shocks so that he would confess to the alleged crime, his eight months pregnant wife was held in a cell in the same building and also interrogated. The first applicant had also been implicitly threatened with his wife being tortured if he did not confess to the crime, a point at which he agreed to sign a confession.[895]

In this case, vulnerability was cited in two instances: first, it was specifically mentioned in relation to the applicant's wife, eight months pregnant, so in a particularly vulnerable position, which was deemed to have considerably exacerbated her husband's mental suffering; second, it was cited directly in relation to the first applicant, who was a criminal suspect under a "significant risk of torture" in Ukrainian police custody at the time of the facts (the elevated risk of torture was observed by the Court based on reports from the Ukrainian Ombudsman and the Committee for the Prevention of Torture).[896] Both types of vulnerabilities were mentioned as two elements in the final assessment, which together with subjection to electric shocks, led the Court to conclude that the severity of the husband's ill-treatment had been specific of torture. In *Nechiporuk* the Court missed the opportunity to give further value to ill-treatment purely of a psychological nature. While the Court noted that the threat "exacerbated" the applicant's mental suffering, which is of course true, one should also note that it did not merely exacerbate his suffering, it was the breaking point

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[893] *Akkoç v. Turkey,* par. 116.
[894] *Ibidem,* par. 116.
[895] *Nechiporuk and Yonkalo v. Ukraine,* no. 42310/04, 21 April 2011, par. 14.
[896] *Ibidem,* par. 155-158.

for the applicant. Though he had already been subjected to electric shocks and would not admit to the crime, he immediately agreed to sign a confession when his wife was threatened. Such details are not available for the case of *Akkoç*, as the judgment does not provide a very thorough evolution of the facts, so no specific conclusions can be drawn for that case. However, a simple "taking note" of this element did not do justice to the psychological suffering inflicted and to the importance of family ties as a source of vulnerability and suffering.

What the Court missed in *Nechiporuk* was remedied in the 2015 case of *Nalbandyan v. Armenia*. In this case the facts involved a mother and daughter (minor at the time of the events) subjected to interrogations, while the father was also held in custody and beaten while interrogated. Both of them, mother and daughter, were subjected to beatings and pressured to admit to a crime; the mother was subjected to repeated beatings to the soles of her feet and would often lose consciousness but would not admit to the crime. The breaking point in this case was the moment the daughter was brought to the police department and locked in a dark room with rats. Under the threat of her daughter being tortured, the mother confessed to the crime.[897]

Unlike in the final assessment of both *Akkoç* and *Nechiporuk*,[898] the Court emphasized here the special tie between mother and daughter and the officers' intention to obtain a confession by the particular treatment applied.[899] Therefore, compared to *Akkoç* and *Nechiporuk* the Court gives a prominent place to psychological ill-treatment resulting from the exploitation of family ties. It does so even in the absence of an expert report concerning the psychological trauma, unlike in *Akkoç*,

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[897] *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 7-28.
[898] *Akkoç v. Turkey*, par. 117; *Nechiporuk and Yonkalo v. Ukraine*, par. 159.
[899] *Nalbandyan v. Armenia*, par. 110.

where the applicant had been diagnosed and under medication for chronic post-traumatic stress disorder.[900]

A concurring opinion authored by Judge Motoc reveals that the intention of the officers and the vulnerability of the victims prevailed over the physical intensity of the ill-treatment.[901] Though in a first instance Judge Motoc refers to the vulnerability of the victims resulting from the custodial measure, she then immediately states that "the intense psychological suffering arising from the very close family ties between the two victims was considered sufficient to find that the physical violence which occurred during the period in custody had amounted to an act of torture."[902] Therefore, although the concurring does not clearly differentiate between the two types of vulnerability, the first arising from being held in custody and the second, which was the most important here, resulting from the exploitation of family ties, the concurring elucidates the motives which might not be particularly obvious in the public reasoning of the Court. So can it be said that the case signals a change in the case law of the Court? Is severity no longer being considered predominantly as a result of the amount of injuries? Is psychological suffering more prominent due to the use of vulnerability? I would note that the case signals indeed a positive change towards reconsidering psychological suffering even more important than physical pain and suffering. However, the mention of physical violence and the fact that the victims presented medical evidence for their physical injuries shows that psychological suffering might not always be sufficient for a finding of torture; the case was nonetheless particularly exceptional.

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[900] *Akkoç v. Turkey*, par. 29.
[901] Concurring opinion of Judge Motoc in *Nalbandyan v. Armenia*, par. 1 ("The factors indicating to us that this was a case of torture rather than of inhuman or degrading treatment are the intent behind the conduct (dolus specialis) and the victims' vulnerability. The existence of these two factors prevailed over the physical intensity of the pain or suffering").
[902] Ibidem, par. 2.

4.3.2 THE ECTHR: VULNERABILITY AND SEXUAL AUTONOMY

In the 2006 case of *Sheydayev v. Russia*[903] the Court made a finding of torture for the beating of the applicant by police officers who sought to make him confess to a crime. The applicant was continuously beaten with a chair leg in the head and left ear; he was threatened with a harsher sentence and with being sodomised, but refused to confess. On the second day of the abuse the applicant was again beaten while tied up and at a certain point police officers attempted to sodomize him by undressing him and making him sit on a bottle. At that point the applicant agreed to write a confession.[904] The reasoning of the Court takes into account the physical pain and suffering confirmed by the corroboration of medical evidence with the applicant's statements.[905] The rest of the assessment of the ill-treatment turns on restating the elements taken into account for determining severity ("the duration of the treatment, its physical or mental effects, the sex, age and state of health of the victim"[906]).

The applicant's breaking point, and for that matter any person's vulnerability, sexual autonomy, features in the Court's judgment only to the extent that it could be inferred from a reference to the standard for degrading treatment under the archetypal formula: "The acts complained of […] were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."[907] Concededly there could be no physical injury to prove that the attempt to sodomise the applicant actually happened and no psychological assessment was made in the case, but given that his statements were

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[903] *Sheydayev v. Russia*, no. 65859/01, 7 December 2006
[904] *Ibidem*, par. 9.
[905] *Ibidem*, par. 61.
[906] *Ibidem*, par. 62.
[907] *Ibidem*, par. 60.

accepted, then his allegation concerning the immediate and serious threats ought to have also carried some weight in the overall argument. The use of standardised formulations in the absence of further consideration in the merits of the case minimizes the impact of psychological suffering resulting from the exploitation of a vulnerability that concerns sexual autonomy.

In the more recent case of *El-Masri v. the Former Yugoslav Republic of Macedonia,*[908] the Court was again confronted with the issue of vulnerability and sexual autonomy. Of relevance here is the applicant's treatment at the Skopje Airport, which did not contain interrogations per se, but the treatment to which he had been subjected was part of a well-documented interrogation process which started with the person being reduced to a state of helplessness so that she would later provide information.[909] For this purpose, the applicant was blindfolded, severely beaten from all sides, his clothes were cut with a knife or scissors and, while thrown on the floor with his hands pulled and a boot placed in his back, "he then felt a firm object being forced into his anus."[910] While still blindfolded, he was forcibly and violently administered a suppository. Of all the acts to which he had been subjected up to that point, the applicant stated before the Court that the latter had been the most degrading and shameful. He was then placed in a nappy, dressed, and while totally deprived of his senses (hooded, chained, wearing earmuffs and eye pads) he was taken to an airplane surrounded by armed security guards from Macedonia. In the airplane he was placed in the spread-eagled position with his face down, he was secured and during the flight he was mostly unconscious due to an anaesthetic.[911]

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[908] *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012.
[909] *Ibidem*, par. 124.
[910] *Ibidem*, par. 21.
[911] *Ibidem*, par. 21, 205.

While the Court noted in the factual summary, within the section concerning the analysis on the merits, that the applicant had been sodomised with an object, in the analysis of the severity of the treatment it held that the forcible undressing was an invasive and humiliating procedure and that hooding caused "at least intense physical and mental suffering."[912] The Court then notices that the "forcible administration of a suppository […] was not based on any medical considerations"[913] and that "the manner in which the applicant was subjected to that procedure caused serious physical pain and suffering." Admittedly, the Court needed to clarify that medication can be forcibly administered where necessary for medical considerations, and it does cite *Zontul v. Greece*,[914] which concerned the rape of the applicant. In *El-Masri*, though the Court notices the applicant's "particularly helpless situation,"[915] the issue of sexual autonomy is barely mentioned, under the form of a contextual analysis of the procedure followed by the authorities and the manner in which the act was effected.

However, the case was the perfect example of the interaction between what at first sight might be considered two competing values, vulnerability and autonomy of the person. The exact interplay between the two is difficult to define, as autonomy is also vulnerable,[916] so the applicant's sexual autonomy was also a source of vulnerability, a source however that was not fully grasped by the Court. I would not go into more details about the interaction between the applicant's vulnerability and his sexual autonomy since such an effort might unintentionally deflect responsibility and accountability towards the applicant. It should be enough to say that the interplay between the two

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[912] *Ibidem*, par. 208-209.
[913] *Ibidem*, par. 210.
[914] *Zontul v. Greece*, no. 12294/07, 17 January 2012, par. 89.
[915] *El-Masri v. the Former Yugoslav Republic of Macedonia*, par. 208.
[916] J. H. Anderson, and Axel Honneth, "Autonomy, vulnerability, recognition, and justice" in John Christman and Joel Anderson (ed.), *Autonomy and Challenges to Liberalism*, (Cambridge: Cambridge University Press, 2005), 130-132.

values and the failures of the State caused considerable psychological suffering, not merely "physical pain and suffering" as stated by the Court. The applicant himself mentioned almost ten years after the facts that it was the most degrading and shameful act. The focus solely on the physical suffering causes the Court to miss the chance to give further meaning to psychological suffering and sexual autonomy.

4.4 VULNERABILITY RESULTING FROM THE VICTIM'S PRIOR STATE OF HEALTH

To the vulnerability resulting from the two sources discussed above, being held in custody and being ill-treated during interrogation, there are other features of the individual that can further add to an already serious state of vulnerability. The victim's precarious state of health is one of them.

4.4.1 ECtHR: THE PRIOR STATE OF HEALTH IS RELEVANT BUT NOT FULLY DEVELOPED

The ECtHR referred to this factor as a relevant one in at least two judgments in which it found that the ill-treatment amounted to inhuman treatment. In a judgment pronounced in 2000, *Büyükdağ v. Turkey*,[917] the applicant had been suffering from a severe bilateral myopia and detachment of the retina. During the ill-treatment she had been subjected to beatings and spraying with cold water while stripped of her clothing.[918] In its reasoning concerning the qualification of the treatment the Court observed that the acts had been of such a nature that they caused physical pain and mental suffering, especially considering her prior state of health.[919] In this case however, the applicant's allegations included only inhuman treatment; she did not invoke torture. Whether this made a difference in the Court's finding is difficult to say. However, considering the gravity of the acts

[917] *Büyükdağ v. Turkey,* no. 28340/95, 21 December 2000.
[918] *Ibidem,* par. 48-55.
[919] *Ibidem,* par. 55.

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themselves (the treatment included beatings to the head, being stripped naked and hosed with water) applied for fifteen days, her vulnerability, and the fact that she had proven with medical documents that the effects of the ill-treatment included pain and diminished capacity to move her arms, it seems that the treatment was quite severe. In my opinion the fact that applicants invoke merely inhuman treatment and not torture should not be held against them. If the Convention itself does not provide a definition of torture, I do not believe that applicants should be expected to study the Court's case law in order to determine where the threshold between torture and inhuman treatment is set, an issue that is after all subject to change.

The second case of relevance here is *Kovalchuk v. Ukraine,* pronounced ten years after *Büyükdağ v. Turkey*. The applicant, suffering from alcohol withdrawal symptoms, was subjected to beatings during his interrogation in order to obtain from him a confession for murder.[920] The Court held that the treatment qualifies as inhuman and degrading especially because the applicant's state of health and "vulnerable emotional state"[921] were exploited by the authorities to break the applicant's resistance and obtain a false confession. This conclusion was reached by the Court "regardless of whether the police resorted to physical violence"[922] and despite the fact that the only injuries which could be proven in the Court's view were a leg and shoulder haematomas, qualified by the medical personnel as "minor bodily injury."[923] I believe this case is indicative of the Court's determination to give more importance to vulnerability as a factor in determining the qualification of ill-treatment as torture or as inhuman treatment. If the injuries had been more serious or if the methods used to inflict ill-treatment had been specifically cruel, the outcome would have been that of torture.

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[920] *Kovalchuk v. Ukraine*, no. 21958/05, 4 November 2010, par. 55-62.
[921] *Ibidem*, par. 60.
[922] *Ibidem*, par. 60.
[923] *Ibidem*, par. 18.

The importance of the vulnerability of the victim resulting from prior health conditions is difficult to determine within the final assessment of the ill-treatment, first because the phrases used may not always be clear and specific, and second, because the Court does not explain why the applicant's previous health condition mattered for the final assessment. With regard to the first reason, in *Büyükdağ* and in *Kovalchuk* this element has a stand-alone position, while in other cases the phrase "the applicant's health condition" is used in a general manner. In the final assessment in *Büyükdağ v. Turkey* it is clear that the Court separated the effects of the ill-treatment from the applicant's previous health condition as two separate elements determining the severity of the treatment.[924] In *Kovalchuk v. Ukraine* the Court's attention to the applicant's health condition prior to his placement in police custody is made even more explicit ("*especially* given the applicant's vulnerable state of health at the time of his detention in custody"[925]). However, this differentiation is not always evident, as in other factually similar cases the phrase "the applicant's health condition" was used in general. For example, in *Samartsev v. Russia*,[926] *Ryabtsev v. Russia*,[927] and in *Bobrov v. Russia*,[928] the Court repeatedly used this phrase (or variations of it) in the final assessment of the ill-treatment despite the fact that the applicants did not suffer from any previous

[924] *Büyükdağ v. Turkey,* par. 55 ("la Cour considère que les actes dénoncés étaient assurément de nature à engendrer des douleurs ou des souffrances tant physiques que mentales chez M[me] Büyükdağ, et compte tenu notamment de son état de santé […] Ce sont ces éléments qui amènent la Cour à considérer que les traitements exercés sur la personne de la requérante ont revêtu un caractère à la fois inhumain et dégradant").
[925] *Kovalchuk v. Ukraine*, par. 61.
[926] *Samartsev v. Russia*, no. 44283/06, 2 May 2013, par. 98 ("Having regard to all the circumstances of the treatment as such, its physical and mental effects and *the applicant's health condition*, the Court concludes that the ill-treatment at issue amounted to inhuman and degrading treatment in violation of Article 3 of the Convention"). In *Samartsev v. Russia*, inhuman treatment was found by the Court for ill-treatment consisting mainly of beatings inflicted during the criminal investigation.
[927] *Ryabtsev v. Russia*, no. 13642/06, 14 November 2013, par. 76 ("Having regard to all the circumstances of the treatment, its physical and mental effects and *the applicant's state of health*, the Court is satisfied that the accumulation of the acts of physical violence inflicted on the applicant on 29 February 2004 amounted to inhuman and degrading treatment, in violation of Article 3 of the Convention").
[928] *Bobrov v. Russia*, no. 33856/05, 23 October 2014, par. 45 ("Having regard to the physical and mental effects of the ill-treatment in question and *the applicant's state of health*, the Court is satisfied that the accumulation of the acts of physical violence inflicted on the applicant on 31 August 2004 amounted to inhuman and degrading treatment, in violation of Article 3 of the Convention").

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health condition. This may indicate two things: either the court mistakenly took this phrase from cases in which this element was indeed relevant, where the applicants suffered from a previous health condition which made them even more vulnerable to the ill-treatment, but the phrase does not carry any meaning in the context of cases where it is not actually relevant; either starting from cases in which the phrase was used the Court continued to use it to refer to the state of health of the applicants after the ill-treatment, and thus the phrase became a staple for expressing the effects of the ill-treatment as a quantity of injuries that only amounts to inhuman treatment. After analysing all these cases I believe that the first explanation is more plausible, given that, when analysing the cases in chronological order, slight changes to the initial phrase can be observed; also, the physical consequences of the ill-treatment are already covered by the phrase "the physical and mental effects of the ill-treatment" constantly used in these judgments.

Going to the second reason why it is difficult to determine the importance of vulnerability resulting from prior health conditions, in *Büyükdağ v. Turkey*, if the Court had explained why the applicant's condition mattered (for example, because she risked an aggravation of her prior health condition or because her vision impairment made her more debilitated before the authorities as she could not predict the blows and the ill-treatment), then it would have been possible to explain the importance of this element. As the judgment stands, the principle of taking into account vulnerability is there, noted, but not fully developed so it cannot be said that in this specific case this element was central to determining the severity of the ill-treatment and the outcome would have been different in its absence. I also consider that in *Büyükdağ v. Turkey* the Court would have found that the ill-treatment amounted to inhuman and degrading treatment irrespective of the applicant's state of health before her arrest. The effects of the ill-treatment on the applicant's health assessed at two

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days of sick leave were already serious, so even in the absence of the vulnerability element the conclusion might have been the same.

4.4.2 The U.S.: Exploiting Suspect's State of Health Could Qualify Ill-treatment As Torture under Substantive Due Process and is Relevant for Damages Awarded

The victim's vulnerability as a result of her weakened state of health was a matter that was mentioned in at least two cases before the U.S. Supreme Court.[929] These cases concern verbal interrogation of hospitalized injured suspects, an unusual procedure that admittedly might be necessary in order to secure evidence; however, the threshold where the circumstances shift into coercive interrogation is at the officers' reaction and exploitation of the suspect's vulnerability, his need of medical attention. As it is reasoned in these cases, the suspect's diminished health, the pain resulting from various injuries that occurred prior to the interrogation further heightens the victim's state of shock, the feeling of powerlessness in custody and during interrogation, and contributes to more easily breaking her will so that she will provide information or a confession. The two relevant cases here are *Mincey v. Arizona* and *Chavez v. Martinez.*

In 1978, in *Mincey v. Arizona*[930] the U.S. Supreme Court found that the interrogation of a wounded person in the intensive care unit, while refusing to answer questions, resulted in coerced statements in violation of the due process rights under the Fourteenth Amendment. The case arose after a narcotics raid at the petitioner's house resulted in the shooting and death of a police officer and the serious wounding of the petitioner. On the same night of the raid, after Mincey was taken to

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[929] See also *Beecher v. Alabama*, 389 U.S. 35 (1967), in which the plaintiff had been threatened by police officers with a rifle in order to confess to a rape and murder. He had been previously shot in the leg, which was later amputated, and five days later, when he signed a confession, he was under the influence of morphine. The Court referred to his treatment as "gross coercion" (at 38).
[930] *Mincey v. Arizona*, 437 U. S. 385 (1978).

the hospital almost in a coma and placed in the intensive care unit, a police officer proceeded to interrogate him although he was suffering from an injury of the sciatic nerve, partial paralysis, and was connected to breathing tubes, a catheter, and intravenous feeding tubes.[931] The interrogation lasted for approximately four hours despite the petitioner's requests that it be stopped until he would have been provided with a lawyer and despite him losing consciousness several times during the interrogation. As the Court reflected, the petitioner was "debilitated and helpless" "at the complete mercy" of the interrogator since he was isolated from contacts with a lawyer, and his state was far from "a rational intellect and a free will."[932] These circumstances led to his will being overborne and to the Court recognizing that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."[933] Although the Court follows its usual line of not providing a qualification of the treatment, torture or inhuman treatment, the case is important because it confirms that a coercive interrogational environment affecting the individual willpower can result from the diminished state of health of the victim and not only from physical acts.

A retreat from the categorical stance on due process confessions is provided in the 2003 judgment of *Chavez v. Martinez*, which concerned a petitioner's allegation that his due process right not to be subjected to coercive interrogation under the Fourteenth Amendment had been violated even though the statements thus obtained had not been used at trial.[934] He had been interrogated as a suspect by Officer Chavez, while receiving treatment for gunshot wounds to the face, wounds that rendered him unable to distinguish between his interrogator and the medical personnel. The

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[931] *Mincey v. Arizona*, at 397.
[932] *Ibidem*, at 399.
[933] *Ibidem*, at 402, citing *Blackburn v. Alabama*, 361 U.S. 199 (1960) at 206.
[934] *Chavez v. Martinez*, 538 U.S. 760 (2003). For a discussion of *Chavez v. Martinez* and its consequences, see, among others, Marcy Strauss, "Torture," *New York Law School Law Review*, Vol. 48, (2003): 226-242; John T. Parry, "Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after *Chavez v. Martinez*," *Georgia Law Review*, Vol. 39 (2005): 733-838; Rosalie Berger Levinson, "Time to Bury the Shocks the Conscience Test," *Chapman Law Review*, Vol. 13, (2010): 307-356.

questioning persisted despite the repeated requests to receive medical treatment. The District Court and the Ninth Circuit Court ruled in favour of Martinez, holding that even though the statements obtained during the interrogation had not been used in a criminal trial against him, the police officer violated his due process right when he obtained the statements via coercive means.[935] The U.S. Supreme Court was split in a plurality opinion. First, Justices Thomas, Rehnquist, and Scalia considered that the plaintiff's claim could be brought under the Fourteenth Amendment but that most likely no violation would be found. Second, Justices Souter and Breyer held that police abuse that fails the "shock the conscience" test would violate due process and remanded the issue of whether in this case the treatment was shocking to the lower court.[936] Third, Justices Stevens, Kennedy, and Ginsburg, who concurred and dissented in part, considered that the treatment of Martinez was a violation of due process but remanded the case since no majority could be achieved on this point. Torture is brought in the discussion by these justices. The very first sentence of Justice Stevens' opinion explicitly states that Martinez was subjected to "torturous methods":

> As a matter of fact, the interrogation of respondent was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods. As a matter of law, that type of brutal police conduct constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty.[937]

Justice Stevens further mentions that Martinez suffered "severe pain and mental anguish"[938] which, according to international standards to which the U.S. adhered as well, would indicate that torture was inflicted during the interrogation. However, the line at which the severity translates into torture is unclear, since it might be debatable whether "torturous method" precisely indicate torture or something akin to torture. Justice Kennedy refers to increased pain and to prolonged or increased

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[935] *Chavez v. Martinez*, at 766.
[936] *Ibidem.*
[937] Justice Stevens concurring and dissenting in part in *Chavez v. Martinez*, 538 U.S. 760 (2003).
[938] Ibidem, at 787.

suffering that officers would cause if they acted against the will of a wounded suspect.[939] Further, according to Justice Kennedy, a civil action under 42 U.S.C. § 1983 could be validly brought once "a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement."[940] So while no majority could be achieved on whether a violation of due process had taken place, it is clear that the exploitation of a suspect's state of health by police questioning is relevant or even determinative for the severity and especially for the amount of compensation awarded.

On this issue, with regard to cases concerning civil damages, the prior health state of the applicant was held as a central element, together with the severe beatings inflicted, for calculating damages in *Cronin v. Islamic Republic of Iran.* The plaintiff had suffered from bowel obstruction when he was abducted from the hospital and tortured during interrogations. Despite the precarious state of his health, he was severely and repeatedly kicked and punched with a rifle butt in his stomach, as well as forced to look at others being brutally beaten. This ill-treatment lasted for four days and resulted in him nearly dying of dehydration because the ill-treatment made him unable to drink and also made it difficult for him to breathe.[941] Although the U.S. District Court for the District of Columbia did not specifically refer to his state of health as a vulnerability, the judgment indicates that this factor played an important part in the court's finding of torture, as well as in the amount of damages awarded.

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[939] Justice Kennedy concurring in part and dissenting in part in *Chavez v. Martinez*, 538 U.S. 760 (2003), at 798.
[940] Ibid., at 798.
[941] *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222 (D.D.C.2002), at 234.

4.4.3 UN BODIES: SCARCE CASE LAW AND APPARENTLY INSIGNIFICANT ELEMENT

For the UN bodies, the only case that I could identify as involving an issue of vulnerability resulting from the victim's prior state of health is *Arzuada v. Uruguay*, a case presented before the UNHRC. The complainant had argued that her niece, the victim of torture during interrogation, had been in a precarious health as she had contracted meningitis and the ill-treatment had included blows to the head.[942] The UNHRC gives no relevance to this factor in its final assessment and no mention is made of whether this was considered purely a speculation on the part of the complainant.

4.5 MENTAL DISABILITY: THE U.S. - THE WEAK OF WILL AND POWER OF RESISTANCE

The only case involving the interrogation of a person with mental disability, in which the U.S. Supreme Court used the designation torture (and cruel), was *Culombe v. Connecticut*.[943] It involved a 33 year-old individual subjected to intimidation, isolated from a lawyer and his family for four days. During this time he was interrogated repeatedly and confessed to a murder after seeing his wife, who urged him to tell the truth.[944] Though as I have mentioned before in this study, the U.S. Supreme Court does not usually determine whether a certain ill-treatment amounted to torture, in this case the Court aims to provide certain general principles to law enforcement officers to follow in interrogations, though whether the aim was achieved is doubtful, especially given the plurality nature of the opinion. The Court seemed very determined to communicate to the law enforcement officers that it views torture not only as brutal physical ill-treatment but also as

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[942] *Arzuada v. Uruguay*, no. 147/1983, 1 November 1985, par. 4.3 and 13.2.
[943] *Culombe v. Connecticut*, 367 U. S. 568 (1961).
[944] *Ibidem*, at 614-616.

psychological abuse. The Court stated that "[t]here is torture of mind as well as body; the will is as much affected by fear as by force."[945] A concurring by Justice Douglas and Black also seems preoccupied by more general aspects such as the vulnerability of lower classes, the weak, poor, and illiterate.[946] Therefore, though *Culombe* starts boldly, the plaintiff's vulnerability is lost among general principles and the vulnerability of other minorities. The U.S. Supreme Court also reversed several convictions in which confessions of mentally ill persons were at issue, though it did not use the word torture or ill-treatment.[947] In *Blackburn v. Alabama,* the Court focused on the vulnerability of the accused, resulting from his illness coupled with the isolation from family for approximately nine hours, placed in a climate of fear by police officers' relentless interrogation.[948] Though in *Culombe* and *Blackburn* the petitioners' mental illness was verifiable by medical evidence, the Court did not limit violations of the due process clause to such requirements. Even when a mental illness of the petitioner is not clearly established but there are doubts as to the level at which the person can understand his situation or his rights given his level of education, the U.S. Supreme Court has held this to be in favour of establishing coercion especially when petitioner was subjected to extensive interrogation.[949] In *Spano v. New York,* it reversed a criminal conviction where the petitioner had a verified history of emotional instability.[950] To assess the limits of

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[945] *Culombe v. Connecticut,* at 605.
[946] Concurring opinion by Justice Douglas, joined by Justice Black in *Culombe v. Connecticut.*
[947] For further cases see *Davis v. North Carolina,* 384 U. S. 737 (1966) (the U.S. Supreme Court considered the coercive atmosphere created by police in the case of a person with a doubtful mental state, held for 16 days without outside contact. The petitioner's vulnerability, noted as "an impoverished Negro with a third or fourth grade education," was one of the two elements considered by the Court, besides the isolation of the petitioner for a long period of time, in reversing the conviction.) and *Reck v. Pate*, 367 U.S. 433 (1961) ("a nineteen-year-old youth of subnormal intelligence" and suffering from "at least borderline mental retardation" held incommunicado for several days and subjected to uninterrupted questioning for six to seven hours daily and even put on display for the public).
[948] *Blackburn v. Alabama,* 361 U.S. 199 (1960).
[949] See *Ward v. Texas,* 316 U. S. 547 (1942); *McNabb v. United States,* 318 U.S. 332 (1943); *Clewis v. Texas,* 386 U. S. 707 (1967).
[950] *Spano v. New York,* 360 U.S. 315 (1959).

coercive interrogation in such cases the Court would look at the pressure applied and the "power of resistance" [951] of the plaintiff.

4.6 Other Demographic Characteristics and their Impact on qualifying the ill-treatment

4.6.1 The Age and Sex of the Victim

4.6.1.1 The ECtHR: Age and sex are always relevant as a source of vulnerability, brought more to the fore in recent case law

In the ECtHR case law, the young age of the victim has seen an increased relevance as a factor determining the qualification of ill-treatment. The first case in which vulnerability resulting from this element was noted was *Aydin v. Turkey* in 1997, where the applicant was a 19 year-old woman, so her vulnerability was noted by the Court as two-fold, stemming from youth and sex.[952] In that case the applicant, had been subjected to rape while in police custody so while her vulnerability was important in relation to the overall ill-treatment, the Court did well in not emphasizing these two factors as relevant only in relation to rape, so that it would not give the act of rape more gravity just because it was perpetrated on a woman for instance. Further cases that noted the young age, and where relevant, the sex of the applicant, include *Batı and Others v. Turkey,*[953] *Corsacov v. Moldova*,[954] and *Menesheva v. Russia.*[955] In all of them this factor is noted as relevant although, rightly, other considerations such as the type of ill-treatment might take precedence. In *Corsacov* for instance, although the Court noted that the applicant being only seventeen years old was of

[951] *Fikes v. Alabama,* 352 U. S. 191 (1957), at 197.
[952] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 83-84.
[953] *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 122.
[954] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 64.
[955] *Menesheva v. Russia*, no. 59261/00, 09 March 2006, par. 61.

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"great importance"[956], it also considered determinative for a finding of torture that *falaka* was inflicted on him.[957] More recently, the final conclusion of the Court, which was usually a general one, referencing the severity and sometimes the purpose of the ill-treatment, has started being more precise.[958] In 2011, in *Dushka v. Ukraine* the Court held that the beatings to which the applicant, a minor at the time of the events, had been subjected in police custody in order to obtain a confession, had amounted to inhuman treatment "especially given the applicant's vulnerable age." [959] Despite the relevance of these factors, it should be noted that they are never the primary consideration, and much less a guarantee for a finding of torture, as obvious in *Dushka*. The gravity of the injuries and of the treatment itself still remain primary considerations, in order to avoid an overly-broad conception of torture and inhuman treatment. Furthermore, the fact that references to considerations of age are overly theoretical and should be correlated with other factors was evident in 2015, in the Grand Chamber case of *Bouyid v. Belgium*, where dissenters pointed to the fact that an automatic attribution of vulnerability on the basis of age is inadequate in the absence of consideration of other aspects of the case.[960]

4.6.1.2 The U.S.: The Youth, "Easy Victim of the Law"[961]

Youth and age appear as important elements in the case law of the U.S. Supreme Court and the exploitation of this vulnerability was found to be in violation of the standards of decency. For the

[956] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 64.
[957] *Ibidem*, par. 65.
[958] See for instance *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 110 ("Having regard to the particularities of the treatment inflicted on the second and third applicants, […] and taking also into consideration that the third applicant was only a minor, the Court considers that the treatment in question could be qualified as torture […]") and *Shestopalov v. Russia*, no. 46248/07, 28 March 2017, par. 48 (Having regard to all the circumstances of the case, including the applicant's age, […], the Court considers that such treatment amounted to torture").
[959] *Dushka v. Ukraine*, no. 29175/04, 3 February 2011, par. 53.
[960] Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, par. 8, in *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015.
[961] *Haley v. Ohio*, 332 U. S. 596 (1948), 599.

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U.S., youth and age are a sign of a weaker will power and understanding of the legal consequences and therefore contribute strongly to reversing convictions made on the basis of involuntary confessions. Although there are several cases in which age was relevant, I will stop only at *Haley v. Ohio,* where the U.S. Supreme Court explained in detail the considerations for regarding the youth an "easy victim of the law."[962] In *Haley* the accused was a 15 year old arrested around midnight as a suspect for murder and was subjected to a "five-hour grilling"[963] by shifts of officers, without any contact with a lawyer or his family. He signed a confession in the morning and was subsequently convicted and sentenced to life imprisonment. The Court provides a long and detailed explanation of why the youth need additional protection when compared to adults. It referred to the 15 year olds as being at a difficult age in general and a legal procedure could make them victims of fear and panic, as they are easily overwhelmed by aspects that would normally leave an adult unimpressed. Furthermore, the Court paralleled the experience of the accused with that of an inquisition,[964] so it concluded that the police had violated the standards of decency of the due process clause under the Fourteenth Amendment. Besides youth and age, lack of education (or "ignorance") was also frequently the cause for reversing convictions of accused who confessed to a crime.[965]

4.6.2 ETHNIC AND NATIONAL ORIGIN: VARIED RELEVANCE AMONG JURISDICTIONS

In the case law of the UNCAT, the very first three cases in which the Committee found violations of Article 1 of the Convention for abuse during interrogations, the complainants, all Roma

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[962] *Haley v. Ohio,* 332 U. S. 596 (1948), 600.
[963] *Ibidem.*
[964] *Ibidem.*
[965] *Chambers v. Florida,* 309 U. S. 227 (1940); *Ward* v. *Texas,* 316 U. S. 547 (1942); *Blackburn v. Alabama,* 361 U.S. 199 (1960), ftn. 7; *Davis v. North Carolina,* 384 U. S. 737 (1966), at 743.

minorities of Serbian origin, had also raised a discriminatory motive for their abuse by police. In *Dimitrijevic v. Serbia and Montenegro*, the complainant stated that the authorities had insulted his ethnic origins and his "gypsy mother."[966] In *Dimitrijevic v. Serbia and Montenegro* the complainant invoked aspects of vulnerability based on ethnic origin and the systematic character of police brutality for the Roma group.[967] Finally, in *Dimitrov v. Serbia and Montenegro*, the complainant also invoked his ethnic origin as a reason for the abuse suffered in police custody and argued that his complaint should be analysed against a background of systematic police abuse against the Roma.[968] In all of these cases there is little indication that vulnerability played a role in assessing the severity of the ill-treatment and reaching the final conclusion, given that the Committee makes no mention of these claims. On the other hand, in the U.S. case of *Mehinovic v. Vuckovic*, the use of a derogatory remark about Muslims, namely that "Muslims were an 'invented nation' and that they 'don't need to exist'"[969] was taken into consideration as part of a humiliating treatment amounting to cruel treatment.

In the ECtHR case law, the ethnic origin is an important component of abuse taking place during questioning. In *Bekos and Koutropoulos v. Greece* the applicants, who were Greek citizens of Roma origin, beaten and threatened with rape during police questioning, claimed that verbal abuse about their ethnic origin was part of the abuse and provided specific examples of slurs that were used by police.[970] In its judgment, the Court included extensive references to international and national reports prepared by the European Union and domestic NGOs on the issue of racially

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[966] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 2.1.
[967] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 3.2.
[968] UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 3.2.
[969] *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (N.D. Ga. 2002), at 1333 (besides the derogatory remarks, the plaintiff had been "forced to lick his own blood from the walls while Vuckovic and others stood laughing").
[970] *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, par. 14.

motivated police abuse against the Roma.[971] The finding however was of a violation of Article 14 (discrimination) taken in conjunction with the procedural aspect of Article 3, as the authorities failed to investigate the possible ethnic undertones of the abuse. Despite the information that in general the Roma were the subject of police abuse in Greece, there was no indication that in the particular case this element had been a factor.[972] Therefore, with regard to ethnic undertones of police abuse during interrogations, general information is insufficient. Unlike other cases, such as for instance conditions of detention, in which general reports carry a significant weight in proving that there is a systemic problem in a certain state, for ethnic violence and police abuse the approach is different. The assessment is made entirely case by case. Furthermore, one might note that the lack of a holistic approach to the substantive aspect, also noted by Judge Cassadevall in his concurring opinion,[973] actually leads to the element of ethnic discrimination not being fully valued in the final assessment of qualification of the ill-treatment. While the Court's approach in analysing Article 14 in conjunction with Article 3 is commendable, as it singles out racially motivated crimes, this should not preclude the vulnerability of the victim from being included in the qualification of the ill-treatment,[974] which would also contribute to a more uniform case law on the issue of vulnerability and police abuse.

As for national origin, the ECtHR in *Razzakov v. Russia* considered that being a foreigner with limited knowledge of the domestic language could further exacerbate one's vulnerability when police interrogations become abusive.[975]

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[971] *Bekos and Koutropoulos v. Greece*, par. 33-37.
[972] *Ibidem*, par. 63-75.
[973] Concurring opinion of Judge Cassadevall in *Bekos and Koutropoulos v. Greece*, par. 2.
[974] The approach in *Bekos* was later taken in *Stefanou v. Greece*, no. 2954/07, 22 April 2010, par. 50-52.
[975] *Razzakov v. Russia*, no. 57519/09, 5 February 2015, par. 54.

4.7 VULNERABILITY IN EMPIRICAL STUDIES

Empirical studies show that the social divide we usually construct for ourselves, between different categories of people or between majority and minority, plays a very important role in justifying ill-treatment in police custody. Empathy between different groups and empathy between a group and an outsider will depend on social categorization.[976] Studies show that people will only see the other as their equal when they belong to the same category and that their emotional response to a factor that affects the other will depend on whether the other is perceived as part of the same category.[977] Additionally, the standards of justice of individuals involved in prohibited behavior will depend upon whether they perceive themselves as perpetrators and whether they see their actions as morally wrong.[978] Two studies of Tarrant, Branscombe, Warner, and Weston show that when torture is perpetrated by the members of a group, torture will be seen as more morally justified than when torture is perpetrated by the members of an outside group.[979] These studies could help explain why the members of minorities or vulnerable groups are the predominant victims of coercive interrogations and for advocating against discrimination, since anti-discrimination law can play an important role in prevention of torture. The Roma minority and more generally, women and juveniles, are three groups that are most vulnerable in coercive interrogations by police. Criminal suspects of Roma origin are frequently the subject of violent interrogations presenting ethnic discrimination overtones. As for women and juveniles, they are

[976] Mark Tarrant, S. Dazeley, and T. Cottom, "Social categorization and empathy for outgroup members," *British Journal of Social Psychology* 48, no. 3 (2009): 427-446.
[977] Vincent Yzerbyt et al., "Intergroup Emotions and Self-Categorization: The impact of perspective-taking on reactions to victims of harmful behavior," *From Prejudice to Intergroup Emotions: Differentiated Reactions to Social Groups*, ed. Diane Mackie and Eliot Smith (New York and Hove: Psychology Press, 2002): 68, 75.
[978] Anca Miron and Nyla R. Branscombe, "Social Categorization, Standards of Justice, and Collective Guilt," *The Social Psychology of Intergroup Reconciliation*, ed. Arie Nadler, Thoma Malloy, and Jeffrey Fisher (Oxford University Press, 2008): 80.
[979] Mark Tarrant et al., "Social identity and perceptions of torture: It's moral when we do it," *Journal of Experimental Social Psychology* 48 (2012): 513-518.

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two vulnerable groups that are perceived as easy to manipulate and control, especially when their background can be linked to some form of immoral conduct and delinquency. These characteristics, ethnical origin and deviant behaviour, are seen as the factors that differentiate the suspect from the majority's category, to which the perpetrator belongs, and which will decrease the willingness to treat criminal suspects in a humane and fair manner.

This separation between the members of a suspect group and the majority of the population also plays an important role in providing justice for the victim of torture. Studies show that rather than distancing torture perpetrators from the identity of the group, in order to defend the identity of the group, the members of the group will take important actions to defend the actions of perpetrators as a response to perceived threats against the social identity of the whole group.[980] The knowledge that a fellow member of the group has used torture and the possibility that his actions will be perceived as representative for the group will actually encourage attempts to morally justify torture. Even empathy for the torture victim that is an outside member of the group will be less strong when the perpetrator was a member of the group, than when the perpetrator is an outsider. Furthermore, the mechanism by which blame is attributed to the victim are also similar, depending on whether the victim is an insider or an outsider to the group.[981]

From all these studies we can conclude that the standards of justice and redress accorded to the victim are limited by the reaction of the dominant group members. Anti-discrimination laws and

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[980] *See* Mark Tarrant and A.C. North, "Explanations for positive and negative behavior: The Intergroup attribution bias in achieved groups," Current Psychology, no. 23 (2004): 161-172; J. Jetten et al., "Debating deviance: Responding to those who fall from grace," *Rebels in groups*, ed. J. Jetten and M.J. Hornsey (Oxford, Wiley-Blackwell, 2011).
[981] *See* Tarrant et al., "Social identity and perceptions of torture: It's moral when we do it."

policies can thus fill in a hidden gap of the legal prohibition of torture and inhuman treatment which affects the treatment of minorities during police interrogations.

4.8 CONCLUSION

As I have shown in this chapter, the vulnerability of the victim is a relevant factor when assessing the qualification of the ill-treatment. It also appears to be a more uniform factor than for instance the duration of the ill-treatment. In recent judgments of the ECtHR it has even been used as the primary determinant for a finding of torture (see *Nalbandyan* and concurring opinion of Judge Motoc, mentioned above).

Whether the use of this factor will become increasingly important in the final assessment is too early to tell, but a negative aspect that might result is to render the definition of torture irrelevant. Furthermore, the use of objective demographic criteria (sex and age for instance) does not actually take into consideration the victim's subjective experience of the ill-treatment. But then again, there are rare judgments that truly grasp the experience of the victim. The paradox of this concept is that at the same time it could be a tool to emphasize the state's obligations and psychological suffering, the latter largely ignored so far or supressed under standard formulas that render meaningless the psychological experience of the victim.

While compared to the ECtHR, for the UN bodies the concept of vulnerability resulting from being in state custody or from being subjected to ill-treatment during interrogation is not brought to the fore in any of the cases analysed in this chapter. Although the decisions give the impression that the concept is somewhere in the background, to reinforce the states' obligations the concept should be exploited to its potential.

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For the U.S., vulnerability stems from the highly coercive context of interrogations, the need to provide procedural due process to suspects presumed innocent and more generally to ensure that police enforce the law with respect to life and liberty. Further considerations such as the plaintiff's mental disability or his prior state of health are often encountered in the case law and may be deemed essential for the determination of damages.

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5 THE ROLE AND DETERMINATION OF INTENT AND PURPOSE WITHIN THE DEFINITION OF TORTURE

5.1 INTRODUCTION

As shown in the first chapter of the dissertation, intention and purpose are present in the definition of torture and their absence would theoretically lead to ill-treatment being categorized as inhuman treatment. Where severe pain or suffering is inflicted unintentionally or accidentally, the act would amount at most to inhuman treatment.[982] As Sussman observes, "while one might accidentally kill or inadvertently maim, one cannot accidentally or inadvertently torture."[983] Also, when severe pain or suffering is not inflicted for a purpose enumerated by Article 1 of the UNCAT (or for a purpose of a similar nature to the ones enumerated), the act would also amount to inhuman treatment.

The role of this chapter is to discuss the position occupied by intention and purpose as defining elements of torture employed in interrogation cases and the way in which these elements are determined in the case law. Also, including a study of intention and purpose integrates the perpetrator's perspective into the definition of torture, which could compensate for the shortcomings that might be entailed by what has been termed as a predominantly victim-centred approach to torture in which only the effects are considered relevant to whether an act amounts to torture.[984]

It will be shown that, in general, purpose and intention are based on inferences drawn from the circumstances of the case or from using the indicator of severity (the multitude of ill-treatments,

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[982] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 118; Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," 830.
[983] David Sussman, "What's Wrong with Torture," *Philosophy and Public Affairs* Vol. 33, Issue 1 (2005): 5.
[984] Michael Davis, "Torture and the Inhumane," *Criminal Justice Ethics,* Vol. 26, No. 2, (2007): 37.

the nature of the acts, the effects on the victim, etc.). Therefore, there is never any proof or direct evidence of intent or of purpose required from the claimant; intent and purpose are mostly established probabilistically and there might be cases where these two elements are not discussed within the analysis of whether the treatment amounts to torture.

The two elements are analysed here in the same chapter because the case law typically regards them as very closely connected with each other and sometimes even confounds them within the analysis. Therefore, since their positions within the definition of torture and in the case law are so entwined, I have chosen to follow the same approach.

The structure of chapter includes a first section that will provide a theoretical perspective on intention and purpose, along with introducing the main issues arising for each of these elements; the following sections will look at how these elements are determined in the case law of the studied jurisdictions – therefore, the second section will investigate attempts at conflating intention and purpose in a single entity; the third section will look at sources for inferences and presumptions of intention and purpose (the context or the facts of the case; the nature of the acts inflicted; the injuries caused to the victim; and the lack of procedural guarantees and the resulting vulnerability of the victim). Lastly, the fourth section will give an overview of the place occupied by intention and purpose within the determination of torture by the studied jurisdictions.

As it will be seen, starting with the third section of this chapter, I have decided to separate the UN bodies from the rest of the jurisdictions because the analysis they provide for intention and purpose is the most static and largely obscure if not downright absent from the case law on interrogational torture.

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One final note, with regard to intent and purpose in the U.S., the interpretation of these elements has been done in several lines of case law. First, cases concerning criminal prosecution via the provisions of §§ 2340-2340B of the US Code Chapter 113C. Second, civil cases brought on the basis of federal acts providing victims of torture with a civil remedy (the Alien Tort Statute and the Torture Victim Protection Act), also interpreted the notion of intent. And third, cases concerning immigration and extraditions to countries where the plaintiffs might face torture. The first two lines of cases are relevant for this thesis and will be analysed in this chapter.

5.2 THEORETICAL PERSPECTIVES ON INTENTION AND PURPOSE

5.2.1 INTENTION: GENERAL OR SPECIFIC?

In general, by intention we understand that the person is aware of the act or the consequences of the act. When motives are involved, we are already talking about intentionally acting in order to obtain certain consequences or foreseeing those consequences. With regard to intention, the most debatable issue that has arisen so far in the context of determining torture has been whether the required intention is of a general or a specific nature. According to Scanlon and Dancy, intention may be understood in a wide sense, when an act is made with awareness or foreseeability as regards the consequences of the act.[985] Gail Miller understands general intent in the sense of performing a conduct and specific intent in the sense of performing a conduct in order to achieve a result or to commit a certain crime.[986] From an even more general perspective, Andreas Maier states that we could consider the intention of the perpetrator of torture to be that of breaking the victim's will

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[985] T.M. Scanlon and Jonathan Dancy, "Intention and Permissibility," *Proceedings of the Aristotelian Society, Supplementary Volumes*, Vol. 74 (2000): 306.
[986] Gail H. Miller, Defining Torture, Volume 3 of Floersheimer Center for Constitutional Democracy, New York: Occasional paper, Benjamin N. Cardozo School of Law, 2005, p. 14.

and "enforce his will on the victim."[987] Also from a very general perspective, Seumas Miller argues that the torturer acts with the "*intention* of substantially curtailing the autonomy of their victims."[988] Furthermore, intention may also be understood in a narrow sense, as Scanlon and Dancy argue that this would be in connection with the reason why a person did something.[989]

The drafting history of Article 1 of the UN Convention Against Torture shows that the United States had proposed that the element of intention be formulated as an act inflicted "deliberately and maliciously."[990] When this proposal was not adopted, the U.S. included an understanding with regard to intention, replicated in the U.S. Torture Statute (Section 2340), which stipulates that "an act must be *specifically intended* to inflict severe physical or mental pain or suffering."[991]

Ever since the U.S. included this interpretive understanding in the ratification of the UN Convention Against Torture to slightly modify the definition of torture and the Torture Memos used it to narrow the definition of torture, there have been differing opinions as to the nature of intention required for torture. What was meant to be an interpretive clarification was taken further in the 2002 and 2003 U.S. Department of Justice Memos authored by Jay Bybee and, respectively, John Yoo, who argued that specific intent means that to amount to torture the precise objective of a defendant must be the infliction of severe pain or suffering.[992]

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[987] Andreas Maier, "Torture. How Denying Moral Standing Violates Human Dignity" in *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, edited by Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster, (Dordrecht: Springer 2011): 105.
[988] Seumas Miller, "Torture," *The Stanford Encyclopedia of Philosophy* (Summer 2015), Edward N. Zalta (ed.).
[989] Scanlon and Dancy, "Intention and Permissibility," 306.
[990] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, (Oxford, New York: Oxford University Press, 2008), 74.
[991] The U.S. reservations, understanding, and declarations submitted upon ratification of the UN Convention Against Torture are available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en#EndDec last accessed in May 2017. See also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, 74.
[992] Assistant Attorney General Jay S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, August 1, 2002, pp. 3-5, available at

Although this interpretation of intention has been apparently repudiated in 2004, when the Levin Memo stated that it would not be useful to define the meaning of specific intention since the President had already directed the U.S. authorities not to engage in torture,[993] the exact content of intention has remained unanswered.

From a purely theoretical interpretation of the legal provisions at issue, Kevin Jon Heller observed that specific intent is required by both UNCAT and the U.S. Torture Statute and that torture is actually a specific intent crime under both instruments; however, for the UNCAT, specific intent concerns the purpose for which suffering and pain are inflicted. On the other hand, for the U.S., specific intent concerns the suffering and pain inflicted since the purpose element has been eliminated from the definition of torture.[994] Also, Oona Hathaway, Aileen Nowlan, and Julia Spiegel argue that torture under the U.S. Statute and under CAT have the same specific intent, that of inflicting pain and suffering for a purpose.[995]

Furthermore, Manfred Nowak and Elisabeth McArthur argue that under the UNCAT, intention must relate to both the conduct that inflicts severe pain or suffering and to the purpose.[996] Moreover, Manfred Nowak and Elisabeth McArthur have also stated that the specific intent

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http://nsarchive.gwu.edu/torture_archive/docs/Document%2001C.pdf last accessed in September 2010; Deputy Assistant Attorney General John C. Yoo, *Memorandum for William J. Hayne II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, Washington, March 14, 2003, pp. 36-38, available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf, last accessed in September 2010.

[993] Acting Assistant Attorney General Daniel Levin, *Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 U.S.C. §§2340-2340A*, December 30, 2004, p. 16-17, available at https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf last accessed in May 2017.

[994] Kevin Jon Heller, *No, Andrew, "Specific Intent" Does Not Equal "Evil Motive."*

[995] Hathaway, Nowlan, and Spiegel, "Tortured Reasoning : The Intent to Torture Under International and Domestic Law."

[996] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, (Oxford, New York: Oxford University Press, 2008), 74.

referenced by the U.S. in its understanding included in the ratification of the UNCAT does "not seem to go beyond the requirement of intention spelled out in the text of Article 1."[997]

Very few analyses were actually made for this element in the context of torture, and they are rarely or insufficiently grounded in case law interpreting the definition of torture in interrogation cases.[998] This is therefore an issue on which I hope I can bring further clarifications in the following sections.

5.2.2 PURPOSE: FRIEND OR FOE?

With regard to purpose, things are quite straightforward for the application of this element, as the UNCAT provides a list of purposes and mentions that the list is open to purposes similar in nature to those already enumerated,[999] so there is not much opportunity for intricate interpretations. Also, as Burgers and Danelius have observed, the list of purposes appears to be connected to state policies or state interests.[1000] However, from the studied jurisdictions, the U.S. offers the example of a more expansive definition from this point of view, since the U.S. Torture Statute renounced the list of purposes. Note however that this was done only in the U.S. Torture Statute, the criminal remedy,[1001] while in the civil remedy provided by the Torture Victim Protection Act (and in other

[997] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, 74; See also Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," 830.
[998] Oona A. Hathaway, Aileen Nowlan, and Julia Spiegel, "Tortured Reasoning: The Intent to Torture Under International and Domestic Law," *Virginia Journal of International Law, Vol.* 52, No 4 (2012): 791-837; Aditi Bagchi, "Intention, Torture, and the Concept of State Crime," *Penn State Law Review,* Vol. 114 (2009): 1-38; Steven Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law,* (Antwerp: Intersentia, 2011), 214-233; Kevin Jon Heller, *No, Andrew, "Specific Intent" Does Not Equal "Evil Motive,"* 7 May 2009, at http://opiniojuris.org/2009/05/07/no-andrew-specific-intent-does-not-equal-evil-motive/ last accessed in May 2017.
[999] Manfred Nowak, "What Practices Constitute Torture?: US and UN Standards," 821, 831; Burgers and Danelius, 118.
[1000] Burgers and Danelius, 119.
[1001] The U.S. Torture Statute of 1994 defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." It goes further to provide a detailed enumeration of causes for "severe mental pain or suffering."

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civil statutes that have imitated the TVPA definition), this element was kept in line with the UNCAT.[1002]

The legal literature concerning the element of purpose is on the same page with the literature on intention. Seumas Miller argues that the central purpose for torture is the breaking of the victim's will,[1003] much like Andreas Maier, mentioned above, stated that the intention of the perpetrator of torture is breaking the victim's will.[1004] Furthermore, Rhonda Copelon has argued that purpose is an element that can "elucidate the evil of torture,"[1005] as long as it is understood as a tool to identify the functions or goals of violence. Furthermore, she states that while for methods that inflict extreme pain or suffering, purpose might be redundant, for less obvious methods such as psychological, purpose is also a factor that may strengthen an ill-treatment so that it would actually be qualified as torture.[1006] However, there are scholars that have challenged the inclusion of purpose in the definition of torture, reasoning that by including this factor there would be an undue limitation of state conduct causing severe pain or suffering that would be prohibited as torture.[1007]

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[1002] As explained in more detail in Chapter 1, section 1.5.3, the Torture Victim Protection Act of 1991 defines torture as ""any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind".
[1003] Seumas Miller, "Torture."
[1004] Andreas Maier, "Torture. How Denying Moral Standing Violates Human Dignity" in *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, edited by Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster, (Dordrecht: Springer 2011): 105.
[1005] Rhonda Copelon, "Intimate Terror," in *The Phenomenon of Torture: Readings and Commentary*, ed. William F. Schulz, (University of Pennsylvania Press, 2013), 185.
[1006] Ibidem, 185.
[1007] Deborah E. Anker, *Law Of Asylum In The United States*, (Thomson West, 2014), 499.

In what follows I will provide an overview of avenues for determining intent and purpose in the case law of the studied jurisdictions, in order to understand their role and value within the definition of torture.

5.3 CONFLATING (THE ROLE OF) INTENTION AND PURPOSE

One approach to determining intention and purpose is to regard these two elements as a unit. They are considered part of an overall deliberate position of the person inflicting the ill-treatment. For the ECtHR, this is obvious in cases in which one of the two elements, either intention or purpose, is subsumed to the other, so that only one of them is mentioned or analysed in the judgment, while the other is overlooked but it could be said that it is still "tacitly" present. For the U.S., this approach can be seen in the Emmanuel Case,[1008] concerning the criminal trial of the son of Charles Taylor, former president of Liberia, for torture and conspiracy to commit torture. In this case, a rare discussion of the role of purpose is provided in relation to intention. Purpose is seen as a way to reinforce the intentional element. As for the UN bodies, the UNHRC provides at least five examples in which one of these elements is subsumed to the other and it is usually intention which appears to be implied where purpose is identified. In the UNCAT case law, there are only two examples of cases in which intention was subsumed under purpose (*Abdelmalek v. Algeria*[1009] and *Ramiro Ramírez Martínez et al v. Mexico*[1010]).

5.3.1 THE ECTHR: INTENTION SUBSUMED TO PURPOSE MORE READILY THAN PURPOSE WOULD BE SUBSUMED TO INTENTION

In ECtHR cases, when one of the two elements, intention or purpose, is missing from the analysis on the merits, it is usually intention that is overlooked. Purpose is more readily identified, although

[1008] *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).
[1009] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014.
[1010] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015.

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the absence of intention does not signify that more attention would be given to purpose. The same skimmed analysis will be provided for this element of torture, usually consisting of the same formulations repeated from one case to another.

To give just a few examples of such cases, in *Polonskiy v. Russia,*[1011] *Eldar Imanov and Azhdar Imanov v. Russia,*[1012] *Nechiporuk and Yonkalo v. Ukraine,*[1013] *Nasakin v. Russia,*[1014] and in *Mostipan v. Russia,*[1015] the Court stated that the ill-treatment, whether categorized as torture or inhuman treatment, had been apparently inflicted in order to intimidate, debase, drive the applicant into submission and confess to having committed a criminal offence. In all these cases the inference of a certain purpose appears to be made from the factual circumstances of the case.

Also presenting a formulaic determination of purpose, in *Nadrosov v. Russia*, the ECtHR held that the ill-treatment had been "retaliatory in nature and aimed at debasing the applicant and forcing him into submission."[1016] The same quotation and argument used in *Nadrosov* is subsequently used in *Barabanshchikov v. Russia*[1017] and in *Ochelkov v. Russia*[1018] although no issue concerning a possible resistance to arrest, planning to escape or defying the orders of police officers arose in any of these cases.

As it can be seen, a broader purpose is introduced, different from the four possible purposes enumerated in the UNCAT definition of torture. Although qualifying the ill-treatment as retaliatory might suggest that the purpose envisioned was to punish, the applicants' claims in all these cases

[1011] *Polonskiy v. Russia*, no. 30033/05, 19 March 2009, par. 124.
[1012] *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, 16 December 2010, par. 93.
[1013] *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, par. 157.
[1014] *Nasakin v. Russia*, no. 22735/05, 18 July 2013, par. 54.
[1015] *Mostipan v. Russia*, no. 12042/09, 16 October 2014, par. 60.
[1016] *Nadrosov v. Russia*, no. 9297/02, 31 July 2008, par. 36.
[1017] *Barabanshchikov v. Russia*, no. 36220/02, 8 January 2009, par. 52.
[1018] *Ochelkov v. Russia*, no. 17828/05, 11 April 2013, par. 95.

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had been that they had been subjected to the ill-treatment for the usual purpose encountered in interrogation cases, that of providing a confession. However, the preference for more general purposes remained unexplained by the ECtHR and although quite isolated, since these cases concerned Russia, the same argument persisted for quite an extended period of time, namely from 2008 to 2013.

Furthermore, in *Savin v. Ukraine* the ECtHR based its conclusion concerning the purpose of the ill-treatment on the finding of the domestic authorities, and held that the ill-treatment had been inflicted in order to coerce a confession from the applicant.[1019] Lastly, in *Mesut Deniz v. Turkey*,[1020] the Court provided a more detailed description of purpose, stating that on the basis of the degree and nature of ill-treatment and the evidence in the case, it can conclude that the purpose was to obtain information concerning the applicant's connections with an illegal organization.

In all these cases the element of intention is not mentioned. I would not however conclude that the element is completely absent; although it is not indicated in the judgment, it would be difficult to imagine that there could be an unintentional act aimed at a certain purpose. Therefore, I would consider that intention is simply included in the purpose identified by the Court and the identification of purpose is considered sufficient to account for intention.

Instances of purpose being subsumed to intention are rarer than the other way around. Examples for the latter are more readily available, while for the former I could only identify *Sheydayev v. Russia*. In this case the Court made a finding of torture for ill-treatment inflicted in police custody during interrogation and inferred the intentional infliction of pain and suffering from the medical

[1019] *Savin v. Ukraine*, no. 34725/08, 16 February 2012, par. 61.
[1020] *Mesut Deniz v. Turkey*, no. 36716/07, 5 November 2013, par. 48.

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report and from the applicant's statements.[1021] Although the applicant claimed that obtaining a confession was the purpose of the ill-treatment,[1022] the Court did not make any indication on this element.

Therefore, it might be concluded that from the two elements, purpose is more present than intention in the analysis of the ECtHR in interrogational torture cases, given the easiness of inferring intention from purpose.

5.3.2 THE U.S.: THE EMMANUEL CASE FINDS TORTURE EVEN IN THE ABSENCE OF PURPOSE

With regard to the U.S. the relation between intention and purpose was discussed in a case that arose under the criminal provision of the U.S. Code Section 2340. In *United States v. Emmanuel*,[1023] the son of Charles Taylor, former president of Liberia, was prosecuted, among other counts, for torture and conspiracy to commit torture between 1999 and 2003 while he commanded the Liberian Antiterrorist Unit and also participated in other activities of the Antiterrorist Unit and of the Liberian National Police.[1024] The acts of torture charged against the defendant included the pouring of boiling water on the bodies of the victims, burns with a hot iron and with cigarettes, the application of electric shocks, the dripping of plastic and wax, and rubbing of salt on the open wounds.[1025]

One of the defendant's arguments, of relevance for this chapter, was that the implementation of the Convention Against Torture through the Torture Statute was not adequate and that in effect the

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[1021] *Sheydayev v. Russia*, no. 65859/01, 7 December 2006, par. 61.
[1022] *Ibidem*, par. 7.
[1023] *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).
[1024] *United States v. Charles Emmanuel*, CASE NO. 06-20758-CR-ALTONAGA/Turnoff, Order on Defendant's motion to dismiss the indictment, United States District Court for the Southern District of Florida, p. 7, available at https://www.flsd.uscourts.gov/website/cases/pressDocs/106cr20758_148.pdf last accessed in June 2017.
[1025] *United States v. Charles Emmanuel*, Order on Defendant's motion to dismiss the indictment, p. 7-8.

statute "creates a different crime from the act of torture defined in the Convention."[1026] Unlike the Convention, the Statute did not include the condition that "severe pain or suffering is intentionally inflicted for such purposes as obtaining information or a confession when inflicted by a public official in an official capacity."[1027] The defendant therefore argued that since the purpose requirement of the UNCAT was eliminated in the U.S. Torture Statute, this elimination has essentially broadened the definition of torture and set an advantage for the prosecution, who no longer had to prove the perpetrator's motives. He further stated that the prohibition of torture under the U.S. Code was more akin to aggravated battery than to torture, since the crime proscribed by the U.S. Code was more expansive than that under the Convention.[1028]

While the U.S. District Court for the Southern District of Florida admitted that the definition of torture in the statute does not align with the Convention in all its material aspects, it found that it is parallel, as "both texts define torture to include the intentional infliction of severe pain or suffering by a public official or person acting under color of law."[1029] The fact that the specific intention element is not found in the statute under the same form as in the Convention was not an obstacle for the court, which held that "the more expansive statutory definition, which captures more acts of torture than does the definition contained in the Convention, is consistent with the international community's near universal condemnation of torture and cruel, inhuman or degrading treatment, and is consistent with repeated calls for the international community to be more "effective [in] the struggle against torture."[1030]

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[1026] *Ibidem*, p. 9.
[1027] *Ibidem*, p. 10.
[1028] *Ibidem*, p. 10.
[1029] *Ibidem*, p. 13.
[1030] *Ibidem*, p. 14.

The court looked at the acts included in the indictment in order to determine whether the element of intent as provided in the statute was sufficiently informative for any ordinary person. According to the court, all of the acts charged against the defendant (burning with hot iron and cigarettes, use of scalding water, rubbing salt into wounds, etc.) appear to have sufficient informative strength when coupled with the language of the statute so that the defendant could not argue that vagueness precluded him from understanding that such acts were specifically intended to inflict severe pain or suffering and were therefore prohibited under the statute and the Convention.

Further arguments were provided on appeal by the U.S. Court of Appeals for the Eleventh Circuit analyzed the role of the element of purpose in the definition of torture and held that the enumeration of purposes in the UNCAT illustrates the possible motivations behind the conduct but it merely reinforces the intentional element of torture, it emphasizes that torture can only be intentional and not the result of negligent behaviour. While this element was eliminated from the Torture Statute, the government added the "specifically intended" requirement, which serves the same purpose that the enumeration of specific purposes serves in the UNCAT. The court also concludes that even if the definition of torture is more expansive from this point of view, it serves even more faithfully the scope of combatting torture for which the UNCAT had been drafted.[1031]

The approach taken in *Emmanuel* can also be encountered in civil cases, namely in *Moradi v. Islamic Republic of Iran*,[1032] where the U.S. District Court for the District of Columbia referred to the previous case of *Price v. Socialist People's Libyan Arab Jamahiriya,*[1033] in which the purposive element had been analyzed in detail. The court looked at the role of the purpose element in the

[1031] *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010), at 809.
[1032] *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015).
[1033] *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), at 92.

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TVPA's definition of torture and held that a list of purposes was included in order to reinforce the intentionality and malice behind torture and to highlight that mere negligent behaviour would not amount to torture. It then concluded that on the facts of the case in *Moradi*, the victim had been subjected to pain deliberately and maliciously in order to obtain a confession.[1034]

As it can be observed from these civil and criminal cases, a certain conflation of the role played by the two elements, intention and purpose, takes place when the U.S. Torture Statute and the TVPA are interpreted by the U.S. courts. While an enumeration of purposes might be missing from the definition of torture under the Torture Statute, courts have stepped in to interpret the statute by following the meaning and purpose advanced by the UNCAT.

5.3.3 THE UN BODIES: INTENTION SUBSUMED TO PURPOSE BUT APPARENTLY NOT THE OTHER WAY AROUND

In the UNHRC case law, I have identified five cases in which only one of the elements of intention and purpose are noted in the judgment and they all concern a mentioning of purpose and an overlooked intention. In *Estrella v. Uruguay* the UNHRC factually identifies the purpose as an effort on the part of the perpetrators to make the victim admit to politically subversive activities.[1035] In *Cariboni v. Uruguay* the complainant had been subjected to ill-treatment for the purpose of "extracting information with regard to his ideological convictions, political and trade-union activities."[1036] In *Herrera v. Colombia* the element of purpose is mentioned in a factual manner, as a statement of the complainant which is accepted by the UNHRC.[1037] In *Khalilov v. Tadjikistan* the victim had been subjected to torture in order to obtain a confession of guilt, without any further

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[1034] *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015).
[1035] HRC, *Estrella v. Uruguay*, no.74/1980, 29 March 1983, par. 8.3.
[1036] HRC, *Cariboni v. Uruguay*, no. 159/1983, 27 October 1987, par. 9.2.
[1037] HRC, *Herrera v. Colombia*, no. 161/1983, 2 November 1987, par. 10.2.

information or analysis.[1038] Lastly, in *Giri v. Nepal*, the only case which provides a more detailed and theoretical view on purpose, this element is noted not only as one of the elements of torture but as the determinant.[1039] Unfortunately, besides this theoretical indication, the UNHRC does not go further to indicate the role of this element in relation to intention and on the merits of the case the Committee fails to identify the exact purpose of the ill-treatment. The purpose is noted only by the victim in the formulation of the complaint.[1040] Intention is not dealt with in none of these cases.

With regard to the UNCAT, as already mentioned, there are only two cases in which intention and purpose appear to be analysed together. Purpose is mentioned in *Abdelmalek v. Algeria*[1041] in a very general manner, practically including the entire formulation found in the definition of torture in the UNCAT. Furthermore, in *Ramiro Ramírez Martínez et al v. Mexico,*[1042] the UNCAT determines that the purpose of the ill-treatment of the complainants was to obtain a confession for a crime. In these two cases there is no mention of intention.

However, I believe that the fact that intention is not explicitly mentioned in either UNHRC or UNCAT cases is not an indication that this element is not considered relevant, but I would rather interpret its absence as an indication that it is subsumed to purpose, since there cannot be an action done with a purpose and unintentionally.

5.4 Sources of Intention and Purpose: Inferences from various aspects of the case

There are several sources for determining intention and purpose in an interrogation case, though the mechanism is the same for all of these sources. On the basis of the information and evidence

[1038] HRC, *Khalilov v. Tadjikistan*, no. 973/01, 18 October 2005, par. 7.2.
[1039] HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 7.5-7.6.
[1040] Ibidem, par. 3.2.
[1041] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.3.
[1042] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015, par. 17.3.

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available in the case, intention and purpose are inferred from the following sources: first, from the context of the case, meaning from the sequence of events and facts of the case, an approach which proves to be closely tied to and quite difficult to differentiate from the second and third option mentioned here; second, they are inferred from the injuries and effects of the ill-treatment on the victim, an approach which goes back to the mechanical quantification style of determining severity; third, intention and purpose might also be inferred from the violent nature of the acts, an aspect which is closely tied to the premeditation and organization of the ill-treatment. Furthermore, note that these avenues for drawing inferences in order to determine intention and purpose are not mutually exclusive, meaning that there might be cases in which several of them provide relevant information (purpose for instance might be presumed from the violent nature of the acts, the grave suffering inflicted, and from the factual circumstances of the case;[1043] intention might be presumed from the violent nature and the particular gravity of the injuries inflicted[1044]).

5.4.1 Inferences from the Context or Facts of the Case

This section shows that the ECtHR bases its determination of intention and purpose on the overall circumstances of the case without much explanation provided as to the exact evidence that supports the finding. A similar approach is taken in U.S. due process cases and a more detailed analysis is provided in civil damages cases. What can be noted for both jurisdictions is that intention is more readily obscured than purpose.

5.4.1.1 The ECtHR: the circumstances of the case are an infinite source for intention and purpose

The ECtHR case law has a long tradition of ascertaining intention and purpose as apparent from the overall circumstances of the case, or as the Court rarely states, from "the course of the events"

[1043] See for instance *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 85.
[1044] *Kaverzin v. Ukraine*, no. 23893/03, 15 May 2012, par. 123.

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(in *Selmouni v. France)*[1045] or "the sequence of events" (in for instance *Menesheva v. Russia*, *Bati and Others v. Turkey, Gisayev v. Russia*, or *Isayev and Others v. Russia*).[1046] The list of cases in which these two elements (or sometimes only one of them, if the other is omitted) are determined as "apparent" from the facts, circumstances and evidence presented in the case is quite long and chronologically it extends at least from *Aydin v. Turkey*.[1047] For example, a similar approach was subsequently used in *Mikheyev v. Russia,*[1048] *Arif Çelebi and Others v. Turkey,*[1049] *Nechiporuk and Yonkalo v. Ukraine,*[1050] *Nalbandyan v. Armenia,*[1051] *Hajrulahu v. "The Former Yugoslav Republic of Macedonia".*[1052]

Among these cases there are rare instances in which the Court would actually explain the exact basis for its inference and go beyond the general term of "circumstances." For instance, in 2003, in *Aktas v. Turkey*, a case in which the victim died as a result of the ill-treatment, the ECtHR explained on the facts of the case the source for its inference of purpose and made references to exact statements made in the domestic case.[1053] Perhaps the Court felt the need to provide the exact rationale for its presumption especially because the victim had died and the Government had offered some alternative but unconvincing explanations for the death (including wrestling between the victim and his brother).[1054]

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[1045] *Selmouni v. France* [GC], no. 25803/94, 28 July 1999, par. 98.
[1046] *Menesheva v. Russia*, no. 59261/00, 9 March 2006, par. 60; *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, par. 118; *Gisayev v. Russia*, no. 14811/04, 20 January 2011, par. 144; *Isayev and Others v. Russia*, no. 43368/04, 21 June 2011, par. 166.
[1047] *Aydin v. Turkey [GC]*, no. 23178/94, 25 September 1997, par. 85.
[1048] *Mikheyev v. Russia*, no. 77617/01, 26 January 2006, par. 135.
[1049] *Arif Çelebi and Others v. Turkey*, nos. 3076/05 and 26739/05, 6 April 2010, par. 59.
[1050] *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, par. 157.
[1051] *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 110.
[1052] *Hajrulahu v. "The Former Yugoslav Republic of Macedonia*", no. 37537/07, 29 October 2015, par. 101.
[1053] *Aktas v. Turkey*, no. 24351/94, 24 April 2003, par. 319.
[1054] *Ibidem*, par. 269.

Furthermore, there are cases for which I can only assume that the assessment of intention and purpose is made as an inference from the entirety of the facts, since there is no other explanation provided in the judgments of the Court.[1055] They might as well be inferred from the injuries or from the perceived cruelty of the ill-treatment inflicted, but where no indication is given and since the judgments themselves have reached such a mechanical level that the ECtHR might not explain the source of its determination, there is no possibility of drawing unquestionable conclusions. For instance, in *Erdoğan Yilmaz and Others v. Turkey* the Court notes that the ill-treatment had been inflicted intentionally in order to extract a confession,[1056] but no further explanation is provided with regard to the source of its conclusion. The statement concerning intention and purpose becomes an isolated announcement, necessary to be made because it is required by the definition of torture.

The determination of intention and purpose is therefore by and large in the form of a deduction or a supposition from the overall case. Since the burden of proof is reversed and rests on the Government, the applicant does not need to prove intention and purpose. Therefore, the Court might make a finding of torture even in the absence of evidence concerning the intention of the perpetrator, where the State does not provide a plausible explanation with regard to injuries presented by the individual at the time of release from custody. [1057]

5.4.1.2 The U.S.: Due process cases and the secondary position of intention and purpose

In due process cases, the U.S. courts address confession (one product of interrogational torture, aside from information) from a different standpoint than in traditional interrogational torture cases.

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[1055] See for instance, *Fartushin v. Russia,* no. 38887/09, §§ 52-54, 8 October 2015, par. 43; *Razzakov v. Russia*, no. 57519/09, 5 February 2015, par. 54; *Ovakimyan v. Russia*, no. 52796/08, 21 February 2017, par. 47.
[1056] *Erdoğan Yilmaz and Others v. Turkey*, no. 19374/03, 14 October 2008, par. 50.
[1057] Gail H. Miller, Defining Torture, Volume 3 of Floersheimer Center for Constitutional Democracy, New York: Occasional paper, Benjamin N. Cardozo School of Law, 2005, p. 13.

In due process cases, the use of false confessions are the central issue analyzed in a judgment and often the very question of the case is formulated in terms of whether the conviction rests on a confession that is not free and voluntary.[1058] This means that they are seen as connected to justice and fair trial, rather than with the person's interest of being treated humanely and with respect during criminal investigations.

In this context, the elements of intent and purpose are not as obviously relevant for the final conclusion. The purpose, obtaining information or a statement in the process of criminal investigation, in the sense of motive behind the ill-treatment or behind procedural violations, will be assumed on the basis of the circumstances of the interrogation, much like in ECtHR cases. This perspective can be seen in cases such as *Brown v. Mississippi*, *Haynes v. Washington*, *Mincey v. Arizona,* or *Miller v. Fenton*.[1059] Then there are plenty of cases where purpose is indicated in a direct manner in separate opinions[1060] or in the majority's opinion (such as for instance *Chambers v. Florida*, *Ward v. Texas, Watts v. Indiana*, *Williams v. United States*, *Spano v. New York*, *Culombe v. Connecticut*, *Davis v. North Carolina*, and *Clewis* v. *Texas*).[1061]

With regard to intention, there is largely the same pattern followed for purpose, as this element is also assumed on the basis of the entire factual background. Some of the examples provided above for purpose are also valid here for intention (for instance *Brown v. Mississippi*, *Mincey v.*

[1058] See for instance *Brown v. Mississippi*, 297 U.S. 278 (1936), at 280; *Chambers v. Florida*, 309 U. S. 227 (1940); *Ward* v. *Texas,* 316 U. S. 547 (1942), at 551; Dissenting opinion of Justice Burton, joined by Chief Justice Reed and Justice Jackson in *Haley v. Ohio*, 332 U.S. 596 (1948), at 615.
[1059] See *Brown v. Mississippi*, 297 U.S. 278 (1936); *Haynes v. Washington*, 373 U. S. 503 (1963), at 512; *Mincey v. Arizona*, 437 U.S. 385 (1978); *Miller v. Fenton*, 474 U.S. 104 (1985);
[1060] See for instance Concurring and dissenting opinion by Justice Kennedy, joined by Justice Stevens and by Justice Ginsburg (as to Parts II and III), in *Chavez v. Martinez*, 538 U.S. 760 (2003).
[1061] See *Chambers v. Florida*, 309 U. S. 227 (1940), at 239; *Ward v. Texas*, 316 U. S. 547 (1942), at 555; *Watts v. Indiana*, 338 U.S. 49 (1949), at 55-56; *Williams v. United States*, 341 U.S. 97 (1951), at 103; *Spano v. New York*, 360 U. S. 315 (1959), at 325; *Culombe v. Connecticut*, 367 U.S. 568 (1961), at 610 and 636; *Davis v. North Carolina*, 384 U. S. 737 (1966), at 746; *Clewis* v. *Texas*, 386 U. S. 707 (1967), at 71;

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Arizona, *Miller v. Fenton).* Further examples include *Chambers v. Florida*, *Ward v. Texas*, *Reck v. Pate*, or *Culombe v. Connecticut*.[1062] However, unlike purpose, intention is rarely spelled out directly[1063] and as it was seen for the ECtHR case law, intention is more readily obscured than purpose.

Nonetheless, the perception that I could note from due process cases is that even when intention and purpose could be discerned as formulated in a similar manner to the ECtHR judgments, they are at the same time lost somewhere in the background of determining whether the confession was obtained involuntarily.

As for civil damages cases, in *Mehinovic v. Vuckovic* for instance the U.S. District Court for the Northern District of Georgia analyzed the elements of intent and purpose in quite some detail, holding that discriminatory reasons were behind the motivation of the perpetrator. The conclusion was reached by inferring intention and purpose from the entire context in which the ill-treatment had been applied and from the statements containing Muslim undertones, made by the defendant.[1064] Furthermore, the court also looked into the systematic character of the abuses committed within a context of a large-scale ethnic cleansing campaign. It highlighted the degree of coordination between the military and the political authorities, the patterns of practices followed (including the detention and execution of non-Serb men, the practices of rape, sexual assaults and humiliation of entire communities), and the wanton and malicious deliberate infliction of these

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[1062] See *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Reck v. Pate*, 367 U.S. 433 (1961); *Culombe v. Connecticut*, 367 U.S. 568 (1961), at 610; *Miller v. Fenton*, 474 U.S. 104 (1985); *Mincey v. Arizona*, 437 U.S. 385 (1978).
[1063] See *Williams v. United States*, 341 U.S. 97 (1951), at 103; *Spano v. New York*, 360 U. S. 315 (1959), at 325; Concurring and dissenting opinion by Justice Kennedy, joined by Justice Stevens and by Justice Ginsburg (as to Parts II and III), in *Chavez v. Martinez*, 538 U.S. 760 (2003).
[1064] *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), at 1347.

acts against the Muslim population.[1065] In an analogous manner, though lacking the "large-scale campaign" element, in due process cases intention is sometimes indirectly spelled out in the form of an organized plan or endeavour of the authorities to obtain a confession,[1066] especially when the authorities formulate defence arguments that invoke their alleged attempts to preserve the victim's safety.

Other cases in which intent and purpose appear to be determined on the basis of the overall context and facts of the case include for instance *Doe v. Qi*[1067] and *Massie v. Government of the Democratic People's Republic of Korea*.[1068] In both cases, the discussion of intent and purpose is very factually based and aside from isolated remarks that for instance intention is required so that "haphazard" acts could not be the basis of claims of torture,[1069] not much analysis and insight is provided. They do however always identify the exact purpose based on the alleged facts (to discriminate, punish or intimidate in *Doe v. Qi* and to extract confessions in *Massie*[1070]) while for intention the courts would identify the element either directly[1071] or by referring to the planning and campaign-type of application of the ill-treatments.[1072]

5.4.2 Inferences from the Nature of the Acts Inflicted or of the Ill-Treatment as a Whole

For the ECtHR, the inference of intention and purpose from the nature of the acts inflicted developed two types of arguments. The first is based on the gratuitous violence inflicted and the second on the fact that such violence conveys a certain degree of premeditation. In a minority of

[1065] *Ibidem*, at 1342-1345.
[1066] *Ward v. Texas*, 316 U. S. 547 (1942), at 555; *Watts v. Indiana*, 338 U.S. 49 (1949), at 55; *Clewis* v. *Texas*, 386 U. S. 707 (1967), at 712.
[1067] *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal 2004).
[1068] *Massie v. Government of the Democratic People's Republic of Korea*, 592 F. Supp. 2d 57 (D.D.C. 2008).
[1069] *Doe v. Qi*, at 1319.
[1070] *Massie v. Government of the Democratic People's Republic of Korea*, par. 42.
[1071] *Doe v. Qi*, at 1319.
[1072] *Massie v. Government of the Democratic People's Republic of Korea*, par. 67.

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case arising from the "war on terror" the ECtHR refers to premeditation as arising from a series of psychological acts carefully planned by authorities. For the U.S. the nature of the acts as the basis for inferring intention and purpose is most obvious in civil damages cases, where similarly to the ECtHR the courts might also note the systematic nature of the abuse.

5.4.2.1 The ECtHR: gratuitous violence and premeditation

In the jurisdiction of the ECtHR, since the 1996 case of *Aksoy v. Turkey,* in which the facts concerned the application of the Palestinian hanging, the Court has proceeded to presume intention from the gravity of the treatment itself. In *Aksoy* it held that "this treatment could only have been deliberately inflicted."[1073] Since *Aksoy,* the method of suspension has easily been automatically considered to be intentionally inflicted in interrogation cases and consequently to amount to torture. Furthermore, the French translation of the phrase repeatedly used in these judgments to assess intention shows that it is the violent character and degree of the treatment, more specifically the gratuitous violence, which determines the Court to presume intention. This is evident in *Erdal Aslan v. Turkey*[1074] which concerned the infliction of falaka and in *Ölmez v. Turkey*[1075] which concerned suspension.

Two lines of arguments can be distinguished when the Court determines intention in cases that concern ill-treatment of a violent nature. To exemplify, first, in *Bulgaru v. the Republic of Moldova*, which also concerned suspension, the Court held that this is a particularly reprehensible form of ill-treatment "as it presupposes an intention to obtain information, inflict punishment or intimidate."[1076] Second, in *Aksoy v. Turkey* and, in a different formulation in *Lyapin v. Russia* (with

[1073] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, par. 64.
[1074] *Erdal Aslan v. Turkey*, 25060/02 and 1705/03, 2 December 2008, par. 73.
[1075] *Ölmez v. Turkey*, no. 39464/98, 20 February 2007, par. 60.
[1076] *Bulgaru v. the Republic of Moldova*, no. 35840/09, 30 September 2014, par. 20.

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regard to electric shocks) and in *Razzakov v. Russia* (with regard to electric shocks and suspension), the Court appears to have based its inference of intent and purpose on the fact that the method itself could have been carried out only after "a certain amount of preparation and exertion."[1077]

In the same way, intention and purpose in cases concerning *falaka* have been inferred from the nature and degree of the ill-treatment and similar phrasing used in cases concerning suspension was also used in these cases. For instance, in *Mammadov (Jalaloglu) v. Azerbaijan* the Court highlighted the nature of the ill-treatment which discloses a degree of preparation and therefore intention on the part of the perpetrator.[1078] Also, in *Batı and Others v. Turkey* the Court indicated that such type of ill-treatment was intentionally inflicted,[1079] while in *Corsacov v. Moldova* the Court stated even more unequivocally that this reprehensible form of ill-treatment presupposes in itself the purposive element ("an intention to obtain information, inflict punishment or intimidate"[1080]). Furthermore, in *Valeriu and Nicolae Rosca v. Moldova*, the Court stated that falaka "is always intentional and can only be regarded as torture."[1081] Other ill-treatments that have been held by their violent nature to amount to torture, such as electric shocks and rape, again the Court has followed the same pattern with regard to intention. Examples include *Buzilov v. Moldova*[1082] for electric shocks and *Zontul v. Greece*[1083] for rape.

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[1077] *Aksoy v. Turkey*, par. 64; *Lyapin v. Russia*, no. 46956/09, 24 July 2014, par. 119; *Razzakov v. Russia*, no. 57519/09, 5 February 2015, par. 54.
[1078] *Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007, par. 69.
[1079] *Batı and Others v. Turkey,* nos. 33097/96 and 57834/00, 3 June 2004, par. 122.
[1080] *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, par. 65.
[1081] *Valeriu and Nicolae Rosca v. Moldova*, no. 41704/02, 20 October 2009, par. 64.
[1082] *Buzilov v. Moldova*, no. 28653/05, 23 June 2009, par. 32.
[1083] *Zontul v. Greece*, no. 12294/07, 17 January 2012, par. 92.

With regard to the degree of preparation and exertion, besides the fact that a certain degree of organisation and planning appears to be tied to the idea of particularly violent ill-treatment, not much has been articulated by the Court. The case law rarely used the concept of premeditation, which has first been mentioned in *Ireland v. the United Kingdom* to refer to the premeditation of the use of the five techniques.[1084] After this case however, it has mostly used the concept as part of the general principles under Article 3 and rarely in the very analysis on the facts of the case. In a concurring opinion in *Nikiforov v. Russia* it was argued that the beatings to which the applicant had been subjected during the investigation and which resulted in a broken nose, multiple bruises and abrasions, do not give the impression of "gratuitous and premeditated violence"[1085] as part of a calculated plan, which would have more readily conveyed a deliberate ill-treatment amounting to torture. Furthermore, in *Iordan Petrov v. Bulgaria*, it was the applicant who invoked violent and premeditated acts inflicted on him during interrogation but the Court did not confirm his allegation and found only inhuman treatment, without any analysis of intention and purpose.[1086]

The cases that have more readily raised the issue of premeditation, careful planning and organisation of ill-treatment are those arising from the "war on terror," *El-Masri v. the former Yugoslav Republic of Macedonia,*[1087] *Al Nashiri v. Poland,*[1088] *Abu Zubaydah v. Poland,*[1089] as well as *Gäfgen v. Germany,*[1090] the example of ticking bomb scenario. In these cases, and especially in those arising from the U.S. "war on terror," the treatments applied to the applicants were not spontaneous acts but appear as a series of actions planned in advance, with attention and

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[1084] *Ireland v. The United Kingdom*, no. 5310/71, 18 January 1978, par. 167.
[1085] Concurring Opinion of Judge Malinverni, joined by Judges Rozakis and Jebens, par. 8, in *Nikiforov v. Russia* (no. 42837/04, 1 July 2010).
[1086] *Iordan Petrov v. Bulgaria*, no. 22926/04, 24 January 2012, par. 85-88.
[1087] *El-Masri v. the former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012.
[1088] *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.
[1089] *Abu Zubaydah v. Poland*, no. 7511/13, 24 July 2014.
[1090] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.

meticulousness.[1091] In *Gäfgen v. Germany* [GC], the ECtHR noted in the establishment of the facts and in the legal qualification of the treatment that the threats of "intolerable pain" that would have been inflicted by a specially-trained professional and under medical supervision were part of a calculated plan, deliberate and intentional.[1092] Even in *El-Masri*, where although no actual interrogation took place, the treatments were part of a well-documented process devised to weaken the individual.[1093] In *Abu Zubaydah* the Court even stated that it was irrelevant whether in Poland the applicant had been interrogated or simply debriefed, given that the purpose of both procedures had been the same.[1094] All of the acts had been premeditated, formalised, legally approved by the authorities and specifically designed to obtain information, "to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence."[1095] Therefore, at least for some cases before the ECtHR, premeditation means something more than the mere preparation and effort to inflict violent ill-treatments such as electric shocks, suspension, rape, and falaka.

Finally, note that while cases concerning a violent nature of the act repeatedly include the generic phrase that "this form of ill-treatment is particularly reprehensible as it presupposes an intention to obtain information, inflict punishment or intimidate," they do not always go into identifying the exact purpose applicable for the given facts of the case. This is even more obvious in cases concerning rape, where intention might be omitted from the analysis[1096] and the element of purpose

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[1091] Ibidem, par. 104.
[1092] Ibidem, par. 94-95, 104-106.
[1093] *El-Masri v. the former Yugoslav Republic of Macedonia*, par. 124, 205-211.
[1094] *Abu Zubaydah v. Poland*, par. 511.
[1095] *Al Nashiri v. Poland,* par. 515; *Abu Zubaydah v. Poland*, par. 511.
[1096] *Aydin v. Turkey* [GC], no. 23178/94, 25 September 1997, par. 80-87.

could be completely redundant.[1097] Since the severity of the suffering is of such a serious nature, the act could be inflicted without purpose and still amount to torture.

Moreover, there are cases concerning the violent nature of the acts in which intention and purpose are not discussed. For instance, in *Akkoç v. Turkey*, the ill-treatment involved electric shocks, blows to the head, and the use of water hosing, but although a theoretical reference is made to purpose, the judgment includes no discussion of intent and purpose on the facts of the case. [1098] In *Cakici v. Turkey*, a case that concerned the infliction of beatings and electric shocks resulting in the death of the victim, the Court made a finding of torture without looking into the elements of intention and purpose.[1099] In *Gurgurov v. Moldova* the ill-treatment involved electric shocks, suspension, beatings, and the use of a gas mask to stop the applicant from breathing. This wanton infliction of violence, which resulted in a disability, was held to amount to torture without any mention of intent and purpose.[1100]

Although it appears that where the infliction of pain or suffering is vicious, and even more so where there are grave consequences for the victim, the elements of intent and purpose become largely irrelevant, it still proves quite challenging to clearly establish where the Court simply considers intention and purpose to be redundant for determining the type of ill-treatment and where these two elements are simply forgotten along the analysis.

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5.4.2.2 The U.S.: similar inferences as in the ECtHR case law though not as developed

Although at first sight intention and purpose appear to be rather factually mentioned in the U.S. case law, if looked upon from a more general perspective and considering the gruesome acts

[1097] *Maslova and Nalbandov v. Russia*, no. 839/02, 24 January 2008, par. 106-108; *Zontul v. Greece*, par. 92.
[1098] *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, par. 115-119.
[1099] *Cakici v. Turkey* [GC], no. 23657/94, 8 July 1999, par. 88-93.
[1100] *Gurgurov v. Moldova*, no. 7045/08, 16 June 2009, par. 59-61.

encountered in the civil damages cases presented before the U.S. courts, one could conclude that these two elements are determined in light of the violent and malicious nature of the acts. This is the case in *Paul v. Avril*,[1101] *Cicippio v. Islamic Republic of Iran*,[1102] *Daliberti v. Republic of Iraq*,[1103] *Cronin v. Islamic Republic of Iran*,[1104] *Acree v. Republic of Iraq*,[1105] *Ahmed v. Magan*.[1106] Furthermore, in a similar approach to that of the ECtHR, in some of these cases, the courts would add to the brutal nature of the acts considerations on the systematic nature of the abuse[1107] or for instance they would highlight the repetitive and recurrent sessions of vicious acts specifically inflicted to cause extreme pain and agony.[1108] Nonetheless, the quality of the analysis is not as developed as the one of the ECtHR, leaving the reader with less of a sense of orderly and structured arguments for identifying intention and purpose.

5.4.3 Inferences from the Injuries Caused to the Victim

The inference of intention and purpose from the visible injuries caused to the victim can be found in both ECtHR and U.S. case law. However, it is on this issue that a slightly different interpretation can be seen in the U.S. with regard to specific intention to inflict harm.

5.4.3.1 The ECtHR

The injuries caused to the victim have been used by the ECtHR as a hallmark of intentionally inflicted acts of ill-treatment. For instance, in *Lenev v. Bulgaria*, the Court presumed intention and purpose (obtaining a confession) from the injuries caused to the applicant's fingers and finger-

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[1101] *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), at 335.
[1102] *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62 (D. D.C. 1998), at 67.
[1103] *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19 (D.D.C. 2001), at 26.
[1104] *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222 (D.D.C.2002), at 234.
[1105] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), at 217, 219-220.
[1106] *Ahmed v. Magan*, No. 2:10-cv-00342, (S.D. Ohio Aug. 20, 2013).
[1107] *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), at 335.
[1108] *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), at 217, 219-220.

nails as a result of squeezing of his hands and insertion of objects under the nails.[1109] In *Chitayev and Chitayev v. Russia*, where the applicants had suffered, among others, craniocerebral traumas, intracranial hypertension, post-traumatic stress disorder, and numerous blunt injuries on the body, the Court considered that the physical pain thus inflicted was intentional and pursued the purpose of obtaining a confession.[1110]

Furthermore, in *Carabulea v. Romania*, where the ill-treatment resulted in the applicant's death, the Court inferred the intention and purpose of the acts from the pain and suffering inflicted.[1111] In *Kaçiu and Kotorri v. Albania*, where the beatings inflicted on the first applicant had been so severe that he had to be carried to the hearing by police officers, the Court considered that inferences concerning the intentional infliction and the purpose could be drawn from such treatment that left visible injuries.[1112]

Very similarly to *Kaçiu and Kotorri*, in *Tarasov v. Ukraine*, the applicant also had to be carried to the court hearing, in this case with the help of a stretcher, as a result of the injuries inflicted while interrogated in police custody. While the Court does not insist on intention and purpose, and even concludes that the ill-treatment amounted to torture based on the serious nature of the injuries, in the part concerning the establishment of facts, the judgment indicates that at least the element of purpose (obtaining a confession) was determined on the basis of the marks left by electric shocks on the body of the applicant.[1113]

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[1109] *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, par. 14 and 115.
[1110] *Chitayev and Chitayev v. Russia*, no. 59334/00, 18 January 2007, par. 36 and 155.
[1111] *Carabulea v. Romania*, no. 45661/99, 13 July 2010, par. 148.
[1112] *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, 25 June 2013, par. 98.
[1113] *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, par. 63-65.

Where possible, the medical proof of injuries was correlated by the Court with the evidence that confessions had been used against the victim in a criminal trial,[1114] with the victim's statements,[1115] or with the period of time for which the ill-treatment had been applied, which must have made the victim even more willing to confess in order to end the ill-treatment.[1116]

What follows from this method of inferring intention and purpose on the basis of the gravity of the injuries is that the victim should provide adequate medical evidence for the alleged injuries. She would not have to prove anything else in particular besides the severity of the treatment.

5.4.3.2 The U.S.: Chavez v. Martinez and purpose to harm the victim

In the U.S., the case of *Chavez v. Martinez* is of relevance here. It is the only due process case that gives a somewhat detailed view on intent and purpose based on the injuries caused as a result of the ill-treatment.[1117] The case breaks the usual pattern of due process cases as it did not actually concern any conviction or use of a coerced confession to obtain a conviction. In this case a police officer interrogated a suspect shot by police and the questioning took place while being treated in the intensive care unit.

Although on the issue of whether a violation of due process under the Fourteenth Amendment had taken place there was no majority reached, Justices Thomas, Rehnquist, and Scalia considered that no such violation had taken place. They considered that there was no evidence in the case that the purpose of the interrogation was to harm or to intentionally interfere with the treatment received by Martinez. They argued their finding by observing that the police officer stopped his questioning when various procedures were performed and that there was no evidence of aggravation of injuries

[1114] *Lenev v. Bulgaria*, par. 115.
[1115] *Chitayev and Chitayev v. Russia*, par. 155.
[1116] *Kaçiu and Kotorri v. Albania*, par. 99.
[1117] *Chavez v. Martinez*, 538 U.S. 760 (2003).

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or prolonged stay in hospital because of the interrogation.[1118] For the three Justices, this meant that the police officer's behavior was not "conscience shocking" and therefore that no violation of due process had taken place. Therefore, Justices Thomas, Rehnquist, and Scalia tied the purpose and intention of the police officer to an alleged injury or harm and not to the scope of obtaining a confession. Contrary to classical interrogation torture cases, where confessions are seen as the purpose of the ill-treatment and as distinct from the actual infliction of pain or suffering on the victim, in this case the Justices' standard requires an actual harm intentionally inflicted as the main purpose of police behavior. This seems to confirm the theories that in the U.S. one might find specific intent concerning pain and suffering in interrogations.

5.4.4 Presuming Intention and Purpose From the Lack of Procedural Guarantees and From the Resulting Vulnerability of the Individual

As noted in the previous chapter concerning vulnerability, the ECtHR has been taking into consideration the powerlessness of the individual held in the custody of authorities and subjected to ill-treatment. It has done so for the purposes of determining the severity of the ill-treatment and especially to give further relevance to the psychological experience of ill-treatment upon the victim of torture within the overall evaluation of the category of ill-treatment. The effects of this approach can also be distinguished in the determination of the elements of intention and purpose, as in these cases there will be an even stronger presumption in favour of the applicant's account and in favour of the ill-treatment being inflicted intentionally and for a prohibited purpose.

This was the case in *Olisov and Others v. Russia*, where the Court noted a systemic problem at the domestic level consisting of delays in officially registering arrests, the status of the persons in custody, and interrogating individuals in custody without the proper procedural guarantees, such

[1118]Ibidem, at 775-776.

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as the assistance of a lawyer, a practice which encouraged police brutality during interrogations. The Court then confirmed that this was the exact situation that arose for the applicants in this case and noted their "particular vulnerability vis-à-vis the police officers,"[1119] which strengthened the presumption in favour of their account of the facts.

Besides refuting the Government's alternative explanations for the injuries, the analysis of the ill-treatment contains no further arguments on the merits. Although the Court presented the principles according to which it distinguishes between torture and inhuman or degrading treatment, there is no explicit application of these principles to the case. Without further explanations, the Court concluded that "given their severity and the aim of obtaining confessions" [1120] the acts of violence inflicted on the applicants amounted to torture.

Furthermore, in *Kovalchuk v. Ukraine*, where the applicant was suffering from alcohol withdrawal symptoms while taken in custody for interrogation and was subsequently hospitalized in a delirious state on the same day that he confessed to having committed a murder. The Court noted that the police officers most likely exploited the applicant's vulnerable state of health and his emotional state and further deprived him of procedural guarantees in order to obtain false confessions.[1121] From all the procedural irregularities discerned in the case the Court presumed that even though the police might not have resorted to physical violence, they had used his arrest as an excuse to break his resistance and to obtain incriminating statements.[1122]

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[1119] *Olisov and Others v. Russia*, nos. 10825/09, 12412/14, and 35192/14, 2 May 2017, par. 78.
[1120] *Ibidem*, par. 87.
[1121] *Kovalchuk v. Ukraine*, no. 21958/05, 4 November 2010, par. 60-62.
[1122] *Ibidem*, par. 60.

Note however that the finding in this case was of inhuman treatment and not torture, most likely because the only injuries that the Court considered to be established by evidence consisted of haematomas to the leg and shoulder.[1123] Since it was not possible to find a purpose on the basis of an inference from injuries that were not among the most serious, the Court used the applicant's vulnerability and the lack of procedural guarantees as a basis for this element, ultimately strengthening its conclusion that the acts amounted to inhuman treatment.

5.4.5 The UN Bodies: Static and Largely Absent Analysis of Intention and Purpose

As mentioned in the introduction of this chapter, I have decided to separate the UN bodies from the rest of the jurisdictions since their analysis of intention and purpose is the most static and generally obscure if not downright absent from the case law on interrogational torture. Furthermore, cases in which these bodies attempt to give more insight into the role of intention and purpose are extremely rare and even where they do exist the theoretical explanations do not seem to be actually applied in the case under analysis or in further cases.

5.4.5.1 The UNCAT: no further assessment beyond the "definitional" phrasing of intention and purpose

For the UNCAT, purpose and intention are two elements of torture that do not occupy a central place in the overall analysis of an ill-treatment. In its General comment no. 2, the UNCAT emphasized that intent and purpose within the meaning of Article 1 of the Convention are not determined according to a subjective analysis of the motivations of the perpetrator, but from an objective perspective given the circumstances of the case.[1124]

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[1123] *Ibidem*, par. 59 and 61.
[1124] UNCAT, *General comment no. 2*, par. 9.

While these elements have indeed been assessed from an objective perspective, their assessment is quite feeble. One or both of these elements might be completely missing from the analysis provided by the Committee, as was the case in *Slyusar v. Ukraine,*[1125] *Taoufik Elaiba v. Tunisia,*[1126] *and Asfari v. Morocco*[1127] where both of the elements went unnoticed, despite the fact that the complainant might have explicitly raised at least the element of purpose; or in *Abdelmalek v. Algeria*[1128] and *Ramiro Ramírez Martínez et al v. Mexico,*[1129] where no mention was made of intention.

In any case, where they are mentioned, intention and purpose are almost never analysed in a detailed manner. Usually, these two elements are mentioned in a "definitional" manner, which is to say that they follow the phrasing of the definition of torture in Article 1 of the Convention without adding much else to the analysis. This was the case for the majority of the cases studied for interrogational torture, more specifically in *Dimitrijevic v. Serbia and Montenegro* (No. 172/2000), *Dimitrov v. Serbia and Montenegro, Dimitrijevic v. Serbia and Montenegro* (No. 207/2002), *Gerasimov v. Kazakhstan, Hammouche v. Algeria, Evloev v. Kazakhstan, Bairamov v. Kazakhstan, Abdelmalek v. Algeria, Niyonzima v. Burundi, Kabura v. Burundi.*[1130]

[1125] UNCAT, *Slyusar v. Ukraine*, Communication No. 353/2008, 14 November 2011, par. 9.2;
[1126] UNCAT, *Taoufik Elaiba v. Tunisia*, Communication no. 551/2013, 6 May 2016.
[1127] UNCAT, *Asfari v. Morocco*, Communication no. 606/2014, 15 November 2016, par. 3.2.
[1128] UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014.
[1129] UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015.
[1130] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 7.1; UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 7.1; UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 5.3; UNCAT, *Gerasimov v. Kazakhstan*, Communication no. 433/2010, 24 May 2012, par. 12.2; UNCAT, *Hammouche v. Algeria*, Communication no. 376/2009, 8 April 2013, par. 6.2; UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 9.2; UNCAT, *Bairamov v. Kazakhstan*, Communication no. 497/2012, 14 May 2014, par. 8.2; UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.3; UNCAT, *Niyonzima v. Burundi*, Communication no. 514/2012, 21 November 2014, par. 8.2; UNCAT, *Kabura v. Burundi*, Communication no. 549/2013, 16 November 2016, par. 7.2.

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The fact that not much analysis is provided by the UNCAT and that a static phrasing is followed in most of the cases where intention and purpose are mentioned is evident with regard to both of these elements. For intention the UNCAT uses either "intentionally"[1131] or "deliberately."[1132] There is only one exceptional case where intention is considered by the UNCAT in a more thorough manner than usual (although rather tied with the procedural obligation of the state). In the case of *Hanafi v. Algeria* the UNCAT provides a more detailed view of this element, in the sense that the Committee makes clear that the burden of proof with regard to this element is not with the complainant but with the State. The State is the one that has to prove that the treatment applied was not intentional.[1133] Furthermore, the UNCAT clearly explains that from the victim's condition it deduced a "clear intention to inflict suffering on him."[1134] Therefore, intention is presumed from the gravity of the facts and the effects on the health of the victim, so essentially from the severity of the treatment.

For purpose, the UNCAT would usually confirm this element as it had been claimed by the victim. It would point that the purpose of the treatment had been to obtain a confession, without any other further analysis. This was the case in *Gerasimov v. Kazakhstan*, *Evloev v. Kazakhstan*, *Bairamov v. Kazakhstan*, *Niyonzima v. Burundi*, *Ramiro Ramírez Martínez et al v. Mexico*, and *Kabura v. Burundi.*[1135] Furthermore, for this element, the UNCAT also uses static phrases, along the lines of

[1131] See, for instance, UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 7.1; UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 7.1; UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 5.3.
[1132] UNCAT, *Gerasimov v. Kazakhstan*, Communication no. 433/2010, 24 May 2012, par. 12.2; UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 9.2; UNCAT, *Bairamov v. Kazakhstan*, Communication no. 497/2012, 14 May 2014, par. 8.2.
[1133] UNCAT, *Hanafi v. Algeria*, Communication no. 341/2008, 3 June 2011, par. 9.3.
[1134] UNCAT, *Hanafi v. Algeria*, par. 9.2.
[1135] UNCAT, *Gerasimov v. Kazakhstan*, Communication no. 433/2010, 24 May 2012, par. 12.2; UNCAT, *Evloev v. Kazakhstan*, Communication no. 441/2010, 5 November 2013, par. 9.2; UNCAT, *Bairamov v. Kazakhstan*, Communication no. 497/2012, 14 May 2014, par. 8.2; UNCAT, *Niyonzima v. Burundi*, Communication no. 514/2012, 21 November 2014, par. 8.2; UNCAT, *Ramiro Ramírez Martínez et al v. Mexico*, Communication no. 500/2012, 4 August 2015, par. 17.3; UNCAT, *Kabura v. Burundi*, Communication no. 549/2013, 16 November 2016, par. 7.2.

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treatment inflicted "within the context of criminal investigation"[1136] or it might merely enumerate the various purposes mentioned in Article 1 of the UNCAT (obtaining information or confession, punishing, intimidating, or coercing a person for any discriminatory reason during a criminal investigation), without identifying the exact one on the basis of the facts of the case.[1137]

Compared to UNHRC, the presence of the purposive element within the analysis of the UNCAT is more obvious, even though there is no extensive analysis provided and merely a mention of this element is made in the final analysis of the ill-treatment.

5.4.5.2 The UNHRC: complete absence of intention coupled with factual mentions of purpose

For the UNHRC cases on interrogational torture, the elements of intention and purpose are rather marginalized in the overall analysis of the facts. For instance, out of seventeen UNHRC cases analyzed on the issue of interrogational torture, twelve do not contain any reference to either intention or purpose.[1138] The remaining five cases make no mention of intention,[1139] so intention is actually not an issue discussed in the views of the UNHRC in cases that have explicitly categorized the ill-treatment as torture.

[1136] UNCAT, *Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, 3 May 2005, par. 7.1; UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, 24 November 2004, par. 5.3.
[1137] UNCAT, *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, par. 7.1; UNCAT, *Hanafi v. Algeria*, Communication no. 341/2008, 3 June 2011, par. 9.2; UNCAT, *Hammouche v. Algeria*, Communication no. 376/2009, 8 April 2013, par. 6.2; UNCAT, *Abdelmalek v. Algeria*, Communication no. 402/2009, 23 May 2014, par. 11.3.
[1138] See HRC, *Motta v. Uruguay*, no. 11/1977, 29 July 1980; HRC, *Burgos v. Uruguay*, no. 52/1979, 29 July 1981; HRC, *Muteba v. Zaire*, no. 124/82, 24 March 1983; HRC, *Arzuada v. Uruguay*, no. 147/1983, 1 November 1985; HRC, *Acosta v. Uruguay*, no. 162/1983, 25 October 1988; HRC, *Arhuaco v. Colombia*, no. 612/1995, 29 July 1997; HRC, *Domukovsky et al. v. Georgia*, nos. 623, 624, 626 & 627/1995, 6 April 1998; HRC, *Mulezi v. Democratic Republic of the Congo*, no. 962/2001, 6 July 2004; HRC, *Chiti v. Zambia*, no. 1303/2004, 26 July 2012; HRC, *Jumaa v. Libyan Arab Jamahiriya*, no. 1755/2008, 19 March 2012; HRC, *Akmatov v. Kyrgyzstan*, no. 2052/2011, 29 October 2015; HRC, *Askarov v. Kyrgyzstan*, no. 2231/2012, 31 March 2016.
[1139] See HRC, *Estrella v. Uruguay*, no.74/1980, 29 March 1983; HRC, *Cariboni v. Uruguay*, no. 159/1983, 27 October 1987; HRC, *Herrera v. Colombia*, no. 161/1983, 2 November 1987; HRC, *Khalilov v. Tadjikistan*, Communication 973/01, 18 October 2005; HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011.

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Purpose is also rarely mentioned in the analysis, and usually only factually, without any detailed analysis.[1140] *Giri v. Nepal* is the only case presented before the UNHRC that offers a more detailed account on this element but still there is a disconnection between the theoretical view presented by the UNHRC in *Giri v. Nepal* and the actual analysis provided in the HRC's cases. Although in *Giri v. Nepal* the UNHRC refers to the purposive element as the determinant behind categorizing an ill-treatment as torture, the analysis itself in each case is merely focused on the facts as submitted by the complainant, without particular consideration for the purposive element.

I would note however that intention and purpose not getting mentioned in the analysis of the UN bodies does not mean that they are irrelevant. My perception is that the way in which the UNCAT and the UNHRC have for so long drafted their views in a very concise and at the same time very factual manner, with "analyses" on the merits of the case consisting essentially of factual statements, restricts any comprehensive consideration for intention and purpose. The message that is sent is that these two elements are not actually central for the definition of torture.

5.5 The Place Occupied by Intention and Purpose within the Determination of Torture by the Studied Jurisdictions

This section draw on the cases analysed and show that for all three jurisdictions the elements of intention and purpose occupy a secondary place in the determination of torture.

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[1140] See HRC, *Estrella v. Uruguay*, no.74/1980, 29 March 1983, par. 8.3; HRC, *Cariboni v. Uruguay*, no. 159/1983, 27 October 1987, par. 9.2; HRC, *Herrera v. Colombia*, no. 161/1983, 2 November 1987, par. 10.2; HRC, *Khalilov v. Tadjikistan*, Communication 973/01, 18 October 2005, par. 7.2; HRC, *Giri v. Nepal*, no. 1761/08, 24 March 2011, par. 7.5-7.6.

5.5.1 THE ECTHR: A SECONDARY ROLE FOR INTENTION AND PURPOSE

In the case law of the ECtHR the elements of intent and purpose do not appear to be the subject of an intense analysis or any major debate, sometimes even being noted without any further explanation.[1141] Rather, these elements have not been the centre of attention and they appear as secondary to severity, since as shown above they are mostly inferred from aspects that form the basis for the assessment of severity.

The secondary value or place of intention and purpose within the overall assessment of the type of ill-treatment inflicted during interrogations is even more distinguishable in cases where the injuries inflicted on the victim reveal a level of severity specific only of inhuman treatment or where the applicants themselves claim that the ill-treatment amounted only to inhuman treatment.

In such cases the ECtHR might abstain from analysing the elements of purpose and intention, since a finding of torture is not possible if the degree of pain and suffering is not sufficiently severe. Continuing to analyse intention and purpose in this scenario would be a pointless course of action. Furthermore, as observed in previous chapters, many cases that concern inhuman treatment are also cases in which the evidentiary file has certain weaknesses and the Government would usually argue that the applicant's injuries had been caused by resisting the arrest.

In any case, this approach can be seen throughout the case law and some examples include *Hulki Güneş v. Turkey*,[1142] *Ryabtsev v. Russia*,[1143] and *Asllani v. "the former Yugoslav republic of Macedonia*".[1144] In *Hulki Güneş v. Turkey* the applicant alleged ill-treatments without qualifying them as inhuman or torture and claimed that he had been interrogated under duress in order to

[1141] See for instance *Nitsov v. Russia*, no. 35389/04, 3 May 2012, par. 54.
[1142] *Hulki Güneş v. Turkey*, no. 28490/95, 19 June 2003, par. 68-74.
[1143] *Ryabtsev v. Russia*, no. 13642/06, 14 November 2013, par. 70-77.
[1144] *Asllani v. "the former Yugoslav republic of Macedonia*", no. 24058/13, 10 December 2015, par. 85-87.

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obtain a confession.[1145] The Court confirmed that the injuries, which included grazes and bruises arising to one day of sick leave, took place while he was interrogated but it did not go further to look into intention and purpose.[1146]

The same sequence of considerations can be discerned in *Ryabtsev v. Russia*, where although the applicant also claimed that the purpose for the infliction of ill-treatment had been to force him to confess, this issue was not considered in the final assessment since "the accumulation of the acts of physical violence […] amounted to inhuman and degrading treatment."[1147] Similarly, in *Asllani v. "the former Yugoslav republic of Macedonia*" the applicant did not qualify the ill-treatment in his claim before the Court though he did mention that police officers clearly threatened him in order to confess to bribery. The Court stopped at inhuman treatment although it recognized that the ill-treatment had been inflicted during interrogation and that it had caused the applicant bruises and a broken nose.[1148]

Earlier examples include for instance *Tomasi v. France*,[1149] *Ribitsch v. Austria*,[1150] and *Büyükdağ v. Turkey*,[1151] where the applicants themselves alleged that the ill-treatment which took place during interrogation and police custody amounted only to inhuman treatment. Although (with the apparent exception of Tomasi who based his claim on the conclusion in *Ireland v. the United Kingdom*) they indicated that the purpose of the ill-treatment was to make them confess to a crime,

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[1145] *Hulki Güneş v. Turkey*, par. 65.
[1146] *Ibidem*, par. 74.
[1147] *Ryabtsev v. Russia*, par. 13 and 76.
[1148] *Asllani v. "the former Yugoslav republic of Macedonia*", par. 9 and 86-87.
[1149] *Tomasi v. France*, no. 12850/87, 27 August 1992, par. 112-116.
[1150] *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, par. 29 and 35-40.
[1151] *Büyükdağ v. Turkey*, no. 28340/95, 21 December 2000, par. 51-55.

the Court did not analyze or mention this element in its reasoning but strictly referred to the injuries suffered to hold that inhuman and degrading treatment had taken place.

It is true that the applicants themselves claimed only inhuman treatment so the Court might not have been under any obligation to go further in its analysis and consider whether torture had taken place. However, if the European Convention itself does not define torture, should an applicant's claim necessarily point to torture and include in their argument all elements of torture in order for the Court to be under the obligation to consider torture?

In my opinion, even with the risk of causing discontent on the part of the Government and even though the application process has become ever more stringent, the ECtHR should not require applicants to precisely point to the category of ill-treatment. An applicant might refer to inhuman treatment in a general manner, without the intention of categorizing the ill-treatment suffered during interrogation. Furthermore, considering that the case law thresholds for Article 3 are constantly evolving and the case law itself is quite fragmented, this would be requiring the applicant to have a thorough knowledge of the interpretation of Article 3 in order to make a correct assessment of his claim. Lastly, not imposing such a requirement would avoid cases such as *Tomasi,* in which the applicant was apparently misled by the finding of inhuman and degrading treatment made in *Ireland v. the United Kingdom*. Admittedly, common sense limitations with regard to vagueness in formulating complaints before the ECtHR should still be applicable.

There are further examples of more recent cases in which the ECtHR makes findings of inhuman treatment and appears to "forget" about intention and purpose (*Bekos and Koutropoulos v.*

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Greece,[1152] *Alchagin v. Russia*,[1153] *Samartsev v. Russia*,[1154] *Bobrov v. Russia*,[1155] *Gorshchuk v. Russia*,[1156] and *Shlychkov v. Russia*[1157]*)* and sometimes even of intention, purpose, and severity (*Hajnal v. Serbia*[1158]). Similarly to inhuman treatment cases, purpose and intention are also overlooked in cases in which there is no classification of the ill-treatment inflicted during interrogations but a violation of the substantive aspect under Article 3 is found. For instance, in *Ayse Tepe v. Turkey*, where the applicant claimed to have been subjected to systematic torture during interrogation (consisting of Palestinian hanging, beatings, electric shocks, cold water hosing, threats of ill-treatment and rape) and forced to sign a statement, the Court stopped its analysis after it found the Government responsible for the ill-treatment.[1159] Similar circumstances and omission of intent and purpose can be seen in *Balogh v. Hungary*,[1160] *Hasan Kiliç v. Turkey*,[1161] *Colibaba v. Moldova*,[1162] *Yusuf Gezer v. Turkey*,[1163] *Breabin v. Moldova*,[1164] and *Dvalishvili v. Georgia*.[1165]

Perhaps the singular case in which the ECtHR indicated that the intentional element might prevail over severity in the process of categorizing ill-treatment is *Nalbandyan v. Armenia*. Although in the majority opinion the Court enumerated several elements taken into account when classifying the treatment inflicted on the applicants (including the type and gravity of ill-treatment, the

[1152] *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, par. 12, 29, and 51.
[1153] *Alchagin v. Russia*, no. 20212/05, 17 January 2012, par. 52-57;
[1154] *Samartsev v. Russia*, no. 44283/06, 2 May 2013, par. 26-33 and 94-99.
[1155] *Bobrov v. Russia*, no. 33856/05, 23 October 2014, par. 7 and 38-46.
[1156] *Gorshchuk v. Russia*, no. 31316/09, 6 October 2015, par. 33.
[1157] *Shlychkov v. Russia*, no. 40852/05, 9 February 2016, par. 9 and 67-70.
[1158] *Hajnal v. Serbia*, no. 36937/06, 19 June 2012, par. 83-93.
[1159] *Ayse Tepe v. Turkey*, no. 29422/95, 22 July 2003, par. 16, 20, 33-42.
[1160] *Balogh v. Hungary*, no. 47940/99, 20 July 2004, par. 48-54.
[1161] *Hasan Kiliç v. Turkey*, no. 35044/97, 28 June 2005, par. 16, 31, 36-43.
[1162] *Colibaba v. Moldova*, no. 29089/06, 23 October 2007, par. 42-51.
[1163] *Yusuf Gezer v. Turkey*, no. 21790/04, 1 December 2009, par. 11, 29-33.
[1164] *Breabin v. Moldova*, no. 12544/08, 7 April 2009, par. 50-52.
[1165] *Dvalishvili v. Georgia*, no. 19634/07, 18 December 2012, par. 41-45.

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intention of the officers, the relationship between the applicants, and the age of one of them),[1166] in a concurring opinion of Judge Motoc it was revealed that actually it was the factor of vulnerability and the intentional element, the latter understood as a unit made of intention and purpose, which prevailed over severity.[1167]

5.5.2 THE U.S.: ALSO A SECONDARY PLACE FOR INTENTION AND PURPOSE

With regard to the other jurisdictions, I will not go through the U.S. due process cases again, since that has been analyzed above in sub-section 5.4.1.2, and it was concluded that indeed intention and purpose take more of a background position in the overall assessment of whether a confession was obtained voluntarily. As for civil cases, where the focus is on the amount of damages awarded, even though intention and purpose are elements included in the definition of torture as understood under various U.S. civil remedies statutes, this is not a guarantee that they will actually be properly considered in the case law. Therefore, there are cases in which the issue of intention and purpose does not specifically arise as a factor in the analysis but at most they could be inferred from the factual part of the decisions. This was the case for instance in *Xuncax v. Gramajo*,[1168] *Cabiri v. Assasie-Gyimah*,[1169] *Simpson v. Socialist People's Libyan Arab Jamahiriya*.[1170]

5.5.3 THE UN BODIES

With regard to the UN Bodies, as I have already mentioned above, the impression that is left by the manner in which the views of the UNCAT and of the UNHRC are drafted is that intention and purpose are indeed secondary to the severity of the ill-treatment or even completely absent from any consideration of the merits. This might of course be only the public appearance but it still

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[1166] *Nalbandyan v. Armenia*, nos. 9935/06 and 23339/06, 31 March 2015, par. 110.
[1167] Concurring opinion of Judge Motoc in *Nalbandyan v. Armenia*, par. 1.
[1168] *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995).
[1169] *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D. N.Y. 1996).
[1170] *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003).

shows that other considerations such as injuries or type of ill-treatment are more relevant for the determination of torture.

5.6 CONCLUSION

For all the jurisdictions under analysis there is only one way of determining intention and purpose, namely inferring and presuming these elements from various information provided in the case. There is no single and unified source for determining intention and purpose, and the ECtHR's case law appears to be the most varied with regard to the sources taken into consideration in order to infer these two elements. The overall circumstances and the facts of the case, the nature of the ill-treatment or the injuries inflicted, and even the lack of procedural obligations and the victim's vulnerability might serve as the basis, alone or in combination, for an inference of intention and purpose. Therefore, the severity of the treatment is often considered the basis for a certain automatic finding of intention and purpose.

As for the role of intention and purpose within the overall assessment of the qualification of ill-treatment, it appears to be secondary to the infliction of severe pain or suffering in all of the studied jurisdictions. Many cases reveal that intention and purpose are elements placed in the background, sometimes even subsumed to one another. They might just not receive public recognition or they might actually be completely forgotten and absent from any consideration about the qualification of ill-treatment.

With regard to whether intention and purpose are necessary, in my opinion the two elements can be helpful elements for determining torture, especially in order to distinguish torture from other less serious crimes in domestic criminal law. Much like Rhonda Copelon has argued, they might also provide a supporting push for certain methods of ill-treatment to be understood as torture.

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However, I can also see that purpose for instance might become a burden in scenarios where for instance the victim of the ill-treatment has died as a result of the torture inflicted. Where evidence is scarce and the purposive element of torture cannot be determined because of this lack of evidence, then the treatment would amount at best to inhuman treatment.[1171]

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[1171] See for instance *Süheyla Aydin v. Turkey*, no. 25660/94, 24 May 2005, par. 196-197.

GENERAL CONCLUSIONS

SUMMARY OF THE FINDINGS

The general research question addressed in this dissertation concerned the interpretation and the meaning of torture. To answer this question I have chosen the category of interrogational torture, the so-called classic example of use of torture, and I have analyzed interrogation cases in three jurisdictions: the ECtHR, the UN (comprising the UNCAT and the UNHRC), and the U.S. After a theoretical analysis of the definition of torture it was concluded that severity and the purposive element are the two factors that determine whether an ill-treatment falls under the category of torture or inhuman treatment. By looking at these two elements in more detail, at the means and recurring factors based on which they are established and the arguments provided in interrogational torture cases, I have sought to provide a systematic account of what makes an act fall under the category of torture.

Despite the differences between the three jurisdictions – the ECtHR with the most developed case law and argumentation; the UN bodies with views drafted in a general, statement-like manner; the U.S. with a very fragmented legal background and a case law focused on procedural matters, jurisdictional obstacles,[1172] or egregious factual circumstances – it is still possible to discern common traits for determining torture. The use of the "totality of circumstances" approach, although rarely stated in these jurisdictions, is actually specific for all three of them. In varying degrees, the use of a quantitative approach to determine the "severity of pain or suffering" is also

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[1172] See *Warfaa v. Ali*, 33 F. Supp. 3d 653 (E.D. Va. 2014).

a go-to criteria for all the jurisdictions, although for the UN bodies this is mostly inferred from their factual statements and for the U.S. this is most accurate for damages litigation.

ANSWERING THE RESEARCH QUESTIONS

HOW IS TORTURE ASSESSED IN INTERROGATION CASES? WHAT PREVAILS IN ASSESSING TORTURE CLAIMS AND WHAT SEPARATES TORTURE FROM INHUMAN TREATMENT?

Although theoretically both severity and purpose are equally relevant, I would argue that with regard to interrogational torture in the majority of cases the distinctive criteria appears to be the severity of the treatment, particularly quantified based on the extent and gravity of the injuries. Similar in nature to the assessments made in domestic criminal law, there is in fact a direct causal link between the conclusions reported in medical documents, the gravity of the treatment, and a finding of torture. Grave or long-term injuries, disabilities, or even death (all of them consequences that might shock the assessor) will greatly influence whether a finding of torture is made. On the other hand, although it is not a condition for finding torture, the absence of long-term effects on the health of the victim, whether physical or psychological, will influence findings of torture in interrogational settings. For the ECtHR for instance, while in *Selmouni* the threshold for torture was apparently lowered, the subsequent case law continued to focus on quantity-oriented factors, including the number of acts inflicted or the number of injuries. Although, admittedly, the underlying logic of the courts might not be to actually require long-term effects or numerous injuries for a finding of torture, the continued emphasis on this element in their argumentation may lead to the misleading appearance that this factor is an element of torture.

Also part of a severity focused analysis, the nature of the treatment, in some cases intertwined with the extent of the damage to health, is the basis for perceiving egregious methods such as falaka,

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suspension, rape, and electric shocks as torture, methods that are the representation of the perpetrator's cruelty and of the wantonness of pain or suffering inflicted. For the U.S. for instance, there is a scarcity of cases that would analyze the definition of torture in detail, considering that the due process case law focused on the shock the conscience test and on the involuntary confessions test (which is lower) is not very helpful. In these conditions the damages litigation case law, which usually arises from the most egregious ill-treatments used in totalitarian regimes, has remained the main source of interpretation for torture. This has led to the creation of a case law where mere cruelty is not sufficient, which would not normally raise a concern considering the culturally relative dimension of "cruel," if it were not for findings that extreme cruelty is needed for ill-treatment to amount to torture, which in the long run might contribute to a very restrictive understanding of torture.

As for intention and purpose, they are sometimes absent from the analysis of torture and when they are analyzed it is at most in a kind of mark off reference or they are subsumed to one another. In general they are based on inferences or presumptions drawn from the overall circumstances of the case or from using the indicator of the severity and the multitude of ill-treatments. The fact that they are always established probabilistically reduces them to a secondary role in determining torture. Their significance is mostly obvious in borderline cases.

These conclusions are drawn by looking at the overall case law, though in certain cases the judgment itself might concede that severity is indeed the go-to criteria. The ECtHR for instance recognized that it bases its qualification of torture "not so much on the intentional nature of the ill-treatment as on the fact that it had "caused 'severe' pain and suffering" and had been "particularly

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serious and cruel"".[1173] For instance, in *Savin*, the ECtHR stated that there were two elements that led to its finding, severity and intention/purpose. However, it later explicitly recognized in another of its judgments, *Ushakov and Ushakova v. Ukraine*,[1174] that it found torture since the ill-treatment resulted in a permanent disability. This is clearly not just an issue of interpretation of the same case by a different section or division of the Court, since the same Ukrainian country division and Fifth Section of the Court who dealt with the case also made this subsequent admission. In *Gäfgen* the distinguishing element was also severity since, after analyzing all the elements that it considered relevant, the Grand Chamber concluded that "the classification […] depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused."[1175] Furthermore, in cases in which inhuman treatment is found, the ECtHR might emphasize that although the treatment was serious, the level of cruelty required by the threshold of torture was not reached.

Furthermore, even where purpose is the "official" distinguishing criteria, the case law reveals otherwise. Although the UN bodies are not particularly revealing on their preferred element for distinguishing torture from inhuman treatment, the UNHRC in the case of *Giri v. Nepal* has stated that the distinction is made by the purpose and not severity of the treatment. Yet, the emphasis in all the cases lies on factors specific of severity (the nature of the ill-treatment, the effects, etc.).

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[1173] *Cestaro v. Italy*, no. 6884/11, 7 April 2015, par. 173. Although this case does not concern interrogational ill-treatment, I have used this citation from this case because it originates in the part of the judgment where the Court provides a general overview of its case law with regard to torture.
[1174] *Ushakov and Ushakova v. Ukraine*, no. 10705/12, 18 June 2015, par. 83 ("Lastly, it does not escape the Court's attention that, as pointed out by the applicants, one of the police officers actively involved in their ill-treatment, K., has been mentioned by the Court in the case of *Savin* […]. Indeed, it was established by the domestic courts in that case that K. had severely ill-treated the applicant back in 1999, but the charges were dropped as time-barred. The Court classified that ill-treatment as torture given that it had resulted in the applicant's disability for life").
[1175] *Gäfgen* [GC], par. 108.

The same is valid for the UNCAT. If indeed the background criteria is purpose, this should be made more obvious in the decisions.

The preponderant focus on the severity of pain or suffering calls for a word of caution. The assessment of severity based on the consequences on the health of the victim was the source of abuse in the war on terror enhanced interrogations and undoubtedly illustrated the arbitrariness of this criteria. It should therefore be kept in mind that although such an approach might appear to make it easier on the judges to determine torture, since their role is reduced to nothing more than perfunctory actions, methods that are less obvious on the body inconspicuously facilitate a proliferation of torture. Also, more awareness about research-based and expert evidence on the topic of torture might counterbalance the negative consequences of the current approach.

WHAT OTHER FACTORS CAN BE TAKEN INTO ACCOUNT?

More recently and perhaps as a spill-over from the developing case law on the rights of vulnerable people and vulnerable groups, vulnerability (as an objective or subjective feature of the victim) is silently becoming a factor in analyzing interrogational torture cases. Detained persons are already particularly vulnerable individuals, so inflicting torture makes them even more vulnerable during and after custody. Although vulnerability is not a guarantee for finding a violation or for finding torture for that matter, it can however be a tool to emphasize the state's obligations. It can also be viewed as an aggravating element in assessing ill-treatment in order to give more substance to claims of psychological torture, which are usually buried under standard formulas. Also, it can be a helpful tool in refocusing the court's attention towards the subjective experience of the victim and provide the public with a better understanding of her experience. It should be noted however that using this factor might lead to rendering the classical definition of torture irrelevant and

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encouraging subjective assessments since it leaves great leeway for the assessor of the ill-treatment and if the concept is not uniformly defined, as it has been pointed by the legal scholarship.

A further characteristic that can generally be observed in cases in which torture was found include a certain degree of organization, preparation, and meticulousness on the part of the perpetrators. This is easily observable for egregious methods where ill-treatments inflict gratuitous violence but also in cases that arose from the war on terror abuses. This is therefore a factor that should be kept in mind when categorizing abuses, as it appears to be equally fair to both physical and psychological treatments. As mentioned in the dissertation, physical ill-treatments are most readily viewed as possible candidates for findings of torture, while psychological treatments are more often categorized as inhuman. This factor however can counterbalance the failures in recognizing the suffering inflicted through psychological ill-treatment.

IS THERE A UNIFORM VIEW OF WHAT AMOUNTS TO TORTURE IN INTERROGATIONS?

Largely yes, but the unanimous agreement is limited to extreme ill-treatment amounting to torture. Extreme pain or suffering is usually understood as in the Torture Memos, loss of an organ, pain akin to death. However, there are ill-treatments resulting in injuries such as broken ribs, broken nose, fractured testicle, etc. (for the ECtHR for instance) which were held to be only inhuman treatment despite their grave effects on an organ or limb. From the point of view of the type of ill-treatment inflicted (with few exceptions), it appears that physical methods of coercive interrogations are prevalent in cases in which torture was found, while psychological ill-treatments are most likely to be found as amounting to inhuman treatment. Therefore, it is more difficult to determine whether an ill-treatment will be considered torture once the case involves ill-treatments outside of the "extreme" category and this is where interpretations of what amounts to torture will

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become more varied. Arguments concerning the proportional use of force necessary to subdue an uncooperative person are very efficient in engaging the reasoning into lengthy considerations on the use of force, so that the issue of qualifying the ill-treatment is completely overlooked.

If the interpretation of the prohibition of torture and inhuman or degrading treatment during interrogations is diverse across the international courts and international bodies, I would expect an even higher diversity in cases presented at the domestic level but also in other categories of cases concerning torture, besides interrogational ones. Given this diversity of interpretations at the international level, unfortunately I find certain arguments of the Torture Memos less surprising. This is one conclusion that I did not expect to reach at the end of this study.

Does this say anything about the role of courts? Should their power be limited in favour of the other branches? I think not, I believe the problem is rooted in the quality of decisions and judgments where the overstressing of the injuries of the victim has led to a lack of argumentative reasoning, in the considerably diminishing effort directed at explaining the motives for reaching a certain conclusion, or in the avoidance of categorizing certain ill-treatments as torture or as inhuman treatment. All of these issues lead to unpredictability.

IS THERE A LOWERING OF THE THRESHOLD OF TORTURE IN INTERROGATION CASES?

As already stated, robust and definite findings of torture are still made with predilection in cases concerning extremely cruel treatments and the main emphasis does continue to be on the effects of the treatment and the injuries caused to the victim. However, most obvious for the ECtHR case law, there are certain signs that looking into other options for assessing torture is feasible. The war on terror abuses, leaked to the press in June and December 2004, acted as an upheaval of the traditional argumentative line in torture cases. To some extent this has contributed to the awareness

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that the interpretation and understanding of torture is not satisfactory and that the principles behind the prohibition need to be more noticeable. Therefore, as shown in Chapter 2, at least for the ECtHR, there is in more recent cases an appearance of lowering the threshold for torture.

As shown in Chapter 4, psychological suffering and the applicant's vulnerability are slowly but gradually gaining importance. For instance, "helplessness", a term used very often in psychological evaluations has been used in the ECtHR's case law on Article 3 predominantly after June 2004. Out of 91 judgments in which the term is included, only six have been pronounced before that date. The same conclusion is valid for "powerlessness" (out of 39 judgments on Article 3, only four judgments were pronounced before June 2004).[1176] Of course this could be due to the ordinary evolution of the case law, since the European Convention is a "living instrument."[1177] However, given that the Court directly examined war on terror cases, in which these two factors, psychological suffering and vulnerability were central for U.S. operations, its perspective could have been more or less enriched (see, for instance, the direct link between waterboarding and vulnerability in *Hajrulahu v. "The Former Yugoslav Republic of Macedonia"*).[1178]

Nonetheless, I am not certain whether this awareness will actually turn into the much needed change. As Judge Zupančič stated in *Jalloh*, "[w]hat in 1952 was patently "conduct that shocked the conscience" has in 2006 become an issue that must be extensively […] pondered, argued and debated."[1179] The change in the "hierarchy of values,"[1180] sensibilities and interests appears to be

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[1176] The searches in HUDOC were done on July 14, 2017.
[1177] See, among others, *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978, par. 31; *Selmouni v. France*, par. 101.
[1178] *Hajrulahu v. "The Former Yugoslav Republic of Macedonia"*, no. 37537/07, 29 October 2015, par. 100 ("the applicant was held on several occasions under water in a swimming pool while his legs and arms were handcuffed, which made him being in a state of vulnerability").
[1179] Concurring opinion of Judge Zupančič, *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.
[1180] Ibidem.

the counterweight that sustains an elevated threshold for torture. This is the conclusion that I would draw with regard to the use of ill-treatments in interrogations. Unlike other studies that have concluded that the standard for torture and other ill-treatments has been lowering,[1181] this dissertation shows in a more nuanced manner that by undertaking a comprehensive study concentrated on the details of one category of cases, general conclusions are not necessarily valid. Studying torture is like Dewulf acknowledged, a work of unexpected magnitude,[1182] but it appears that the deeper the study goes, it might also result in unexpected conclusions.

WHAT FUTURE FOR THE DEFINITION OF TORTURE?

In my opinion the legal definition of torture is not flawed, it does not necessarily have to be modified, like other scholars might suggest.[1183] It might be that more philosophically-oriented definitions would capture much better the essence of torture. However, for legal purposes, the UNCAT definition is well constructed. The real concern is with the way that "severe pain or suffering" has been interpreted and the criteria that has been used. More awareness and effort is needed to bring to the fore the underlying reason and principles that the prohibition of torture embodies. Instead of perpetuating a mechanical and emotionless assessment of torture, dependent on quantities of injuries and acts, further alertness should be given to the balance of power between the two parties involved, attention to the unique dehumanization that results from the total control over the victim and concern for the public dimension and consequences of this practice.

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[1181] Steven Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law*, 137, 200.
[1182] Ibidem, 14.
[1183] Ibidem, 477-553.

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