



**HUMAN RIGHTS 4 - ALWAYS  
PROHIBITED OR “ALMOST” ALWAYS  
PROHIBITED? PROHIBITION OF  
TORTURE**

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# INSTRUMENTS

- Literal trailer from reality – where and when?
- Where are the first instruments?
- Implicitely:
  - U.S. Bill of Rights:  
VIII. *„Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.“*
  - Declaration of the Rights of Man and of the Citizen  
*„9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.“*



# INSTRUMENTS

## ○ Explicitly: UDHR:

- „*Article 5*

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. “*

## Art. 7 ICCPR:

*„No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. “*



# INSTRUMENTS

## ○ ECHR:

- *„Article 3*

*Prohibition of torture*

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment. “*

## ○ European Charter:

*„Article 4 Prohibition of torture and inhuman or degrading treatment or punishment*

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment. “ – Konstantinidis?*



# INSTRUMENTS

- UN Convention against Torture 1984: Committee Against Torture (CAT) - why is it useful to have a separate procedure for monitoring torture? What is it good for? What states were the inspiration?
- & Optional Protocol to the Convention against Torture (OPCAT) - Subcommittee on Prevention of Torture (SPT) 1984
- *Article 19*
    1. *The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.*



# INSTRUMENTS

## ○ **Article 20**

*If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.*

*Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.*

*If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.*

## **Article 22**

*A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.*



# INSTRUMENTS

- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (no definition, just procedure connected with Art. 3 ECHR)

„Article 2

*Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.“*



# INSTRUMENTS

## ○ Common Art. 3 of Geneva Conventions 1949:

- *„In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
  - (1) *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
    - (a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ...“*





# ABSOLUTE OR ALMOST ABSOLUTE?

## ○ Is it absolute or opened to balancing test?

- Absolute = no limitation, no derogation, no balancing
- No limitation: language:

*„No one shall be subjected to torture or to inhuman or degrading treatment or punishment.“*

No derogation: Art. 15:

*„Derogation in time of emergency*

- 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
- 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 § 1 and 7 shall be made under this provision.“*



## ABSOLUTE OR ALMOST ABSOLUTE?

- No balancing....what is balancing?
- Balancing in proportionality test (example of Grogan):
  - Is there a legitimate purpose?
  - Necessity (is there alternative measure less intrusive and equally effective?)
  - Balancing (costs and gains)

Ticking bomb dilemma

- ECHR Gafgen v. Germany 1.6.2010 (torture, life and fair trial)



# ABSOLUTE OR ALMOST ABSOLUTE?

10. J. was the youngest son of a banking family in Frankfurt am Main. He got to know the applicant, a law student, as an acquaintance of his sister. On 27 September 2002 the applicant lured J., aged eleven, into his flat in Frankfurt am Main by pretending that the child's sister had left a jacket there. He then killed the boy by suffocating him.
12. Subsequently, the applicant deposited a ransom note at J.'s parents' place of residence stating that J. had been kidnapped and demanding one million euros. The note further stated that if the kidnappers received the ransom and managed to leave the country, then the child's parents would see their son again. The applicant then drove to a pond located on a private property near Birstein, approximately one hour's drive from Frankfurt, and hid J.'s corpse under a jetty.
13. On 30 September 2002 around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was under police surveillance. He lodged part of the ransom money into his bank accounts and hid the remainder of the money in his flat. That afternoon, he was arrested at Frankfurt am Main airport with the police pinning him face down on the ground.
14. He was then questioned by M. with a view to finding J. The applicant intimated that the child was being held by another kidnapper. He subsequently indicated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake.
15. Early in the morning of 1 October 2002, before M. came to work, Mr Daschner (D.), Deputy Chief of the Frankfurt police, ordered another officer, Mr Ennigkeit (E.), to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. D.'s subordinate heads of department had previously and repeatedly opposed such a measure. Detective officer E. thereupon threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him into a cell with two huge black men who would sexually abuse him. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. The Government disputed that the applicant had been threatened with sexual abuse or had been physically assaulted during the questioning. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of J.'s body some ten minutes thereafter.



## ABSOLUTE OR ALMOST ABSOLUTE?

- ECHR answer to Art. 3: Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.
- To Art. 6: The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.



# DEFINITION OF TORTURE

- Torture \* inhumane \* degrading treatment



# DEFINITION OF TORTURE

- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987 Article 1:

*„1. For the purposes of this Convention, torture means any act by which **severe pain or suffering**, whether physical or mental, is **intentionally inflicted** on a person **for such purposes** as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, **when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.“*

Is it now clear....?



# DEFINITION OF TORTURE

- In Europe – vague definition not to limit ECHR: rather prevention (which two states had troubles with torture in Europe on a regular basis?)
- Examples: *Aydin v. Turkey* – rape in prison (1997), *Aksoy* – Palestinian hanging (1996), *Ireland v. U.K.* – five techniques (1978):
  - (a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
  - (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
  - (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
  - (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
  - (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.
  - How would you classify it?



# DEFINITION OF TORTURE

## ○ ECHR classification:

- *„167. In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering....*





# DEFINITION OF TORTURE

*Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".*

*Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.*

*168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3. "*



# DEFINITION OF INHUMANE TREATMENT

- Less intensive: Ireland v. U.K. 1978 and „five techniques“ .....
- ....but prohibited nevertheless: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987 Article 16, paragraph 1:
  - *“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or 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.”*



# DEFINITION OF DEGRADING TREATMENT

- Humiliation in the eyes of others or yourself – typically public corporal punishments:
  - ICCPR: *Osbourne v. Jamaica* 2000 (Jamaica left Optional Protocol because of those cases)
  - In October 1994, the author was convicted by the Westmoreland Circuit court, Savannah-la-Mar, along with a co-accused for illegal possession of firearm, robbery with aggravation and wounding with intent. He is serving a sentence of 15 years' imprisonment with hard labour and is subject to receive 10 strokes of the tamarind switch.



# DEFINITION OF DEGRADING TREATMENT

- Tyrer v. U.K. 1978:
  - Mr. Anthony M. Tyrer, being aged 15 and of previous good character, pleaded guilty before the local juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school. The assault, committed by the applicant in company with three other boys, was apparently motivated by the fact that the victim had reported the boys for taking beer into the school, as a result of which they had been caned. The applicant was sentenced on the same day to three strokes of the birch in accordance with the relevant legislation.
  - How would you classify it?



# DEFINING DEGRADING TREATMENT – CORPORAL PUNISHMENTS

- *„The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.*

*The Attorney-General for the Isle of Man drew particular attention to the fact that the punishment was carried out in private and without publication of the name of the offender. Publicity may be a relevant factor in assessing whether a punishment is "degrading" within the meaning of Article 3, but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.*



# DEFINING DEGRADING TREATMENT – CORPORAL PUNISHMENTS

- *33. Nevertheless, the Court must consider whether the other circumstances of the applicant's punishment were such as to make it "degrading" within the meaning of Article 3. The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. **Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity.** Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."*



# JUVENILE CORPORAL PUNISHMENTS

- The boundaries are changing:
  - Selmouni v. France 1999 (you know part of the story):
  - *„Having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions”, the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.“*



# TREATING PRISONERS

- Selmouni v. France 1999:
  - The police arrested Mr Selmouni in connection with a drug-trafficking investigation.
  - Mr Selmouni was first questioned from 12.40 a.m. to 1.30 a.m. on 26 November 1991 by the police officers against whom he later made a complaint. Having been questioned and taken back to the court cells, Mr Selmouni had a dizzy spell. The court cell officers took him to the casualty department at Jean Verdier Hospital in Bondy at 3.15 a.m. The medical observations made by the casualty department read as follows:
    - *“Date of examination: 26 November 1991. 3.15 a.m. Attends casualty complaining of assault. On examination, several superficial bruises and injuries found on both arms. Bruises on outer left side of face. Bruise on left hypochondrium. Marks of bruising on top of head. Chest pains increase with deep respiration.”*
    - Description by Selmouni: *„In the evening of the same day, when there were fewer staff on the first floor, I was questioned again by six police officers, who were particularly brutal to me. I was punched, and beaten with a truncheon and a baseball bat. They all carried on assaulting me until 1 a.m. I think that this session of ill-treatment had begun at about 7 p.m. At one point they made me go out into a long office corridor where the officer I presumed was in charge grabbed me by the hair and made me run along the corridor while the others positioned themselves on either side, tripping me up. They then took me into an office where a woman was sitting and made me kneel down. They pulled my hair, saying to this woman ‘Look, you’re going to hear somebody sing’.*





# TREATING PRISONERS

## ○ Selmouni v. France 1999:

- *„95. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.“*
- *„102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person’s state of health, it can be presumed that such intensity of blows will cause substantial pain. .... the marks of the violence Mr Selmouni had endured covered almost all of his body.*
- *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 ... Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.*



# TREATING PRISONERS

## ○ Selmouni v. France 1999:

- „104. *The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning.*
- *105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant’s person caused “severe” pain and suffering and was particularly serious and cruel. **Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.***“
- Does it make a difference for the state and for the applicant?
- Having regard to the extreme seriousness of the violations of the Convention of which Mr Selmouni was a victim, the Court considers that he suffered personal injury and non-pecuniary damage for which the findings of violations in this judgment do not afford sufficient satisfaction. It considers, having regard to its previous conclusions, that the question of the application of Article 41 is ready for decision and, making its assessment on an equitable basis as required by that Article, it awards him FRF 500,000.



## TREATING PRISONERS

- Peers v. Greece 2001 (Brit in Greek prison, 2 months without windows, claustrophobic, Turkish toilet, no ventilation....yes...civis europaeus sum!)
- Papon v. France 2001 (Vichy, arrested when aged 88 for 10 years, 2002 released, died 2007)
- New: Vinter v. U.K.: 9. 7. 2013, No. 66069/09, 130/10 a 3896/10, life imprisonment without chance for release might be violation of Art. 3



# MENTAL HARM

- Explicitly mentioned only by Art. 13 of Arabian Charter 1997:

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- „Article 13

(a) *The States parties shall protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment. They shall take effective measures to prevent such acts and shall regard the practice thereof, or participation therein, as a punishable offence.*

(b) *No medical or scientific experimentation shall be carried out on any person without his free consent.*“

But in ECHR case law acknowledged too *Selcuk and Asker v. Turkey 1998*; or *Kurt v. Turkey 1998* (mental harm of mother caused by disappearance of her arrested son)



## SPECIFIC SITUATIONS

- Unbearable life conditions: *Larioshina v. Russia* 2002 (low pension, potentially inhumane....)
- Late conscript in 70 years: *Tastan v. Turkey* 2008: „31. *La Cour considère que le recrutement et le maintien du requérant sous les drapeaux dans les circonstances décrites ci-dessus, ainsi que le fait qu’il ait dû participer à des entraînements réservés à des recrues beaucoup plus jeunes que lui, alors qu’il avait, quant à lui, plus de soixante-dix ans, ont été une épreuve particulièrement douloureuse et ont porté atteinte à sa dignité. Ils ont causé une souffrance allant au-delà de celle que pourrait comporter pour tout homme la contrainte consistant à accomplir le service militaire, et ont constitué en soi un traitement dégradant au sens de l’article 3 de la Convention.*“
- Intensive discrimination in immigration procedure: *African Asians v. U.K.* 1973



# EXTRADITION AS A RISK OF TORTURE?

## ○ Art. 3 of UN Convention:

- *„1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
- *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.“*



## EXTRADITION AS A RISK OF TORTURE?

- Human Rights Committee: *Ng. v. Canada*
- ECHR case law
  - *Soering v. UK 1989* (murderer not extradited to Virginia because of „death row phenomenon“)
  - *Dalia v. France 1998* (limits of *Soering* case law, heroin smuggler extradited to Algeria without risk of mistreatment)
  - *D. v. U.K. 1997* (St. Kitts and Nevis)
  - Now *N. v. U. K. 2008* (Uganda, not terminal stage of HIV)



## SAADI - DISCUSSION

- What is „the rule“ here?
- To balance or not to balance, that is the question....





# EXTRADITION IN EUROPEAN CHARTER

*„Article 19*

*Protection in the event of removal, expulsion or extradition*

- 1. Collective expulsions are prohibited.*
- 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.“*



# INDIVIDUALITY....

- What is your „room 101“.....?

