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Legislative Framework of the Crime of Torture in the Regulation and Jurisdiction of Slovenia

ABSTRACT: *The article aims to explore the Slovenian regime on the crime of torture by presenting the genesis of the Slovenian incrimination of torture and its adequacy in the light of international law. The overview of the Slovenian legislative framework and case law involving the crime of torture begins with a presentation of the relevant international and national legal acts. This is followed by an analysis of the content of the relevant provisions in the Slovenian Constitution and in the Criminal Code, which is examined considering the international legal sources that bind Slovenia. By closely examining the genesis and the content of incrimination of torture, as it is known in the Slovenian Criminal Code, the article presents to foreign readers and the international professional audience the specific features of Slovenian incrimination of torture and its deviations from the international legal framework. In the following, the sanction system and the actors in the process of enforcement of particular norms aiming at the crime of torture are presented. The article concludes with an analysis of the case law on torture. Slovenian courts have not yet encountered the crime of torture. Therefore, the focus is on Slovenia's convictions before the European Court of Human Rights for violation of Art. 3 of the Convention on Human Rights.*

KEYWORDS: *torture, crime of torture, incrimination of torture, Slovenian criminal legislation, Convention against Torture*

1. Introduction

The first part of the article is devoted to a brief introduction of the concept of torture and the history of its regulation at the international level. Since the 20th century, torture has been prohibited by all major international legal instruments but has not been eradicated.

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1.1. Brief history of torture and its prohibition within the framework of international human rights law

Tortures have been widely practiced throughout human history and have been legally and morally acceptable for a long period. It was particularly used as a form of punishment following victory in the war and as an interrogation tool, especially with respect to accusations of state crimes, sexual offences, heresy, and witchcraft.¹ European governments (e.g. Sweden, Germany, Scotland, and France) formally abolished torture in the eighteenth and nineteenth centuries;² in the twentieth century, the universal prohibition of torture began to be established and regulated, along with the development of human rights. However, some scholars oppose this type of torture³. One such scholar was Italian philosopher, criminologist, and jurist Cesare Beccaria. In his famous work *On Crimes and Punishments* (originally published in 1764), Beccaria notes that the torture of a criminal, which is 'cruelty accepted by most nations, whether to compel him to confess a crime, to exploit the contradictions he runs into, to uncover his accomplices [...] or to expose other crimes of which he is guilty but has not been charged',⁴ is not a proper means for discovering the truth.

Although the 20th century saw the prohibition of torture becoming a universal human right protected by several international treaties, the same century saw a revival in the use of torture. Torture was first revived by totalitarian states, while some liberal democracies followed suit in the 21st century.⁵ It can be argued that torture has never really disappeared, and many reliable reports have testified that it continues to be practiced worldwide.⁶ The former United Nations Special Rapporteur on Torture has noted that 'torture is practiced in more than 90 percent of all countries and constitutes a widespread practice in more than 50 percent of all countries'.⁷

In the present century, the debate on the use of torture has been revived, especially within the framework of the post-9/11 attacks of the global war on terror.

1 Greer, 2015, p. 7.

2 Einolf, 2007, p. 101; Greer, 2015, p. 7.

3 Some authors claim that the merits of interrogational torture have been debated since antiquity. See, for example, Maio, 2001, p. 1609.

4 Beccaria, 1995, p. 39.

5 Among them, the United States stands out in particular. In the article 'Liberal Democratic Torture', Lukes claims that although it is not publicly admitted, we know that since the attacks of 11 September 2001, officials of the United States at various locations worldwide, from Bagram in Afghanistan to Guantanamo in Cuba to Abu Ghraib in Iraq, have been torturing prisoners. For more, see: Lukes, 2006, pp. 1-2.

6 Einolf, 2007; Danner 2004.

7 Nowak, 2012, pp. 313-314.

In recent decades, we have begun to examine the concerns of theorists who have begun to question the absolute nature of the prohibition against torture. In moral philosophy and legal theory, the debate on whether it is possible to define exceptions in which torture would be justified or excusably intensified in the context of terrorist attacks has revived interest in possible moral and legal justifications for torture suspects in 'ticking bomb scenarios'. The other reason why the 'absoluteness' of the prohibition against torture has recently come under critical scrutiny was shattered by the case of *Gäfgen v Germany*,⁸ judged by the European Court of Human Rights (later on as 'ECtHR'). Faced with an extremely morally difficult consideration, police officers can threaten to torture a suspect if they believe this may save the life of an innocent child. The ECtHR clearly indicates that they may not. However, many wonder whether the ECtHR, in deciding that the German court's decision on the admissibility of evidence obtained under the threat of torture was not contrary to the ECHR, has slightly softened the absolute nature of the prohibition against torture. In the article 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law', Greer observes that despite the massive amount of literature, which the *Gäfgen* case prompted, there is no consensus about legally and morally very pressing issue of whether torture is ever justified. In such cases, the purpose is to elicit information that can save innocent lives during terrorist attacks.

1.2. Torture as a legal phenomenon within the framework of international law

As a legal phenomenon, the prohibition of torture evolved from the common law prohibition of the inhuman treatment of prisoners of war as part of efforts to humanise war. Although the concept of torture does not appear in the Hague Conventions (1899-1907)⁹, several provisions, in substance, require the humane treatment of persons in war. Theorists of international criminal law consider this a key historical antecedent of the modern conventional regulation of torture.¹⁰ In 1948, the Universal Declaration of Human Rights declared the prohibition of torture a fundamental human right.¹¹ Thirty years later, the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the

8 *Gäfgen v. Germany*, 22978/05, 1 June 2010.

9 Hague Conventions of 1899 and 1907. Signed July 29, 1899 and October 18, 1907. Entered into force on various dates.

10 See, for example: Korošec, Filipčič and Zdolšek, 2018, pp. 616-617.

11 Universal Declaration of Human Rights, Art. 5.

General Assembly, came into effect.¹² Article 19 of the Convention established the Committee against Torture,¹³ which monitors the implementation of the Convention by state parties.

Today, the prohibition of torture is a fundamental principle of customary international law and a prohibited practice under international treaties. It is one of the most complex concepts in international human rights law and constitutes one of the most serious human rights violations.

As is well known, human rights define the limits of a state's power over individuals. International law has two important features. First, human rights are accepted for the benefit of the people, not the states. This means that the human rights obligations states accept are not subject to reciprocity and, therefore, may not be restricted by one state even if the restriction has occurred in another. Second, human rights are expressions of human dignity that cannot simply be abolished by the state. While the State may derogate from some of them (e.g. freedom of movement, freedom of expression) in certain cases and under conditions provided in international treaties, it may not derogate from certain internationally protected rights, even in situations where the existence of the State is threatened.¹⁴ Similar to the prohibition of slavery or genocide, the prohibition of torture is absolute—no exception can be accepted, defended, justified, or tolerated under any circumstance, including war or any other public emergency.¹⁵ Nevertheless, as indicated above, some theorists have recently begun to argue that the absolute nature of the torture prohibition may be problematic.

As a concept of international human rights law, torture has become limited to acts for which it is possible to hold public officials responsible, either by committing to torture themselves or by participating in it actively (perpetration) or passively (omission). In international criminal law, it is now generally accepted that the relevant intent must be shown by a public official at the time the torture is committed.¹⁶ Below, the definitions of torture will be used as they are known in international legal sources to show how Slovenian law differs from international law in its understanding of torture.¹⁷

In addition to torture, the prohibition of certain practices related to torture, such as cruel treatment, inhuman treatment, degrading treatment, cruel punishment,

12 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

13 *Ibid*

14 Türk, 2018, pp. 112-113.

15 APT and CEJIL, 2008, p. 2.

16 Korošec, Filipčič and Zdolšek, 2018, p. 617.

17 Author's note: A different understanding of torture can be found in the jurisprudence of the ECtHR, which I will draw attention to below.

inhuman punishment, and humiliating punishment, has appeared for a long period in codified international law and international legal theory in parallel with the prohibition of torture. Simplistically, these prohibitions refer to practices that differ from torture mainly because the degree of pain is lower.

2. Relevant legal acts dealing with the crime of torture in the Republic of Slovenia

First, the international legal sources Slovenia has ratified and is bound by are discussed, followed by the national legislative framework on the (crime of) torture. Particular attention has been paid to the definition of torture, especially in terms of who the perpetrator may be. It will be shown that Slovenian legislation differs slightly from international legislation in this respect.

2.1. International legal sources

As a member of the European Union and the United Nations, Slovenia is a party to all the most important international legal instruments prohibiting torture—the Universal Declaration of Human Rights, the Rome Statute of the International Criminal Court, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, Convention against Torture), the European Convention on Human Rights (ECHR), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

International legal sources hold a special position in the Slovenian legal order. In accordance with Article 8 of the Constitution of the Republic of Slovenia, statutes and executive regulations must comply with the generally accepted principles of international law and treaties binding on Slovenia. All ratified and published international treaties are applied directly—every person can base their claim on a right acknowledged in an international treaty, although such a right might not exist in the Slovenian legal order. If a statute does not conform to internationally accepted obligations, the Constitutional Court can reject the law. (Article 21: Constitutional Court Act).¹⁸ Additionally, all individual legal acts of state bodies (local and public authorities), including criminal judgments, must comply with international treaties ratified by the National Assembly.¹⁹

18 Türk, 2018, p. 61; Grad, Kaučič and Zagorc (2018), p. 148.

19 Koročec, 2000, p. 770.

2.1.1. Convention against torture and other cruel, inhuman, or degrading treatment or punishment

In the academic literature, it is undisputed that the Convention against Torture is the central international legal instrument in the fight against torture and its related treatment.²⁰ Owing to this Convention, the prohibition of torture and related treatments has developed into one of the most widely recognised individual rights. Slovenia ratified the Convention against Tortures in 1993.²¹ As Slovenia is a State governed by the rule of law under Article 2 of the Constitution and is bound by the norms mentioned in the previous paragraph, public authorities at all levels must endeavour to adopt acts and decisions in such a way that they conform to the provisions of the Convention against Torture.

The Convention against Torture defines torture under Article 1.²² For the purpose of convention, torture is

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.

The cited provision makes the motive of a person to inflict ‘severe pain and suffering’, which is essential for the definition of torture. This provision also explicitly states that a victim’s suffering can be physical or mental. Moreover, it makes it indisputably clear that only a public official or another person acting in their capacity can be a perpetrator of torture within the meaning of the convention.

The Convention does not define other forms of degrading treatment, which are mentioned in the title of the Convention (‘other cruel, inhuman or degrading

²⁰ Korošec, Filipčič and Zdolšek, 2018, p. 617.

²¹ Act Ratifying the Convention against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment [Zakon o ratifikaciji konvencije proti mučenju in drugim krutim, nečloveškim ali poniževalnim kaznim ali ravnanju, MKPM], Official Gazette of the Republic of Slovenia, no. 7/93.

²² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

treatment or punishment'), although it prohibits them. Article 16 of the Convention provides for the following:

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 I, 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2.1.2. Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court,²³ which established the International Criminal Court (ICC), is the central source of international criminal law. It contains a comprehensive general section and a catalogue of criminal incriminations under international criminal law.

The Slovenian National Assembly ratified the Rome Statute of the International Criminal Court²⁴ in 2001, which has been in force in Slovenia since 1 July 2002. The Rome Statute classifies torture as a crime against humanity, a war crime, or serious violation of the Geneva Conventions. The definition of torture in Article 7.1(f) differs slightly from that in the Convention. The Roman Statute defines torture as

Intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

The definition of torture in the Rome Statute is much more streamlined than that in the Convention. Strikingly, the definition does not explicitly require the offender to be an official or someone acting in an official capacity. As already indicated, there is no doubt in theory that torture, at a conceptual level, originated as an act of public authorities, regardless of whether they conducted the torture or actively or passively participated in it. As noted above, the Convention against Torture builds the concept

²³ The Rome Statute was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and entered into force four years later.

²⁴ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002).

of torture on the discriminatory intent of public officials and envisages public officials as the only possible perpetrator of torture. This element of torture fades from the Rome Statute's definition of a criminal offence. However, the logic of human rights violations has not entirely disappeared there due to the contextual circumstances required for criminality.²⁵

2.1.3. European Convention of Human Rights

The third major international legal instrument prohibiting torture is the European Convention on Human Rights ratified by Slovenia in 1994.²⁶ As is well known, the ECtHR has jurisdiction to rule on individual or state applications alleging violations of the rights set out in the ECHR by states that have ratified the Convention, where the applications concern matters that fall within the competence of state authorities. In this sense, the ECHR builds the concept of torture on the act of state authority and envisages public officials as the only possible perpetrators of torture. The manner in which the human rights enshrined in the ECHR are enforced and possibly violated relies on the state's functioning.²⁷

The prohibition of torture and other forms of ill treatment is enshrined in Article 3 of the ECHR, one of the shortest provisions of the Convention, which simply states the following:

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

This provision must be read together with Article 15 of the ECHR, which, by stating that no derogation from the provision of Article 3 can be made, imposes an absolute prohibition of torture and inhuman and degrading treatment or punishment. As Article 3 does not define torture or other forms of ill treatment, a complex and extensive body of case law has emerged from the European Court of Human Rights (and other European Human Rights judicial bodies) that sets out the definitional aspects of torture and other forms of abuse.²⁸ The ECtHR has developed different definitions of the forms of ill treatment in two seminal cases: the Greek case²⁹ and Ireland vs. the

²⁵ Korošec, Filipčič and Zdolšek, 2018, p. 620.

²⁶ Act ratifying the Convention on Human Rights and Fundamental Freedoms [Zakon o ratifikaciji Konvencije o varstvu človekovih pravic in temeljnih svoboščin], Official Gazette of the Republic of Slovenia, no. 7/94.

²⁷ Hassanová, 2023, p. 59.

²⁸ Long, 2002, p. 3.

²⁹ Greek Case, 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969.

United Kingdom³⁰. Within its jurisprudence, the Court has clarified that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 and that it has to be a deliberate form of abuse by agents of the state in the performance of their duties.^{31,32}

2.2. National legal sources

2.2.1. Constitution of the Republic of Slovenia

In the Slovenian legal system, torture is prohibited at the constitutional level. Article 18 of the Constitution of the Republic of Slovenia prohibits torture, inhumanity, and degradation of punishment or treatment.³³ It provides as follows:

No one may be subjected to torture or to inhuman or degrading punishment or treatment. The conducting of medical or other scientific experiments on any person without his free consent is prohibited.

Article 21 of the Constitution prohibits the use of violence by state authorities against people whose liberties are restricted, including during the execution of criminal sanctions. The Article also prohibited the extortion of confessions and statements. Notably, the Slovenian Constitution does not contain a definition of torture or other forms of ill treatment, whereas the absolute nature of the prohibition of torture is established at the constitutional level.³⁴

The prohibition of torture also includes positive obligations for the state. The State must ensure an effective and impartial investigation and prosecution of persons who have interfered with the prohibition of torture and must not rely on evidence obtained through torture. Furthermore, the State may not extradite an individual to another state if they are subjected to torture or prosecuted based on evidence obtained by torture against them or against third parties.³⁵ According to the Constitution, the prohibition of torture is an absolute individual right that is directly enforceable, does

30 Ireland v. United Kingdom, 5310/71, 18 January 1978.

31 For more on the implementation of Art. 3 of the European Convention on Human Rights, see Reidy, 2002.

32 It will be pointed out below that the ECtHR also recognises a violation of the Art. 3 of the Convention in some cases where there is no intention to torture.

33 The Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, no. 33/91-I.

34 This follows from Article 16(2) of the Constitution, which specifies which rights cannot be suspended or restricted.

35 Grad, Kaučič and Zagorc, 2018, p. 780-781.

not need to be further defined by law, knows no exception, and must not be subject to a balance of values.

At the legislative level, the Slovenian legal order does not have a specific legal act dealing with torture. Nevertheless, the present Criminal Code of the Republic of Slovenia,³⁶ adopted in 2008 (hereinafter referred to as the 'CC-1'), criminalises torture as a separate incrimination and as a method of enforcement of two other incriminations—the crimes against humanity (Art. 101) and war crimes (Art. 102).

2.2.2. Criminal code

As torture is one of the most recent incriminations in the Slovenian Criminal Code, this section briefly presents its history.

Slovenia became independent in 1991. The National Assembly adopted the Criminal Code and Criminal Procedure Act in September 1994, which entered into force in January 1995. The Slovenian Criminal Code in force between 1995 and 2008³⁷ did not include torture incrimination. Torture was only incriminated as a method of enforcing crimes against humanity and war crimes. Despite this deficiency, it was possible to cover all the cases under the Convention against Torture with the use of '*combination of offences*' (e. g. the incrimination of aggravated and grievous bodily harm) and the broad definition of a public official.

The Committee against Torture (CaT) first considered the situation in Slovenia in light of the Convention against Torture at its session in May 2000. In its public observations at the end of the session, the CAT expressed a positive opinion on the positive legal situation in Slovenia, as well as on Slovenia's implementation of the relevant provisions. However, the Committee expressed concern that Slovenian substantive criminal law does not provide for specific incrimination of the crime of torture^{38, 39}

In 2008, Slovenia adopted a new CC-1. In addition to several other trends, the adoption of the new Criminal Code was motivated by a desire to align Slovenian legislation more closely with international instruments such as the Convention against Torture and the Rome Statute. The Slovenian legislature followed the aforementioned recommendation of the Committee against Torture and criminalised torture as a

36 Criminal Code, Official Gazette of the Republic of Slovenia, no. 95/04.

37 Criminal Code, Official Gazette of the Republic of Slovenia, no. 95/04.

38 Consideration of Reports Submitted by States Parties under Art. 19 of the Convention (CAT/C/CR/30/4)

39 Korošec points out that the same recommendation was made by the UN Committee against Torture to every country that did not have such a specific incrimination of torture. At that time, this was the vast majority of all countries, including most countries on the European continent. See: Korošec, 2000, p. 769.

specific form of incrimination in Article 265. The Slovenian legislature copied the definition of the Convention against Torture. The incrimination of torture was placed in the chapter entitled 'Offences against official duty and public authority'.

In 2012, the Slovenian legislature (in an amendment to CC-1B) moved the incrimination of torture to another chapter without changing the content of the incrimination. This is rare in Slovenian criminal law. The legislature deleted Article 265 and created Article 135a of CC-1. The incrimination of torture is now placed in the sixteenth chapter of CC-1, titled 'Crimes against human rights and freedoms'. Below is an English translation of the full incrimination of torture under current legislation.

Article 135.a (Torture)

(1) Whoever intentionally causes severe pain or suffering to another person, either physical or mental, in order to obtain information or a confession from him or a third person, punish him for an act committed by himself or a third person, or which is suspected as having been committed by him or a third person with a view of intimidating him or putting him under pressure, or to intimidate a third person or put such person under pressure or for whichever reason which is based on any form of violating equality, shall be sentenced to imprisonment for not less than one and not more than ten years.

(2) If the pain and suffering referred to in the preceding paragraph is caused or committed by an official or any other person who possesses official status or on his initiative or upon his expressed consent or tacitly, he shall be sentenced to imprisonment for not less than three and not more than twelve years.

The incrimination of torture, as is known in the current Slovenian legislation, is analysed below.

2.2.3. Criminal Procedure Act

Slovenian criminal procedure law, both at the constitutional and legislative levels, protects the accused against the extortion of confessions by state authorities within the framework of two legal principles: the right to silence and privilege against self-incrimination.⁴⁰ In Article 227/7 in conjunction with Article 266/3, the Slove-

40 See Šugman Stubbs and Gorkič, 2011, p. 248-251.

nian Criminal Procedure Act⁴¹ prohibits the interrogation of an accused person by all means which may be used to influence their will. This study does not conduct a detailed analysis of the abovementioned procedural guarantees. Nevertheless, the prohibition of torture and degradation treatment is a threshold the state must never cross when obtaining evidence during the criminal procedure. Moreover, the prohibition of torture, inhuman, and degrading treatment cannot be waived, just as other procedural guarantees can, and the accused cannot consent to torture.

3. Analysis of the content of the incrimination of torture

As already indicated, torture originated as an act committed by the state or public officials, whether they conducted the torture themselves or actively or passively participated in it. It was shown above that the Convention against Torture builds the concept of torture on the discriminatory intent of public authorities. Although very faded, this conception of torture is also found in the Roman Statute and ECHR. Therefore, the offender of the crime of torture under the Convention, the Rome Statute, and the ECHR may only be a public official or someone acting in an official capacity, at the official person's initiative, or with the official person's consent.

The regime of the Slovenian Criminal Code is different. The incrimination in torture (as cited above) is divided into two paragraphs which determine the different penal frames based on different offenders. Paragraph 1 of Article 135 of the Slovenian Criminal Code repeats the wording of what should be considered torture in the Convention against Torture. Thus, among other things, the Slovenian provision explicitly considers psychological torture as a form of torture. However, the Slovenian regime differs significantly from the international regime in at least one respect. The offender of the crime of torture under paragraph 1 can be anyone, not only a public official, as provided for in the Convention against Torture. Nevertheless, in the second paragraph, the Slovenian legislature provides an aggravated form of the crime of torture, for which a person who meets the criteria of a public official⁴² is punished with a longer prison sentence than an offender who is not a public official.

In this sense, the Slovenian legislation goes beyond the Convention's definition of torture. This becomes even more complicated because the incrimination of torture is placed in a chapter that traditionally includes incriminations that can only be committed by public officials. Some scholars have expressed concerns regarding such definitions. Professor Korošec is particularly critical in this respect, pointing out that

41 Criminal Procedure Act, Official Gazette of the Republic of Slovenia, no. 176/21.

42 The Criminal Code defines an official in Article 99. From the comparative law perspective, the definition of an official is relatively broad.

the Slovenian legislature is changing the established concept of torture as it is known in international law.⁴³

Korošec notes that from a comparative law perspective, it is surprising that the criminal offence of torture in Slovenian CC-1 is described in its general form as a general offence with regard to the possible offender (*delictum commune*). In Korošec's view, the incrimination of torture in its general form in CC-1 is redundant, as the substance of this provision is covered by a number of other offences in CC-1 (in particular, offences against life and the body, human rights and freedoms, and sexual integrity).⁴⁴

Notably, torture is understood as an act of the state in the legal and sociological contexts. Chirstopher Einolf defines torture in terms of behaviour as an *act in which severe physical pain is intentionally inflicted on a person by a public official while that person is under the custody of control of that official, where there has not been, or has not yet been, a formal finding of guilt.*⁴⁵

4. Sanction system and Actors in the Process of Enforcement

As indicated in the previous section, the punishment for torture depends on the offender. More severe punishment is imposed if the offender is a public official. Such an offender is sentenced to a minimum of 3 years and a maximum of 12 years of imprisonment. If the offender is not an official, they will be sentenced to a minimum of one and a maximum of ten years of imprisonment. In the Slovenian legal order, there are no specific legislative rules on the persecution for torture crimes. This offence is prosecuted *ex officio*, and like every other criminal offence, this one is being investigated by the police and the public prosecutor in pre-trial proceedings, while the judicial investigation is conducted by the investigating judge.

However, a special public body deals with preventive controls related to torture crimes. The Act of Ratification of the Optional Protocol to the Convention⁴⁶ against Torture designated the Ombudsmen of the Republic of Slovenia as a national preventive mechanism. The Ratification Act states that the powers and tasks of the state preventive mechanism under the Optional Protocol are to be exercised by the Ombudsman and, in agreement with the Ombudsman, by non-governmental

43 Korošec, Filipčič and Zdolšek, 2018, p. 615-620.

44 See Korošec, Filipčič and Zdolšek, 2018, p. 615-638.

45 Einolf, 2007, p. 103.

46 Act of Ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Official Gazette of the Republic of Slovenia, no. 114/2006; Art. 17, 18, 19, 20, 21, 22, 23.

organisations registered in Slovenia, and by organisations that have acquired the status of humanitarian organisations in Slovenia.

The Ombudsman of Slovenia publishes annual reports on the implementation of tasks and powers of the National Preventive Mechanism ('NPM'). The task of the NPM is, for example, to visit all locations in a country where people are deprived of their liberty and inspect how such persons are treated to strengthen their protection against torture and other cruel, inhuman, or humiliating treatments or punishments. While observing suitable legal norms, the NPM makes recommendations to the relevant authorities to improve the conditions and treatment of people, and prevent torture and other forms of cruel and inhuman treatment or punishment. In this regard, the NPM may also submit proposals and comments on applicable or drafted acts.

6. Case law and doctrine related to the issue

The Slovenian courts, including the Constitutional Court, have not yet dealt with the crime of torture under Article 135. a of the Slovenian Criminal Code.

However, Slovenia was convicted several times before the ECtHR violated Article 3 of the Convention. Therefore, this section presents some of the most important and earliest convictions of Slovenia before the ECtHR for violating Article 3 of the Convention.

Within the case law of the ECtHR, the prohibition of torture in Article 3 is not limited to torture in the narrow sense but has gradually become, *inter alia*, a central instrument for assessing the adequacy of living conditions in prison.⁴⁷ Statistically, this provision is the basis for the majority of prisoner complaints.⁴⁸ Therefore, it is not surprising that in almost all cases of violation of Article 3 of the Convention, Slovenia was convicted of inadequate living conditions in prisons.

Under Article 3 of the Convention, States must ensure that a person deprived of liberty is detained in conditions consistent with human dignity, that the manner in which the measure is conducted does not place them in such distress or hardship as to exceed the unavoidable level of suffering inherent in the deprivation of liberty and that their health and well-being are adequately protected. As Ambrož and others point out, the ECtHR does not define the meaning of 'human dignity', nor does it define the 'unavoidable level of suffering'.⁴⁹

⁴⁷ In addition to Art. 3, Art. 8 (Right to respect for private and family life) and Art. 13 (Right to an effective remedy) are relevant to the situation of persons in prison.

⁴⁸ Ambrož, Cvikel and Oštir, 2013, p. 346.

⁴⁹ Ibid.

The substance of these concepts must be recognised in the jurisprudence of the ECtHR, and the Convention must be understood as a dynamic instrument whose interpretation evolves and changes with the evolution of society. Thus, in the course of this century, the Court began to recognise unacceptable violations of human dignity, even where suffering was not intentionally inflicted but was the result of poor material conditions and inadequate organisation.

6.1. *Rehbock v. Slovenia*

The first Slovenian conviction for the violation of Article 3 does not concern living conditions in prisons but police brutality. German national Ernst Rehbock was arrested by the Slovenian police. The circumstances of the arrest, during which he suffered injuries, were disputed between parties. However, the court concluded that the force used by policemen during Mr. Rehbock's arrest was excessive and unjustified. Such use of force caused injuries, which, in turn, caused serious suffering to the applicant of nature, amounting to inhuman treatment. The Court ruled that Article 3 of the Convention was violated.⁵⁰

In subsequent years, Slovenia was convicted of police brutality several more times; see, for example, *Matko v. Slovenia*.⁵¹

6.2. *Mandić and Jović v. Slovenia, Štrucl and others v. Slovenia*

In the cases of *Mandić and Jović v. Slovenia*⁵² and *Štrucl and others v. Slovenia*⁵³, the Court examined the conditions of detention and imprisonment at the Ljubljana Prison. The applicants alleged a violation of the prohibition of torture, degradation, and inhuman treatment under Article 3, a violation of the right to private and family life under Article 8, and the right to an effective remedy under Article 13 of the Convention. In 2011, the chamber found that all complainants had suffered violations of their rights under Articles 3 and 13 of the Convention. In particular, they complained of severe overcrowding, which led to a lack of personal space, poor sanitary conditions, and inadequate ventilation. They also complained of excessive restrictions on out-cell time, high cell temperatures, inadequate healthcare and psychological assistance, and exposure to violence from other inmates due to insufficient security. The applicants complained that the conditions of their detention in Ljubljana Prison

50 *Rehbock v. Slovenia*, 29462/95, 28 November 2000.

51 *Matko v. Slovenia*, 43393/98, 2 November 2006.

52 *Mandić and Jović v. Slovenia*, 5774/10, 5985/10, 20 October 2011.

53 *Štrucl and others v. Slovenia*, 5903/10, 6003/10, 6544/10, 20 October 2011.

amounted to a violation of Article 3 of the Convention. Particularly, they complained of severe overcrowding, which led to a lack of personal space, poor sanitary conditions, and inadequate ventilation. They also complained of excessive restrictions on out-cell time, high cell temperatures, inadequate healthcare and psychological assistance, and exposure to violence from other inmates due to insufficient security.

The Court accepted that there was no indication of a positive intention to humiliate the applicants. Nonetheless, the court considered that the distress and hardship endured by the applicants exceeded the unavoidable level of suffering inherent in detention, exceeded the threshold of the severity of Article 3, and amounted to degrading treatment.

7. Conclusions

Tortures have been widely used throughout human history as a form of punishment after winning a war and as a tool for interrogation. European governments abolished torture at the legislative level in the eighteenth and nineteenth centuries, and in the twentieth century, the prohibition of torture became a universal human right. However, in the last century, torture has been resumed by some totalitarian regimes and revived by some liberal democracies (especially within the framework of the post-9/11 debate) as well.

By presenting an international legal framework for torture, this article shows that the Republic of Slovenia has established an appropriate legislative framework for the crime of torture. Current Slovenian legislation provides for the crime of torture, which is essentially regulated in the same way as at the international level. It deviates from the international framework only in the sense that it envisages any individual as a possible perpetrator of the offence of torture and not only officials, as provided for by international sources.

A survey of the jurisprudence of the European Court of Human Rights—several cases in which Slovenia has been convicted of violating Article 3 of the Convention—revealed that Slovenia, whose courts have not yet encountered the crime of torture in the sense of the Criminal Code, has difficulty ensuring adequate conditions in prisons.

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