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EVOLUTION OF UNDERSTANDING THE CONCEPT OF "TORTURE" WITHIN THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

ЕВОЛЮЦІЯ РОЗУМІННЯ ПОНЯТТЯ «КАТУВАННЯ» У МЕЖАХ КОНВЕНЦІЇ ПРО ЗАХИСТ ПРАВ ЛЮДИНИ І ОСНОВОПОЛОЖНИХ СВОБОД

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Article 3 of the European Convention on Human Rights embodies a *jus cogens* norm, which is an imperative principle of international law that prohibits torture, inhuman or degrading treatment, or punishment. The article explores how the European Court of Human Rights (ECtHR) and the European Commission of Human Rights have interpreted and applied this norm. The author justifies the need for in-depth exploring international standards on prohibition of torture in the light of pressing necessity of law and admnistrative reform in Ukraine related to the combating torture.

The analysis departs from describing the historical context in which the prohibition against torture was coined, reflecting on the horrors of World War II that encouraged the creation of such robust human rights protections. The article also discusses the case law that has shaped the interpretation of torture, starting from the Greek Colonels Case, which laid the groundwork for the understanding of torture, to more recent cases that have expanded the scope of what constitutes torture under the ECHR.

A key focus is the ECtHR's approach to differentiating torture from other forms of inhuman or degrading treatment, particularly through the elements of intentionality, purpose, and the severity of suffering inflicted on the victim. The article underlines the Court's tendency to broaden the understanding of torture, incorporating both physical and psychological harm, and deepening the concept of human dignity.

Ultimately, this article contributes to the understanding of how international human rights law, particularly through the jurisprudence of the ECtHR, continues to adapt and respond to the complexities of preventing and punishing torture, meanwhile remaining its focus on the absolute nature of its prohibition.

Key words: prohibition of torture, human rights, European Convention on Human Rights, European Court of Human Rights.

Стаття 3 Європейської конвенції з прав людини втілює норму jus cogens, яка є імперативним принципом міжнародного права, що забороняє катування, нелюдське або таке, що принижує гідність, поводження чи покарання. У статті досліджується, як Європейський суд з прав людини (ЄСПЛ) та Європейська комісія з прав людини трактували та застосовували цю норму. Автор обґрунтовує необхідність глибокого вивчення міжнародних стандартів щодо заборони катувань у світлі нагальної потреби правової та адміністративної реформи в Україні, спрямованої на боротьбу з катуваннями.

Аналіз починається з опису історичного контексту, в якому була сформульована заборона катувань, із відображенням жахів Другої світової війни, що спонукали до створення таких потужних засобів захисту прав людини. У статті також розглядається прецедентне право, яке сформувало розуміння катувань, починаючи з «Грецької справи полковників», що заклала основу для розуміння катувань, і до більш сучасних справ, які розширили поняття того, що вважається катуванням відповідно до ЄКПЛ.

Ключова увага приділяється підходу ЄСПЛ до диференціації катувань від інших форм нелюдського або такого, що принижує гідність, поводження, особливо через елементи умислу, мети та тяжкості страждань, завданих жертві. У статті підкреслюється тенденція Суду до розширення розуміння катувань, включаючи як фізичну, так і психологічну шкоду, і поглиблення концепції людської гідності.

Зрештою, ця стаття сприяє розумінню того, як міжнародне право прав людини, зокрема через юриспруденцію ЄСПЛ, продовжує адаптуватися та реагувати на складнощі, пов'язані з попередженням і покаранням за катування, зберігаючи при цьому акцент на абсолютній природі його заборони.

Ключові слова: заборона тортур, права людини, Конвенція про захист прав людини та основоположних свобод, Європейський суд з прав людини.

Statement of the problem. Article 3 of the European Convention on Human Rights (hereinafter referred to as the ECHR) proclaims the freedom of everyone not to be subjected to torture or to inhuman or degrading treatment or punishment [1]. Article 3 reproduces the provision that is currently considered a jus cogens norm [2, p. 178] that is, an imperative norm of international law – the prohibition of cruel treatment is absolute, that is, the violation of this prohibition and the failure to fulfill the relevant obligations cannot be justified by any circumstances. Article 3 of the ECHR is based on the same principles as reflected quite clearly in Article 15.

As the European Court of Human Rights states in its decisions, "... the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilization, closely related to respect for human dignity" [3]. Torture and ill-treatment have been practiced for a long time by states to punish, subjugate people, and to obtain confessions during interrogations [4]. Only in the 20th century the prohibition of cruel treatment was proclaimed at the international level, which can certainly be noted as a victory of the idea of human dignity over the arbitrariness of the state.

Technically, Article 3 declares the prohibition (or freedom from being subjected to) such treatment as torture (1), degrading treatment (2), inhuman treatment (3), degrading punishment (4), and punishment that is inhumane (5). Based on the ECtHR case law, under this article the states shall bear both negative obligations – not to commit such types of behavior – and positive obligations to oppose ill-treatment, in particular to investigate the mentioned actions as a crime. Torture as a type of prohibited behavior under Art. 3 of ECHR must have special characteristics compared to other types of prohibited behavior; torture is often considered as a "top of illegality" of what Article 3 prohibits [5, p. 158]. Torture involves the "deliberate, purposeful tyranny of a human's body and spirit" by those who have control over the victim of torture (representatives of the state or those who can be considered as such) [5, p. 86–87].

The identification of these specific features of torture and their interpretation takes an important place in the ECHR system; at the same time, it is worth noting that the concept of torture in terms of Article 3 has significantly evolved since the adoption of the Convention.

This article aims to explore the evolution of the approach of the European Commission of Human Rights and the European Court of Human Rights regarding the concept of "torture" under Art. 3 of the ECHR. This scientific question will be

studied by examining the text of the ECHR, the preparatory materials of the ECHR, the case law of the European Commission and the European Court of Human Rights, as well as by studying academic literature and practical materials devoted to the human right not to be subjected to torture.

State of art of current research. Reaction to torture is a topic that has occupied an important place on the agenda of the Ukrainian science and foreign research for a long time. The existing research addresses the issue of the prohibition of torture in the context of the international legal fight against terrorism [6], criminological [7] and criminal law [8] aspects of the crime of torture. Fewer number of studies is devoted to general theoretical aspects and perspectives of ECHR: however, the works of D. Yagunov should be noted [9]; as well as the dissertation work of G. Hrystova, which is comprehensive in the development of views on the obligations of the state in the field of human rights, and a whole section of her study is devoted to the case law of the ECtHR regarding the articulation of obligations under Art. 3 [10].

As much attention is paid to this issue by the human rights organizations, which is reflected in their analytical materials [11]. The common goal of scientific and analytical works to more thoroughly examine the prohibition of torture is related to the fact that the Ukrainian society has not managed to overcome the systemic problem of torture in penal institutions, during the pre-trial investigation; since 2014, the profile of the crime of torture has also been supplemented by systematic practices of torture in the temporarily occupied territories and it gained new tragic proportions after the full-scale Russian invasion of Ukraine.

Disappointing conclusions about the existence of a systemic problem of torture in Ukraine are confirmed by the fact that, according to the database of decisions of the ECtHR, among the cases against Ukraine under execution, approximately 16% are related to prohibited treatment [12]; the ECtHR also issued several "pilot decisions" against Ukraine, emphasizing the impracticality of further consideration of individual complaints of torture practices until Ukraine solves this problem at the systemic level [13]. The reports of the UN Committee against torture, in particular the Seventh Periodic Report on Ukraine also emphasize significant problems. The latter notes that the main include not only the inconsistency of the concept of "torture" (art. 127 of the Criminal Code of Ukraine), but also the ineffective investigation of cases of torture and the lack of justice and compensation for victims [14]. The last conclusion means that even in case of harmonization of the legislation with the norms of international law on the prohibition of torture, which was partially done at the end of 2022 [15], this problem requires a comprehensive approach and a deep reform of the system of execution of punishments and the system of pre-trial investigation. For this purpose, it is important to understand international standards of human rights, in particular the prohibition of torture.

Presentation of the main material. *Preparatory documents for the ECHR.* The current Article 3 of the ECHR is short-spoken and rather laconic, which makes it difficult to understand from the first reading to which types of treatment and in which contexts it applies. In other words, the intention of the drafters of the Convention is unclear and it cannot be clearly understood from the text of Article 3. The preparatory materials of the ECtHR (in French – *travaux préparatoires*) shed light on the true intentions of the authors of the European Convention.

The events of World War II became a trigger for the development of many norms aimed at prohibiting treatment that targets the very core of human rights – human dignity – the Universal Declaration of Human Rights of 1948, the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Geneva Conventions on protection of the victims of war of 1949. The European Convention was not an exception. In August 1949, the Consultative Assembly of the Council of Europe, which drafted the Convention, harmonized the declared purpose of the Council of Europe with Article 1 of the Statute of the Council of Europe, adopted the year before, regarding the protection and further realization of the human rights and fundamental freedoms. As indicated in the preparatory materials of the ECHR, the discussion around Art. 3 of the Convention began with the concept of "personal safety", which meant ensuring that "... no person shall be subjected to any form of mutilation or sterilization or to any form of torture or beating", the person shall not be forced to take drugs, imprisoned with excessive light, darkness, noise or silence that causes mental suffering" [16, p. 3]. Further, the representatives of the British delegation emphasized the need for absolute ban on torture, in order to "announce to the world in the most absolute and direct way, the condemnation of the terrible wave of barbarism and atrocities that has swept the world during the last 30 years" [17, p. 3–5]. This statement was ultimately upheld by the Consultative Assembly, which recognized that "any form of torture inflicted by the police, military authorities, members of private organizations or any other persons is incompatible with civilized society and constitutes "crimes against heaven" and against humanity. The prohibition must be absolute, and torture can be permitted neither to obtain evidence, nor to preserve life or even the security of the state" [16, p. 5].

Although this definition was not literally embodied in the text of the Convention, these discussions shed light on the fact that, firstly, the drafters of the Convention reached an understanding regarding the absolute prohibition of torture. Secondly, the drafters of the Convention did not provide any comprehensive list of actions that belong to torture. Thirdly, the above statements demonstrate that the state and its representatives are considered as the main threat of torture. The authors especially emphasized the danger of using torture by the police to obtain evidence or other advantages for the security of the state. These specifications of torture distinguished actual torture from other types of prohibited treatment.

The European Commission on Human Rights Case law. The initial text of the Convention established a two-stage mechanism for consideration of complaints by the European Commission on Human Rights and the ECtHR. At that moment, complaints from individuals were received and considered by the European Commission, which decided on rejecting or accepting the complaint for proceedings, as well as on the possibility and expediency of the member state or the Commission itself to apply directly to the ECtHR.

The European Commission of Human Rights became the first international authority to consider the case of torture and other forms of prohibited behavior, which took place within the framework of the Greek Colonels case (*Greek Colonels Case*). And the mentioned case was initiated not by an individual complaint, but by the complaints of the states – the Netherlands, Sweden, Denmark and Norway against Greece. The complaint was based on the statements about human rights violations by the military government of Colonel Georgios Papadopoulos, who came to power in Greece in 1967 as a result of a military coup; these violations were recorded by Amnesty International and included various methods of torture. In this case the Commission emphasized the special characteristics of torture. According to the Commission, any torture to be considered as such must be inhuman and degrading. However, the word "torture" is often used to describe inhumane treatment with specific purpose; for example, obtaining information or confession, or inflicting punishment, and it is usually an aggravated form of inhumane treatment [5, p. 6]. At the same time, inhumane treatment was defined as "at least such treatment that intentionally causes serious suffering, mental or physical, which is unjustified in a specific situation".

The case of the Greek colonels had a very important political and legal significance. Firstly, it was a very bold response of the Council of Europe (perhaps the only international organ-

izations at the time) to the manifestations of authoritarianism in Europe – the military dictatorship in Greece at that moment, which was actually the intention of the drafters of the Convention, including during the drafting of Art. 3. Secondly, the European Commission confirmed in this case that it understands the prohibition of torture to be based on compassion for the pain and suffering of the victims and not on religious or moral considerations. In other words, the identification of torture occurs by fitting what is unacceptable for each person to the experience of a particular victim. This led to the strengthening of the victim-centric (human-centric approach) in international law [17, p. 307–308]. Thirdly, the European Commission of Human Rights confirmed the absolute nature of the prohibition of torture, rejecting the Greek revolutionary government's statements that its violations were caused by the circumstances of the state of emergency that threatened the life of the nation under Article 15 of the Convention. Fourthly, the case of the Greek colonels became an impetus for the strengthening of international mechanisms of protection against torture, which in particular resulted in the adoption of the UN Convention with a special monitoring committee, authorized to conduct field inspections in the member states of the Council of Europe, and is still the most effective mechanism of this kind. [18]

The European Court of Human Rights Case Law. The inter-state case Ireland v. United Kingdom became the starting point of the European Court of Human Rights regarding the interpretation of the concept of "torture", although it did not recognize the existence of torture itself in this case. However, the decision in this case is significant because the ECtHR indicated that in fact the Convention distinguishes between torture and other types of prohibited behavior based on the specific characteristic of "causing very serious and cruel suffering". In this case, the ECtHR had to assess the treatment of detainees associated with the Irish Republican Army in Northern Ireland who were arrested by British law enforcement officers. Among others, the detainees were subjected to: standing against a wall, covering with a hood, noise tests, deprivation of sleep and deprivation of food and drink. The court stated that "although these five methods, taken together, undoubtedly constituted inhuman and degrading treatment, and although their purpose was to obtain confessions, ... and although they were used systematically, they did not cause suffering of a particular person of the intensity and cruelty that is meant when it comes to torture" [19], i.e. they did not constitute torture. This case has been widely criticized by researchers for its very narrow approach to the understanding of "torture" [20, p. 55], and the Court was accused of making a political decision rather than a human rights decision. At the request of Ireland, the case was re-examined in 2018, four years after the release of a documentary on the Irish state television, which revealed that the United Kingdom had concealed many facts from the ECtHR that would have led it to the conclusion that these five techniques actually constituted torture, as well as the fact that the United Kingdom sanctioned these practices at a "ministerial level". The ECtHR did not find these facts to be decisive in reversing the decision after such a long time and maintained its initial conclusion that these five techniques constituted inhuman and degrading treatment. [21] Ireland also insisted that these five techniques have significant, severe and lasting consequences for people, equating these techniques to torture. And although in 2018 the ECtHR already recognized the long-term effect of ill-treatment as a specific feature for the legal qualification of "torture" [23], in response to Ireland's request, it noted that it cannot apply the modern interpretation of Article 3 to the events of forty years ago, i.e. retrospectively [23].

In 1996, the Court made its first decision in a case based on an individual complaint, where it established the existence of torture. The case of Aksoy v. Turkey concerned the prolonged detention of an alleged member of the Kurdistan Workers' Party, which had been in armed conflict with security forces in the Southeastern Turkey since 1985. During his detention, the applicant was subjected, inter alia, to the "Palestinian hanging" – he was stripped naked, his hands were tied behind his back and he was hung by his hands for a long time, accompanied by bodily injuries and blindfolds. The ECtHR seems to have recalled and applied all previously established standards of proof of torture in this case. In particular, it noted that the "Palestinian hanging" could only be *intentional*, because its execution require certain training and effort, and *purposeful* – to obtain confessions or information from the applicant. In addition to severe pain, the applicant suffered *long-term* paralysis of both arms, which lasted for some time (paragraph 64) [23]. Ultimately, the serious and cruel nature of such treatment amounted to torture.

In the case of 1997 of Aydin v. Turkey [24] regarding the rape and other ill-treatment of a 17-year-old girl in custody, the ECtHR recognized that an act of rape may constitute torture within the meaning of Article 3 of the ECHR if it involves not only (1) severe physical pain due to forced penetration, (2) feelings of humiliation and abuse both physically and emotionally, (3) deep psychological "scars" in the victim that remain over time (paragraph 83).

Consequently, the ECtHR's approach to the understanding of torture is gradually becoming broader, and the Court demonstrates its activity in interpreting the concept of "torture". This trend would be cemented by the ECtHR's conclusion made in the case of 1999 of Selmouni v. France, where the applicant had been ill-treated in custody. The court found that the treatment was *deliberate* for the purpose *of obtaining a confession* and declared it to be a torture. However, the government disputed this decision, stating that in previous case law (Ireland v. United Kingdom), similar actions were not recognized as torture, but treatment with a lower threshold of severity (which does not so "stigmatize" the state). The ECtHR rejected this argument, noting that "*the acts recognized as inhuman or degrading treatment in the past may be defined as torture in the future*" [25]. At the same time, the Court noted that for a long time after the case of the Greek colonels, the elements of intentionality and purpose in the definition of torture were leveled; the Court decided to "revive" the focus on these elements, emphasizing that it is required by the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[1].

As the researchers note, from 1996 to 2019, the ECtHR found 152 violations of Article 3 by the states, where the torture was found, which indicates greater willingness of the Court to find the states guilty of non-fulfillment of their obligations, to prevent or punish torture [20, p. 57]. Torture as a type of prohibited behavior includes the "element of control" as a determinant implemented by the state in the person of its officials or other persons for the purpose of obtaining evidence and confessions (the "purpose" element) for prosecution and sentencing in the future [4, p. 68]. It is often argued that recognition of torture, as opposed to inhuman or degrading treatment or punishment, is particularly damaging to a state's profile of human rights and may indicate a policy of persecution. In recent years, the ECtHR has confirmed its aim to overcome torture, which prohibition is absolute and has the status of jus cogens, that is, the norms of higher importance in the system of priority of norms than the law of treaties and even "general" customary rules [10, p. 174]. This brought the ECtHR back to the Convention's goal – the development of Europe based on the ideas of human rights and the rule of law [17, p. 312].

Subsequent case law of the ECtHR confirmed the majority's commitment to this expanded approach. First, the list of actions corresponding to the concept of "torture" has expanded. In the case of Nevmerzhitsky v. Ukraine, the ECtHR

[1] Ця Конвенція була ухвалена у 1984 році, і набула чинності у 1987 році. Це перший міжнародний інструмент, де надано визначення «катування» у ст. 1.

recognized the forced feeding of a starving prisoner as a violation of the prohibition of torture, as it involved the use of handcuffs, a mouth widener, and a rubber tube being inserted into the esophagus [26]. In the case of V.S. v. Slovakia, the ECtHR equated forced sterilization with torture. [27] Second, the context in which a person is "under the control of the state", which is essential for establishing torture, has become broader and is now not limited to imprisonment. In the case of Cestaro v. Italy, the ECtHR found that the violent beating of anti-globalist protesters hiding in a school to punish and humiliate them was a torture [28]. Third, the Court concluded that the threat of torture can also amount to torture, since the nature of torture encompasses both physical pain and mental suffering [29].

Conclusions. Article 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms establishes an absolute prohibition of torture. This article is not wordy, and it does not include an interpretation of torture and how to distinguish it from the other forms of ill-treatment. An analysis of the preparatory materials for the Convention helps to understand that the main purpose of the introduction of this ban is the prevention of any form of torture by the state, which cannot be justified either by the purpose of obtaining evidence, or by preserving the lives of others, or by considerations of state security.

The European Commission on Human Rights and the European Court of Human Rights became the first international bodies to interpret and apply the norm on the prohibition of torture. The European Court of Human Rights has developed elements that characterize torture and distinguish it from other types of cruel treatment – special cruelty during the execution and intense suffering of the victim, intentionality and purpose, torturing in the conditions when the victim is controlled the state (in the punishment execution establishments, in other contexts, when the victim cannot resist), the presence of long-term consequences for the victim's health (in particular, in the case of rape).

The European Court of Human Rights does not provide any comprehensive list of acts that may constitute torture; on the contrary, it confirms its flexibility and openness to the interpretation of the concept of "torture" and a greater determination to protect people from torture by holding states guilty of failure to fulfill their obligations.

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