Chapter 10

The Council of Europe and the European System

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<A>INTRODUCTION

Within Europe there are three principal regional organizations which play a role in the protection and promotion of human rights: the Council of Europe (COE); the European Union (EU); and the Organization for Security and Cooperation in Europe (OSCE). The geographic coverage, institutional and legal arrangements, and relative approaches of each to addressing and eradicating torture and other ill-treatment mean that whilst distinct, there are some considerable areas of overlap between them. In what follows, the relevant legal and institutional frameworks and the work of these three systems to address the prohibition of torture and inhuman and degrading treatment or punishment are introduced. A very brief contextual overview of the three systems within which normative and institutional means of addressing torture and ill-treatment have been developed is followed by sections focusing on the COE and EU and their legal frameworks and principal institutions and mechanisms. This is followed by a more detailed overview of how torture and ill-treatment is addressed by the European Convention on Human Rights (ECHR), in particular through the jurisprudence of the European Court of Human Rights (ECtHR). Areas of complementarity and of tension in approaches to torture across the European systems and institutions are highlighted and examined in the following discussion as they arise.

<A>CONTEXT

Within Europe, the COE, EU and OSCE all have mandated institutions whose work relates to the prohibition of torture and ill-treatment. Helpfully, albeit incidentally, all Member States of the EU are also Members of the COE, and likewise all COE States are 'participants' in the OSCE. With 57 participating states, the OSCE embraces the largest area, including the USA and Canada. The COE has a membership of 47 states, and the EU (post-Brexit) 27. It is beyond the scope of this overview to set out the structure or workings of these organizations more generally, the focus being on their work relevant to the prohibition of torture and ill-treatment. This said, the historical foundation and underlying philosophy of each helps to explain their respective approaches and levels of engagement with both torture and ill-treatment, and human rights more broadly.

The key reason for the creation of each organisation concerned the desire to foster peace and stability in the region. Following the Second World War thinking pulled in two competing directions. On one side a supranational system, a 'United State of Europe', marked by deep economic integration and overarching political structures was advocated. On the other, an intergovernmental model was favoured which would retain more fully the individual sovereignty of its Member States but nevertheless foster cooperation between them, including institutions for the promotion and protection of democracy, the rule of law and human rights.

The history is covered capably elsewhere,[1] but the net outcome was that Europe developed both. In the organizations known to us today, the supranational, integrationist preference gave rise ultimately to the European Economic Community (EEC) in 1957 which, in 1993, became the EU.[2] The intergovernmental path was reflected in the establishment of the COE in 1949.

Whilst the EEC was centred on economics, the COE made 'the maintenance and further realisation of human rights and fundamental freedoms'[3] central to its work from the outset. One of its key treaties, concluded in 1950, is the European Convention on Human Rights and Fundamental Freedoms (ECHR) which sets out the (mainly civil and political) rights to be protected and created the European Court of Human Rights (ECtHR). The COE's most notable contribution in respect of torture and ill-treatment specifically is the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, which entered into force in 1989, and the European Committee for the Prevention of Torture that it creates.[4] Additionally, in 1999 the COE established the office of Council of Europe Commissioner for Human Rights[5] which works for the promotion and protection of human rights in Europe.

Conversely, the EU developed its interest in human rights protection much later. This was marked particularly by the adoption of its Charter of Fundamental Rights in 2000, though it was not until the Treaty of Lisbon in 2009 that the Charter gained full legal status, making it binding on EU institutions and states. In 2007, the EU created the European Union Fundamental Rights Agency[6] some of whose work has been relevant to the fight against torture. The EU has also produced Guidelines on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, their most recent iteration in September 2019.[7]

Regarding the relationship between the EU and the ECHR, the Lisbon Treaty states that the EU 'shall accede' to the ECHR.[8] However, a 2014 decision from the Court of Justice of the European Union (CJEU) rendered this all but impossible in practice.[9] It has not happened and it is unlikely that it ever will.

The OSCE came into being much later in 1975 as the 'Conference on Security and Cooperation in Europe' with the adoption of the Helsinki Final Act. It was created against the backdrop of the Cold War 'as a security organisation ... aimed at creating a comprehensive framework for peace and stability in Europe'.[10] The legal status of the OSCE as an

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[1] Greer, S, Gerrards, J and Slowe, R, *Human Rights in the Council of Europe and the European Union* (Cambridge University Press, 2018).
[2] Treaty on European Union (Consolidated Version), Treaty of Maastricht (OJ C 325/5, 7 December 1992).
[3] Statute of the Council of Europe, 5th May 1949, ETS no 001, Article 1(b).
[4] See below and Chapter XXX of this volume.
[5] Resolution 99(50) on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session).
[6] Council Regulation (EC) no 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.
[7] Guidelines to EU policy towards third countries on torture, and other cruel, inhuman or degrading treatment or punishment - 2019 Revision of the Guidelines, adopted by the Council at its 3712th meeting held on 16 September 2019.
[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ 2007/C 306/01, 17 December 2007), Article 6(2).
[9] *Opinion 2/13 on EU Accession to the ECHR*, 18 December 2014, ECLI:EU:C:2014:4:2454. See Greer, Gerrards and Slowe (n 1 above), 37-8.
[10] Zannier, L, 'Human Rights and the OSCE's comprehensive Security concept' in *Vienna Manual on Human Rights*' (OSCE, 2012). Available at: https://www.osce.org/sg/103964?download=true

international organization remains a matter of some debate: it has avoided the creation of treaties, including its founding documents; it has 'participating states' rather than Member States; and commitments made by those states are always made unanimously but binding only politically.[11] Nevertheless, the OSCE's 'comprehensive' approach to regional security is built on three thematic pillars: politico-military; economic; and human 'dimensions' of security, each of which is considered equally important.[12] In the human dimension, the OSCE recognises 'respect for human rights and fundamental freedoms' as one of its ten guiding principles and participant states have made and confirmed specific commitments, including directly on torture and other ill-treatment.[13] The main OSCE institution responsible for the human dimension is the Office for Democratic Institutions and Human Rights (ODIHR). It was created by the 1990 Charter of Paris, and 'provides support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights and tolerance and non-discrimination.'[14] The ODIHR thus plays a significant role, mainly in capacity building and technical support. It is beyond the scope of this chapter to explore its work in greater detail, but for completeness, it should be noted.[15] The institutional context in Europe is, therefore, complex to say the least. It offers a range of norms, institutions and approaches which engaged with the prohibition of torture and ill-treatment. In what follows the relevant structures and work in the COE and EU are explored in greater detail.

<A>LEGAL FRAMEWORK

<B>**Council of Europe**

<C>Article 3 ECHR

Article 3 of the ECHR comprises a single sentence:

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

Whilst this is an elegant formulation, it is not particularly illuminating regarding what it means in detail and in practice. The definition of the respective terms and the scope of the prohibition, for example the extent to which it applies extra-territorially, have necessarily been developed by the jurisprudence of the ECtHR, and before its abolition in 1998 the European Commission on Human Rights. This is examined more closely in Section 5, but two key observations on the text can be made at this point. Firstly, unlike other instruments such as the CAT and the ICCPR, the wording of the prohibition in the EHCR does not refer directly to 'cruel' treatment. This should not be seen, and is not seen, as meaning that the

[11] Steinbrock, M, Moser, M and Peters, A (eds), *The Legal Framework of the OSCE* (Cambridge University Press, 2019); Froehly, J P, 'The OSCE 40 Years after Helsinki: Fall Back or Reset?' (2016) 25 *Polish Quarterly of International Affairs* 7-21.
[12] Strohal, C, 'Consolidation and New Challenges: The ODIHR in the OSCE's 30th Anniversary Year' *OSCE Yearbook* (Baden-Baden, 2006).
[13] These are compiled in OSCE Human Dimension Commitments, Volume 1, Thematic Compilation ,3rd edn, (ODIHR, 2012).
[14] https://www.osce.org/odihr
[15] Notable work includes a handbook for practitioners outlining the OSCE's experience of prevention work, best practice and strategies: OSCE, The Fight Against Torture: the OSCE Experience (ODIHR, 2009), available at https://www.osce.org/odihr/37968?download=true. A recent example of the OSCE's technical support is advising Poland on its torture legislation, particularly on the definition of Torture see OSCE/ODIHR, *Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation* (ODIHR, 2018) available at: https://www.osce.org/odihr/388763

ECHR prohibition is a weaker prohibition than its comparators elsewhere which do include this term. Instead, since torture and any other deliberately inflicted ill-treatment meeting the threshold of inhuman is also evidently cruel, a European interpretation would tend to see cruelty as being implicit in the prohibition.

Secondly, and more crucially, Article 3 provides an absolute prohibition. The text is clear that 'no one' shall be subjected to torture or ill-treatment, and this does not allow for any circumstances in which an exception might arise. The absolute nature of the prohibition is confirmed by Article 15(2) ECHR which is explicit that even in 'time of emergency threatening the life of the nation' there can be no derogation from Article 3. Neither is Article 3 subject to any other restriction, qualification or balancing with competing rights claims or interests.[16] This however, is as far as the text of Article 3 takes us - and the force of an absolute prohibition is compromised if there is a lack of clarity over either its content or its scope. It is the ECtHR, over many years, which has thrashed out this detail, returned to below in Section 5.

<C>European Convention for the Prevention of Torture

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) entered into force on 1 February 1989. It established the European Committee for the Prevention of Torture (CPT), a non-judicial, preventive body, and introduced an approach to dealing with torture and ill-treatment that was nothing short of revolutionary at the time. It establishes a system of regular visits by the CPT, a regional inter-disciplinary group of independent experts, to places of detention within the Member States. Based on those visits, and subsequent CPT reports and recommendations, an on-going relationship of dialogue between the CPT and states is developed as a means of combatting torture and ill-treatment, and more generally to improve the treatment and situation of people detained by the state.

In addition to regular visits and on-going dialogue the system's central features are confidentiality[17] and cooperation.[18] It is not and was never designed to be adversarial. With its focus on prevention, it is forward looking: to 'strengthen... protection' and improve the situation of detainees. In ratifying the treaty, states grant the CPT permission to visit 'any place within its jurisdiction where persons are deprived of their liberty by a public authority'.[19] Article 3 ECPT obligates the CPT and 'the competent national authorities' of Member States to co-operate', whilst Article 11 ECPT protects the confidentiality of 'information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned'. Though almost all states publish the CPT's reports as a matter of

[16] It has been observed the notion of absolute rights is nebulous, not being precisely defined in the case law and including assessment of subjective factors: Addo, M K, and Grief, N 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 *European Journal of International Law* 510-524. It has elsewhere been argued Article 3 cannot be fully absolute. This is based argument that in (rare) situations where absolute rights clash, - such as one person's right to life with another's Article 3 right - a moral assessment should cause one person's right to yield to another's: Greer, S, 'Is the prohibition against torture, cruel, inhuman and degrading treatment or punishment really 'absolute' in international human rights law?' (2015) 15 *Human Rights Law Review* 101-37. For replies to this: Mavronicola, N, (2017) 15 *Human Rights Law Review* 479-98; Graffin, N, (2017) 15 *Human Rights Law Review* 681-99. Both were responded to by Greer in the same journal in 2018.
[17] ECPT, Article 11.
[18] ECPT, Article 3.
[19] ECPT, Article 2.

course (albeit it often with some considerable delay), the principle of confidentiality within the treaty affords space for open and honest discussion between the parties.

The ECPT has never put forward definitions of torture or of inhuman or degrading treatment, the very things the CPT is mandated to prevent. As a non-judicial body, it is not within the CPT's mandate to do so (see below) and it has always been cautious not to stray into this area which rightly belongs to the ECtHR. Normatively, what the CPT has done is to offer a more concrete conception of preventive standards. Through its long experience of preventive visiting the CPT has developed such standards on numerous themes relating to the treatment of people in detention and the conditions in which they are held. This began with the CPT publishing thematic standards in its Annual Reports, but later the CPT published a repository of these standards both in copy and on its website.[20] In reality, the standards are generally reformulations of recommendations made frequently to states, but they are nevertheless helpful in setting out the CPT's expectations and approach. More recently, the CPT has produced several 'Factsheets': on women in prison; immigration detention; and the transport of detainees. It has also published 'Checklists' for evaluation of, for example, of psychiatric hospitals.[21]

<C>European Prison Rules

The most prominent and impactful COE soft law instrument relevant to Article 3 ECHR is the 2006 European Prison Rules (EPR).[22] Now in its third iteration, it has developed significantly since the first. That version in 1973, the (European) Standard Minimum Rules for the Treatment of Prisoners, very closely mapped onto the 1953 version of the UN Standard Minimum Rules, with very little value added.[23] They were revised in 1987, made more European, and renamed becoming the EPR. By more than one account, neither of these earlier versions was 'as influential as its authors may have hoped', partly because the CPT's reports gave greater detail[24] and also because they were barely ever referred to in the ECHR jurisprudence. That said, in 2006 the CPT commented positively that previous versions had been influential.[25] Reference to the EPR by the ECtHR and the CPT cannot be taken fully as evidence of their impact or importance, but is at least illustrative and the EPR are frequently referred to by both bodies. In 2016, 2017 and 2018 the EPR was referred to in respectively 13, 6 and 6 ECtHR Article 3 cases,[26] in many of which extracts from CPT reports had referred to the EPR.

The 2006 EPR updated the previous version to reflect the ECHR, ECtHR jurisprudence and the CPT's work, particularly its standards.[27] It is thus considered the 'most comprehensive modern European formulation' of state policy that should govern the administration of prison

[20] https://www.coe.int/en/web/cpt/standards
[21] *Ibid*.
[22] Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (11 January 2006).
[23] Reynaud, A, *Human Rights in Prisons* (Council of Europe, 1983) cited in van Zyl Smit, D and Snacken, S, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009).
[24] Van Zyl Smit and Snacken (n 23 above), 23.
[25] 15th General Report on the CPT's Activities, CPT/Inf (2005) 17, para 49.
[26] Based on search of the ECtHR HUDOC search database.
[27] EPR, Preamble.

systems,[28] and 'represent[s] a synthesis of many of the trends that preceded it.'[29] With the purpose of ensuring respect for the human rights and dignity of prisoners,[30] the EPR provides a high level of detail for a general document. It is organized thematically and opens by setting out some basic principles. In particular, '[a]ll persons deprived of their liberty shall be treated with respect for their human rights' (Rule 1); they retain all rights that have not been removed 'lawfully' (Rule 2); and any restrictions must be the 'minimum necessary and proportionate to the legitimate objective' (Rule 3). Moreover, lack of resources cannot justify conditions that 'infringe prisoners' human rights' (Rule 4).

Following the (nine) basic principles, the EPR addresses a number of core issues: conditions of imprisonment; health; good order; management and staff; inspection and monitoring; untried prisoners; and regime for sentenced prisoners. Each issue is divided into sub-themes: for example, Part II, concerning conditions of imprisonment, has various subsections including on the needs of specific groups: women, children and infants.

Part II also has a subsection on 'admissions', which can be used to illustrate both the level of detail included in the EPR and their correlation with CPT (preventive) standards. The Rules outline what must be 'immediately' recorded 'at admission', including 'any visible injuries and complaints about prior ill-treatment'.[31] Also 'at admission', the detainee should be given information including of their rights.[32] 'Immediately after admission' a third party should be informed,[33] and 'as soon as possible' the prisoner should be examined by a medical practitioner.[34] These safeguards accord strongly with CPT standards, which present them as three of four fundamental rights that should be present from the outset of deprivation of liberty. Whilst the EPR does not in this subsection refer to the fourth of the CPT's fundamental safeguards, access to a lawyer, this is addressed in Rule 23 concerning the provision of legal advice. Unlike CPT standards, Rule 23 does not indicate a timeframe for access to a lawyer, but the difference is contextual. The EPR apply to convicted prisoners or those remanded in custody by a judicial authority, that is, people in prisons. The CPT comparison drawn here is generally applied from the time of apprehension by the police. Indisputably, 'there is a high degree of consonance between the revised EPR and the principles and recommendations contained in CPT visit reports as well as in the Committee's General Reports.'[35]

<B>**European Union**

<*C*>Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (CFR),[36] adopted 1999 and adapted in 2007, was originally a soft law instrument. It became legally binding only with the entry into force of the Treaty of Lisbon (TEU) in 2009.[37] Article 6(1) TEU accords the CFR

[28] Van Zyl Smit and Snacken (n 23), 87
[29] *Ibid*, 36
[30] EPR Preamble. (The 1987 draft refers to 'dignity', whereas the adopted version refers to 'human rights').
[31] Rule 15.1
[32] Rule 15.2 with Rule 30.
[33] Rule 15.3 with Rule 24.9.
[34] Rule 16 (a) with Rule 42.1.
[35] 15th General Report on the CPT's Activities, CPT/Inf (2005) 17, para 50.
[36] Charter of Fundamental Rights of the European Union (2000/C 364/01), Nice, 7 December 2000.
[37] Treaty of Lisbon (n 8 above).

the 'same legal value' as the EU Treaties, meaning its content is both binding on EU states and institutions and justiciable. The CJEU can therefore hear human rights cases. Article 6(2) obligates the EU to accede to the ECHR, and Article 6(3) states:

> 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [i.e. the ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

This is now especially important given the EU is unlikely to accede to the ECHR. There is a clear intention that there be coherence between the two systems. Notably, the CFR's content is primarily 'addressed to the institutions and bodies' of the EU and binds Member States 'only when they are implementing Union law.'[38] Hence, although the CFR covers a wider spectrum of rights than the ECHR, its impact governing the conduct of EU states is more limited. Consequently, emphasis remains with the COE and ECHR for rights common to both systems, and overlap regarding which treaty applies and which court has competence is mostly avoided.

The danger of differing interpretations, scope and definitions being given to rights under the two respective frameworks is also mitigated by Article 52(3) CFR. Where rights under the CFR correspond with rights under the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by' the ECHR. The prohibition of torture and inhuman or degrading treatment or punishment is one such right, and the corresponding Article 4 CFR and Article 3 ECHR have identical wording. Article 52(3) CFR adds that Union law may still provide 'more extensive protection', and indeed, the EU's position on the death penalty, considered never to be lawful, is an example. Nevertheless, it is the ECtHR which has through its extensive jurisprudence developed definitions and clarified the scope of the prohibition of torture and inhuman or degrading treatment or punishment in Europe.

<C>EU Legislation

The EU's approach to the prohibition of torture through legislation and soft law has been outward-looking: directed towards the EU's interactions with third (non-EU) states, far more than looking inward on itself. This can be largely explained by measures having been taken under the EU's Common Foreign and Security Policy, and by the CFR's limited scope regarding EU states noted above. The key legislation is Regulation (EU) 2019/125 *concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*.[39] This codifies a previous 2005 Council Regulation,[40] itself referred to as 'the Anti-Torture Regulation',[41] and amendments to it, and is binding on all EU states. Regulation (EU) 2019/125 not only 'lays down Union rules governing trade' of such goods with third countries. It also sets 'rules governing the supply of brokering services, technical assistance, training and advertising related to such goods.'[42]

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[38] CFR (n 36 above), Article 51.
[39] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (codification).
[40] Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.
[41] EU Commission: https://ec.europa.eu/fpi/what-we-do/anti-torture-measures_en
[42] Regulation (EU) 2019/125 (n 39 above), Article 1.

An interesting feature of this Regulation is it that, unlike the CFR, (and of course the ECHR), it provides definitions. Although these definitions were intended to apply only narrowly to the Regulation, they are worth highlighting. Torture is defined by wording identical to Article 1 of the UNCAT, with a single line addition at the end. Whereas the UNCAT definition ends by noting that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions', the EU Regulation adds that 'Capital punishment is not deemed a lawful penalty under any circumstances.'[43] This puts a particularly European stamp on the definition of torture, and certainly makes clear the EU's stance as regards its relationship to the death penalty. This stance, it should be added, is consistent with that across the COE: all 47 states having abolished the death penalty in peacetime, most at all times.[44] In 1989 the ECtHR indicated 'death row phenomenon' 'could give rise to' an Article 3 ECHR violation,[45] but strengthened its position in 2010 finding the mental suffering caused by fear of execution constitutes inhuman treatment, and hence the death penalty violates Article 3.[46]

Perhaps surprisingly, Regulation (EU) 2019/125 also defines 'other cruel, inhuman or degrading treatment or punishment'. This is unusual, not least because neither the UNCAT, the ECHR nor the CFR define these types of ill-treatment. The definition given however, is somewhat underwhelming and not especially helpful. It states:

> 'other cruel, inhuman or degrading treatment or punishment' means any act by which pain or suffering attaining a minimum level of severity, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either 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, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties. Capital punishment is not deemed a lawful penalty under any circumstances'.[47]

There is clearly no attempt to distinguish 'cruel', 'inhuman' or 'degrading' or to explain what, if anything, might set them apart. All this definition really says is these other forms of ill-treatment must cause sufficiently severe pain or suffering to fall within *their* scope, and impliedly not be sufficiently severe to be considered as torture.[48] This EU definition differs from the definition of torture also for its silence on the purposive element which under the UNCAT is required for there to be an act of torture. It could therefore be assumed for the Regulation's purposes that there need not be a purpose at all for this *less severe, but 'severe enough'* ill-treatment. However this reading is potentially problematic, since the definition indicates that ill-treatment is to be 'inflicted', which may suggest intention, though it is possible that there can be intention without purpose. The key point is that this inclusion does not suggest an especially developed or sophisticated understanding of what might be termed together 'other ill-treatment', yet claims to be a definition.

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[43] *Ibid*, Article 2(a).
[44] ECHR, Protocols 6 and 13. Armenia, Azerbaijan and Russia are the only states not to have ratified Protocol 13 which completely abolishes the death penalty and allows no derogation.
[45] *Soering v. the United Kingdom*, 7 July 1989, Series A no 161, para 111.
[46] *Al-Saadoon and Mufdhi v. the United Kingdom*, no 61498/08, ECHR 2010.
[47] Regulation (EU) 2019/125 (n 39 above), Article 2(b).
[48] Arguably this same approach is seen in UNCAT Article 16, but that provision does not purport to be a definition as such.

Although this definition is included for the purposes of the Regulation itself, it has the potential to mislead. For example, it is uncontested (and recognised also in the EU Guidelines, discussed below), that detention conditions are capable of amounting to inhuman and degrading treatment, but the Regulation is silent on this. Given the Regulation's specific focus on torture, it might have probably been better not to seek to define other forms of ill-treatment at all.

<C>EU Guidelines on torture and other cruel treatment

In September 2019, the EU adopted new 'Guidelines to EU Policy towards third state countries on torture and other cruel, inhuman or degrading treatment or punishment'[49] (the Guidelines), revised from earlier versions in 2001, 2008 and 2012. This comprehensive and authoritative soft law document sets out the EU's approach to eradicating torture and ill-treatment globally. Its purpose is to 'provide practical guidance to EU institutions and Member States, that can be used in their engagement with third countries as well as in multilateral human rights fora, to support ongoing efforts' to that end.[50] The UNCAT, OPCAT and the relevant ECtHR jurisprudence 'form the basis of the EU's policy against torture and other ill-treatment',[51] and the Guidelines are consistent with these, drawing also from international and regional standards and from the work of relevant bodies. Helpfully the Guidelines also clarify the EU's use of terminology, confirming its adoption of the UNCAT definition of torture, and that the definition of 'other cruel, inhuman or degrading treatment ... should be in line with' ECtHR case-law and can include sub-standard detention conditions.[52]

The Guidelines set out action to be taken by the EU towards the goal of eradicating torture and other ill-treatment and include a statement of the EU's policy approach. The EU's objective is 'to engage with third countries to take effective measures against torture and other ill-treatment to ensure that their absolute prohibition is enforced and that victims have access to rehabilitation services, legal support and other forms of reparation.'[53] This is 'an integral part of [the EU's] human rights policy.' The EU takes a 'holistic and proactive approach' to the 'global eradication' of torture, 'including awareness-raising, education and training, prevention, monitoring and accountability, protection and redress, including rehabilitation for the victims of torture and other ill-treatment.'[54] 'EU Member States are determined to comply fully with international obligations prohibiting torture and other ill-treatment'.[55] 'The EU encourages third countries to mainstream safeguards against torture and other ill-treatment.'[56] It also 'promotes and supports' the work of National Human Rights Institutions and National Preventive Mechanisms under OPCAT.[57]

After stating EU policy, the Guidelines give an overview of its practical support, - 'political and financial tools' - towards its objective. This includes political dialogue; monitoring, assessing and reporting; making statements; and even observing trials where it is believed the defendant or witnesses have been subjected to torture or ill-treatment. It is a highly detailed

[49] EU Guidelines (n 7 above).
[50] *Ibid*, para 6.
[51] *Ibid*, para10.
[52] *Ibid*, para 9.
[53] *Ibid*, para 16.
[54] *Ibid*, para 17.
[55] *Ibid*, para 18.
[56] *Ibid*, para 18.
[57] *Ibid*, para 18.

statement of action with decisive undertakings that variously the 'EU', 'EU Delegations' and 'EU Heads of Mission, etc. 'will' take.

The EU's approach is 'comprehensive' and 'encompasses all essential elements to eradicate torture: prohibition, prevention, accountability and redress.'[58] The 'operational section' of the Guidelines are arranged by these four themes and identify measures, 'important safeguards' the EU will 'urge and support third [non-EU] countries to take.' In this section also, the Guidelines offer an impressive level of detail. Not only are they consonant with other international and regional standards, they both reinforce and are bolstered by references to treaties, soft law, and reports. Space does not permit detailed engagement with these measures, suffice to say the 2019 revision is a significant rework of the previous version and arranged under the following themes: prohibit torture and other ill-treatment in law; reaffirm the absolute prohibition of torture and other ill-treatment in policy; comply with safeguards and procedures relating to detention; provide efficient and safe complaints mechanisms; allow efficient detention monitoring and oversight mechanisms; combat impunity; and provide redress for victims. It is authoritative, relevant and an invaluable tool towards the eradication of torture.

<B>**Some Comments on the Legal Framework**

The main thrust of EU law regarding the prohibition of torture is directed towards third states. Apart from the CFR itself, which is only binding on EU states when they are implementing EU law, there is little which looks to the practice of EU states themselves. There is no document for example, setting out expectations on EU states to meet their obligations under Article 4 CFR. It would require no leap of the imagination for this to be understood as including those set out in the Guidelines, but it is unlikely that all EU states would choose to do so unless expressly required. EU states have been responsible for a considerable number of violation findings under Article 3 ECHR, including 27 findings for torture in the years to 1959-2018.[59] In the same period, Romania and Greece have been in held in violation for (substantively) inhuman and degrading treatment in 263 and 115 cases respectively. Moreover, the Guidelines call for third states to criminalize torture whilst it is well known that Italy only did so in July 2017, and this through legislation that many have deemed inadequate.[60] It is also notable that not all EU states are prepared to extradite suspects to other EU states. For example, certain states routinely refuse to extradite to Greece and Romania because of the detention conditions in those states.[61] Following a decision in its Supreme Court, Denmark has refused to extradite suspects to Romania on this basis.[62] In May 2019, the Netherlands refused to return a prisoner to the UK considering prison conditions where he would likely end up 'inhumane'.[63]

It is absolutely correct, indeed necessary, that the EU puts pressure on third states to eradicate

[58] *Ibid*, para 4.
[59] Violator states: Austria (1); Belgium (1); Bulgaria (1); France (2); Greece (1); Italy (9); Netherlands (1); Poland (2); Romania (2); Slovak Republic (1); Sweden (1); United Kingdom (2). For a statistical breakdown of violations see: https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf
[60] https://www.hrw.org/news/2017/07/11/italys-new-law-torture-fails-meet-international-standards
[61] Statistics on European Arrest Warrants, including their refusal are available at: https://e-justice.europa.eu/content_european_arrest_warrant-90--maximize-en.do
[62] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, 11804/19, Brussels, 30 August 2019, 44.
[63] https://www.theguardian.com/world/2019/may/10/dutch-court-blocks-extradition-of-man-to-inhumane-uk-prisons

torture and ill-treatment using such tools as the Guidelines and Regulation (EU) 2019/125. At the same time, more needs to be done by the EU and by EU states to get their own houses in order. Currently, this is addressed neither by soft law nor legislation by the EU. It is, however, clear from the manner in which the EU has striven for compatibility with the ECHR that the main source of normative guidance for the EU and member states regarding the prohibition and prevention of torture will in practice derive from the COE, and from which it will have difficulty in departing.

<A>PRINCIPAL INSTITUTIONS

This Section introduces the principal institutions in Europe whose work is relevant to the prohibition of torture and other ill-treatment. The intention is to give a flavour of what each does and the contribution they make. It is beyond the scope of this chapter to explain and examine all aspects of each institution in detail. The intention is to show, through its various institutions, how the European region is equipped to address the prohibition. Institutional responses are not only reactive but also proactive, including directly through preventive visiting and financial and technical assistance. In the drive to eradicate torture and ill-treatment in Europe, two institutions are key: the ECtHR and the CPT.

<B>**Council of Europe**

<C>European Court of Human Rights

The ECtHR's role extends beyond determining accountability for Article 3 violations. Its jurisprudence (for which see the following section) is instrumental in determining the scope and content of the prohibition not only for the purposes of the ECHR, but also the CFR.

The ECtHR derives its mandate from the ECHR, as amended by Protocols 11 and 14, and has jurisdiction to 'consider all matters concerning the interpretation and application' of the ECHR and its protocols.[64] It may receive inter-state applications, these being a claim by a state party that another has acted in breach of its Convention obligations.[65] It may also receive individual applications 'from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation' by an ECHR state.[66] Inter-state applications are relatively rare, though they are becoming less so.[67] As regards Article 3, however, the foundations of the ECHR's approach are rooted in two early inter-state applications, the *Greek case*[68] and *Ireland v UK*,[69] discussed below. Individual applications form the overwhelming majority of cases considered by the ECtHR.[70] Most applications are

[64] ECHR, Article 32.
[65] ECHR, Article 33.
[66] ECHR, Article 34
[67] There have been 24 inter-state applications since 1953. Of these, eight applications were made since 2014 (three in 2018). A further three applications were made between 2007-9: https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf See also: Ulfstein, G and Risini, I, 'Inter-state applications under the European Convention on Human Rights: strengths and challenges' *EJILTalk*, 24 January 2020: https://www.ejiltalk.org/author/gulfstein/
[68] *Netherlands v. Greece*, Report of 18 November 1969, 1969 12 Yearbook 1 (The *Greek case*).
[69] *Ireland v. the United Kingdom*, 18 January 1978, Series A no 25.
[70] On 31 December 2019 there the ECtHR had 59,800 pending cases, almost all individual applications. ECtHR Statistics: https://www.echr.coe.int/Pages/home.aspx?p=reports&c=

rejected on preliminary grounds, but cases considered on the merits are usually decided by a Chamber of 7 judges but exceptionally, although not infrequently, might be considered by a 'Grand Chamber' composed of 17 judges.

The ECtHR has a very high case load and many of the applications are 'repetitive cases'[71] deriving from 'a common dysfunction at the national level'. To address this, the ECtHR has developed a 'pilot judgment procedure',[72] by which, when there are several applications with the same root cause, it may select one or more to prioritise. The ECtHR will then decide the immediate case before it and at the same time identify the underlying structural issues giving rise to repeat cases, and indicate to the state in question 'the type of remedial measures needed to resolve it.'[73] The ECtHR can then choose to adjourn ('freeze') similar pending cases (it may also reinstate them if not satisfied by the State's response) and so reduce its caseload. This means that, in effect if not in by design, the ECtHR now has a preventive dimension to its work.

To date, there have been five pilot judgments concerning Article 3 ECHR, all in respect of inhuman or degrading treatment. Four of these have related to structural problems within the respective states - Russia, Italy, Bulgaria and Hungary - causing inadequate detention conditions in prisons,[74] the fifth, to structural inadequacies in the Belgian psychiatric detention system.[75] Of the prison cases, the Court has decided at present not to adjourn similar cases from its pending list concerning Russia, Bulgaria or Hungary until appropriate measures are fully implemented. The potential benefits of the pilot judgment approach are illustrated by *Torreggiani v Italy*, concerning severe overcrowding due to 'chronic dysfunction' in the prison system and which had resulted in 'several hundred' similar pending applications. The ECtHR directed Italy to put in place effective and appropriate measures to address prison overcrowding within one year of its decision becoming final, during which time it adjourned similar pending cases. In response Italy made legislative changes and introduced a compensation scheme. The ECtHR has since indicated its view that, in principle, these measures should afford appropriate relief.[76]

Two further aspects of the ECtHR's general approach to Article 3 ECHR should be noted. First, the ECtHR distinguishes between 'substantive' and 'procedural' dimensions of the prohibition, distinguishing between the question of whether (substantively) there has been torture or ill-treatment, or whether (procedurally) there has been a failure to fully investigate allegations or to safeguard. This maps onto the second point. The ECtHR is more than willing to make 'strong inferences' of fact and to reverse the burden of proof,[77] and it frequently does so. The ECtHR is not a court of first instance and in most of the cases it hears the facts are

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[71] In January 2019 there were 57,250 such cases, Court Pilot Judgment Factsheet, January 2019: https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf

[72] See generally: Leach, P, Hardman, H, Stephenson, S and Blitz, B, *Responding to Systemic Human Rights Violations: An Analysis of "Pilot Judgment"' of the European Court of Human Rights and Their Impact at National Level* (Intersentia, 2010).

[73] Pilot Judgment Factsheet (n 71 above).

[74] *Ananyev and Others v. Russia*, nos 42525/07 and 60800/08, 10 January 2012; *Torreggiani and Others v. Italy*, nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013; *Neshkov and Others v. Bulgaria*, nos 36925/10 and 5 others, 27 January 2015; *Varga and Others v. Hungary*, nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13.
and 64586/13, 10 March 2015.

[75] *W.D. v. Belgium*, no 73548/13, 6 September 2016.

[76] Pilot Judgment Factsheet (n 71 above).

[77] *Ireland v United Kingdom* (n 69 above).

already fully established. However, torture and ill-treatment, which can include disappearances, are invariably strongly contested by the respondent state to the point that state denial can be considered a defining aspect of them.[78] Rightly or wrongly, the ECtHR applies the high 'beyond reasonable doubt' standard of proof.[79] However, while it may already be possible for the ECtHR to find a violation on the procedural grounds, that, for example, the state has not adequately investigated allegations of ill-treatment, the application need not necessarily fail on the substantive question due to a lack of evidence due to the possibility of reversing the burden of proof in appropriate cases.[80]

<C>Committee for the Prevention of Torture

The CPT and its work were briefly introduced above.[81] This section provides an overview of the CPT's general approach to its mandate and its use of key terminology.

The CPT's function, as its full name suggests, is preventive. It is an independent, non-judicial and multi-disciplinary body of experts mandated

> ' by means of visits, [to] examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.'[82]

Preventive visiting is thus central to the CPT's mandate. By ratifying the ECPT, all COE Member states agree to allow and accommodate the CPT's visits, which may be announced or unannounced. This means allowing the CPT to enter the country and to have unrestricted and immediate access to, and circulation within, any place of detention in the state, including the ability to speak privately with detainees and others who consent, and being provided with any information it requests which is relevant to the exercise of its mandate. Visits are regular, and the CPT aims to make an announced ('periodic') visit to every member state roughly once every four to five years, although in reality there is some variation from this, in part because of the differing size of the countries and of the detained populations. Periodic visits are generally for two weeks, during which the CPT visits a range of detention types including police custody, remand centres and prisons in the criminal justice sector, as well as immigration detention, psychiatric and social care facilities. Unannounced ('ad hoc') visits are shorter in duration but focussed to a particular problem area identified in the state.

The CPT's country visits form the basis of an on-going dialogue between the Committee and the state. During a visit, and even during its preparation phase, the CPT is attentive to legal and other safeguards against torture and other ill-treatment, the treatment of detainees, detention conditions and regime in the state in question. A visit usually begins with the delegation meeting with high-level officials and separately with Civil Society Organisations before the main part of the visit: going into institutions, meeting and talking with detainees,

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[78] Keller, H and Heri, C, 'Enforced Disappearance and the European Court of Human Rights: A "Wall of Silence": Fact-Finding difficulties and States as "Subversive Objectors"' (2014) 12 *Journal of International Criminal Justice* 735

[79] Compare the Human Rights Committee which applies the balance of probabilities. See Chapter seven of this volume.

[80] Bicknell, C, 'Uncertain Certainty? Making Sense of the European Court of Human Rights' Standard of Proof' (2019) 8 *International Human Rights Law Review* 1.

[81] For a detailed study of the CPT see Bicknell, C, Evans, M and Morgan, R, *Preventing Torture in Europe* (Council of Europe, 2018).

[82] ECPT, Article 1.

staff and other interested parties, especially in confidential interviews, looking at registers and records and generally building a picture of the practical experience of detention within the facility in question. On completion of a visit, the CPT adopts and transmits a report to the state authorities, including its recommendations to improve the situation of detained people. States are expected to take positive steps in light of the CPT's findings and recommendations. Frequently, visit reports include 'immediate observations', which are points the CPT highlights as high priority, often giving the state a short time-frame within which to address or at least to reply to them. Article 10(2) ECPT also allows the CPT to issue a 'Public Statement' where the state is not cooperating. The CPT has only eight times made such statements, and they should be considered the end point of a process, but which can by themselves be sufficient to cause a state to adjust its behaviour. In accordance with the ECPT, the reports and all relevant discussion between the CPT and the state are confidential. Most states do however, authorise the CPT to publish its visit reports and their responses to them,[83] albeit often with some considerable delay.

Because of its specific mandate, the CPT does not work with fixed definitions of torture or inhuman or degrading treatment and avoids applying these labels to situations: it is a non-judicial body and that is the ECtHR's domain. The CPT is also categorically not a fact-finding arm of the ECtHR. Its role - through visits and cooperative dialogue with states to prevent torture and ill-treatment - would be undermined were that the case, whilst the preventive dimension of its work means it is not oriented towards accountability through the ECtHR. This said, as both are COE bodies with Article 3 ECHR as their common reference point, their work inevitably intersects and relationships have matured to a point at which they now work synergistically, often referring to and reinforcing the findings or work of the other.[84]

The CPT has developed a 'non-judicial approach to labelling'[85] in order to distance itself somewhat from the language of Article 3 ECHR. Firstly, the CPT always refers to 'allegations'. Whilst it often qualifies allegations as being credible or consistent with recorded injuries, it never reports ill-treatment as an established fact. Secondly, instead of using the terms 'torture', 'inhuman' or 'degrading', to describe reported mistreatment, the CPT usually refers to 'ill-treatment,' an overarching term a step removed from the language of the ECHR. The CPT will again usually qualify this with some indication of the severity or intentionality of the ill-treatment, for example 'severe', 'deliberate' or 'serious'. Finally, when the CPT does use the terms 'torture', 'inhuman' or 'degrading' it again introduces a form of qualified distancing, most commonly the formulations x treatment 'could be considered to be' or 'could be considered as amounting to' torture, etc. It is probable that in such cases the CPT has formed its own view of the nature of the treatment it is describing. It nevertheless approaches the wording cautiously in its reports and accompanies it with detailed factual accounts of the basis of its impression.

<C>Commissioner for Human Rights

[83] See https://www.coe.int/en/web/cpt/home
[84] Bicknell, Evans, and Morgan (n 81 above).
[85] *Ibid*, 73-78.

The office of Commissioner for Human Rights was established in 1999 by a Resolution of the COE Committee of Ministers.[86] The Commissioner is an impartial and independent[87] non-judicial institution with a mandate to 'promote education in, awareness of and respect for human rights' in COE states.[88] This includes promoting 'the effective observance and full enjoyment' of human rights; facilitating the activities of national human rights institutions; giving advice and information on human rights protection and prevention; and identifying shortcomings in member states.[89] Whenever the Commissioner deems it appropriate, she may address a report to the Committee of Ministers or also to the Parliamentary Assembly.[90] The Commissioner must cooperate with international institutions for the promotion and protection of human rights while avoiding unnecessary duplication of activities.[91] In its awareness raising and thematic work the office cooperates with other COE bodies and with 'a broad range' of international institutions including specialised UN offices, the EU and the OSCE. The Commissioner cooperates also with national human rights institutions, NGOs, universities and think-tanks.[92]

As a non-judicial office, the Commissioner does not decide individual complaints, though it is her office's role to be informed and to build a better understanding of human rights issues within COE countries as well as issues of thematic concern. Accordingly, the 'Commissioner *may* act on any relevant information' which might come from governments, national parliaments, national ombudsmen, individuals or organisations,[93] and the Commissioner can issue recommendations, opinions and reports.[94]

The Commissioner's work is divided into three main areas: country visits, including dialogue with state authorities and civil society; thematic reporting and advising on human rights implementation; and awareness-raising. Although the office has not yet published thematic work specifically concerning torture and ill-treatment, many of the themes explored have a bearing upon it, such as children's rights; counter-terrorism; LGBTI; migration; and persons with disabilities.[95]

Issues concerning Article 3 are also a prominent feature of the Commissioner's country specific work, which includes publishing relevant 'issue papers' (reports), acting as third party intervenor in ECtHR cases, country visits, issuing statements and written letters to heads of government that the situation is being monitored and urging specific action. For example, the mass influx of migrants to Europe fleeing persecution and war has created a crisis in Europe and placed acute pressure particularly on first port of entry states. The Commissioner undertook a country visit to Greece in October 2019 following which she made a statement

[86] Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session).
[87] *Ibid*, Article 2.
[88] *Ibid*, Article1 and 3(a).
[89] *Ibid*, Article 3.
[90] *Ibid*, Article f.
[91] *Ibid*, Article 3 (i).
[92] https://www.coe.int/en/web/commissioner/mandate
[93] Resolution (n 87) Article 5.
[94] *Ibid*, Article 8.
[95] For example, the Commissioner has published papers on corporal punishment of children: *Children and Corporal Punishment: "the right not to be hit, also a children's right"* CommDH/IssuePaper(2006)1; juvenile justice: *Children and Juvenile Justice: Proposals for Improvements* CommDH/IssuePaper(2009)1; and the right to family reunification for refugees: *Realising the right to family reunification for refugees in Europe* (COE 2017).

that the situation that had 'dramatically worsened' over the previous year and called on Greece to urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception centres.[96] When Italy introduced legislation affecting the rights of refugees, asylum seekers and migrants, the Commissioner wrote a letter to the Italian Prime Minister expressing concern, including over measures 'hampering and criminalising the work of NGOs who play a crucial role in saving lives at sea, banning disembarkation in Italian ports, and relinquishing responsibility for search and rescue operations to authorities which appear unwilling or unable to protect rescued migrants from torture or inhuman or degrading treatment.'[97] Following up on a letter sent to Bosnia and Herzegovina in May 2018,[98] the Commissioner issued a statement calling for the urgent relocation of migrants who were being held in overcrowded, 'deplorable' conditions in an improvised camp without running water or electricity and poor sanitation.[99]

This is just a snap-shot of the Commissioner's work in one thematic area which demonstrates some of the tools used to promote respect for Article 3 ECHR in the COE.

<B>**European Union**

<C>Court of Justice of the EU

The Court of Justice of the EU (CJEU) has jurisdiction to hear claims invoking the CFR. The CJEU case law relating to the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR) is far more limited than the ECtHR's (on corresponding Article 3 ECHR) for at least three reasons. Firstly, the CFR binds EU states 'only when they are implementing Union law.' Secondly, the CFR has only been legally binding since 2009. Thirdly, since the ECtHR is exclusively focussed on human rights and very well established it is the main point of reference for litigants. There have, nevertheless, been more Article 4 cases than might first be expected, particularly in respect of non-refoulement for asylum seekers and under the European Arrest Warrant (EAW) scheme, of which the latter is the most revelatory.

Recently, in *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg,*[100] the CJEU's Grand Chamber made a preliminary ruling on the interpretation of Article 4 CFR and legislation applicable to the EAW[101] which, on the face of it, conflict. In summary, EAW is a mechanism by which suspects connected with significant crimes may be arrested and subsequently extradited from one EU state (the 'executing state') to another (the 'issuing state'). It is based on EU principles of 'mutual trust' and 'mutual recognition', meaning that, 'save in exceptional circumstances, EU states must consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU

[96] https://www.coe.int/en/web/commissioner/-/greece-must-urgently-transfer-asylum-seekers-from-the-aegean-islands-and-improve-living-conditions-in-reception-facilities
[97] https://rm.coe.int/native/0900001680921853
[98] https://rm.coe.int/commdh-2018-12-letter-to-the-authorities-regarding-the-migration-situa/1680870e4d
[99] https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-urgent-relocation-of-migrants-from-vucjak-in-bosnia-and-herzegovina
[100] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg*, Case C-128/18, Judgment of the Court (Grand Chamber), 15 October 2019.
[101] Namely, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

law.'[102] Additionally, 'save in exceptional cases', they may not check whether another EU state has 'actually, in a specific case, observed the fundamental rights guaranteed by the European Union.'[103] At the same time, Article 4 CFR must be interpreted as having 'the same meaning and scope' as Article 3 ECHR,[104] which provision will not allow extradition or return to a receiving state where there is a 'real risk' of torture or inhuman or degrading treatment or punishment. Herein lies the problem, which has been known for quite some time[105] but not fully resolved: not all EU states are compliant and a 'real risk' may exist. Indeed, it was noted above that extraditions including to Greece, Romania and the UK have been refused on this basis.

The same difficulty arose when Romania issued a request to Germany, which led to the German Courts seeking a preliminary ruling from the CJEU. *Dumitru-Tudor Dorobantu* shines real light on the relationship between the ECHR and EU law. Although divided into a series of specific sub-questions, Germany asked two overarching questions, which put broadly were: (a). under Framework Decision 2002/584 (i.e. the EAW) what are the minimum standards for custodial conditions required by Article 4 CFR, including whether there is an "absolute" minimum cell size requirement and whether and how cell size can be mitigated, and (b) What standards are to be used to assess whether conditions comply with fundamental rights, including how comprehensive an assessment of custodial conditions in the issuing state (Romania) is permitted, namely were the German courts in this case limited to an "examination as to manifest errors"?

The judgment considers these questions together and the CJEU expressly confirmed that Article 4 CFR corresponds with Article 3 ECHR, including the 'meaning and scope' of the right as determined by ECtHR case law as well as the text.[106] The CJEU's examination of personal space is notable for its fidelity to the ECtHR position, particularly that set out in *Mursic v Croatia*.[107] Regarding the extent and scope of the review of custodial conditions in the issuing state, the absolute nature of the prohibition of torture and ill-treatment means that more is required than a superficial assessment limited to 'obvious inadequacies.'[108] The review is to 'determine, specifically and precisely' whether there is a real risk to the person whose extradition has been sought,[109] hence authorities in the executing state are 'solely required to assess' prisons (and temporary facilities) where that individual would, according to the issuing state, be detained.[110] However, and perhaps controversially,

> 'When the assurance that the person concerned will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained in the issuing Member State, has been given, ...the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter.'[111]

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[102] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (n 100 above), para 46.
[103] *Ibid*, para 47.
[104] *Ibid*, para 47.
[105] For example: Justice, *European Arrest Warrants: Ensuring an effective defence* (Justice, 2012).
[106] *Ibid*, para 58.
[107] *Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016. See also Bicknell, Evans and Morgan (n 81 above) 35-6.
[108] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (n 100 above), para 62.
[109] *Ibid*, para 63.
[110] *Ibid*, para 66.
[111] *Ibid*, para 68.

Accordingly, the CJEU anticipates that 'only in exceptional circumstances' will there be a 'real risk' and a request be refused. This approach seeks to maintain as far as possible the mutual recognition principle and harmony between EU states, whilst ensuring against 'pockets of impunity' within the EU. However, since some EU states do not necessarily meet an acceptable ECHR/CFR-compliant baseline, whilst this approach may well protect the particular individual in question, its overall impact is limited. It would be far bolder and send a much stronger message politically and preventively to block extradition where detention conditions are more generally unacceptable.

<C>FRA

The Fundamental Rights Agency was created in 2007 and has produced important work helping embed a rights-based culture across the EU. Similar to the COE's Commissioner for Human Rights, the FRA works on themes, many of which intersect with Article 4 CFR, including asylum, migration and borders; LGBTI; hate crime; racism; rights of the child; Roma; and people with disabilities. It engages in research to identify and understand issues as well as best practices to resolve them. It assists EU institutions and states and offers significant practical guidance. Examples of relevant work produced by the FRA include: a manual for fundamental rights-based police training;[112] continuously reporting, reminding and keeping pressure on EU states about the extent of human suffering at immigration reception centres[113]; and participating in expert meetings convened for example on the theme of responding to violence against children.

<A>ECtHR JURISPRUDENCE: DEFINITIONS AND SCOPE OF ARTICLE 3 ECHR

The ECtHR's jurisprudence plays a fundamental defining role through which the scope and content of the Article 3 ECHR prohibition of torture and inhuman or degrading treatment or punishment are clarified as well as implemented. This is important for the COE and equally for the EU, particularly its institutions which are not already bound by the ECHR, since Article 4 CFR corresponds Article 3 ECHR and the EU has to date, readily adopted the ECtHR's interpretation. Therefore, the ECtHR Article 3 jurisprudence carries significant authoritative weight across both systems.

The ECHR is recognised as a 'living instrument which must be interpreted in the light of present-day conditions', meaning:

> 'certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It [the ECtHR] 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.'[114]

[112] https://fra.europa.eu/en/publication/2013/fundamental-rights-based-police-training-manual-police-trainers
[113] https://fra.europa.eu/en/news/2019/migrants-continue-suffer-reception-centres-remain-overcrowded-and-violence-against
[114] *Selmouni v France* [GC], no 25803/94, ECHR 1999-V, para 101.

Consequently, the ECtHR's understanding of acts prohibited under Article 3 have changed over time and will almost certainly continue to do so. Additional uncertainties mean that even when the facts are established it can often be difficult to predict whether the ECtHR will find the acts, circumstances or conditions in question violate Article 3, or how they will be classified.[115] The case law nevertheless provides some clear guidance.

<B>**Key Terminology**

<C>Torture

Perhaps surprisingly, it was not until the case of *Aksoy v Turkey* in 1996 that the ECtHR first determined that an act of torture had taken place.[116] The general approach to torture and ill-treatment under Article 3 had, however, been set out in two earlier cases which considered what sets 'torture' apart from 'inhuman' and/or 'degrading' treatment or punishment. Since *Aksoy*, findings of torture have become far more frequent as the ECtHR has matured and grown in confidence. Its approach to the terms is something of a blend between its two earlier positions and subsequent development and now appears to be very much more aligned with the UNCAT definition which emphasises the relevance of the *purpose* as well as the *severity* of deliberately inflicted ill-treatment.

Article 3 was first considered in the *Greek case,* where the Commission[117] attempted to differentiate the prohibition's key elements.

> 'It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and all inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman or degrading treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.'[118]

The statement became discredited because of the unfortunate implicit suggestion that the deliberate infliction of severe mental or physical suffering might in some situations be justifiable. Categorically, it cannot be, and the ECtHR's case law has since stated the absolute nature of the prohibition in no uncertain terms.[119] This false start aside,[120] the basic approach remains one in which torture is 'often' inhuman treatment which is inflicted for a purpose, and 'generally' an 'aggravated' form of inhuman treatment. It remains true that the ECtHR has always looked for an aggravating factor which, in the *Greek case* was the presence of purpose.[121]

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[115] Bicknell, Evans and Morgan (n 81 above) 63.
[116] *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI.
[117] Now defunct.
[118] (n 68).
[119] *Gäfgen v. Germany* [GC], no 22978/05, ECHR 2010, para 107. This is not withstanding nuanced arguments in the literature noted above (n 16 above).
[120] The Commission itself did so in *Ireland v. the United Kingdom* (Report, paras 388-90) in 1976. See also Rodley, N S, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 467-493.
[121] Bicknell, Evans and Morgan (n 81 above) 64-67.

In *Ireland v UK*[122] the ECtHR again recognized the importance of purpose,[123] but took the position that because a 'special stigma' attaches to torture it must attain a greater level of severity than other ill-treatment. In consequence, *torture*, *inhuman* and *degrading* treatment have long been understood as comprising a sliding scale, with the level of severity determining how the ill-treatment should be categorized. The severity was also contingent on the characteristics of the victim, including sex, age, and state of health. Severity, however, is no longer quite so central. Indeed, *Aksoy* itself indicated the relevance of both severity and purpose to a finding of torture, and more recent cases tend to take both elements together as determinants of categorization.[124] Context also increasingly plays a role in the ECtHR's assessment of what labels to apply. But, it is argued, particularly based on the *Greek case*, that purpose itself is capable of being the aggravating factor which can render what would otherwise be inhuman treatment into an act of torture without the need for it to be 'more' severe.[125]

<C>Inhuman Treatment and/or Degrading Treatment

The 'scale of severity' approach based on where along a continuum of severity particular ill-treatment fits is perceptible in the jurisprudence.[126] The ECtHR frequently refers to 'inhuman and degrading' together without differentiating between them, as if this were a single category in its own right. However, there has relatively recently been a shift in approach, with the ECtHR considering degrading treatment alone, linking it with human dignity and introducing a subjective dimension. According to the Grand Chamber in *Kudła v. Poland* degrading treatment 'is such to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them'.[127]

The Grand Chamber in *Bouyid v. Belgium* emphasised that human dignity lies at the core of the Article 3 prohibition, a link 'particularly strong' with degrading treatment.[128] The judgment illustrates the ECtHR's broad approach. Firstly, whether ill-treatment is degrading includes objective and subjective elements. All ill-treatment must be of a minimum level of severity to engage Article 3 and this, *Bouyid* confirms, 'usually involves actual bodily injury or intense physical or mental suffering.' Even without it,

> 'where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3'.[129]

What distinguishes this from inhuman treatment or torture in this case is the severity of suffering, which must be 'serious physical or mental suffering' in these latter categories. Hence, torture and inhuman treatment may be distinguished from each other based on severity and the presence or absence of purpose, whilst degrading treatment is distinguishable based on severity.

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[122] *Ireland v. United Kingdom* (n 69 above).
[123] *Ibid*, para167.
[124] See for example *Ateşoğlu v. Turkey*, no 53645/10, 20 January 2015, para 20; also *Süreyya Eren v. Turkey*, no 36617/07, 20 October 2015, para 35.
[125] Bicknell, Evans and Morgan (n 81 above) 64-67.
[126] E.g. *Costello-Roberts v. the United Kingdom*, 25 March 1993, Series A no 247-C.
[127] *Kudła v. Poland* [GC], no 30210/96, ECHR 2000-XI, para 92.
[128] *Bouyid v. Belgium* [GC], no 23380/09, ECHR 2015, para 81 and 90.
[129] *Ibid*, para 87.

<B>**Positive Obligations**

Article 3 imposes a negative duty that states must not commit acts of torture or ill-treatment, and also imposes positive obligations on ECHR Member states.[130] In particular, there is the duty to undertake an effective investigation for alleged violations, for which failure results in a procedural violation even where a substantive violation cannot be established. Investigations need to be 'conducted independently, promptly and with reasonable expedition.' When appropriate (and it is not always possible, e.g. disappearance cases), the 'victim should be able to participate effectively.' In principle, the investigation should be 'capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.'[131] There are many cases in which such procedural failings are found.

Positive obligations under Article 3 are not exclusively procedural. The state may have a duty to protect against the acts of private individuals. If ill-treatment by private parties is with the 'acquiescence or connivance' of the state authorities this 'may engage the State's responsibility under the Convention.'[132] Even without acquiescence safeguards need to be in place. For example, in *O'Keeffe v Ireland,* concerning the sexual abuse of a child in a non-state primary school, the Grand Chamber made clear 'the content of the positive obligation to protect' connotes 'effective measures of deterrence against [such] grave acts' and 'can only be achieved by the existence of effective criminal-law provisions backed up by law-enforcement machinery.'[133] Safeguards in this case needed to include

> 'at a minimum ... effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State.'[134]

<B>**Non-refoulement**

As under other systems, the ECHR prohibition of torture and ill-treatment includes the principle of *non-refoulement*: that a person may not be extradited or otherwise returned to a third state if, once there, they might be ill-treated.[135] Under Article 3 ECHR the principle applies when there are 'substantial grounds' for believing there is a 'real risk' to the individual if returned.[136] This principle has already been discussed in respect of the EAW above, and applies equally to irregular migrants and/or failed asylum seekers, as indeed anyone else being extradited or deported. The burden of proving the risk falls to the applicant. However,

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[130] For a detailed study of positive obligations see Lavrysen, L, *Human Rights in a Positive State* (Insentia, 2016).
[131] *O'Keeffe v. Ireland* [GC], no 35810/09, ECHR 2014 (extracts), para 172.
[132] *Ilaşcu and Others v. Moldova and Russia* [GC], no 48787/99, ECHR 2004-VII, para 318, referring to *Cyprus v. Turkey* [GC], no 25781/94, ECHR 2001-IV, para 81.
[133] *O'Keeffe v. Ireland* (n 131 above), para 148.
[134] *Ibid*, para 162.
[135] For insight into the ECtHR's views see 'Non-refoulement as a principle of international law and the role of the judiciary in its implementation' (Council of Europe, 2017): https://www.echr.coe.int/Documents/Dialogue_2017_ENG.pdf
[136] *Soering v. United Kingdom* (n 45 above); *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

the ECtHR recognises the difficulty this presents for asylum seekers and *J.K. v Sweden* sets out very clearly its approach.[137]

First, 'real risk' is objectively evaluated, and must be 'assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion'.[138] Second, the risk need not be of ill-treatment perpetrated by the state: the 'absolute character' of the prohibition[139] dictates that Article 3 protects also against non-state actors in this context. Third, the burden of proof is on the applicant, but for asylum seekers it is 'frequently necessary to give them the benefit of the doubt when assessing the credibility' of statements and documents.

> 'As a general rule, an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination.'[140]

Additionally, individual factors which on their own might not suggest a real risk must be considered cumulatively and, taken together, may meet the threshold.[141] Finally, although not decisive, past ill-treatment 'may be relevant for assessing the level of risk of future ill-treatment'. *J.K.* notably shows synergy with the EU Qualification Directive and UNCHR documents in making this point, citing Article 4(4) of the Directive directly:

> '[t]he fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'.[142]

<B>**Extra-territoriality**

Under Article 1 ECHR states parties must 'secure to everyone within their jurisdiction' the rights and freedoms sets out in the Convention. This is uncomplicated if applied, for example, to a psychiatric hospital in mainland France. '[A]cts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases',[143] to be determined in each case on its facts.[144] The Grand Chamber in *Al-Skeini v UK* set out circumstances in which exceptions have applied. Most, albeit not all, examples in the case law concern overseas military operations. Broadly, jurisdiction applies where the ECHR state exercises effective control over either a person or persons; or a territory.

'State agent authority and control' means acts of diplomatic and consular agents 'may amount to an exercise of jurisdiction when [they] exert authority and control over others.'[145] It may equally apply when, 'through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that

[137] *J.K. and Others v. Sweden* [GC], no. 59166/12, 23 August 2016.
[138] *Ibid*, para 87.
[139] *Ibid*, para 80.
[140] *Ibid*, para 94.
[141] *Ibid*, para 95.
[142] *Ibid*, para 99.
[143] *Al-Skeini and Others v. the United Kingdom* [GC], no 55721/07, ECHR 2011, para 131.
[144] *Ibid*, para 132.
[145] *Ibid*, para 134.

Government.'[146] Also, where the use of force by a state's agents who are not in their own territory bring an individual under their control, jurisdiction may apply.[147]

Control giving rise to extra-territorial effect may be territorial, such as when an ECHR state party exercises 'effective control of a territory' not its own, by consequence of (lawful or unlawful) military action. Whether a state has effective control over a territory is a question of fact decided with reference to such indicators as 'the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'.[148] The ECtHR has not accepted the argument that during 'active hostilities' in international armed conflict, international humanitarian law rather than human rights law is applicable.[149] The ECHR and international humanitarian law apply concurrently. Moreover, *Jaloud v the Netherlands* confirmed that in joint military operations, the fact that the UK had operational control did not divest the Netherlands of its jurisdiction and thus its responsibility.[150] On the high seas, a vessel is subject to the exclusive jurisdiction of the state whose flag it is flying.[151]

[146] *Ibid*, para 135.
[147] *Ibid*, para 136.
[148] *Ibid*, para 139.
[149] *Hassan v. the United Kingdom* [GC], no 29750/09, ECHR 2014, paras 76-77.
[150] *Mozer v. the Republic of Moldova and Russia* [GC], no 11138/10, 23 February 2016 which concerned the Moldovan breakaway territory of Transdniestria over which Moldova has no control and which is supported by Russia, shows again that jurisdiction may apply concurrently for more than one state. Although Russia had effective control (and was found in violation), Moldova still had positive obligations under the ECHR.
[151] *Hirsi Jamaa and Others v. Italy* [GC], no 27765/09, ECHR 2012.

<B>**Torture committed by non-ECHR states parties**

European standards regarding how people are treated have a reach far beyond the COE area. As noted above, the EU regulates the behaviour of third states through trade regulation and soft power. Non-refoulement means that extradition requests from third states necessarily require an assessment of risk to the individual against ECHR standards.

In several cases the ECtHR has made incontrovertible findings of torture and ill-treatment perpetrated by the United States' Central Intelligence Agency (CIA) in the context of extraordinary rendition. Whilst the ECtHR has no jurisdiction to hear cases brought directly against the United States, its findings were relevant to cases brought against Poland,[152] Romania[153] and the Former Yugoslav Republic of Macedonia (FYROM),[154] for complicity. In order to establish these states' involvement, the CIA's activity inevitably had first to be established. Al Nashiri and Abu Zubaydah were both subjected to extraordinary rendition and held in CIA-run 'black sites' in Poland, where they were tortured by the CIA. Al Nashiri was subsequently transferred to Romania where he was held by the CIA in conditions and under a regime that cumulatively amounted to inhuman treatment. El-Masri, a German national, was arrested by the Macedonian authorities and detained for 23 days without being permitted to contact the German authorities. The circumstances of this amounted to inhuman and degrading treatment.[155] The Macedonian authorities then handed him to the CIA whose treatment of him at Skopje airport amounted to torture. FYROM was found 'directly responsible' for this 'since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.'[156] He was then transferred by air to Afghanistan where he was held for 5 months, in violation of FYROM's non-refoulement obligation.

These cases are significant. Both the COE and EU made important contributions uncovering the truth about rendition by commissioning reports to investigate the involvement of European states. These are known respectively as the Marty[157] and Fava Reports,[158] and both provide an extraordinary level of detail, naming victims, flight numbers, destinations and times. They provided important, but not exclusive, evidence for the ECtHR. The particular significance of these cases, however, is they represent definitive finding by an international Court that a third state, operating outside both its jurisdiction and that of the Court, has committed acts of torture. The United States is a state party to the ICCPR and UNCAT, but does not accept the individual communications procedures of either, nor to that of the Inter-American Convention on Human Rights. El-Masri's case had also collapsed before the US Courts, due to the government invoking 'state secrets privilege' to withhold vital supporting

[152] *Al Nashiri v. Poland*, no 28761/11, 24 July 2014; *Husayn (Abu Zubaydah) v. Poland*, no 7511/13, 24 July 2014. See also: Jorgensen, N H B, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 *Chinese Journal of International Law* 11.
[153] *Al Nashiri v. Romania*, no 33234/12, 31 May 2018.
[154] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no 39630/09, ECHR 2012.
[155] *Ibid*, para 204.
[156] *Ibid*, paras 205-211.
[157] *Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States*, Doc. 10957, 12 June 2006 ('the 2006 Marty Report').
[158] European Parliament: the Fava Inquiry, CIA Activities in Europe: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20070209IPR02947&language=EN> accessed 30 August 2019.

evidence.[159] Although the ECtHR could not award reparation or just satisfaction against the United States, this case provided a degree of justice and complete impunity was avoided.

<A>CONCLUSION

The prohibition and prevention of torture and other ill-treatment in Europe is not covered by a single institution or set of norms. With three principal organizations playing a role in the protection and promotion of human rights across the region, Europe is complex, offering *systems* rather than a system. The focus of this Chapter is on the COE and EU laws and institutions relevant to the prohibition of torture. Space has not permitted more on the OSCE, but its contribution particularly through capacity building and technical support, is not insignificant. As outlined above, all Members of the EU are also Members of the COE and respectively through Article 4 CFR and Article 3 ECHR, both organisations have binding law prohibiting absolutely torture and other ill-treatment. Moreover, within both, the death penalty is understood as violating the prohibition. There is intentionally a great deal of coherence and synergy between the EU and COE regarding torture. Article 6(3) TEU makes clear the ECHR rights are 'general principles' of EU law, whilst Article 52(3) CFR indicates the same 'meaning and scope' should be given to Article 4 CFR as it is under Article 3 ECHR. This provision, and the fact the ECtHR jurisprudence is so rich in setting out the content and scope of Article 3, pushes a great deal of emphasis for understanding the prohibition onto the COE. As regards accountability, the CFR is rather more limited than the ECHR, binding EU states only when they are implementing EU law. A key problem faced by the EU is marrying its 'mutual recognition' requirement of states with the non-refoulement requirement under Article 4 CFR. This has been addressed by the CJEU in the context of EAWs, but not necessarily in the strongest terms that would advance prevention. Indeed, the EU's focus on protection from torture is outward looking, addressed to third, non-EU states. It is erroneous to assume EU states do not have detention conditions amounting to inhuman treatment, or even commit acts of torture, and the EU would do well to create additional guidelines directing the conduct of its own states in this regard. The COE has a much more advanced system for prevention, provided by the CPT which is now in its 30th year of preventive visiting, and also (albeit to a lesser extent and incidentally) by the Pilot Judgment system of the ECtHR.

[159] *El-Masri v Tenet* 437 F.Supp. 2d (E.D.Va. 2006); *El-Masri v United States* 479 F. 3d (4 Cir. 2007). See also: Vedaschi, A, 'Globalization of Human Rights and Mutual Influence between Courts: The Innovative Reverse Path of the Right to the Truth' in Shetreet, S (ed), *The Culture of Judicial Independence, Rule of Law, and World Peace* (Martinus Nijhoff, 2014).