



## **Human Rights Law Clinic Papers 2018**

# **THE ABUSIVE USE OF PRE-TRIAL DETENTION AS A FORM OF TORTURE OR ILL-TREATMENT**

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May 2018

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## 1. Introduction

This legal memorandum has been written for the Office for Democratic Institution and Human Rights within the Organization for Security and Cooperation in Europe (OSCE) in relation to the Anti-torture programme of the Human Rights Department. The focus is on whether the abusive use of Pre-trial detention (PTD) can amount to a form of torture or ill-treatment under international human rights law. The concept of PTD will be explained in section two along with its use by three OSCE member states. Section three will then explore how the international community is already addressing the problem of abusive PTD through internationally binding juridical norms and political agreements. Consequently, section four will provide a legal argument that the abusive use of PTD can indeed amount to a form of either torture or ill-treatment. Finally, section five will conclude by presenting a summary of the key findings.

## 2. Background

### 2.1. The practice

PTD occurs when a person is detained and charged with a criminal offence before trial.<sup>1</sup> Martin Schoenteich estimates that almost 10 million people a year are held in PTD, with Europe being the second highest offender globally.<sup>2</sup> The United Nations (UN) stresses that PTD is lawful in exceptional circumstances,<sup>3</sup> pursuant to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR),<sup>4</sup> to ensure the integrity of the criminal justice system describing it as a “measure to safeguard a criminal procedure”.<sup>5</sup> However, the practice should not be used *pro forma* because it undermines the presumption of innocence,

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<sup>1</sup> Andrea Huber, ‘Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment’ (*Penal Reform International*, 2013) [https://www.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10\\_final2.pdf](https://www.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf) accessed 24 March 2018.

<sup>2</sup> Martin Schoenteich, ‘Why the Overuse of Pretrial Detention is an Overlooked Human Rights Issue’ (*Open Society Foundations*, 12 September 2014) <https://www.opensocietyfoundations.org/voices/why-overuse-pretrial-detention-overlooked-human-rights-crisis> accessed 23 March 2018.

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (ICCPR) art 12(3), available at: <http://www.refworld.org/docid/3ae6b3aa0.html> accessed 05/04/2018.

<sup>4</sup> ICCPR, art 9(1).

<sup>5</sup> Andrea Huber (n 1).

by unfairly reversing the burden of proof upon the detainee violating article 14(2) of ICCPR,<sup>6</sup> in favour of “public protection”.<sup>7</sup> It may therefore only be used if there are reasonable grounds of suspicion which require a restriction of liberty.<sup>8</sup> These two limbs of the test must be satisfied in order for a competent authority to order PTD however the practice must be used under the principle of “last resort”.<sup>9</sup> The European Convention on Human Rights (ECHR) provides a legally binding list of circumstances under which a person’s liberty may be restricted pursuant article 5(1)(a-f) which must be interpreted narrowly.<sup>10</sup> The Parliamentary Assembly of the Council of Europe (PACE) has gone further by identifying instances which may amount to an abusive use of PTD including: to force confessions, to discredit political adversaries, to promote foreign policy initiatives, to blackmail the detainee into selling their business, and to intimidate civil society.<sup>11</sup> PACE has identified several causes for this abusive practice, however, the most prominent explanation suggests that legal culture accommodates a skewed power dynamic in favour of the prosecution because it provides the perception that the host state is “tough on crime”.<sup>12</sup>

## 2.2 Case Study

Russia, Italy and Hungary are the three OSCE member states which have been selected to be the subjects of this case study because they provide a balanced geographical representation of the OSCE region. Russia has been chosen because it has been seriously suggested that the country’s “contemporary criminal justice system is still under the significant influence of the Soviet past” which may have significant negative influences on its legal culture,<sup>13</sup> and because of its consistent use of PTD to discriminate against minority

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<sup>6</sup> ICCPR art 14(2).

<sup>7</sup> Martin Schoenteich, ‘Presumed guilty: the quiet human-rights scandal of pre-trial detention’ (*Open Democracy*, 18 October 2014) <https://www.opendemocracy.net/opensecurity/martin-schoenteich/presumed-guilty-quiet-humanrights-scandal-of-pretrial-detention> accessed 22 March 2018.

<sup>8</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (14 December 1990) page 169 <https://digitallibrary.un.org/record/1296532/files/a-conf-144-28-rev-1-e.pdf> accessed 17 March 2018.

<sup>9</sup> ‘A Measure of Last Resort? The practice of pre-trial detention decision making in the EU’ (*Fair Trials*, 26 May 2016) <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> accessed 19 March 2018.

<sup>10</sup> ‘Chapter 5: Human Rights And Arrest, Pre-Trial Detention And Administrative Detention’ (*Office of the High Commissioner for Human Rights*) <http://www.ohchr.org/Documents/Publications/training9chapter5en.pdf> accessed 13 March 2018.

<sup>11</sup> ‘Abuse of pre-trial detention in States Parties to the European Convention on Human Rights’ (*Parliamentary Assembly of the Council of Europe*, 2015) <http://website-pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5> accessed 12 March 2018.

<sup>12</sup> *ibid* sec 1.1.

<sup>13</sup> Kirill D. Titaev, ‘Pretrial detention in Russian criminal courts: a statistical analysis’ (2016) 41(3) 145 *The International journal of comparative and applied criminal justice* <https://doi.org/10.1080/01924036.2016.1239117> accessed 24/04/2018.

groups especially the Lesbians, Gay, Bisexual, Transgender, Inter-sex (LGBTI) community.<sup>14</sup> Italy has been picked because it sits on a migration corridor and therefore processes a significant amount of undocumented foreign nationals.<sup>15</sup> This places strain on an already fragile judicial system,<sup>16</sup> potentially allowing PTD to be used as a quick remedy of choice instead of a fair trial. This is corroborated by the Italian Ministry of Justice which states that the country has the highest percentage of pre-trial detainees in Western Europe – 9,138 individuals were detained before trial in 2015.<sup>17</sup> Hungary also sits on a major migration pathway too and the government's controversial foreign policy regarding immigration made it a prime candidate to investigate in relation to human rights abuses, specifically the abuse of PTD towards foreign nationals.<sup>18</sup> Furthermore in 2013 the government amended the constitution allowing PTD to be unlimited in length in certain cases,<sup>19</sup> which was severely condemned by the Hungarian Helsinki Committee which monitors human rights abuses.<sup>20</sup>

### 3. Applicable Law and Standards

#### 3.1. The United Nations

Torture or ill-treatment is prohibited pursuant article 7 ICCPR,<sup>21</sup> and the necessary criteria for an act to amount to torture pursuant to article 1 UN Convention against Torture (CAT) includes: an qualified intentional act (e.g. specific purpose or based on discrimination), severe pain or suffering (physical or mental) by a lawful authority.<sup>22</sup> Instead, ill-treatment is

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<sup>14</sup> 'Russia: Bureau of democracy, human rights and labor' (*U.S. Department of State*, 3 March 2017) <https://www.state.gov/j/drl/rls/hrrpt/2016/eur/265466.htm> accessed 11 March 2018.

<sup>15</sup> Stefano Stefanani, 'The EU can't solve Italy's migration crisis' (*Politico*, 29 July 2017) <https://www.politico.eu/article/eu-cant-solve-italy-migration-crisis-refugees-mediterranean-sea/> accessed 9 April 2018.

<sup>16</sup> 'Italy's justice system has quite a long road ahead but already scores better – The Italian view' (*OECD ECOSCOPE*, 9 October 2017) <https://oecdecoscope.wordpress.com/2017/10/09/italys-justice-system-has-quite-a-long-road-ahead-but-already-scores-better-the-italian-view/> accessed 02/04/2018.

<sup>17</sup> Grazia Parisi and others, 'The practice of pre-trial detention in Italy; Research Report' (*Antigone*, September 2015) <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf> accessed 21 March 2018.

<sup>18</sup> Marton Dunai, 'Hungary builds new high-tech border fence – with few migrants in sight' (*Reuters*, 2 March 2017) <https://www.reuters.com/article/us-europe-migrants-hungary-fence/hungary-builds-new-high-tech-border-fence-with-few-migrants-in-sight-idUSKBN1692MH> accessed 22 March 2018.

<sup>19</sup> 'The Practice of Pre-Trial Detention: Monitoring Alternative And Judicial Decision-Making' (*Hungarian Helsinki Committee*, October 2015) [https://www.fairtrials.org/wp-content/uploads/PTD\\_country\\_report\\_Hungary\\_HHC\\_2015.pdf](https://www.fairtrials.org/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf) accessed 10 March 2018.

<sup>20</sup> Ivona Bieber and others, 'Promoting the Reform of pretrial detention in CEE-FSU countries – introducing good practices' (*Hungarian Helsinki Committee*, 2013) [https://helsinki.hu/wp-content/uploads/Pre-trial detention in CEE-FSU countries.pdf](https://helsinki.hu/wp-content/uploads/Pre-trial%20detention%20in%20CEE-FSU%20countries.pdf) page 36, accessed 23/04/2018.

<sup>21</sup> ICCPR (n 3) art 7.

<sup>22</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (CAT) art 1, available at: <http://www.refworld.org/docid/3ae6b3a94.html> accessed 14/04/2018.

an umbrella term which covers any intentional act which is inhuman or degrading.<sup>23</sup> There is no requirement of qualified intent therefore no specific aim of the ill-treatment needs to be identified.<sup>24</sup> The ICCPR does not define the concepts of either torture or ill-treatment. However, the Human Right Committee has indicated in its communication in *Vuolanne v Finland* that the “subjective nature” of an act must be considered when trying to distinguish between torture or ill-treatment.<sup>25</sup> This is confirmed by The UN Special Rapporteur on Torture, Cruel, Inhuman and degrading treatment or Punishment, Manfred Nowak, who insists that whether the nature of an act meets the definitional threshold of torture or ill-treatment will depend on the merits of the individual case as there is no objective distinction between the two categories.<sup>26</sup>

A significant soft law measures is The Body of Principles for the Protection of all Persons under Any Form of Detention (1988).<sup>27</sup> It directly specifies the human rights of persons in detention by providing a detailed list of good practice principles which state parties should not violate. Principle 5 for example specifically prohibits detention based upon discrimination.<sup>28</sup> Furthermore, guideline 13(a) of the Guidelines on the role of Prosecutors (1990) prohibits the prosecution from basing their decision-making upon categories which are considered discriminatory.<sup>29</sup> In addition, guideline 17 stipulates that national law must protect the integrity of discretionary powers afforded to the prosecution, such as the ordering of PTD, by ensuring transparency and fairness.<sup>30</sup> Finally, the UN Standard Minimum Rules for Non-custodial measures (Tokyo Rules) indicate that detention should always be employed as a last resort pursuant rule 6.1, that the time period should be proportionate and that due regard to the individual’s human dignity be upheld pursuant rule 6.2.<sup>31</sup> Nahihan Cihangir states that violation of soft law is grounds for the finding of an abusive use of PTD,

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<sup>23</sup> OCHR (n 10).

<sup>24</sup> ‘What is Torture and Ill-treatment’ (*Icelandic Human Rights Centre*) <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-freedom-from-torture-or-cruel-inhuman-or-degrading-treatment-or-punishment/what-is-torture-and-ill-treatment> accessed 13 March 2018.

<sup>25</sup> *Vuolanne v Finland* CCPR/C/35/D/265/1987, UN Human Rights Committee (HRC), 2 May 1989 available at: <http://www.refworld.org/cases,HRC,50b8ee372.html> accessed 12/04/2018.

<sup>26</sup> Manfred Nowak, *UN Convention against Torture: A commentary*, (Oxford University Press 2008), page 73.

<sup>27</sup> UN General Assembly, *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment: resolution/adopted by the General Assembly*, 9 December 1988, A/RES/43/173 available at: <http://www.refworld.org/docid/3b00f219c.html> accessed 13/04/2018.

<sup>28</sup> *ibid* principle 5.

<sup>29</sup> Guidelines on the role of Prosecutors A/CONF.144/28/Rev.1 (1990), art 13(a), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> accessed 13/04/2018.

<sup>30</sup> *ibid* guideline 17.

<sup>31</sup> UN General Assembly, *United Nations Standard Minimum Rules for Non-custodial measures* (Tokyo Rules) A/RES/45/110 (1990), Principles 6.1 and Principles 6.2, available at <http://www.refworld.org/docid/3b00f22117.html> accessed 15/04/2018.

so it is essential for human rights lawyers to take stock of these measures when assessing whether an abusive act amounts to torture or ill-treatment.<sup>32</sup>

### 3.2. The Council of Europe

The ECHR prohibits the use of torture or ill-treatment pursuant article 3 but fails to define the terms explicitly.<sup>33</sup> The late European Commission of Human Rights held in the case of *Denmark v. Greece* that the purpose of the act in question distinguishes torture from inhuman treatment or degrading treatment.<sup>34</sup> However, the ECtHR in *Ireland v United Kingdom* instituted a sliding scale measure based on severity,<sup>35</sup> which was also confirmed in the case of *Aydin v Turkey*.<sup>36</sup> Nonetheless, the purposive approach returned in *Selmouni v France*.<sup>37</sup> Therefore both the severity and purpose of the act should be taken into consideration when distinguishing between torture and ill-treatment.

The first category of ill-treatment underneath the ECtHR jurisprudence is inhuman treatment which is the cornerstone for any claim to amount to torture.<sup>38</sup> The treatment must involve “treatment as deliberately causing severe suffering, mental or physical, which in the particular situation is unjustifiable”.<sup>39</sup> Unlike torture, inhuman treatment requires no purposive element and lacks sufficient severity.<sup>40</sup> However, the ECtHR in *Campbell and Cosans v UK* held that it must cross the upper severity threshold of degrading treatment.<sup>41</sup>

The lowest form of ill-treatment is degrading treatment which must constitute the baseline for any violation of article 3 ECHR.<sup>42</sup> It must also cause “gross humiliation”,<sup>43</sup> and the threshold must be adjudicated from case to case.<sup>44</sup> The ECtHR held in *Ireland v UK* that

<sup>32</sup> Nagihan Cihangir, ‘The role of soft law and the interplay between soft law and hard law in the context of international human rights’ (2017) 8 Law & Justice Review 14.

<sup>33</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (ECHR), art 3, available at: <http://www.refworld.org/docid/3ae6b3b04.html> accessed 11/04/2018.

<sup>34</sup> *ibid.*

<sup>35</sup> *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978).

<sup>36</sup> *Aydin v Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1987).

<sup>37</sup> *Selmouni v France* App no 25803/94 (ECtHR 28 July 1999).

<sup>38</sup> *Ireland v UK* (n 35).

<sup>39</sup> *European Commission of Human Rights. (1970). The Greek case: report of the Commission: application no. 3321/67-Denmark v. Greece, application no. 3322/67-Norway v. Greece, application no. 3323/67-Sweden v. Greece, application no. 3344/67-Netherlands v. Greece* (Commission Decision), available at: [https://www.echr.coe.int/Documents/Denmark\\_v\\_Greece\\_I.pdf](https://www.echr.coe.int/Documents/Denmark_v_Greece_I.pdf) accessed 12/04/2018.

<sup>40</sup> ‘Interpretation of torture in light of the practice and jurisprudence of international bodies’ (OCHR) [http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation\\_torture\\_2011\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf) accessed 25/04/2018.

<sup>41</sup> *Campbell and Cosans v The United Kingdom* App no 7511/76 (ECtHR, 25 February 1982).

<sup>42</sup> *Ireland v UK* (n 35).

<sup>43</sup> *The Greek Case* (n 39).

<sup>44</sup> *Tyler v United Kingdom* App no 5865/72 (ECtHR, 15 March 1978).



there must also “be a minimum level of severity”,<sup>45</sup> and in *East African Asians v United Kingdom* that there must be an interference with the person’s dignity.<sup>46</sup> In relation to intent the ECtHR held in *Peers v Greece* that that a lack of intent will not necessarily prevent a finding of violation of article 3 in relation to degrading treatment.<sup>47</sup>

The main political soft law instrument that will be analysed when assessing whether an act amounts to torture or ill-treatment will be the European Prison rules (EPR) which were adopted by the Council in Europe in 2006 to safeguard the mental and physical well-being of detainees.<sup>48</sup>

## 4. Pre-trial detention as a form of torture or ill-treatment?

For the abusive use of PTD to amount to a form of torture or ill-treatment the following steps must be fulfilled: A) There must be a deprivation of liberty,<sup>49</sup> B) This must have been caused by an abusive act,<sup>50</sup> C) This act must then violate a soft law measure which causes one of the following three elements to be fulfilled:

### 4.1. Three elements

#### 4.1.1. Severity of suffering

For an act to amount to ill-treatment there must be a minimum level of suffering which if found to be significantly severe may lead to a finding of torture. In assessing this definitional threshold, the ECtHR in the case of *Ireland v UK*<sup>51</sup> considered a range of deciding factors:

#### Duration of treatment

The duration of detention can determine the level of mental and physical suffering. The Italian state uses PTD, for example, as a replacement punishment against individuals because of the inevitably excessive length of criminal proceedings within the country.<sup>52</sup> Indeed, a report by Antigone in 2015 found that time limits for PTD can be disproportionately

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<sup>45</sup> *Ireland v UK* (n 35).

<sup>46</sup> *East African Asians v United Kingdom* (1973) 3 EHRR 76 (Commission Decision).

<sup>47</sup> *Peers v Greece* App no 28524/95 (ECtHR, 19 April 2001).

<sup>48</sup> Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, Rec(2006)2, (EPR) available at: <http://www.refworld.org/docid/43f3134810.html> accessed 03/04/2018.

<sup>49</sup> ICCPR (n 3) article 9(1) and ECHR (n 33) article 5(1).

<sup>50</sup> 8 UN Congress (n 8) and PACE Res (n 11).

<sup>51</sup> *Ireland v UK* (n 35), para 162.

<sup>52</sup> Antigone (n 17).

long lasting up to 9 years in some circumstances.<sup>53</sup> This finding is relevant as it significantly violates Tokyo Rule 6.2 which stipulates that PTD should only last as long as is “necessary” because it is meant to be a temporary measure.<sup>54</sup> The extent of the violation of this soft law principle is significantly great to indicate a severe level of both mental and physical suffering which fulfils the second criteria required for an act to amount to torture. This is because 9 years is a manifestly disproportionate amount of time to restrict the liberty of a potentially innocent individual.

In the case of *Gillardo Sanchez v Italy* the ECtHR held that there had been a violation of the right to liberty pursuant article 5(1) ECHR because the applicant had been kept in detention for 18 months.<sup>55</sup> Moreover, in the notorious case of *Labita v Italy* the ECtHR held again that 2 years and 7 months of PTD was excessive especially because the defendant had been acquitted in relation to other proceedings.<sup>56</sup> The facts of both these cases violate Tokyo Rule 6.1 which requires a balancing exercise to be undertaken during criminal proceedings, involving “an investigation of the alleged offence” against “the protection of society and the victim”.<sup>57</sup> The length of detention in these cases also suggests that Italian authorities are more inclined to apply PTD pro forma without regard for due diligence.<sup>58</sup> Although this is a clear violation of the balancing act required under Tokyo rule 6.1 prima facie the duration of detention is unlikely to amount to severe mental or physical suffering because the soft law requirement does not specify a necessary time in which “an investigation of the alleged offence” needs to be concluded.<sup>59</sup> Therefore, the acts in these instances do violate Tokyo Rule 6.1 to some large extent causing deliberate suffering, enough to amount to inhuman treatment.

In a case study conducted by Fair Trials it was revealed that an Algerian national who was detained in Italy in relation to charges of extortion, which he denied, was only acquitted after being held in PTD for 445 days.<sup>60</sup> The individual was not allocated an interpreter and never appeared in court to give evidence.<sup>61</sup> The facts of this case violate guideline 17 of the Guidelines on the role of Prosecutors which requires detaining authorities to carry out PTD in a fair and transparent manner. Denying a foreign national means to communicate and restricting his access to appear and give evidence before a competent

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<sup>53</sup> *ibid.*

<sup>54</sup> Tokyo Rule (n 31) 6.2.

<sup>55</sup> *Gillardo Sanchez v Italy* App no 11620/07 (ECtHR, 24 March 2015).

<sup>56</sup> *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000).

<sup>57</sup> Tokyo Rule (n 31) 6.1.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> Fair Trials (n 9).

<sup>61</sup> *ibid.*

judicial authority significantly undermines the human rights principles of universality<sup>62</sup> and equality which article 17 of this soft law measure aims to protect.<sup>63</sup> Grazia Parisi believes that these examples show how the significantly excessive length of detention is sometimes carried out on purpose as a “retributive” measure,<sup>64</sup> which is a cruel justification. It is therefore submitted that this violation of guideline 17 is significant enough to amount to the upper severity threshold needed to find an act of torture, because the detainee was left absolutely helpless without any means by which to represent himself or communicate within the Italian criminal justice system.

### Physical effects of treatment

The use of PTD can cause detainees to suffer from severe physical side-effects. Confining individuals to a small space without fresh air and sunlight may cause weight loss because of a decrease in appetite.<sup>65</sup> However, it may also increase the risk of obesity because the lack of ability to move around can lead to “low blood sugar, and arthritic joints” which hinder the possibility of undertaking regular exercise.<sup>66</sup> Mikhail Fedotov, the head of the Kremlin’s Human Rights Council, in a 2016 report described how a gulag style detention centre had caused a detained to become incapacitated: “His legs didn’t work anymore after being kept in a punishment isolation cell for months”.<sup>67</sup> This is a clear violation principle 9 of The United Nations Basic Principles for the Treatment of Prisoners which provides that prisoners “shall have access to the health services available in the country”.<sup>68</sup> This is because a health service should be construed to include the accessibility to undertake activities which are essential to maintain optimal physical health. Restricting the ability for an individual to move around to such an extent which leads to irreversible deterioration in mobility violates this soft law principle, causing the detainee to experience cruel and serious physical suffering.<sup>69</sup> It is

<sup>62</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> accessed 04/05/2018.

<sup>63</sup> *ibid*, article 1

<sup>64</sup> Grazia Parisi (n 17) 23.

<sup>65</sup> ‘New research highlights impact of detention on mental and physical health of immigration detainees’ (*Refugee Action*, 23 October 2014) <https://www.refugee-action.org.uk/new-research-highlights-impact-detention-mental-physical-health-immigration-detainees/> accessed 02/05/2018.

<sup>66</sup> Nell Baldwin and Amber Cardoos, ‘Understanding weight change while incarcerated’ (*Brown University*, 24 December 2016) <https://pdfs.semanticscholar.org/d2dc/d6e4e9de6ddb7d8abe09463300968342c396.pdf> accessed 01/05/2018.

<sup>67</sup> Marc Bennetts, ‘Putin’s gulag: Torture and solitary confinement are regular features of Russia’s prison system, and it’s set to get worse’ (*Politico*, 12 July 2016) <https://www.politico.eu/article/putins-gulag-ildar-dadin-moscow-russia/> accessed 21 March 2018.

<sup>68</sup> UN General Assembly, *Basic Principles for the Treatment of Prisoners: resolution/adopted by the General Assembly*, 28 March 1991, A/RES/45/11, principle 9, available at: <http://www.refworld.org/docid/48abd5740.html> accessed 23/04/2018.

<sup>69</sup> *Ireland v UK* (n 35).

therefore submitted that this impact amounts to a severe level of physical suffering which is the second requirement needed for an act to amount to torture.<sup>70</sup>

Prohibiting detainees from being exposed to natural sunlight may also have a detrimental biological effect because it may decrease the amount of vitamin D uptake leading to poor skeletal health.<sup>71</sup> In 2016 a report on the use of PTD in Hungary found that the included restricting “outdoor exercise”.<sup>72</sup> This finding violates rule 27.3 EPR because it deprives detainees of their right to benefit from “adequate exercise”. This aspect of PTD may also increase muscular atrophy which can lead to excessive weight gain,<sup>73</sup> placing strain and causing pain on an already fragile bodily frame. This impact of PTD is unjustifiable because it disregards the safeguards pursuant rule 27.3 EPR which is intended to prevent such consequences.<sup>74</sup> It therefore crosses the gross humiliation threshold required for an act to amount to inhuman treatment because muscle wasting is a severe form of physical suffering.<sup>75</sup>

Amnesty International have also identified stomach pain, anaemia, oral thrush and deteriorating vision among other direct physical consequences of detention.<sup>76</sup> This shows that detention disproportionately increases the physical malaise of individuals which could amount to a violation of section 39 EPR because not enough is being undertaken by prison authorities to “safeguard the health of all prisoners in their care”.<sup>77</sup> These consequences of PTD can amount to a form degrading treatment because acute illnesses and conditions although not necessarily long lasting can nonetheless cause gross humiliation and anguish to detainees which significantly interferes with their personal human dignity. However, in 2016 Fabio Voller and others undertook a study to investigate the physical impacts of detention on detainees concluding that individuals can develop chronic conditions such as

<sup>70</sup> CAT (n 22) art 1.

<sup>71</sup> Benjamin Udoka Nwuosu, ‘The Vitamin D status of prison inmates’ (2014) 9(3) PLOS one <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3944727/> accessed 06/05/2018.

<sup>72</sup> ‘26<sup>th</sup> General Report of the CPT’ (*European Committee for the Prevention of Torture*, 2016) <https://rm.coe.int/168070af7a> accessed 23 March 2018.

<sup>73</sup> ‘Exercise advice for adults with muscle-wasting conditions’ (*Muscular Dystrophy Campaign*, 2015) <http://cmt.org.uk/wp-content/uploads/2015/02/Exercise-advice-for-adults-051214.pdf> accessed 04/05/2018.

<sup>74</sup> EPR (n 47) 27.3.

<sup>75</sup> *The Greek Case* (n 39).

<sup>76</sup> Christopher H. Smith ‘Human Rights in Northern Ireland: Congressional Hearing’ (24 June 1997) 220,

[https://books.google.co.uk/books?id=2GBQRoB4JDYC&pg=PA220&lpg=PA220&dq=stomach+pain,+anaemia,+oral+thrush+and+deteriorating+vision&source=bl&ots=il1dgdfZ\\_y&sig=2mXUuSVzizyUSKKUjDHGL\\_Sa7ikk&hl=en&sa=X&ved=2ahUKewjYIOaI0c3bAhUD3KQKHUKbDPoQ6AEwAHoECAEQKw#v=onepage&q=stomach%20pain%2C%20anaemia%2C%20oral%20thrush%20and%20deteriorating%20vision&f=false](https://books.google.co.uk/books?id=2GBQRoB4JDYC&pg=PA220&lpg=PA220&dq=stomach+pain,+anaemia,+oral+thrush+and+deteriorating+vision&source=bl&ots=il1dgdfZ_y&sig=2mXUuSVzizyUSKKUjDHGL_Sa7ikk&hl=en&sa=X&ved=2ahUKewjYIOaI0c3bAhUD3KQKHUKbDPoQ6AEwAHoECAEQKw#v=onepage&q=stomach%20pain%2C%20anaemia%2C%20oral%20thrush%20and%20deteriorating%20vision&f=false) accessed 23/04/2018.

<sup>77</sup> EPR (n 47) 39.

type 2 diabetes mellitus.<sup>78</sup> Goodwin argues that these chronic conditions can exacerbate already fragile individuals, making them more susceptible to depressive episodes.<sup>79</sup> In this instance the violation under rule 39 EPR is so significant that it is submitted that it crosses the severity threshold of inhuman treatment and amounts to torture because chronic conditions are long-lasting and thus take a serious physical burden upon individuals who but for the detention would not have developed the condition.

### Mental effects of treatment

The mental impact caused by PTD on detainees may amount to a severe level of suffering in certain circumstances. The World Health Organization has identified a list of severe mental impacts including: isolation from families and social networks, aggression, shame, and concern about re-integration into the outside world.<sup>80</sup> Rule 40.4 EPR states that the detaining authority should implement measures that “detect and treat” mental illnesses of individuals.<sup>81</sup> However, it appears from recent research conducted by Bobrek and others at the London School of Tropical Medicine that Russian detainees nonetheless have high levels of mental illness notwithstanding the fact that Russia is a member of the Council of Europe who adopted these rules of good practice in 2006.<sup>82</sup> The research found that adapting to a lifestyle of imprisonment “is often extremely difficult, frequently resulting in depression and anxiety”.<sup>83</sup> However, Hanley recognises this “environmental stress”<sup>84</sup> as a typical collateral consequence of detention. This therefore suggests that while the mental impact of PTD may involve some level of mental suffering it is likely that this only reaches the level required for an act to amount to degrading treatment because it is sufficient enough to cause gross humiliation, anguish and interfere with the personal dignity of the individual,<sup>85</sup> yet not sufficiently severe enough to amount to inhuman treatment.

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<sup>78</sup> Fabio Voller and others, ‘Health conditions of inmates in Italy’ (*BMC Public Health*, 1 June 2016) <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-016-3830-2> accessed 12/04/2018.

<sup>79</sup> Guy M. Goodwin, ‘Depression and associated physical diseases and symptoms’ (2006) 8(2) *Dialogues Clinical Neuroscience* 259, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181771/> accessed 10/04/2018.

<sup>80</sup> ‘Prisons can seriously damage your mental health’ (*Prison Reform Trust*, 1999) <http://www.prisonreformtrust.org.uk/uploads/documents/Mentalhealthsmall.pdf> accessed 13/04/2018.

<sup>81</sup> EPR (n 47) 40.4.

<sup>82</sup> Alexey Bobrik and others, ‘Prison health in Russia the larger picture’ (2005) 26(1) *Journal of Public Health Policy* 30 [https://www.researchgate.net/publication/7834446\\_Prison\\_Health\\_in\\_Russia\\_The\\_Larger\\_Picture](https://www.researchgate.net/publication/7834446_Prison_Health_in_Russia_The_Larger_Picture) accessed 21/04/2018.

<sup>83</sup> *ibid.*

<sup>84</sup> Craig Hanley, ‘Prison Effect in the Era of Mass Incarceration’ *The Prison Journal* (25 July 2012) Page 3 <http://journals.sagepub.com/doi/pdf/10.1177/0032885512448604> accessed 23/04/2018.

<sup>85</sup> *The Greek Case* (n 39) and *Ireland v UK* (n 35).

However, Craig Hanley maintains that it is also recognized from research that “very high levels of prison stress can take a special psychological toll”.<sup>86</sup> This may manifest itself in the form of post-traumatic stress disorder which is ten times more likely to effect detainee.<sup>87</sup> In such a circumstance it is argued that the preventative thrust of rule 40.4 which exists to deter mental illness has been violated to such an extent that it is very likely that the detainee has experienced unjustifiably intense and deliberate severe suffering which is necessary for an act to amount to inhuman treatment,<sup>88</sup> because there is disproportionate increased statistical risk of developing a special mental disorder.

The mental effects of PTSD may also affect the relatives of detainees. For example, a case report by the UN Development Program described how the long-term mental effect upon detainees not only effects them significantly but also their family and future generations.<sup>89</sup> A case study of a detainee was presented describing how a four week period of detention had caused his “wife to suffer a nervous breakdown and so disturbed his son that he had to be given psychiatric treatment”.<sup>90</sup> Rule 107.4 EPR places an obligation on detaining authorities to ensure that released detainees are re-integrated into their family life.<sup>91</sup> However, the data from the UN report suggests that even after only a month detention the family life of the detainee can be disproportionately affected by the ordeal of detention.<sup>92</sup> While it doesn’t necessarily indicate a violation of section 107.4 it does suggest that the period in detention has adversely impacted the family unit’s mental wellbeing enough to cause gross humiliation and mental anguish interfering with their dignity, both of which are criteria for an act to amount to degrading treatment.<sup>93</sup>

#### Sex, age and state of health of the victim

Specific attributes of a person may sometimes render them more susceptible to otherwise normal treatment because they belong to a vulnerable category of individuals. This was the ECtHR’s finding in the case of *Romanov v Russia* in which it was held that severe overcrowding had caused a detrimental effect upon the already fragile mental state of the individual, amounting to degrading treatment pursuant article 3 ECHR.<sup>94</sup> This suggests that

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<sup>86</sup> Craig Hanley (n 81).

<sup>87</sup> *ibid.*

<sup>88</sup> *Ireland v UK* (n 35).

<sup>89</sup> ‘The socioeconomic impact of pretrial detention’ (*Open Society Justice initiative*, 2010) [www.undp.org/content/dam/undp/library/Democratic%20Governance/a2j-%20Socioeconomic%20impact%20of%20PTD%20OSI%20UNDP.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/a2j-%20Socioeconomic%20impact%20of%20PTD%20OSI%20UNDP.pdf) accessed 11 March 2018.

<sup>90</sup> *Ibid.*

<sup>91</sup> EPR (n 47) 107.4.

<sup>92</sup> Open Society Justice Initiative (n 88).

<sup>93</sup> CAT (n 22) art 1.

<sup>94</sup> *Romanov v Russia* App no 63993/00 (ECtHR, 20 October 2005).

the threshold of severity of the treatment must be lowered for those who have personal vulnerable dispositions, including:

### *LGBTI*

LGBTI identity is often used as a source of mental manipulation by detaining authorities in the form of intimidatory behaviour such as acts of physical or sexual violence. This causes LGBTI detainees to feel unsafe which causes their “physical, psychological and social health needs” to be neglected.<sup>95</sup> The Special Rapporteur on Torture has stated that LGBTI minorities face “double or triple discrimination” compared to heterosexual individuals,<sup>96</sup> and that public officials usually respond by isolating these minorities in solitary confinement which exacerbates their vulnerable mental state.<sup>97</sup> This is a clear violation of section 40.4 EPR which places a positive obligation on member states to monitor both the physical and mental well-being of detainees.<sup>98</sup> Sexual orientation should not be used as a factor to determine how well individuals are safeguarded from potential mental and physical suffering. Locking an LGBTI person by themselves for long periods of time to protect them from potential aggressors fails to consider the basic needs that a human being requires for optimal mental and physical health. Therefore, it is submitted that this violation of rule 40.4 is significant enough to amount to inhuman treatment because the isolation of LGBTI is unjustifiable as it is based solely on gender identity; a deliberate form of discrimination which can cause intense mental suffering.<sup>99</sup>

The Institute of Medicine published research in 2011 which showed that LGBTI detainees “face more health inequities when compared with heterosexuals [...] higher rates of chronic illnesses, like cardiovascular disease and certain forms of cancer, as well as mental health concerns, like depression, anxiety and suicide”.<sup>100</sup> Indeed, a report by the Special Rapporteur for torture remarked that LGBTI persons “are often considered as a sub-category of prisoners”.<sup>101</sup> This significantly violates rule 40.4 EPR to such an extent that it is submitted it amounts to torture. This is because the biological impact includes long term chronic conditions, some of which may be life threatening, and austere psychological

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<sup>95</sup> Paul Gorczynski, ‘LGBT prisoners’ (2016) 29 *The British Psychological Society* 326 <https://thepsychologist.bps.org.uk/volume-29/may-2016/lgbt-prisoners> accessed 27/04/2018.

<sup>96</sup> ‘LGBTI person in detention: addressing discrimination and abuse’ (*Penal Reform International*, 30 October 2013) <https://www.penalreform.org/blog/lgbti-persons-detention-addressing-discrimination-abuse/> accessed 01/04/2018.

<sup>97</sup> *ibid.*

<sup>98</sup> EPR (n 47) 40.4.

<sup>99</sup> *Ireland v UK* (n 35).

<sup>100</sup> Paul Gorczynski, (n 94).

<sup>101</sup> ‘LGBTI persons deprived of their liberty: a framework for preventive monitoring’ (*Penal Reform International*, 2013) [https://www.apr.ch/content/files\\_res/thematic-paper-3\\_lgbti-persons-deprived-of-their-liberty-en-1.pdf](https://www.apr.ch/content/files_res/thematic-paper-3_lgbti-persons-deprived-of-their-liberty-en-1.pdf) accessed 19 March 2018.

impacts. The adverse physical and mental impact upon this minority group is so grave that the effect amounts to a severe level of suffering which is required for an act to amount to torture.<sup>102</sup>

PTD is also administered in a discriminatory manner against LGBTI such as in the case of *OM v Hungary*.<sup>103</sup> The ECtHR held that the Hungarian government had conducted an arbitrary detention based on sexual identity.<sup>104</sup> This violates Tokyo Rule 2.2 which states that PTD must be administered without discrimination, which can include sexual orientation.<sup>105</sup> Human Rights Watch condemned the case because the Hungarian government also “failed to take into account his [the individual’s] vulnerability in detention arising from his sexual orientation”.<sup>106</sup> This goes against principle 1 of the Protection of all Persons under Any Form of Detention which aims to uphold the respect for the human dignity of the detainees. The detaining authorities not only conducted a targeted discriminatory detention but also failed to consider the fact that being a gay asylum seeker would make him more vulnerable in detention. This case is important because it means that the threshold of the severity of suffering for LGBTI detainees should be lowered to compensate for the significantly disproportionate behaviour enacted towards them. In this case it is submitted that this act of discrimination and disrespect for human dignity amounts to inhuman treatment because it is an unjustifiable employment of PTD, placing the individual in a vulnerable position within the criminal justice system and a deliberate attempt to target minority groups causing intense mental suffering.<sup>107</sup>

### *Women*

Belonging to a specific gender can also increase the severity of suffering experienced by the detainee. According to Ashdown and James women in PTD already “tend to have a background of physical and emotional abuse, mental health problems, and alcohol or drugs dependency”.<sup>108</sup> In a review published by the International Review of the Red Cross it was found that PTD can exacerbate the mental well-being of women who are already vulnerable

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<sup>102</sup> CAT (n 22) art 1.

<sup>103</sup> *OM v Hungary App no 9912/15* (ECtHR 2016).

<sup>104</sup> ‘European court strikes against Hungary’s arbitrary detention of LGBT asylum seekers’ (ILGA Europe, 5 July 2016) <https://www.ilga-europe.org/resources/news/latest-news/european-court-strikes-against-hungarys-arbitrary-detention-lgbt-asylum> accessed 13 March 2018.

<sup>105</sup> Tokyo rule (n 31) 2.2.

<sup>106</sup> ‘Human Rights Watch Country Profiles: Sexual orientation and Country Profiles’ (Human Rights Watch, 23 June 2017) <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity> accessed 24/04/2018.

<sup>107</sup> *The Greek case* (n 39) and *Ireland v UK* (n 35).

<sup>108</sup> Julie Ashdown and Mel James, ‘Women in detention’ 92 *International review of the Red Cross* 877 (IRC, March 2010) <https://www.icrc.org/eng/assets/files/other/irrc-877-ashdown-james.pdf> accessed 14 March 2018.



and at risk.<sup>109</sup> The negative psychological impact upon women is compounded during PTD because “the special needs of women” are often not met by detention centres which are essentially designed for men,<sup>110</sup> which also enables a culture of invisibility to arise in which women are in practice ignored by detaining authorities.<sup>111</sup> This is supported by research which indicates that women are also more likely to suffer from gender-based harm including “sexual assault and exploitation”.<sup>112</sup> These acts are a clear violation of the duty that public authorities are under to ensure the physical and mental health of women pursuant rule 34.1 EPR.<sup>113</sup> Failing to mitigate against the vulnerable predispositions of women in PTD and then failing to account for these needs by placing them in male dominated surroundings is not only unjustifiable but is also a deliberate act which contravenes the good principles established by rule 34.1 EPR to such a degree that these acts cause intense suffering amounting to inhuman treatment.<sup>114</sup>

Detained women are also likely to be single mothers which means that their children are likely not left with a carer during her period in detention.<sup>115</sup> Separation from dependent children can cause significant mental anguish for mothers, including guilt, anxiety and depression.<sup>116</sup> This suggests a significant violation pursuant rule 34.1 EPR which exists to ensure that the “vocational” needs are met.<sup>117</sup> Not being able to attend to relatives who are dependent upon you is surely unjustifiable because it forces a person to abandon their familial commitments causing a severe level of suffering tantamount to inhuman treatment.

### *Minors*

Minors are a third category of vulnerable persons who are at risk of experiencing severe levels of suffering during PTD because they are a minority and vulnerable age group. Human Rights Watch published a report in 2015 describing how the Hungarian detention system does not consider the mental risks minors face when they are detained together with unrelated adults.<sup>118</sup> The psychological repercussions in later life for these minors can be very

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<sup>109</sup> *ibid.*

<sup>110</sup> *ibid* 125.

<sup>111</sup> Michelle Brane and Lee Wang, ‘Women: the invisible detainees’ Forced migration review (*University of Oxford*, September 2013) <http://www.fmreview.org/detention/brane-wang.html> accessed 05/05/2018.

<sup>112</sup> *ibid.*

<sup>113</sup> EPR (n 47) 34.1.

<sup>114</sup> *The Greek case* (n 39) and *Ireland v UK* (n 35).

<sup>115</sup> Megan Bastik and Laurel Townhead, ‘Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners’ (*Quaker United Nations Office*, April 2006) [http://www.peacewomen.org/assets/file/Resources/NGO/HR\\_Prisoners\\_QUNO\\_2008.pdf](http://www.peacewomen.org/assets/file/Resources/NGO/HR_Prisoners_QUNO_2008.pdf) accessed 23/04/2018 23/04/2018.

<sup>116</sup> *ibid* 41.

<sup>117</sup> EPR (n 47) 34.1.

<sup>118</sup> ‘Hungary Immigration Detention profile’ (*Global detention project*, September 2016) <https://www.globaldetentionproject.org/countries/europe/hungary> accessed 27 March 2018.

significant according to the Open Society foundation: “A child who is detained is more likely to drop out of school and face diminished chances of getting a job”.<sup>119</sup> This is evidence that the special needs of children pursuant rule 11 EPR are violated when using PTD incurring a detrimental impact on the psychological wellbeing of the children.<sup>120</sup> It is submitted that this amounts to degrading treatment because it is a clear lack of respect for the dignity of children.<sup>121</sup>

The literature also indicates that a significant proportion of detained minors occurs within Italy because it is often the first arrival point for migrants and especially unaccompanied minors. The proportion of minors detained by the Italian authorities between 2001 and 2007 rose from 65% to 84% showing a steady willingness to employ PTD against juveniles.<sup>122</sup> This is an infringement of Tokyo rule 2.2 which is meant to deter detention based on age.<sup>123</sup> It is therefore submitted that detaining an individual based on their age is a violation of their dignity amounting to an act of degrading treatment.

#### 4.1.2. Specific purpose

The UN Special Rapporteur on Torture, Manfred Nowak, stated in a 2006 report that the specific purpose of an act must be taken into consideration when distinguishing between torture from a form of ill-treatment.<sup>124</sup> This was confirmed by the ECtHR in the case of *Dikme v Turkey* in which the court held “that the infliction of ill-treatment was carried out with the aim of extracting a confession or information about the offences of which Mr Dikme was suspected”.<sup>125</sup>

#### Russia

The Russian authorities frequently use PTD for the specific purpose of forcing a detainee to confess to a crime they did not commit and to force a detainee to testify against third parties.<sup>126</sup> Furthermore, “The risk of confession being extorted is even higher”<sup>127</sup> in countries

<sup>119</sup> Tomasini and Keillor, ‘Protecting children in pretrial detention’ (*Open society foundations*, 29 March 2012) <https://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention> accessed 23 March 2018.

<sup>120</sup> EPR (n 47) 11.

<sup>121</sup> *Ireland v UK* (n 35).

<sup>122</sup> ‘An analysis of minimum standards in pretrial detention and the grounds for regular review in the Member states of the EU’ <http://www.ecba.org/extdocserv/projects/JusticeForum/Italy180309.pdf> accessed 12 March 2018.

<sup>123</sup> Tokyo rule (n 31) 2.2

<sup>124</sup> ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment’ (UN Doc. E/CN.4/2006/6) <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm> accessed 02/04/2018

<sup>125</sup> *Dikme v Turkey* App no 20869/92 (ECtHR, 11 July 1999).

<sup>126</sup> Krill (n 13).

which employ hostile anti-gay rhetoric such as The Chechen Republic.<sup>128</sup> Targeting LGBTI people with a view to force a confession and testifying against third parties not only undermines the presumption of innocence under article 5 ICCPR<sup>129</sup> but is also discriminatory act which is prohibited under Tokyo rule 2.2.<sup>130</sup> This violation is a deliberate and unjustifiable act which amounts to inhuman treatment because it is an instrumentalist approach to the law which uses juridical concepts to benefit corrupt public authorities.

Another purpose of PTD is to put pressure on detainees in order to compel them to sell their business such as in the case of Vladimir Gusinsky.<sup>131</sup> The ECtHR in 2004 ruled that the “Russian authorities used a politically motivated criminal investigation in 2000 to try to take over the print and broadcast operations of Russian media mogul Vladimir Gusinsky”.<sup>132</sup> This is a violation pursuant guideline 17 of the Guidelines on the Role of Prosecutors which prescribe that discretionary powers afforded to the prosecution such as the granting of PTD should only be employed on the basis of a transparent and fair assessment of the alleged offence.<sup>133</sup> As there has been no offence this act of PTD against an individual is a form inhuman treatment because it is unjustifiable and deliberately manufactured because of a corrupt legal culture.

### Discrimination

Italy also uses PTD in a discriminatory manner towards foreign nationals possibly to deter migrant flow into the country.<sup>134</sup> Statistics published by the Italian Ministry of Justice showed a strong correlation between the progression of the migrant crisis from 2010-2015 and an increase in the number of foreign nationals held in PTD from 38.6% to 40.7%.<sup>135</sup> An empirical study conducted by Antigone concluded that “foreign nationals are clearly over presented in prison, but this is particular true for precautionary detention measures”.<sup>136</sup> Furthermore, the Hungarian Helsinki Committee commented that the Roma community are

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<sup>127</sup> Andrea Huber, ‘LGBTI persons in detention: addressing discrimination and abuse’ (*Penal Reform International*, 30 October 2013) <https://www.penalreform.org/blog/lgbti-persons-detention-addressing-discrimination-abuse> accessed 13/04/2018.

<sup>128</sup> Sebastian Malo, ‘LGBTI Chechens covertly brought to Canada, granted asylum’ (*Reuters*, 8 September 2017) <https://www.reuters.com/article/us-canada-lgbt-chechens/lgbt-chechens-covertly-brought-to-canada-granted-asylum-idUSKCN1BJ2D6> accessed 11/04/2018.

<sup>129</sup> ICCPR (n 3) art 5.

<sup>130</sup> Tokyo rule (n 31) 2.2.

<sup>131</sup> ‘European Court Of Human Rights condemns Russia in media case’ (*Committee to protect journalists*, 20 May 2004) <https://cpj.org/2004/05/european-court-of-human-rights-condemns-russia-in.php> accessed 14 March 2018.

<sup>132</sup> *ibid.*

<sup>133</sup> Guidelines on the Role of Prosecutors (n 29) 17.

<sup>134</sup> Parisi (n 17).

<sup>135</sup> *ibid* 21.

<sup>136</sup> *ibid.*

more likely to be held in PTD because of their ethnicity.<sup>137</sup> Detaining an individual because of their nationality or ethnicity violates Principle 5 of the Body of Principle for the Protection of All Persons under Any Form of Detention or Imprisonment and guideline 13(a) of the Guidelines on the Role of prosecutors which prohibits detention on the basis of ethnic or national origin by prosecuting officials.<sup>138</sup> To use PTD upon a class of individuals because they belong to a certain community is unjustifiable under these soft law instruments and is a deliberate attack the human dignity of these people, enough to amount to an act of inhuman treatment.

#### 4.1.3. *Powerlessness of victim*

The powerlessness of the victim of PTD may be taken into consideration when distinguishing between torture or ill-treatment.<sup>139</sup> A research paper by the Open Society Justice Initiative in relation to PTD and torture defines powerlessness as a “situation where the victim is [...] under the total control of another person”.<sup>140</sup> For the purposes of these memorandum it is taken for granted that detainees are powerless because they are under complete control of the detaining authority whilst in PTD.

#### 4.2. Evolution of the definitional threshold

The fourth element which may be considered when assessing whether an act amounts to torture or ill-treatment is whether the act may be interpreted under a different category in the present situation. The CAT committee has suggested that this is because “In practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment is often not clear”.<sup>141</sup> Indeed the International Committee of the Red Cross has criticised the narrow approach of placing acts into specific categories stating that “a strict definition listing every prohibited act would simply test the apparently endless ingenuity of torturers rather than providing effective protection to their victims”.<sup>142</sup> This is useful for lawmakers to note because it means that acts which may have been previously interpreted as amounting to torture or ill-treatment may be interpreted differently in the future. This principle was reaffirmed in the decision in *Tyrer v United Kingdom* in which the ECtHR restated the living

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<sup>137</sup> Bieber (n 20) 36.

<sup>138</sup> UN General Assembly (n 27) art 13(a).

<sup>139</sup> Nowak (n 28) 77.

<sup>140</sup> ‘Pretrial detention and torture: why pretrial detainees face the greatest risk’ (*Open Society Justice Initiative*, 2011) [www.bristol.ac.uk/media-library/sites/law/migrated/documents/osjptd2011.pdf](http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/osjptd2011.pdf) accessed 23 March 2018.

<sup>141</sup> OCHR (n 40).

<sup>142</sup> ICRC Commentary on the Geneva Conventions, IV Convention, International Committee of the Red Cross, Geneva, 1958 (Reprinted 1994), pp. 38-39.

instrument doctrine and held that the Convention is “a living instrument, which must be interpreted in the light of present-day conditions”.<sup>143</sup>

## 5. Conclusion

This legal memorandum has provided a detailed overview of the instances in which the abusive use of Pre-trial detention can amount to torture or ill-treatment under international human rights law by applying soft law provisions in specific cases to assess the severity and purpose of the act. The findings reveal that whether an abusive use of PTD amounts to either torture, inhuman or degrading treatment will often depend from case to case. However, in general the threshold for an act to amount to torture is considerably high, therefore it is most likely that an abusive use of PTD will often amount to either degrading or inhuman treatment. It is hoped that the detailed examples provided in section four will, to some extent, provide a working structure for the international community to manoeuvre this area of international human rights law.

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<sup>143</sup> *Tyler v UK* (n 43).

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