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Technical Assistance for Strengthening Fundamental Rights Sector Coordination

COMPARATIVE STUDY ON PREVENTION OF TORTURE AND ILL-TREATMENT (FRANCE-GERMANY-THE NETHERLANDS)



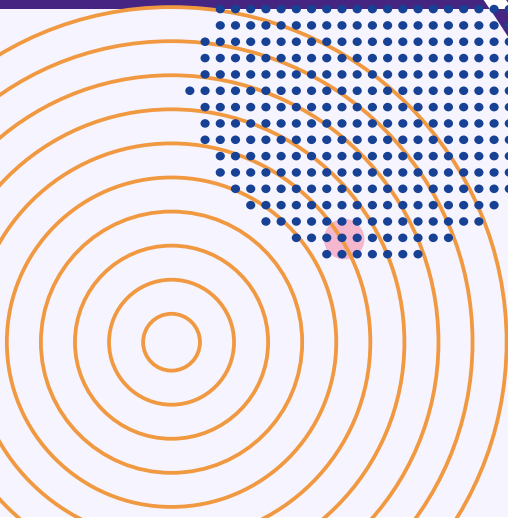
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PREVENTION OF TORTURE
AND ILL-TREATMENT
(FRANCE-GERMANY-THE NETHERLANDS)**

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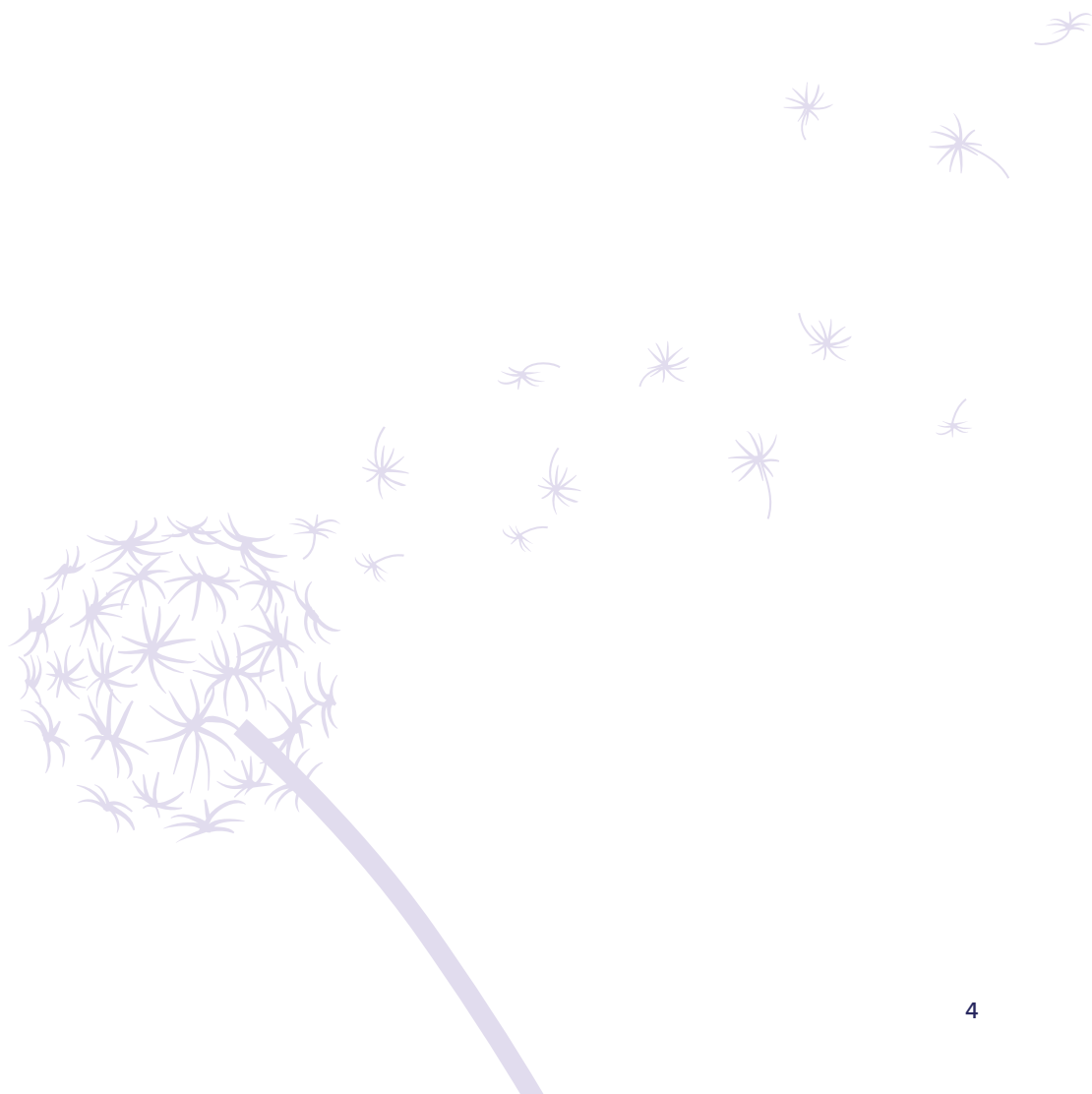
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LIST OF ABBREVIATIONS

CAT	Committee against Torture
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SPT	UN Subcommittee on Prevention of Torture
UN	United Nations
UNCAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment



1. Introduction



The prohibition of torture is one of the fundamental values of a democratic society and is an absolute prohibition. Moreover, the prohibition of torture, a part of international law, is a *jus cogens*¹ norm. This absolute nature of the prohibition of torture and ill-treatment has led to the prohibition of such acts, considered the most severe attack against human dignity and personality, in international law.² Directly linked to human dignity, this right constitutes the core of the right to life and the right to the integrity of one's material and spiritual existence. Since the prohibition of torture and ill-treatment is a fundamental component of human rights, it is not possible to establish a fair, safe and dignified order if this prohibition is not applied. To this end, this absolute prohibition is guaranteed in international and regional human rights conventions, especially Article 5 of the 1948 Universal Declaration of Human Rights. In addition, torture is regulated as an act of crime against humanity in the Rome Statute of the International Criminal Court.

This study comparatively examines the prohibition of torture and ill-treatment through France, Germany and the Netherlands³ which are Member States of the European Union (EU) and party to the European Convention on Human Rights (ECHR) and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The comparison of these three Member States focuses on legislation, institutional structure and practices regarding the prohibition of torture and ill-treatment. While determining the Member States, we aimed to select Member States which are the founding members of the EU and adopt an understanding of human rights in line with the EU *acquis* while establishing systems with different national legal traditions, thus offering good examples.

To this end, in order to examine the selected countries, the first part of the study primarily focuses on international standards and the EU *acquis*, followed by the discussion of the legislation of each Member State regarding the prohibition of torture and ill-treatment as well as the aims of each legislation. The second part of the study examines the institutional structures established by Member States to implement the prohibition of torture and ill-treatment, while the third part explains how the prohibition is implemented in Member States.

2. International Standards



The prohibition of torture as a universal right is based on key instruments such as United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its Optional Protocol (OPCAT). At the regional level, torture is similarly prohibited by conventions such as the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Other important legal instruments, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Code of Conduct for Law Enforcement Officials, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', the Basic Principles for the Treatment of Prisoners, also prohibit torture and ill-treatment and impose various obligations on states. International standards provide for negative obligations for states not to torture as well as positive obligations related to the prevention of and protection against torture and the development of policies for effective investigation and prevention of torture. To this end, the international community has developed many legal instruments and mechanisms to effectively combat torture and ill-treatment,⁴ thus aiming to establish universally applicable standards against torture and other cruel, inhuman or degrading treatments.

¹ Jus cogens rules, meaning 'peremptory rules', refer to the rules which are introduced to protect the values that must be secured primarily for the common benefit of the international community and which should be complied with as the primary obligation of the members of the international community.

² M. Nowak (2005), Challenges to the Absolute Nature of the Prohibition of Torture and Ill Treatment', 23 Neth. Q. Hum. Rts 674.

³ This study examines only the Netherlands, not Aruba, Curaçao and SintMaarten, which are constituents of the Kingdom of the Netherlands.

⁴ For detailed information see <https://rm.coe.int/16806f11a3>.

As the fundamental UN convention providing protection against torture, UNCAT lays down important principles. Briefly, states are required to take effective legal, administrative, judicial and other measures to prevent torture, and to preserve the absolute nature of the prohibition of torture. States have also obligations of prevention, protection and ex officio effective investigation regarding the prohibition of torture. Human rights documents published by the UN and regional organisations impose obligations on the States Parties to establish institutions at the local level or assign existing institutions for purposes such as implementing the documents as well as encouraging and monitoring the implementation. Prepared for this purpose, OPCAT aims to strengthen the protection of the rights of persons deprived of their liberty. In order to prevent torture and other cruel, inhuman or degrading treatment or punishment, the OPCAT aims to establish a system of regular visits by international and national organizations to places where persons are deprived of their liberty.

On the other hand, the 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Istanbul Protocol), as the first international guide on the documentation of torture and its consequences, was prepared to enable States to more effectively protect individuals from torture and ill-treatment and to hold criminals accountable for their actions. Moreover, the Istanbul Protocol also determines the minimum standards which should be complied with by states and health officials to effectively prove torture and ill-treatment. To this end, the Istanbul Protocol was revised in 2022.⁵

The UN Subcommittee on Prevention of Torture (SPT) is responsible for monitoring the implementation of the UNCAT in the States Parties, which report, through the Secretary-General of the United Nations, to the Subcommittee on the measures they have taken to implement the obligations introduced by the Convention. The Subcommittee regularly evaluates the measures taken by the States Parties and allegations of torture and may make recommendations. The Subcommittee considers each report and may make general comments and recommendations, which can be included in annual reports submitted to States Parties and the UN General Assembly. In the countries where the right to make individual applications to the Committee is accepted, individuals can make individual applications. On the other hand, the Special Rapporteur on Torture is a mechanism authorised by the UN through special procedures and monitors the practices of States Parties regarding the prohibition of torture and ill-treatment.

On the other hand, the prohibition of torture is regulated in Article 3 of the ECHR, to which all EU Member States are parties, as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Unlike the general rights laid down by the ECHR, the prohibition of torture has been considered an absolute right, leaving no room for exceptions.⁶ Broadly speaking, the 'prohibition of torture' covers three different types of ill-treatment. These forms of ill-treatment include inhuman or degrading treatment as well as torture. The difference between these types of ill-treatment is the 'level of severity' of suffering caused by the treatment. In order for ill-treatment to fall within the scope of Article 3 of the ECHR, it must reach a minimum level of severity. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.⁷

In addition to the ECHR, the Council of Europe has adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention for the Prevention of Torture). Like the UN Subcommittee on Prevention of Torture, the European Convention for the Prevention of Torture established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT regularly visits Member States of the Council of Europe, sometimes for short periods of time and for *ad hoc* purposes, to evaluate and report on the treatment of persons under surveillance. The CPT sets general standards for persons deprived of their liberty, makes recommendations and evaluates States' responses.⁸

Moreover, the 'principle of non-refoulement' regulated in Article 33 of the 1951 Geneva Convention Relating to the Legal Status of Refugees is also considered within the scope of the prohibition of torture in the law of the European Court of Human Rights (ECtHR) and any expulsion/return contrary to this principle may lead to a violation of Article 3 of the ECHR.⁹

5 For the revised Istanbul Protocol see https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf.

6 <https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture>

7 ECtHR *Labita v. Italy* [GC], no. 26772/95, 06/04/2000, § 120.

8 For the standards and tools of the CPT see <https://www.coe.int/en/web/cpt/standards>

9 Among many decisions, see ECtHR *Saadi v. Italy* [GC], no. , 28/02/2008.

3. EU Acquis



The importance of the prohibition of torture and ill-treatment led to the wide coverage of this prohibition in the EU *acquis*. Article 1 of the EU Charter of Fundamental Rights ensures that ‘human dignity’ cannot be violated and is respected. In parallel with Article 3 of the ECHR, Article 4 of the EU Charter of Fundamental Rights also governs the prohibition of torture or inhuman or degrading treatment or punishment. Article 4 states that ‘*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*’. The regulations regarding this prohibition are accepted by the EU as an important legal framework aiming to protect human rights and fundamental freedoms.

The EU has accepted the prohibition of torture as a priority policy, and published the ‘Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, which was revised in 2019.¹⁰ With the Guidelines, the EU reaffirms its strong commitment to combating torture and other forms of ill-treatment in line with relevant international and regional agreements and standards. In order to completely eliminate torture and ill-treatment, the EU aims to establish and implement effective mechanisms to prevent torture and to severely punish violations of torture and ill-treatment.

These Guidelines should be evaluated together with the ‘EU Guidelines on Death Penalty’¹¹. This policy document pursues an approach that covers all elements regarding prevention, punishment, ensuring accountability and redressing the damage suffered by the victims of torture. To this end, the relevant regulations strictly prohibit torture, inhuman or degrading treatment and aim to enable Member States to prevent and punish such violations.¹² It would be useful to discuss another regulation regarding the compensation of the damage suffered by the victims of torture. In this regard, Member States are required to transpose the Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.¹³ Laying down positive and negative obligations on Member States regarding the prohibition of torture and ill-treatment in order to reinforce the understanding of respect and protection of human rights and to secure the rights of all individuals, these regulations enable Member States to effectively implement this prohibition in their domestic laws and to be accountable at the international level when necessary. The EU adopts a holistic and proactive approach to the prevention of torture, focuses on prevention, protection and rehabilitation of victims, and aims to compensate victims of torture. On the other hand, in a country investigated within the scope of the Human Rights Country Strategy regarding torture, the EU Heads of Mission should conduct an investigation, evaluate the measures taken and report. The EU aims to take effective measures to prevent torture in other countries and emphasises compliance with international standards.

Regarding institutional mechanisms, the most important institutions are the Court of Justice of the European Union (CJEU) which has jurisdiction over cases regarding allegations of torture and ill-treatment, and the European Union Agency for Fundamental Rights (FRA) which is an independent body that promotes and protects human rights. The Report titled ‘Criminal detention conditions in the European Union: rules and reality’¹⁴ published by the FRA should be taken into account as a tool explaining the practices in Member States.

Finally, regarding the prohibition of torture, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection provides for the obligation of Member States to ensure a dignified standard of living in procedures regarding the reception of application for international protection.¹⁵

10 For the Guidelines see <https://www.consilium.europa.eu/media/40644/guidelines-st12107-en19.pdf>

11 https://www.eeas.europa.eu/sites/default/files/08_hr_guidelines_death_penalty_en.pdf

12 For example see: ‘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)’, [https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/108358/133894/F-1305032864/EEU-18358%20\(EN\).pdf](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/108358/133894/F-1305032864/EEU-18358%20(EN).pdf); for detailed information see <https://www.entreprises.gouv.fr/fr/echanges-commerciaux-et-reglementation/service-des-biens-double-usage/anti-torture>.

13 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029>.

14 For the Report see https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf

15 For the Directive see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>

4. National Legislation of Member States on the Prohibition of Torture and Ill-Treatment



4.1. France

In France, one of the founding members of the EU and a party to the ECHR and UNCAT, the only constitutional regulation regarding the prohibition of torture and ill-treatment was introduced by the provision 'No one shall be sentenced to death' in Article 66-1 of the Constitution of the French Republic¹⁶.

Legal provisions regarding torture and ill-treatment are mainly covered by the French Penal Code (FPC)¹⁷. Article 22-1 titled 'Torture and Acts of Barbarity' in Chapter II titled 'Offences against the Physical or Psychological Integrity of the Person' of Book II of the FPC states that 'the subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment'. Since this provision does not contain any definition of the conditions under which the crime of torture and acts of barbarity will occur, but only provides sanctions, it was addressed in the reports prepared by CAT regarding France, which recommended that France add a definition of torture to its Criminal Code in accordance with Article 1 of UNCAT. However, in its reply to this recommendation, France stated that crimes related to 'torture and acts of barbarity' were interpreted by the courts in accordance with Article 1 of the Convention against Torture, Article 3 of the ECHR and the case of the ECtHR, and therefore no further action would be taken regarding this recommendation.¹⁸

Articles 222-1 to 222-6 of the FPC regulate the aggravation of the crime related to torture and acts of barbarity. Accordingly, torture and acts of barbarity are punished by criminal imprisonment for life where it precedes, accompanies or follows a felony other than murder or rape. If torture and acts of barbarity are committed against people stated in Article 222-3, such offence is punished by twenty years' criminal imprisonment. In line with the above-mentioned provision, torture and acts of ill-treatment against physically or psychologically weak people, family members of the perpetrator, some public officials¹⁹ and their relatives are punished with more severe sanctions in the French legal system. Moreover, this provision provides for the aggravation of the sanctions if torture and acts of barbarity are committed by a person who has the authority to use public power or performs a public service duty, while performing his/her duty or on this occasion. Therefore, this provision can be interpreted as providing for a higher level of protection against being subjected to torture and ill-treatment by public officials in French criminal law. In accordance with the FPC, this offence is also aggravated if torture and acts of barbarity are habitually committed by an organised gang against the persons listed in Article 222-4, if torture and acts of barbarity result in permanent disability pursuant to Article 225-5 or unintentional death pursuant to Article 222-6.

On the other hand, the FPC regulates the commission of torture and acts of barbarity together with other offences as an aggravating reason for these offences. For example, among many types of offences, if offences such as 'aggravated sexual assault' (Article 222-26), 'enslavement' (Article 224-1C), 'trafficking in human beings' (Article 225-4-4), 'procuring' (Article 225-9) and 'extortion' (Article 312-7) are committed through torture and acts of barbarity, the sanctions for such offences are aggravated.

Moreover, in accordance with Article 212-1 of the FPC, if torture is committed in pursuit of a concerted plan against a section of a civil population, this is considered a crime against humanity and punished by criminal imprisonment for life.

¹⁶ https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf

¹⁷ https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719?etatArticle=ABROGE&etatArticle=MODIFIE_MORT_NE&etatArticle=TRANSFERE&etatArticle=VIGUEUR&etatTexte=VIGUEUR&isAdvancedResult=true&nomCode=BfMAIA%3D%3D&nomCode=KQbirA%3D%3D&nomCode=M94xeQ%3D%3D&nomCode=U1cRFQ%3D%3D&nomCode=aQb8lg%3D%3D&nomCode=at3QJA%3D%3D&nomCode=mNqhdw%3D%3D&nomCode=n50U7g%3D%3D&nomCode=zW1Hnw%3D%3D&page=1&page=100&query=%7B%28%40ALL%5Bt%22torture%22%5D%29%7D&tab_selection=code&typePaging=DEFAULT&typeRecherche=etat

¹⁸ CAT/C/FRA/7, paragraph 40-45 and CAT/C/FRA/4-6, paragraph 6-10. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/168/21/PDF/G1516821.pdf?OpenElement>

¹⁹ According to Article 222-3 of the FPC, the public officials are 'a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation'.

Finally, under Article 222-49-1 of the FPC, persons found guilty of torture and acts of barbarity barbarism are subject to socio-judicial probation ('le suivi socio-judiciaire') in accordance with the provisions of Articles 131-36-1 to 131-36-13. Article R322-31 of the French Penitentiary Code²⁰ provides for that persons under socio-judicial probation and persons convicted of torture or acts of barbarity shall serve their sentences in prisons that provide appropriate medical and psychological supervision. These provisions show that in the French criminal law system, punishing the perpetrators of torture and acts of barbarity is not deemed sufficient due to the danger they pose to society, and rehabilitation of these people is sought. Another provision supporting this opinion is found in Article 706-47-1 of the French Code of Criminal Procedure²¹. According to this provision, persons who commit torture and acts of barbarity provided for in Articles 222-1 to 222-6 of the FPC may be subjected to the rehabilitation measures governed by the said provision during or after their conviction as part of socio-judicial probation. Additionally, in Article L312-3 of the French Code on Criminal Liability and Internal Security (*Loi Responsabilité Pénale et Sécurité Intérieure*)²², it is stated that persons who have a criminal record of conviction due to torture and acts of barbarity laid down in Article 222-1 and the following Articles of the FPC cannot acquire or possess weapons, ammunition, etc.

Article 689-1 of the French Code of Criminal Procedure expands France's jurisdiction with respect to persons who have committed the offence of torture. When this provision is evaluated together with the Article 689-2 of the same Code, it is concluded that a person who commits the offence of torture within the meaning of Article 1 of the Convention against Torture outside the territories of France can be prosecuted and tried by French courts if this person is present in France. As a rule, France has jurisdiction over crimes committed in France and, under certain circumstances, over crimes committed abroad, especially where the perpetrator is French or the victim is French. However, under universal jurisdiction, French courts have jurisdiction over crimes committed abroad by a foreign person against a foreign victim acting in an official capacity or by persons in public office. In a current decision in 2023, the French Court of Cassation clarified the conditions under which French courts have jurisdiction to try torture, crimes against humanity or war crimes if they are committed abroad and the perpetrator and victim are not French.²³

Article 173 of the French Code of Criminal Procedure, another provision aimed at preventing torture and ill-treatment, states that 'a prosecutor (or the investigating judge) can initiate the procedure to exclude evidence if they suspect that evidence was obtained by torture.'²⁴ A challenge to the validity of a piece of evidence can be made to the Investigation Chamber of the Court of Appeal (*Chambre de l'Instruction*).

Imposes positive and negative obligations on the state regarding the prevention of torture and ill-treatment with the above-mentioned regulations, France has also introduced provisions that address the issue in terms of relations between individuals. Article 2226 of the French Civil Code²⁵ provides for a ten-year statute of limitations for claims arising from an incident resulting in bodily injury and states that if this damage occurs through torture and acts of barbarity, the statute of limitations will increase to 20 years. As another provision aiming to deter torture and ill-treatment at the level of interpersonal relations, Article 727 of the Civil Code states that persons sentenced to judicial or correctional punishment as perpetrators or accomplices for committing torture and acts of barbarity against the deceased will be deprived of inheritance

20 https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000045476241?etatArticle=ABROGE&etatArticle=MODIFIE&etatArticle=MODIFIE_MORT_NE&etatArticle=TRANSFERE&etatArticle=VIGUEUR&etatTexte=VIGUEUR&isAdvancedResult=true&nomCode=BfMAIA%3D%3D&nomCode=KQbirA%3D%3D&nomCode=M94xeQ%3D%3D&nomCode=U1cRFQ%3D%3D&nomCode=aQb8lg%3D%3D&nomCode=at3QJA%3D%3D&nomCode=mNqhdw%3D%3D&nomCode=n50U7g%3D%3D&nomCode=zW1Hnw%3D%3D&page=1&pageSize=100&query=%7B%28%40ALL%5Bt%22torture%22%5D%29%7D&tab_selection=code&typePagination=DEFAULT&typeRecherche=etat

21 https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154?etatArticle=ABROGE&etatArticle=MODIFIE&etatArticle=MODIFIE_MORT_NE&etatArticle=TRANSFERE&etatArticle=VIGUEUR&etatTexte=VIGUEUR&isAdvancedResult=true&nomCode=BfMAIA%3D%3D&nomCode=KQbirA%3D%3D&nomCode=M94xeQ%3D%3D&nomCode=U1cRFQ%3D%3D&nomCode=aQb8lg%3D%3D&nomCode=at3QJA%3D%3D&nomCode=mNqhdw%3D%3D&nomCode=n50U7g%3D%3D&nomCode=zW1Hnw%3D%3D&page=1&pageSize=100&query=%7B%28%40ALL%5Bt%22torture%22%5D%29%7D&tab_selection=code&typePagination=DEFAULT&typeRecherche=etat

22 https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000025503132?etatArticle=ABROGE&etatArticle=MODIFIE&etatArticle=MODIFIE_MORT_NE&etatArticle=TRANSFERE&etatArticle=VIGUEUR&etatTexte=VIGUEUR&isAdvancedResult=true&nomCode=BfMAIA%3D%3D&nomCode=KQbirA%3D%3D&nomCode=M94xeQ%3D%3D&nomCode=U1cRFQ%3D%3D&nomCode=aQb8lg%3D%3D&nomCode=at3QJA%3D%3D&nomCode=mNqhdw%3D%3D&nomCode=n50U7g%3D%3D&nomCode=zW1Hnw%3D%3D&page=1&pageSize=100&query=%7B%28%40ALL%5Bt%22torture%22%5D%29%7D&tab_selection=code&typePagination=DEFAULT&typeRecherche=etat

23 <https://www.courdecassation.fr/toutes-les-actualites/2023/05/12/communiqu%C3%A9-competence-universelle-de-la-justice-fran%C3%A7aise-16948>

24 For detailed information see https://cti2024.org/wp-content/uploads/2021/01/CTI-Exclusionary_Rule_Tool_8-2020_FINAL_.pdf, p. 6

25 https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatArticle=ABROGE&etatArticle=MODIFIE&etatArticle=MODIFIE_MORT_NE&etatArticle=TRANSFERE&etatArticle=VIGUEUR&etatTexte=VIGUEUR&isAdvancedResult=true&nomCode=BfMAIA%3D%3D&nomCode=KQbirA%3D%3D&nomCode=M94xeQ%3D%3D&nomCode=U1cRFQ%3D%3D&nomCode=aQb8lg%3D%3D&nomCode=at3QJA%3D%3D&nomCode=mNqhdw%3D%3D&nomCode=n50U7g%3D%3D&nomCode=zW1Hnw%3D%3D&page=1&pageSize=100&query=%7B%28%40ALL%5Bt%22torture%22%5D%29%7D&tab_selection=code&typePagination=DEFAULT&typeRecherche=etat

4.2. Germany

In the Federal Republic of Germany, one of the founding members of the EU and a party to the ECHR and the UNCAT, the provisions regarding torture and ill-treatment are based on Article 1 of the Constitution of the Federal Republic of Germany²⁶. Titled 'human dignity', this Article states that 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Moreover, Article 2 is titled 'Personal freedoms', and states that every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law. According to Article 16a of the Constitution, regulating the right of asylum, 'persons persecuted on political grounds shall have the right of asylum.' 'Protection of human dignity' is guaranteed by the Constitution.

The German Criminal Code (GCC)²⁷ lays down provisions regarding the prohibition of torture and ill-treatment. This Code does not regulate torture and ill-treatment as a separate offence of a general nature, but considers it an offence in some special cases or a reason for aggravation of certain offences. As a special case, Section 225 of the GCC considers the ill-treatment of persons in one's charge an offence. According to this provision, whoever tortures or roughly ill-treats a person under 18 years of age or a person who is defenceless due to frailty or illness incurs a penalty of imprisonment for a term of between six months and 10 years. It is also stated that the penalty is imprisonment for a term of at least one year in the case death or serious damage to health or substantial impairment of their physical or mental development.

Section 241a of the GCC governs 'casting political suspicion'. The provision provides for that 'whoever, by making a report or casting suspicion on a person, exposes that person to the danger of being persecuted for political reasons and, in violation of the principles of the rule of law, of suffering harm to life or limb through violence or arbitrary measures, of being deprived of liberty or seriously prejudiced in regard to professional or financial circumstances incurs a penalty of imprisonment for a term not exceeding five years or a fine.' Moreover, 'whoever communicates information about another person or transmits such information, and thereby exposes the other person to the danger of [such treatment], incurs the same penalty.' Moreover, according to Section 234a of the GCC, 'whoever, by deception, threat or force, transports another person into a territory outside the territorial scope of this statute, or causes another person to go abroad or prevents that person from returning from abroad, and thereby exposes said person to the danger of being persecuted for political reasons and, in violation of the principles of the rule of law, of suffering harm to life or limb through violence or arbitrary measures, of being deprived of his or her liberty or of being seriously prejudiced in his or her professional or financial circumstances, incurs a penalty of imprisonment for a term of at least one year.'

Moreover, ill-treatment is also considered an aggravating circumstance for the offence of 'human trafficking' under Section 232 of the GCC. Section 194 of the GCC regulates that the offence of insult, which is prosecuted upon request under normal circumstances, is prosecuted without the need for a request in cases where the victim is tortured and the insult is related to this torture. It is observed that Section 213 of the GCC makes ill-treatment a kind of mitigating circumstance or an element of unfair provocation for a person who is subjected to such treatment but is the perpetrator of the offence of 'murder' regulated in Section 212. Section 213 states that 'whoever kills a person under the conditions of section 212 without any fault on their own part on account of being provoked to rage by ill-treatment of or serious insult to themselves or a relative by the person killed and being immediately carried away by that rage to commit the offence, or in the event of an otherwise less serious case, the penalty is imprisonment for a term of between one year and 10 years.'

Another law that includes provisions regarding the prohibition of torture and ill-treatment in the German criminal law system is the German Code of Criminal Procedure (GCCP).²⁸ According to Section 136a of the GCCP titled 'Prohibited Evidence', *'The accused's freedom to form and express a will may not be impaired by ill-treatment, induced fatigue, physical intervention on the body, the administration of drugs, torture, by means of deception or hypnosis. Compulsion may be used only insofar as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under the provisions of criminal procedure law and holding out the prospect of an advantage not envisaged by statute are prohibited. Measures which impair the accused's memory or his or her capacity to understand the wrongfulness of an act are not permitted.'* The provision also states that the above-mentioned *'prohibitions apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition may not be used, even if the accused consents to their use.'*

Section 78 of the GCC gradually lays down limitation periods for the offences included in the code, including offences related to torture and ill-treatment.

26 <https://www.btg-bestellservice.de/pdf/80207000.pdf>.

27 https://www.gesetze-im-internet.de/englisch_stgb/

28 https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html

4.3. Netherlands

In the Netherlands, one of the founding members of the EU and a party to the ECHR and the UN Convention against Torture, there are no provisions regarding torture and ill-treatment in the Constitution of the Netherlands²⁹ or the Criminal Code of the Netherlands³⁰. However, legal provisions regarding torture and ill-treatment are covered by the International Crimes Act of the Netherlands (ICAN)³¹.

ICAN includes two definitions regarding the term of 'torture' in relation to the offences regulated.³² It is stated that the first definition is valid for the term torture referred to in some offences governed by the Act, and the second definition is valid for the term torture referred to in other offences. According to the definition given in Subsection (1)(d) of Section 1 of the Act, 'torture' 'means the intentional infliction of severe physical or mental pain or suffering upon a person who is in the custody or under the control of the accused, subject to the proviso that the pain or suffering does not result solely from, and is not inherent in or incidental to, lawful sanctions;' The first of the offences to which the said definition applies is laid down in Subsection 1 of Section 4 of the Act. Accordingly, persons who commit acts of torture, as defined in the above-mentioned provision, or other inhumane acts of a similar character which intentionally cause great suffering or serious injury to body or to mental or physical health are deemed guilty of a crime against humanity. Persons are liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine, if such acts are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Another offence to which the above-mentioned definition of torture applies is regulated in Subsection 1 of Section 5 of the Act. Accordingly, anyone who commits, in the case of an international armed conflict, torture or inhumane treatment against persons protected by the Geneva Convention of 1949 is liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine. According to Subsection 1 of Section 6, which refers to the same definition, anyone who, in the case of an armed conflict not of an international character, commits a violation of article 3 common to all of the Geneva Conventions of 1949, namely the commission against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those who are placed hors de combat by sickness, wounds, detention, or any other cause, of an act of cruel treatment or torture is liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

According to the second definition given in Subsection (1)(e) of Section 1 of the ICAN, 'torture' 'means the torture as defined in (d) – by or on behalf of a public authority – of a person with a view to extracting information or a confession from him or from a third person, punishing him for an act he or a third person has committed or is suspected of committing, or intimidating him or a third person, or coercing him to do or permit something, or for any reason based on discrimination on any ground whatever.' Subsection 1 of Section 8, which refers to this definition, states that 'torture committed by a public servant or other person working in the service of the authorities in the course of his duties shall carry a sentence of life imprisonment or a term of imprisonment not exceeding twenty years or a fifth category fine.' Moreover, a public servant or other person working in the service of the authorities who, in the course of his duties and by means of gifts, promises, abuse of authority, use of force, threat or deception or by providing opportunity, means or information solicits the commission of torture or intentionally permits another person to commit torture as well as a person who commits torture, if this has been solicited or intentionally permitted by a public servant or another person working in the service of the authorities, in the course of his duties and by one of the means referred to above shall be liable to similar sentences. In the Dutch criminal law system, Article 13 of the Criminal Code does not provide for any statute of limitations for the offence of torture.

Subsection 1 of Section 2 of the ICAN lays down provisions regarding the universal jurisdiction of the Netherlands in cases where the offence of torture is committed, as stipulated by the Netherlands. Accordingly, if the suspect is present in the Netherlands or the offence is committed against a Dutch national, anyone who commits the offence of torture outside the Netherlands is prosecuted in accordance with the Dutch criminal law. There are no requirements for permission.

29 https://www.government.nl/binaries/government/documenten/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf

30 <https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Netherlands-Criminal-Code.pdf>

31 https://documents.law.yale.edu/sites/default/files/netherlands_-_international_crimes_act_english_.pdf

32 However, since they are not compatible with the definition in Article 1 of the Convention against Torture, these definitions are criticised by the Committee against Torture. See CAT/C/NLD/CO/7, paragraph 7. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/442/89/PDF/G1844289.pdf?OpenElement>

The Code of Criminal Procedure of the Netherlands (CCPN)³³ includes provisions that can be applied to evidence obtained through acts of torture and ill-treatment. According to Subsection 1 of Section 359a of the CCPN, the results obtained from an investigation that is not conducted properly cannot be used as evidence of the offence as charged in the indictment.

5. Institutional Structures of Member States Regarding the Prohibition of Torture and Ill-Treatment



5.1. France

The Supervisor-General of Places of Deprivation of Liberty (*Contrôleur Général des Lieux de Privation de Liberté* - CGLPL) is an independent public institution established as the National Preventive Mechanism (NPM) in accordance with Article 17 of OPCAT. The CGLPL aims to monitor places where people are deprived of liberty such as prisons, hospitals where people stay without their consent, places of custody or customs detention, centres for detention of foreigners, and vehicles which are used to transport people deprived of freedom, and to control whether people's fundamental rights are violated in such places. The CGLPL sends advisory reports to those responsible for the place visited, annually submits a publicly available report to the President and the Parliament, may notify prosecutors if he/she becomes aware of any offence during his/her activities and may request disciplinary penalties from the relevant public authority upon becoming aware of professional misconduct.³⁴

The National Consultative Commission on Human Rights (*Commission Nationale Consultative des Droits de l'Homme* - CNCDH) is the French national institution for human rights, established in 1947 in Paris. Its main objectives are to control the effectiveness of the rights protected under the international human rights conventions and monitor the implementation of all recommendations from the international committees in France. In addition to the implementation of the prohibition of torture and ill-treatment, the CNCDH also carries out general studies on human rights, and contributes to the realisation of France's national targets regarding the prohibition of torture and ill-treatment as part of its activities.³⁵

The Defender of Rights (*Défenseur des Droits* - DDD) is a public institution established in 2011 and governed by Article 71-1 of the Constitution of the Republic of France. In addition to receiving complaints, the Defender of Rights also has the authority to take action and file lawsuits ex officio. Aiming to defend people whose rights have been violated and to ensure equality in access to rights, the Defender of Rights is an important institution which is responsible for ensuring that the officers carrying out security activities in France comply with the ethical rules, although it does not have the task of directly implementing the prohibition of torture and ill-treatment.³⁶ The institution receives many applications regarding police violence, especially during meetings and demonstrations, and takes ex officio action in various cases which are published by various press organs.³⁷ Similarly, it is observed that international human rights organisations also issue warnings regarding the prevention of police violence.³⁸

The Inspectorate General of the National Police (*Inspection Générale de la Police Nationale* - IGPN), the Inspectorate General of the National Gendarmerie (*Inspection Générale de la Gendarmerie Nationale* - IGGN) and the Inspectorate General of Services (*l'Inspection Générale des Services* - IGS) are the institutions

33 https://sherloc.unodc.org/cld/uploads/res/document/nld/1921/criminal_procedure_code_of_the_netherlands_html/Code_of_Criminal_Procedure_incorporating_amendments_up_to_October_2012.pdf

34 <https://www.cglpl.fr/en/the-tasks-of-the-contrôleur-general-des-lieux-de-privation-de-liberte/>, for the activities and reports of the CGLPL see CAT/C/FRA/7, paragraph 204-210 and CAT/C/FRA/Q/7/Add.1, paragraph 8-14. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=XHDI7m4A47Wudu208zkc90n5gNZK6JzUfT/qTO6md+5Rr5Th81UikGxSSySKMr2MOQZgw4SKalO975OdFvEuOZg==

35 <https://ennhri.org/our-members/france/#:~:text=The%20French%20National%20Consultative%20Commission,established%20in%201947%20in%20Paris>

36 <https://www.defenseurdesdroits.fr/fr/institution/organisation/defenseur>, also see CAT/C/FRA/Q/7/Add.1, paragraph 9-14.

37 Among many news, see https://www.lepoint.fr/societe/violences-policieres-la-defenseure-des-droits-saisie-100-fois-09-04-2023-2515553_23.php

38 For example <https://www.amnesty.fr/actualites/violences-policieres-et-impunie-en-france>; CAT/C/FRA/7, paragraph 145-152 and CAT/C/FRA/Q/7/Add.1, paragraph 110-129.

responsible for controlling the security forces responsible for enforcing the law and the legitimate use of force. These institutions play an active role in considering and investigating complaints about torture and ill-treatment of individuals by law enforcement forces, thus facilitating the detection of cases of torture and ill-treatment. Moreover, the National Police College of France (*l'École Nationale Supérieure de la Police*) and the National School of Prison Administration (*L'École Nationale d'Administration Pénitentiaire - ENAP*) together with the Independent Administrative Authority (*Autorité Administrative Indépendante - AAI*) provide training to law enforcement forces and prison officials regarding the prohibition of torture and ill-treatment, thus working to prevent possible problems in this regard.³⁹ In addition, the Monitoring Committee (*Comité de Pilotage - COPIL*) was established to support the action plan implemented to combat violence in prisons.⁴⁰

The Interministerial Mission for the Protection of Women against Violence and the Fight against Human Trafficking (*Mission Interministérielle Pour la Protection des Femmes Victimes de Violences - MIPROF*) established in 2013 is responsible for protecting women against violence and combating human trafficking.⁴¹ Victim Support Offices (*Le Bureau d'Aide aux Victimes - BAV*) established under judicial courts in France also provide free legal, social and psychological support to crime victims throughout the criminal justice process.

It is aimed to gradually increase the number of these offices, which offer support to victims of torture and ill-treatment.⁴² The Primo Levi Association⁴³, *Hors la Rue* Association⁴⁴ and CCEM (*Comité Contre l'Esclavage Moderne*)⁴⁵ are nongovernmental organisations in France, aiming to implement the prohibition of torture and ill-treatment and supported by various ministries.

5.2. Germany

Following Germany's ratification of OPCAT, in accordance with Article 17 of this Protocol, Germany established the National Agency for the Prevention of Torture and the Bund-Länder Commission as NPM.⁴⁶ The National Agency for the Prevention of Torture is an independent agency aiming to prevent inhumane conditions and ill-treatment in places where persons are deprived of their liberty.⁴⁷ The Bund-Länder Commission performs similar activities at the state level.⁴⁸

The German Institute for Human Rights (*Deutsches Institut für Menschenrechte - DIMR*) is an independent organisation established for the research, development and promotion of human rights in Germany.⁴⁹ Although not established directly for the purpose of implementing the prohibition of torture and ill-treatment, the Institution carries out research in the field of human rights, especially racial discrimination, human trafficking and gender-based violence, identifies human rights problems and provides analysis on this issue, thus aiming to promote respect for human rights, protect human rights and prevent violations in Germany and at the international level.⁵⁰

The German Forum for Human Rights (*Forum Menschenrechte - FMR*) is a network of more than 50 German nongovernmental organisations working for a better and more comprehensive protection of human rights worldwide, in various regions and countries as well as in the Federal Republic of Germany. The aim of the Forum is to implement joint projects to improve the protection of human rights worldwide, to create awareness in regards to human rights issues among the German public, thus, to draw attention to and resolve possible human rights violations in Germany, to support the work of local, regional and national nongovernmental organisations at the international level as well as to implement the prohibition of torture and ill-treatment.⁵¹

39 CAT/C/FRA/7, paragraph 117-135 and CAT/C/FRA/Q/7/Add.1, paragraph 78-89.

40 CAT/C/FRA/Q/7/Add.1, paragraph 78-89.

41 CAT/C/FRA/Q/7/Add.1, paragraph 45 and 138.

42 CAT/C/FRA/Q/7/Add.1, paragraph 144. See also <https://www.justice.fr/actu/bav#:~:text=Il%20a%20pour%20mission%20d,le%20minist%C3%A8re%20de%20la%20Justice>.

43 CAT/C/FRA/Q/7/Add.1, paragraph 170.

44 CAT/C/FRA/Q/7/Add.1, paragraph 44.

45 CAT/C/FRA/Q/7/Add.1, paragraph 43.

46 <https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms>

47 <https://www.nationale-stelle.de/en/the-national-agency.html#:~:text=The%20National%20Agency%20for%20the%20Prevention%20of%20Torture%20is%20Germany's,the%20UN%20Convention%20Against%20Torture>.

48 <https://en.justiz.de/laender-bund-europa/BLK/index.php>

49 <https://www.institut-fuer-menschenrechte.de/das-institut>

50 <https://www.institut-fuer-menschenrechte.de/>

51 <https://www.forum-menschenrechte.de/>

5.3. Netherlands

The Netherlands Institute of Human Rights (SIM) is an independent organisation specialising in human rights in the Netherlands. Although not established directly for the purpose of implementing the prohibition of torture and ill-treatment, SIM aims to protect human rights in accordance with international instruments such as the UN's fundamental human rights conventions and the ECHR. It is responsible for investigating, reporting and making recommendations regarding human rights violations in the Netherlands, thus contributing to developments regarding the prohibition of torture and ill-treatment.⁵²

The Custodial Institutions Agency of the Netherlands (*Dienst Justitiële Inrichtingen – DJI*) is a public institution operating under the Ministry of Justice of the Netherlands and established to ensure that prisoners serve their sentences in accordance with the justice system and to support their return to society.⁵³ To this end, DJI works to ensure that prisoners in penal institutions complete their sentences under humane conditions, without being exposed to torture and ill-treatment.⁵⁴

The Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor de Strafrechtstoepassing en Jeugdbescherming - RSJ*) is an independent institution which makes decisions regarding the execution of sentences and the protection of children, develops policies and supervises the management of penal institutions and the conditions of detainees.⁵⁵ Offering recommendations to the government on criminal justice and child protection, the Council contributes to the implementation of the prohibition of torture and ill-treatment.⁵⁶

Established to investigate actions which could negatively affect the credibility of the government, the National Criminal Investigation Department of the Netherlands (*Rijksrecherche*) conducts investigations into crimes against the executive bodies of the state and public officials.⁵⁷ To this end, the Institution investigates all incidents involving the use of firearms and other uses of force by the law enforcement and resulting in serious injury or death, and reports such incidents to the prosecutor's office.⁵⁸

Although ratifying OPCAT in 2010, the Netherlands has not established a national preventive mechanism in accordance with Article 17, which obliges States Parties to establish an independent NPM to prevent torture at the national level, and has not designated any present mechanism for this purpose. Criticised by the monitoring commissions for failing to comply with Article 17⁵⁹, the Netherlands responded to the criticism by stating the ongoing work on appointing the above-mentioned the Netherlands Institute of Human Rights as a national prevention mechanism.⁶⁰ Today, four national inspection bodies in the Netherlands constitute the national preventive mechanism of the Netherlands, and these institutions are coordinated by the Inspectorate of Justice and Security of the Netherlands.⁶¹

52 <https://www.uu.nl/en/research/netherlands-institute-of-human-rights-sim/about-sim>

53 <https://www.dji.nl/over-dji>

54 For the activities performed by DJI, see CPT/Inf (2023) 13, paragraph 29, 32, 35.

55 <https://www.rsj.nl/over-de-rsj>

56 For the activities performed by RSJ, see CPT/Inf (2023) 13, paragraph 25, 61, 73.

57 <https://www.rijksrecherche.nl/>

58 CPT/Inf (2023) 13, paragraph 10. <https://rm.coe.int/1680abb4b8>

59 CPT/Inf (2023) 12 paragraph 14-15. <https://rm.coe.int/1680abb4b5> and CAT/C/NLD/CO/7 Paragraph 22-23.

60 CPT/Inf (2023) 13, paragraph 3.

61 <https://www.inspectie-jenv.nl/english>

6. Implementation of the Prohibition of Torture and Ill-Treatment in Member States



6.1. France

The practices in France regarding the prohibition of torture and ill-treatment are generally evaluated positively. The 2021 Report of CPT states that the vast majority of the persons interviewed did not report any physical ill-treatment by members of the police force.⁶² Similarly, the majority of people in penal institutions state that they have not been mistreated by prison staff.⁶³ Moreover, there are very few allegations that prison staff intentionally commit violence against prisoners.⁶⁴ On the other hand, the CPT welcomed the provision of regular training to the staff in order to prevent possible ill-treatment by law enforcement forces and prison staff in France. The CPT also underlined the need for the French authorities to prevent police violence, thus regularly conveying the message of 'zero tolerance' to ill-treatment to all officers under the administrative and command bodies. It is emphasised that all kinds of ill-treatment, especially insults and threats, the use of weapons during deprivation of liberty or transfer are strictly prohibited and that the perpetrators of such acts, people who encourage or condone such acts will be subject to prosecution.⁶⁵ Moreover, while there are allegations of inter-prisoner violence in some prisons, in some prisons, no inter-prisoner violence is observed due to the large number of staff and limited contact between prisoners. It was also noted that a national guide is being prepared, including existing measures to combat violence in custody, in order to bring together good practices developed at the local level. The CPT expressed its wish to be informed about the implementation of this tool.⁶⁶

It appears that the material conditions in detention centres and prisons in France are, in general, adequate and good in terms of hygiene.⁶⁷ Moreover, the Report emphasises the need to provide 4 m² of living space for each individual⁶⁸ while welcoming the measures taken to eliminate some of the inadequacies in prisons and detention institutions.⁶⁹ However, while there are mother-child units and nurseries in women's wards and the material conditions in these units are seen to be in better condition, the Report recommends changes for improvement.⁷⁰ Although situations that pose problems for the mental health of people in prisons were reported,⁷¹ the CPT expresses its satisfaction with the general health services and the availability of doctors with general expertise.⁷² The CPT makes the following recommendations for improvement recommendations: ensuring the availability of a health care worker, preferably a nurse, who can provide first aid, developing policies to prevent suicide cases due to 50% suicide rate in prisons, carrying out health checks without the presence of prison staff, unless requested by a doctor, strengthening the procedure for identifying victims of gender-based violence and performing systematic initial health checks upon admission to the institution.⁷³

A problem that has emerged in practice regarding prohibition of torture and ill-treatment in France, and as reflected in the relevant reports is related to the detention process. One of the main problems is the extension of detention periods in a way that stretches the provisions in the legislation more than necessary.⁷⁴ Moreover, other problematic issues stated in the reports are practices, which make it difficult for detainees to access lawyers⁷⁵ as well as difficulties occurring in providing interpretation services to detainees who do not speak French⁷⁶. Taking into account the decisions of the ECtHR against France, where procedural guarantees, especially the right to access to a lawyer and the right to remain silent, are underlined during detention, for example, the practice of interviewing by the police was abolished.⁷⁷

62 CPT/Inf (2021) 14, page 4.

63 CPT/Inf (2021) 14, paragraph 45.

64 CPT/Inf (2021) 14, page 5.

65 CPT/Inf (2021) 14, paragraph 14.

66 CPT/Inf (2021) 14, paragraph 46.

67 CPT/Inf (2021) 14, paragraph 50.

68 CPT/Inf (2021) 14, paragraph 42.

69 CPT/Inf (2021) 14, paragraph 41-44., CPT Reply, p. 2-4, paragraph 5-17; CPT/Inf (2021) 15, paragraph 14.

70 CPT/Inf (2021) 14, paragraph 62.

71 CAT/C/FRA/CO/7, paragraph 23-26., CPT/Inf (2021) 14, paragraph 84- 86.

72 CPT/Inf (2021) 14, paragraph 77.

73 CPT/Inf (2021) 14, paragraph 78-79 and 81, 86.

74 CPT/Inf (2021) 14, paragraph 12., CPT/Inf (2021) 15, paragraph 54.

75 CPT/Inf (2021) 14, paragraph 23-24., CAT/C/FRA/CO/7, paragraph 10-11.

76 CPT/Inf (2021) 14, paragraph 26.

77 ECtHR Wang v. France, no. 83700/17, 28/04/2022; but see, for the circumstances of a concrete case, Dubois v. France, no. 52833/19, 28/04/2022.

On the other hand, especially considering the severity of ill-treatment in custody, the decision in *Selmouni v France*, which defines the treatment subject to the application as torture and rules a violation of Article 3 of the ECHR, has an important place in the case-law and is one of the most fundamental decisions.⁷⁸ This decision is important in that it provides a broader definition of ‘torture’ for the first time in the case-law of the ECtHR.⁷⁹ The case-law regarding the main decisions against France considers premeditated treatment, applied for hours at a time, and caused simple injury or severe physical or mental suffering as inhumane.⁸⁰ Moreover, in a recent decision, the ECtHR ruled that France violated the prohibition of torture due to acts of violence committed by police officers against a suspect during detention.⁸¹

6.2. Germany

Germany’s legal practices regarding the prohibition of torture and ill-treatment offer a generally positive picture. The reports show that people are not subjected to any ill-treatment by law enforcement officers, both in detention centres and prisons.⁸² Moreover, the reports find that as a rule, the law enforcement officers treat detainees correctly, respectfully and professionally.⁸³ The fact that strip searches⁸⁴ and mechanical restraints (*fixierung*)^{85,86} are rarely used during detention and in prisons, and that similar restraint measures are not applied except in cases of necessity⁸⁷, strengthens the positive impression about Germany’s practices. Moreover, the report states that any claims of ill-treatment by law enforcement officers are diligently examined.⁸⁸ To this end, a central investigation bureau⁸⁹ and an ombudsman institution⁹⁰ were established in some states to conduct investigations in case of any complaints about police officers.

Based on the information provided in the CPT reports, the following issues come to the fore: In the German criminal law system, detention periods are short in accordance with the legislation⁹¹ and people are informed about the reasons for their detention, their rights and obligations.⁹² It is also stated that the material conditions in detention centres and prisons are very good.⁹³ In addition to ensuring that minimum conditions are met, such as the occupancy rate in prisons being at 80%⁹⁴ and the cells being sufficiently large, clean and appropriately equipped⁹⁵, the mother-child unit in prisons have particularly high standards⁹⁶, prisoners are offered opportunities to make good use of their free time⁹⁷ and to have ‘relaxation meetings’ by psychologists or clergy for certain periods of time⁹⁸, which all together show that these centres have a high level of protection capacity. Moreover, the fact that there are no cases of inter-prisoner violence in prisons⁹⁹ and there is a sufficient number of prison staff¹⁰⁰ indicate that good protection is provided to prisoners in terms of the prohibition of torture and ill-treatment. The reports also state other good practices such as enabling detainees and prisoners to effectively exercise their right to access a lawyer¹⁰¹ and a doctor¹⁰² during detention and imprisonment, and ensuring that they can be visited by their families without supervision¹⁰³, and that they have unlimited access to phone calls¹⁰⁴. General health and psychological health services provided to people in detention centres and prisons are also at an adequate level.¹⁰⁵

78 ECtHR *Selmouni v. France* [GC], no. 25803/94, 28/07/1999.

79 See Dutertre, G., Key case-law extracts - European Court of Human Rights. Council of Europe, p. 65-68

<https://book.coe.int/fr/cour-europeenne-des-droits-de-l-homme/2890-key-case-law-extracts-european-court-of-human-rights.html>

80 ECtHR *Ramirez Sanchez v. France* [GC], no.59450/00, 04/07/2006.

81 ECtHR *Castellani v. France*, no. 43207/16, 30/04/2020.

82 CPT/Inf (2022) 18, paragraph 36.

83 CPT/Inf (2022) 18, paragraph 14.

84 CPT/Inf (2022) 18, paragraph 30.

85 Mechanical restraint means the use of a device or equipment that is placed and fixed on the person’s body, which the person cannot easily remove, and which restricts the freedom of movement of all or part of the body.

86 CPT/Inf (2022) 18, paragraph 91.

87 CPT/Inf (2022) 18, paragraph 128.

88 CPT/Inf (2022) 18, paragraph 15, CAT/C/DEU/6, paragraph 131-140.

89 CAT/C/DEU/6, paragraph 131.

90 CAT/C/DEU/CO/6, paragraph 37-38.

91 CPT/Inf (2022) 18, paragraph 12.

92 For details on the detention procedure, see CAT/C/DEU/6, paragraph 163-197.

93 CPT/Inf (2022) 18, paragraph 24 and 39-42.

94 CPT/Inf (2022) 18, paragraph 35.

95 CPT/Inf (2022) 18, paragraph 24 and 35.

96 CPT/Inf (2022) 18, paragraph 40 and 44.

97 CPT/Inf (2022) 18, paragraph 43 and 45.

98 CPT/Inf (2022) 18, paragraph 50.

99 CPT/Inf (2022) 18, paragraph 37.

100 CPT/Inf (2022) 18, paragraph 75.

101 CAT/C/DEU/6, paragraph 17 and 20-22, CPT/Inf (2022) 18, paragraph 20.

102 CPT/Inf (2022) 18, paragraph 23.

103 CPT/Inf (2022) 18, paragraph 79.

104 CPT/Inf (2022) 18, paragraph 77.

105 CPT/Inf (2022) 18, paragraph 59, 64, 70 and 110-116.

Action plans that introduce new provisions and practices on various issues were put into effect to implement the prohibition of torture and ill-treatment in the German legal system. One of the actions plans is ‘National Action Plan against Racism – Positions and Measures to Deal with Ideologies of Inequality and Related Discrimination’¹⁰⁶. Moreover, recommendations prepared both at international and national levels on the ‘protection of children and juveniles against sexual violence and exploitation’ were put into practice.¹⁰⁷ In addition, under two projects titled ‘*Werdenfelser Weg*’ and ‘*ReduFix*’, training seminars are actively offered to law enforcement officers on how to avoid rights restrictions at the highest level possible.¹⁰⁸

The *Gäfgen* decision regarding the prevention of torture and ill-treatment and obtaining evidence as a result of such treatments, and especially the threat of torture¹⁰⁹ and the *Jalloh* decision regarding the use of evidence obtained by prohibited methods¹¹⁰, constitutes the basic principles in the case-law of the ECtHR regarding the prohibition of torture and the requirement of not using the evidence obtained from torture in trial. This case-law can also be considered as a means to improve the practice. It should be noted that especially in recent years, there is a small number of individual applications made and a small number of decisions against Germany by the ECtHR regarding the prohibition of torture and ill-treatment within the meaning of Article 3 of the ECHR. Based on the fact that there has been only one decision¹¹¹ against Germany among the applications in the last five years, it can be stated that the relevant legislation and practice in Germany has been designed to try to prevent violations of people’s rights.

6.3. Netherlands

The reports examined show that the system regarding the prohibition of torture and ill-treatment in the Netherlands is generally adequate and positive. The first issue that can be considered as a positive practice regarding the prohibition of torture and ill-treatment in the Netherlands is the attitude and behaviour of law enforcement officers and staff towards individuals both in detention centres and prisons. According to the findings in the reports, detainees stated that they were not subjected to any ill-treatment by the police, and on the contrary, they were treated with a polite and respectful attitude as a rule¹¹². The same applies to the prison staff.¹¹³ However, it should be noted that, although the number and frequency are low, there are cases where people are subjected to ill-treatment based on racial hatred¹¹⁴, excessive use of stun guns and pepper gas¹¹⁵, and excessively tight handcuffing practices¹¹⁶ during detention. The reports welcome the establishment of an ‘Internal Investigation Department’ under the prosecutor’s office to effectively investigate such ill-treatment.¹¹⁷ Moreover, the Netherlands launched the ‘Power of Difference’ and ‘Eliminate Discrimination’ programs to prevent ethnic/racial profiling by the police.¹¹⁸

Examinations regarding the material conditions of detention centres and prisons so as to determine whether the prohibition of torture and ill-treatment is effectively implemented, resulted extremely positively for the Netherlands. The reports conclude that the material conditions in the detention centres are sufficient for accommodation during the detention¹¹⁹, and that the standards in prisons are high in terms of both the occupancy rate and the opportunities offered to prisoners.¹²⁰ Although there were inadequacies in the examinations carried out by the Committee against Torture (CAT) in 2018 regarding the health services provided in prisons, the CPT reports of 2022 state that health services are of high quality in all institutions visited, making recommendations regarding the development of mental health services.¹²¹

106 CAT/C/DEU/CO/6, paragraph 30.

107 CAT/ C/ DEU/ 6, paragraph 58.

108 CAT/C/DEU/6, paragraph 105.

109 ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, 30.06.2008.

110 ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006.

111 ECtHR, *Roth v. Germany*, no. 6780/18 and 30776/18, 22.01.2021.

112 CPT/Inf (2023) 12, paragraph 23.

113 CPT/Inf (2023) 12, paragraph 106.

114 CAT/C/NLD/CO/7, paragraph 44.

115 CAT/C/NLD/CO/7, paragraph 42.

116 CPT/Inf (2023) 12, paragraph 23.

117 CPT/Inf (2023) 12, paragraph 17.

118 CAT/C/NLD/CO/7, paragraph 5.

119 CPT/Inf (2023) 12, paragraph 41-44, 61-66

120 Also see detailed evaluations of prisons in the Netherlands CPT/Inf (2023) 12, paragraph 109-113

121 CPT/Inf (2023) 12, 140-152

The reports welcome that the periods of detention in the Dutch legal system are very short and that these periods are observed in practice.¹²² Moreover, according to the reports, detainees do not encounter any problems regarding their right to access a lawyer, doctor or third party with whom they wish to communicate.¹²³ It is also observed that the disciplinary sanctions imposed on the prisoners are generally proportionate.¹²⁴

The fact that there is a very low number of current applications to the ECtHR against the Netherlands regarding the prohibition of torture and ill-treatment compared to other Member States, and that the majority of these applications have not resulted in a violation decision¹²⁵, is an important indicator to evaluate the Netherlands' practices on the subject. In addition, since there is no application among these applications stating that the Netherlands do not fulfil its positive obligations regarding the issue, it can be said that the Netherlands' standards regarding the implementation of the prohibition are high. However, among the applications with a violation decision before the ECtHR, *Murray v Netherlands* stands out. The decision rules that the sentence was *de facto* irreducible due to the failure to provide rehabilitation opportunities that would enable the release of people sentenced to life imprisonment, and that there was a violation of Article 3 of the ECHR. Since no treatment was provided to the applicant although the applicant's psychological disorder was accepted as an obstacle to release.¹²⁶ This decision can be considered as an important decision that holds up the case-law in terms of the status of sick prisoners and the right to hope.

7. Conclusion



This study examines three Member States in terms of their legislation, institutional structure and practices regarding the prohibition of torture and ill-treatment. The study has reached important results.

In terms of the legislation of countries regarding the prohibition of torture and ill-treatment, it is necessary to first focus on the scope of the constitutional guarantee provided by taking into account the constitutions of the countries. As explained above, the Constitution of the Republic of France does not mention acts of torture and ill-treatment, but only contains a provision prohibiting the death penalty. On the other hand, the Constitution of the Federal Republic of Germany establishes a strong foundation for the prohibition of torture by providing for the protection of human dignity as a fundamental constitutional provision. While the German Constitution prevents torture and ill-treatment by associating it with the right to life and the right to physical integrity, the Constitution of the Kingdom of the Netherlands does not include a special provision on the subject. Given that constitutions provide the highest protection for fundamental rights and freedoms, it is undoubtedly important to clearly regulate the prohibition of torture and ill-treatment to ensure the implementation of this prohibition. However, since it is known that constitutions also respond to the historical and sociological needs of a society regarding fundamental rights and freedoms, it is possible to conclude that the Netherlands' national experience with torture and ill-treatment is not problematic enough to include this prohibition in their constitution. Therefore, this may not qualify as a lack of protection.

Regarding how the prohibition of torture and ill-treatment is regulated in the legislation of the countries, it can be stated that this prohibition has a wide place in the national legislation of France. Although the lack of a definition of torture and acts of ill-treatment in the French legislation constitutes a problem in terms of compliance with international conventions, it can be said that this can pave the way for many acts to be evaluated as such and thus punished. While there is no definition article, the fact that there are many provisions regarding torture and acts of barbarity in the French Criminal Code, and that these acts are also provided for as a reason for aggravation in terms of other offences, can be considered positive in terms of providing deterrence. Moreover, this deterrence is supported in French legislation, both by other provisions and regulations on the subject. The Netherlands included the prohibition of torture and ill-treatment in the ICAN instead of the CCPN and governs offences with a dual definition of acts of torture. In the German legal system, criminal provisions regarding torture and ill-treatment specifically aim to protect weak groups, and such treatment is considered a reason for aggravation in some offences.

122 CPT/Inf (2023) 12, paragraph 18

123 CPT/Inf (2023) 12, paragraph 27, 33,37

124 CPT/Inf (2023) 12, paragraph 157.

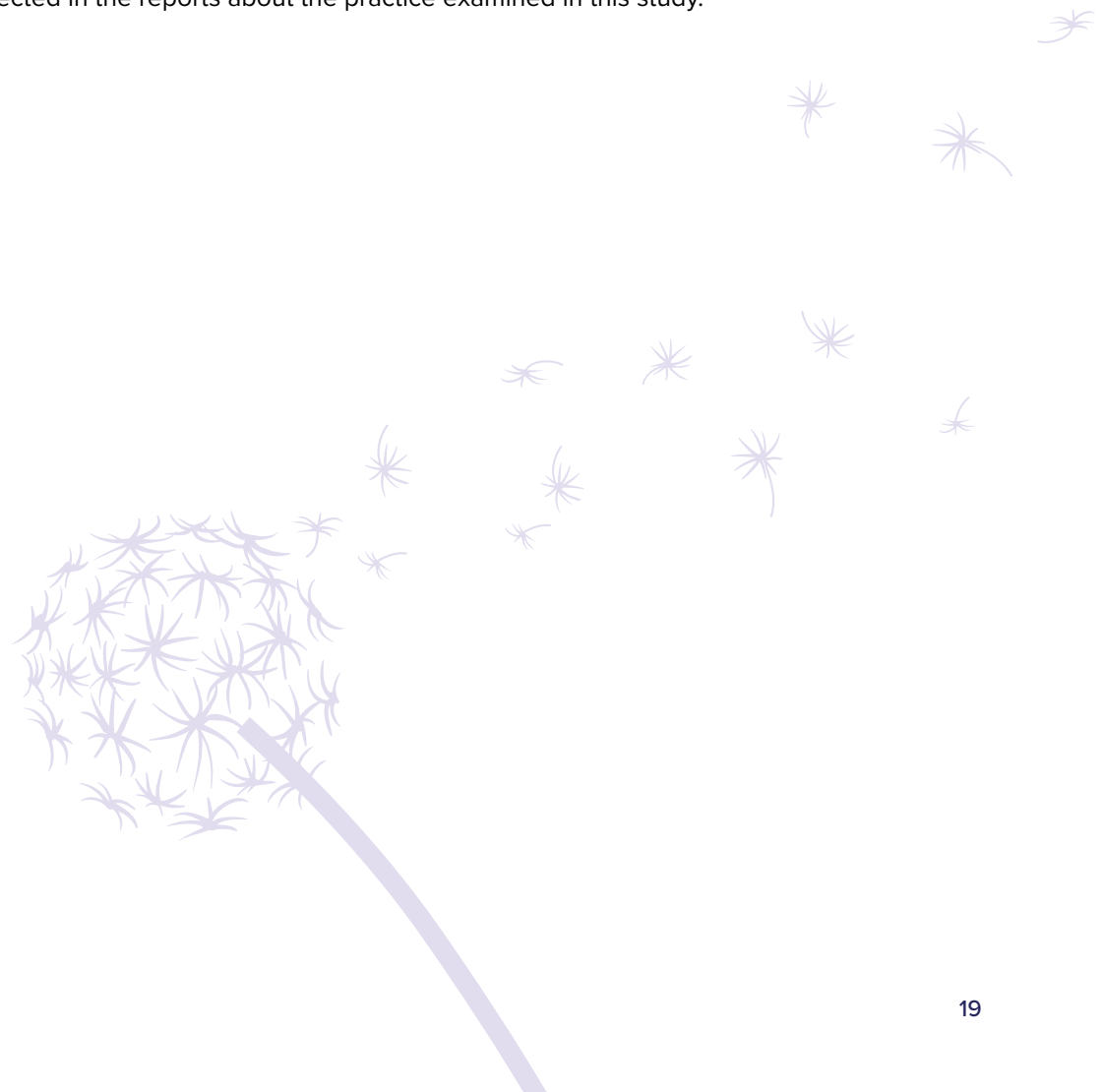
125 For relevant decisions of the ECtHR see *S.A. v. Netherlands* (no. 49773/15) and *A.S.N. and others v. Netherlands* (nos. 68377/17 and 530/18).

126 ECtHR *Murray v. Netherlands* [BD], no. 10511/10, 26/04/2016; for other decisions see ECtHR *Mathew v. Netherlands*, no. 24919/03, 29/09/2005; ECtHR *Van der Ven v. Netherlands*, no. 50901/99, 04/02/2003.

Regarding the institutional structures of Member States responsible for implementing the prohibition of torture and ill-treatment, first, it is necessary to draw attention to the existence and functionality of the national prevention mechanism which should be established within the meaning of Article 17 of the OPCAT. While France and Germany appear to have a national prevention mechanism that meets the requirements laid down in the Protocol, the work on an independent institution fulfilling this duty in the Netherlands is ongoing. In terms of other institutional structures established by Member States on the subject, it is observed that in France, both independent institutions, some state institutions and nongovernmental organisations undertake important duties in preventing torture and ill-treatment. Although there are few numbers of such institutions in the Netherlands, they have important duties on the subject. It should be noted that in Germany, strong structures were established for coordination, especially in order to support the work of nongovernmental organisations on the subject.

On the other hand, regarding how the prohibition of torture and ill-treatment is implemented in Member States, although there are problems in France, especially the acts of ill-treatment by law enforcement officers and the inadequate conditions of detention centres and prisons, it can be emphasised that the applications made to the ECtHR are mostly related to the principle of non-refoulement and the administrative detention of unaccompanied children and immigrants. For Germany, as observed especially from the cases brought before the ECtHR, there are developments regarding the implementation in relation to the principles laid down regarding the allegations of ill-treatment in prisons and the use of prohibited methods and illegally obtained evidence, ensuring that such evidence is not used as a basis for judgment. This can be considered as an important achievement. An examination of the practices in the Netherlands show that although there are a few problematic issues, *with the limited information available to the public*, it can be stated that there is no evidence that the Netherlands causes widespread human rights violations and provides people with a higher level of protection on the subject.

These observations support the argument that the human rights standards of a state are related to the human rights awareness of the practitioners who implement the relevant provisions, and the experience and historical background of that state regarding human rights, rather than the legislation and institutions of that state. Moreover, it is observed that there are efforts to develop and improve the practice in line with the case-law of the ECtHR, improved with various decisions given against all three Member States regarding the prohibition of torture, which is also reflected in the reports about the practice examined in this study.



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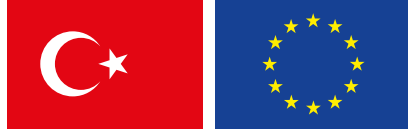
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