



# Guide to Jurisprudence on Torture and Ill-treatment

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## Article 3 of the European Convention for the Protection of Human Rights

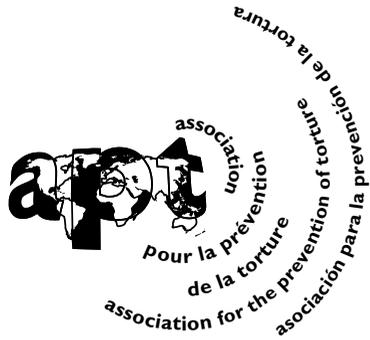


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The prohibition on torture and other forms of ill-treatment is enshrined in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which simply states: *“Prohibition of Torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment”*.

Whilst other international and regional treaties define these prohibited acts, Article 3 does not ascribe any definitional characteristics to torture, inhuman or degrading treatment or punishment. Accordingly, a complex and extensive body of jurisprudence has emerged from the European Human Rights judicial bodies, the European Court of Human Rights and the European Commission of Human Rights, in order to determine the definitional aspects of these forms of abuse.

The purpose of this brochure is to consider the definitions which have emerged from the jurisprudence of these European judicial bodies, as well as the recent developments concerning the scope and application of Article 3.



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## Article 3 of the European Convention for the Protection of Human Rights

by Debra Long

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## FOREWORD

The Association for the Prevention of Torture (APT) is a non-governmental organisation based in Geneva, whose mandate is to prevent torture and ill-treatment. The APT seeks to ensure that norms forbidding torture are respected and to reinforce means for the prevention of torture. Thus, the APT was at the origin of the European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment and the negotiations for an Optional Protocol to the United Nations Convention against Torture.

Yet, in order to prevent torture and ill-treatment it is essential to know what acts or omissions can be defined as such abuses and what is the extent of States' obligations to prohibit and prevent these violations. Accordingly, the APT, in the everyday fulfilment of its mandate, has to be aware of the various definitions and scope of obligations in relation to these violations. Therefore, the APT has to continually consider and evaluate jurisprudence relating to torture and ill-treatment emanating from various judicial and quasi-judicial bodies.

This brochure is the first in a series of five publications, which will form a guide to the main jurisprudence in international law concerning torture, inhuman and degrading treatment and punishment. This series of brochures will consist of the following:

Brochure One: *Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*

Brochure Two: *Jurisprudence of the Inter-American Court and Commission of Human Rights*

Brochure Three: *The Ad Hoc International Criminal Tribunals of the Former Yugoslavia and Rwanda*

Brochure Four: *The United Nations Treaty Bodies*

Brochure Five: *Comparison of the Jurisprudence on Torture in International Law*

These brochures are designed to be a practical series describing the approaches taken by these judicial and quasi-judicial bodies when considering violations of the prohibition and prevention of torture and ill-treatment. It is anticipated that they will be a useful tool for practitioners, human rights defenders and scholars alike. They are not intended to give an exhaustive review of all the jurisprudence on these abuses, but rather to give an in-depth commentary on the leading jurisprudence and approach taken by these judicial and quasi-judicial bodies.



## INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention) embodies all those rights and freedoms which are to be afforded persons and subsequently ascribes positive and negative obligations upon States Parties to ensure respect for those rights.

The prohibition on torture and other forms of ill-treatment is enshrined in Article 3 of the European Convention, which simply states:

### ***“Article 3 - Prohibition of Torture***

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

Article 3 must be read together with Article 15 of the European Convention, which states that no derogation from the provisions of Article 3 can be made. Thus, the European Convention imposes an absolute prohibition on torture, inhuman and degrading treatment or punishment.

Yet, whilst other international and regional treaties define these prohibited acts,<sup>1</sup> Article 3 does not ascribe any definitional characteristics to torture, inhuman or degrading treatment or punishment. Accordingly, a complex and extensive body of jurisprudence has emerged from the European Human Rights judicial bodies, the European Court of Human Rights and the European Commission of Human Rights,<sup>2</sup> in order to determine the definitional aspects of these forms of abuse.

The purpose of this brochure is to consider the definitions which have emerged from the jurisprudence of these European judicial bodies, as well as the recent developments concerning the scope and application of Article 3. The brochure is divided into two chapters. The first chapter reviews the development of definitions for the three prohibited acts and then considers the nature and scope of States Parties' obligations. The second chapter provides a commentary on the most notable recent developments in the scope of application of the prohibition on torture, inhuman and degrading treatment or punishment.



# I DEFINITIONAL ASPECTS

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## I. DEFINITIONAL ASPECTS

### 1. DISTINGUISHING THE PROHIBITED ACTS

Out of the simple proclamation of the prohibition on torture, inhuman and degrading treatment or punishment contained in Article 3 of the European Convention, complex definitions have emerged from the European judicial system and consequential distinctions drawn between the three prohibited acts.

Firstly, in order to fall within the scope of Article 3, an act of ill-treatment, whether it is torture, inhuman or degrading treatment or punishment, must attain a “minimum level of severity.”<sup>3</sup> The assessment of this “entry level threshold” of severity is relative and the Court can take note of the following:

- The duration of the treatment
- The physical effects of the treatment
- The mental effects of the treatment
- The sex, age and state of health of the victim

Once satisfied that the act complained of crosses this “entry level threshold”, the European Commission and Court have considered that a distinction can be drawn between acts of torture, inhuman and degrading treatment or punishment. The distinction between these abuses is largely based upon a threshold of severity.

#### 1.1 Torture – a Special Stigma

*The Greek Case*<sup>4</sup> and *Ireland v UK*<sup>5</sup> are the two leading cases wherein the European Commission and Court developed distinct definitions for the three prohibited acts.

The first of these cases, *The Greek Case*, was considered by the European Commission of Human Rights, and involved the conduct of Greek Security forces following the military coup in 1967. This is a landmark case because the European Commission adopted a general definitional approach which distinguished between the three prohibited acts, i.e. “torture”, “inhuman” and “degrading” treatment or punishment.<sup>6</sup> This approach of treating the acts as distinct violations with different characteristics, whilst subsequently refined, has nevertheless remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment.

In *The Greek Case*, the European Commission held that the defining characteristic of torture was not necessarily the nature and severity of the act committed but rather the purpose for which the act was perpetrated:

*"[A]ll torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. . . . Torture . . . has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."*<sup>7</sup>

In other words, whilst torture was often an "aggravated form of inhuman treatment", this was not the distinguishing element of an act of torture. Torture was rather, the "purposive use of inhuman treatment".<sup>8</sup>

This distinction has however been refined in subsequent decisions and it is arguable that this refinement has meant that the purposive element of the definition of torture, whilst still important, has been marginalised in favour of a threshold based upon a sliding scale of severity between the three acts.

This threshold based upon a level of severity was considered in the second leading definitional case mentioned above, *Ireland v UK*. This case concerned the treatment of IRA suspects by UK troops in Northern Ireland. The case was brought by the Irish Government against the UK alleging, inter alia, that the methods of interrogation using the "five techniques" (sleep deprivation, stress positions, deprivation of food and drink, submission to noise and hooding), constituted a breach of Article 3.

Having satisfied the entry level threshold of severity for the Court to consider the question of a violation of Article 3, the Court went on to draw a distinction between torture, inhuman and degrading treatment. It held that such a distinction was necessary because a "special stigma" attaches to torture.<sup>9</sup> Accordingly, the Court held that in order to be classified as torture, the treatment must cause "serious and cruel suffering". Therefore, the Court decided that the "measuring stick" for assessing whether an act amounts to torture is similar to the minimum entry level threshold required for Article 3 (outlined above), i.e. a subjective decision based upon the severity of pain and suffering occasioned by the act.<sup>10</sup>

In this instance, the Court held that the five techniques used by the UK troops caused "if not actual bodily injury, at least intense physical and mental suffering...and also led to psychiatric disturbances during the interrogation", and therefore fell into the category of inhuman treatment, but the practices did not "occasion suffering of the particular intensity and cruelty implied by the word torture".<sup>11</sup> –thereby overturning the earlier decision by the Commission that the practices did amount to torture.<sup>12</sup>

Consequently, this ruling created a precedent for drawing a distinction between torture, inhuman and degrading treatment or punishment, based primarily upon a progression of severity rather than purpose. Thus, arguably, under such a

threshold of severity, degrading treatment when it reaches a certain severity can be re-classified as inhuman treatment, which, in turn, if particularly serious can be classified as torture.<sup>13</sup>

This threshold of severity has been reiterated and followed in subsequent decisions of the Court and Commission.<sup>14</sup> Recently, in the case of *Aydin v Turkey*,<sup>15</sup> the Court restated the defining characteristics of torture established in the ruling of *Ireland v UK*, and held that in certain circumstances rape causes physical and mental suffering sufficiently severe so as to amount to torture. This case involved a young woman who was held in detention by the Turkish police on suspicion of involvement with the Workers' Party of Kurdistan (the PKK). Whilst in detention she was stripped of her clothes, beaten, sprayed with cold water from high pressure jets, blindfolded and raped.

The Court, having been satisfied that the allegation met the minimum threshold of severity to come within the scope of Article 3, held that:

*"The rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence...against this background the Court is satisfied that the accumulation of acts of physical and mental violence...especially the cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".<sup>16</sup>*

The Court therefore held that the level of suffering occasioned by the rape and the other acts of ill-treatment, met the requirements of the threshold of severity for them to be classified as torture. Furthermore the Court's decision is instructive because the Court held that they would have *"reached this conclusion on either of the grounds taken separately"*, i.e. the allegation of torture due to the rape and the allegation of torture due to the other forms of physical and mental violence inflicted. Accordingly, it is arguable that in certain circumstances an act of rape alone can amount to torture.

Yet, the European judicial system has refrained from drawing up a list of acts which will automatically be considered severe "enough" to be classified as torture and those which will not. The Court has always allowed itself a degree of flexibility when considering the prohibited acts and has been insightful enough to conclude that the Convention should be regarded as a *"living instrument which must be interpreted in the light of present-day conditions"*.<sup>17</sup> This has recently been reiterated in the strongest terms in the case of *Selmouni v France*.<sup>18</sup> This case involved allegations of various forms of ill-treatment whilst the applicant was in police custody, including: being repeatedly punched, hit with objects, and sexually abused.

In its decision the Court, considering the various acts of ill-treatment complained of, held that:

*“Certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.*<sup>19</sup>

This is a key restatement of the degree of flexibility which the Court affords itself when considering violations of Article 3. As a consequence, the Court is not bound to follow previous decisions but is free to re-evaluate case law and adjudicate on acts which previously had not been regarded as torture.<sup>20</sup>

*Selmouni v France* is also a significant case as it made an unprecedented reference to the definition contained in Article 1 of the UN Convention against Torture (UNCAT) in order to establish whether the acts complained of were sufficiently severe so as to amount to torture. The Court, citing Article 1 of UNCAT, noted that it defines torture as *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”* for a specific purpose.<sup>21</sup> The Court stated that, having considered that the suffering inflicted amounted to inhuman treatment, *“it remains to establish in the instant case whether the pain or suffering inflicted...can be defined as severe within the meaning of Article 1 of the United Nations Convention against Torture”*.<sup>22</sup> However, in order to determine the level of severity, the Court returned to the approach established under *Ireland v UK* that this is relative and depends on all the circumstances of the case.<sup>23</sup>

Further, the Court, in making a reference to Article 1 of UNCAT, thereby also re-emphasised the purposive element of torture, which, as noted above, the Commission had first considered was a distinguishing characteristic in *The Greek Case*, but which had been marginalised in subsequent decisions.

The approach taken in *Selmouni v France* to make a reference to the definition contained in Article 1 of UNCAT, has been followed in a few subsequent decisions. In *Ilhan v Turkey*, the purposive element of torture was highlighted in very strong terms. The Court in its findings noted that, *“in addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture...which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating.”*<sup>24</sup>

Clearly, therefore, as established in *The Greek Case* and *Ireland v UK*, torture can be distinguished due to the level of severity of suffering caused and the purpose for which the suffering was inflicted. What is unclear, following the decisions in *Selmouni v France* and *Ilhan v Turkey*, is whether one of these defining charac-

teristics is more influential than the other when categorising an act as torture. Fortunately, however, it can be noted that the Court and Commission have taken a flexible approach when considering allegations of torture in order to try and afford the greatest possible protection to individuals.

## ■ 1.2 Inhuman and Degrading Treatment or Punishment

*The Greek Case* not only distinguished torture from the other forms of ill-treatment but also considered that inhuman and degrading treatment could be distinguished from each other by a threshold of severity. The Commission held that inhuman treatment was “at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable”.<sup>25</sup> It placed inhuman treatment at the centre of a consideration of a violation of Article 3, developing more complex definitions for torture and degrading treatment, with specific characteristics which distinguish them from inhuman treatment.

In *Ireland v UK*, the Commission reiterated the view that “any definition of the provisions of Article 3 of the Convention must start from the notion of inhuman treatment”.<sup>26</sup> Curiously though, whilst inhuman treatment is considered to be at the heart of the application of Article 3, it has nevertheless been somewhat neglected during definitional considerations. However, it can be deduced from the jurisprudence that inhuman treatment is a category into which acts not “crossing the severity threshold” of torture can be placed and it is also used as a point of reference when determining whether treatment is degrading, i.e. treatment which is not sufficiently severe so as to amount to inhuman.<sup>27</sup>

This broad and somewhat ambiguous definitional approach to inhuman treatment, as well as the Court’s level severity to the prohibited acts, can be illustrated by the case of *Campbell and Cosans v UK*.<sup>28</sup> This case involved the threatened use of corporal punishment on two school boys. The punishment did not in fact take place; nevertheless the Court stated that “provided it is sufficiently real and immediate a mere threat of conduct prohibited by Article 3 may itself be in conflict with the provision. Thus to threaten an individual with torture might in some circumstances constitute at least “inhuman treatment”.”<sup>29</sup> Despite this declaration, the Court held that the threatened punishment was not sufficiently severe to amount to torture or to inhuman treatment, nor did the punishment humiliate or debase the boys for a finding of degrading treatment.

Unlike inhuman treatment, degrading treatment has been the subject of more substantial definitional considerations, possibly because it can be considered the baseline for acts to be categorised as a violation of Article 3. Thus, it has in many ways been ascribed the most specific characteristics out of all of the prohibited acts. Once again *The Greek Case* provides a springboard for subsequent definitional refinements. *The Greek Case* considered that for an act to be degrading this implied some form of “gross humiliation”.<sup>30</sup> Subsequently, the Commission

in the case of *East African Asians v UK* expanded on this distinguishing characteristic, stating that “the general purpose of this provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action, which lowers a person in rank, position, reputation or character can only be regarded as “degrading treatment” in the sense of Article 3, where it reaches a certain level of severity”.

Accordingly, in order for a finding of a violation of Article 3 for degrading treatment, the act complained of must be sufficiently severe so as to come within the scope of Article 3 and it must, in some way, interfere with a person’s dignity. This approach to degrading treatment has been followed and refined in subsequent cases, particularly involving the use of corporal punishment. One of the most notable cases which illustrates the Court’s approach towards degrading treatment is *Tyrer v UK*.<sup>31</sup>

This case involved the infliction of a judicial sentence of birching on a fifteen-year old boy on the Isle of Man following a conviction for unlawful assault. After deciding that the treatment was not sufficiently severe for it to amount to torture or inhuman treatment, the Court considered whether the birching amounted to degrading treatment. The Court in its judgement noted: “What is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed upon him...In order for punishment to be “degrading” and in breach of Article 3, the humiliation or debasement involved must attain a particular level”.

The Court went further and outlined some criteria for considering the level of humiliation or debasement involved. The Court declared that the assessment is “in the nature of things relative: it depends on all the circumstances of the case and in particular, on the nature and context of the punishment itself and the manner and method of its execution”.<sup>32</sup>

This approach was reiterated in the case of *Campbell and Cosans v UK* (outlined above), wherein the Court, having held that the threatened punishment was not sufficiently severe to amount to inhuman treatment, went on to consider whether the threatened corporal punishment was degrading. The Court stated that “the “treatment” itself will not be “degrading” unless the person has undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity”.<sup>33</sup> In this instance the Court considered that the two school boys had not suffered any adverse effects and their feelings of apprehension were not sufficiently severe to come within the scope of Article 3.

This leaves however one aspect unanswered. Does there need to be an intention to humiliate or debase a person for the finding of a violation?

Traditionally, the approach has been to take into account whether its object was to humiliate and debase the person concerned.<sup>34</sup> However, in recent cases, such

as *V v UK*, whilst the Court has considered the question of whether the intention of the act was to debase or humiliate the person will still be one factor to be considered, "*the absence of any such purpose cannot conclusively rule out the finding of a violation*".<sup>35</sup>

This case involved an allegation that the trial of a young boy (ten years old) for the murder of another child, amounted to a breach of Article 3. In support of this allegation it was claimed, inter alia, that the low age of criminal responsibility in England, the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial, the physical lay-out of the courtroom, and the overwhelming presence of the media and public, all had a cumulative effect which amounted to a breach of Article 3.

Instructively, the Court, noting that the criminal proceedings were not motivated by any intention on the part of the State authorities to humiliate or debase the applicant, nevertheless held that the absence of any intent would not be a bar to a consideration of an allegation of a violation of Article 3. However, in this instance, the Court held that every effort had been made to modify the trial to take into account the defendant's young age and there was accordingly no violation of Article 3.<sup>36</sup>

This issue of a lack of intent was considered further in *Peers v Greece*.<sup>37</sup> This case concerned an allegation of a violation of Article 3 due to the inappropriate and poor conditions of detention for the applicant. The applicant was a convicted drug user, who was kept in a psychiatric hospital within a prison for a period of time and then transferred to the prison's segregation unit. It was alleged that the conditions of detention were poor and unsuitable for a person in need of psychiatric care. In its decision the Court, noting that there was no evidence of any "*positive intention of humiliating or debasing the applicant*,"<sup>38</sup> nevertheless upheld that this could not rule out the possibility of the finding of a violation. Accordingly, the Court considered that the authorities' omission to improve unacceptable conditions denoted "*a lack of respect for the applicant*,"<sup>39</sup> and there had been a violation of Article 3.

However, although a lack of intent will not bar the finding of a violation, following the decision in *Price v UK*,<sup>40</sup> the absence of intent may be a factor to be taken into account in the consideration of the quantum of damages. The applicant in this instance did not have any limbs and also suffered from kidney problems. She was imprisoned for seven days for contempt of court and it was alleged that, during this time, she was not allowed to take a battery charger for her electric chair as this was considered to be a luxury item. Further, she had to spend one night in a police cell, which was not appropriate for a person with disabilities and its cold condition provoked her kidney infection. She was subsequently moved to a prison health care centre which was also unsuitable for her needs.

The Court held that, whilst there was no evidence of any positive intention to humiliate or debase the applicant, the conditions in which she was kept were

inappropriate and constituted degrading treatment. However, in consideration of the quantum of damages, the Court stated that; “*in determining the amount of the award it has regard, inter alia, to the fact that there was no intention to humiliate or debase the applicant ...*”.<sup>41</sup> This, combined with a short period of detention, led to a relatively small damages award.

## ■ 2. STATES PARTIES’ OBLIGATIONS

As stated above, Article 3 imposes an obligation upon States to prohibit torture, inhuman and degrading treatment or punishment. This obligation, however, does not only encompass a duty to simply prohibit, but the Court and Commission have also extended a positive duty incumbent upon States to protect individuals from these forms of abuses.

### ■ 2.1 Extradition and Expulsion Cases

The exact nature of a State’s obligation to protect individuals from violations has been examined extensively in respect of expulsion and extradition cases.

The leading case on this issue is *Soering v UK*.<sup>42</sup> This case involved the extradition application by the USA of a German national residing in the UK, on a charge of murder. The applicant claimed that the UK would violate, inter alia, Article 3 if they allowed the extradition to take place. Whilst the European Convention on Human Rights does not prohibit the imposition of the death penalty per se, nor consider it to be a form of torture, it was claimed that a violation would arise because the conditions on death row amounted to a breach of Article 3.

The issue of the death penalty and the exact findings of the Court on this matter will be considered in greater detail later. As regards the duty to protect individuals, the Court held that the UK would violate Article 3 if *Soering* were to be extradited because he would be exposed to a “real risk” of being subjected to inhuman or degrading treatment.<sup>43</sup> In other words, the finding of a violation attaches not to the receiving State because of what it might do, but to the returning State for exposing the individual to ill-treatment. Thus, a State owes individuals a duty to ensure that they are not going to be exposed to ill-treatment upon extradition or expulsion.

The reasoning in *Soering v UK* has been revisited in subsequent cases and an expansive jurisprudence on this issue has arisen.<sup>44</sup> One of the most influential and much cited cases in this body of jurisprudence is *Cruz Varas v Sweden*.<sup>45</sup> This case involved the potential expulsion of two Chilean applicants for political asylum on the grounds that they had not invoked sufficiently strong political reasons to be considered refugees. The applicants claimed that if they were expelled to Chile, where they claimed to have been tortured previously, they faced a real risk of being tortured again.

The Court held that it must be shown that there are “*substantial grounds*” for believing in the existence of a real risk of treatment contrary to Article 3.<sup>46</sup> The Court stated that this would be assessed primarily with reference to those facts which were known or ought to have been known at the time of the expulsion, although this would not preclude the Court from considering other information which comes to light subsequent to the expulsion. In this instance the Court concluded that there were no substantial grounds for believing in the existence of a real risk.

This guide for assessing the “level of risk” was upheld in the case of *Vilvarajah v UK*,<sup>47</sup> which noted that: “*the Court’s examination of the existence of a risk of ill-treatment...at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of democratic societies.*”<sup>48</sup>

This case concerned an expulsion which had already occurred, thus the relevant time for assessing the level of risk was the time when the expulsion occurred. If an expulsion has not yet occurred, it was held in *Chahal v UK*<sup>49</sup> that the relevant time for assessing the risk would be the date on which the Court considers the case, therefore it could take into consideration evidence which has come to light since the case was first reviewed.<sup>50</sup>

The case of *Chahal v UK* is also instructive, as the applicant was being expelled because he was suspected of being involved in acts of terrorism. Whilst the Court stated that it was aware of the difficulties facing States in protecting communities from acts of terrorism, nevertheless it confirmed that the Convention prohibits in absolute terms torture (and inhuman or degrading treatment or punishment) irrespective of the victim’s conduct. Accordingly, national interests could not override the interests of the individual where substantial grounds have been shown for believing that he would be subjected to ill-treatment if expelled.<sup>51</sup>

## ■ 2.2 Non-State Actors

Traditionally, the Court and Commission have confined themselves to considering allegations of risks emanating from the States’ authorities. However, recently the Court has confirmed that the absolute nature of the prohibition and the duty to protect individuals can engage a State’s responsibility even where the risk emanates from sources other than the State’s authorities. One of the most notable cases to examine this issue was *HLR v France*.<sup>52</sup> In this instance, H.L.R. was a Colombian national, who had been imprisoned for a drugs offence and was the subject of an order for deportation from France back to Colombia. H.L.R. claimed that if he were to be deported back to Colombia he would be exposed to acts of vengeance from drug traffickers who had recruited him. Therefore, it was claimed that France would be in violation of Article 3 by virtue of the positive obligations incumbent on States to protect individuals.

Whilst the source of the risk of ill-treatment to H.L.R. emanated from private actors and not the State authorities themselves, the Court nevertheless held that:

*"Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials."*<sup>53</sup>

Whilst the jurisprudence on a State's duty to protect individuals from torture and other forms of ill-treatment, even if that risk emanates from a private sphere, is relatively new and therefore limited, this issue was recently considered in *A v UK*.<sup>54</sup> This case involved the caning of a boy by his stepfather. In this instance, the stepfather had severely beaten his stepson and whilst he was prosecuted he was nevertheless acquitted by a jury which considered the punishment to be reasonable chastisement and therefore not a criminal offence. In its judgement, following the reasoning in *HLR v France*, the Court held:

*"The Court considers that the obligations on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals"*.<sup>55</sup>

This is a significant decision, yet this is not to say that a State will be responsible for all acts of torture committed in the private sphere; a State's responsibility still has to be engaged in some way. In the case of *A v UK*, the UK's responsibility was engaged because it was considered that the UK had failed to provide adequate protection to the applicant against treatment or punishment contrary to Article 3 because, whilst the child had been *"subjected to treatment of sufficient severity to fall within Article 3, the English jury acquitted his stepfather, who had administered the treatment"*.<sup>56</sup>

The necessity for the State's responsibility to be engaged for a finding of a violation of Article 3 in respect of acts committed in the private sphere can also be illustrated by the case of *Z and Others v UK*, which upheld the earlier decision in *A v UK*.<sup>57</sup> *Z and Others v UK* involved the extreme neglect and ill-treatment of four children by their parents. In this instance the family's situation had been brought to the attention of the relevant health officials and social services for many years. Further, the poor conditions and state of health of the children had also been reported to the police. However, despite the appalling conditions, the children were not given adequate protection and were not taken into care until five years after the ill-treatment had been brought to the attention of the State's local authority.

The Court in its decision recalled the finding in *A v UK* that States were required to take measures to ensure that individuals were not subject to torture, inhuman

or degrading treatment. The Court held that “*these measures should provide adequate protection, in particular, of children and other vulnerable groups and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge*”.<sup>58</sup> Accordingly, as the local authorities had knowledge of the ill-treatment but had failed to take reasonable steps to prevent it from continuing, the Court held that there had been a violation of Article 3.

### ■ 3. LAWFUL SANCTIONS

As discussed earlier, *The Greek Case* defined inhuman treatment as: “*at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable*”.<sup>59</sup>

By using the phrase “*in the particular situation is unjustifiable*”, despite the non-derogable nature of torture as stated in Article 15 of the European Convention,<sup>60</sup> the Commission appeared to leave the door ajar for it to be argued that there are circumstances within which ill-treatment could be justified. This controversial point was revisited in *Ireland v UK*.<sup>61</sup> In this instance, the Commission had to consider whether the prohibition was absolute or whether “*there may be special circumstances...in which treatment contrary to Article 3 may be justified or excused*”.<sup>62</sup>

With reference to the non-derogable nature of Article 3, the Commission held that the prohibition was “*an absolute one and that there can never be under the Convention or under international law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment*”.<sup>63</sup> This decision thereby closed the loophole left open by the earlier decision in *The Greek Case*.

The reasoning in *Ireland v UK* seems clear and unambiguous: if an act satisfies the thresholds set for determining whether an act amounts to torture, inhuman or degrading treatment or punishment, there can be no justification for it. Furthermore, the conduct of the victim can not be raised as a defence based upon justifiability. For example, in the case of *Tomasi v France*, the Government advanced a justification for Mr Tomasi’s treatment because he was held on suspicion of being involved in a terrorist attack. The Court rejected this defence stating: “*The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals*”.<sup>64</sup>

This judgement follows the reasoning in *Chahal v UK*, where the Court held that the conduct of the applicant or “victim” is irrelevant to the provision of protection afforded by the Convention. The Court reiterated that “*Article 3 ...makes no provision for exceptions and no derogation from it is permissible under Article 15...even in the event of a public emergency threatening the life of the nation*”.<sup>65</sup>

An interesting consideration of any possible justification for treatment contrary to Article 3 arose in the case of *X v Germany*.<sup>66</sup> In this instance the European Commission had to consider whether the act of force-feeding a person who was on hunger strike whilst in prison, amounted to a violation of Article 3. The Commission, whilst noting that; “*forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Article 3*”, nevertheless held that; “*The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant’s will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant’s human dignity*”.<sup>67</sup>

However, this is an unusual case as the justification for the violation was in order to save the life of the person who would otherwise be considered a victim of a breach of Article 3. The ill-treatment was not administered in order to save other lives. This case can therefore be distinguished from *Ireland v UK* (and subsequent cases) which established that there can be no justification for acts in violation of Article 3.

Yet, despite the absolute prohibition on torture, inhuman and degrading treatment, the European Court and Commission have drawn a distinction between treatment and punishment which is inherent in lawful sanctions and that which is not.<sup>68</sup>

This proviso can be seen as an attempt to draw a distinction between treatment and punishment which can said to be a “reasonable” or an unavoidable part of a penal system and acts which unreasonably violate a person’s physical or mental integrity. Clearly, the tolerance of some lawful sanctions does not give “carte blanche” to States to simply create legislation permitting sanctions which amount to acts of torture and other forms of ill-treatment. Lawful sanctions must not be inconsistent with the spirit of the absolute prohibition of acts of torture, inhuman and degrading treatment. Yet, the qualification of “lawful sanctions” can be subjective and encompass many elements of a State’s society i.e. cultural, political and religious thinking. It therefore raises many ambiguities and questions.

The European judicial bodies have commonly considered lawful sanctions in the context of the application of corporal punishment and, to a lesser extent, the imposition of the death penalty, and have developed considerable jurisprudence on this issue.<sup>69</sup>

One of the leading cases which established an approach to the issue of corporal punishment is *Tyrer v UK* (discussed earlier). Despite the arguments raised on behalf of the Isle of Man that judicial corporal punishment was not in breach of the Convention since it did not “*outrage public opinion*,”<sup>70</sup> the Court held that “*it must be pointed out that a punishment does not lose its degrading character*

*just because it is believed to be, or actually is, an effective deterrent or aid to crime control.”<sup>71</sup>*

The Court went further and, whilst considering that the form of punishment did not meet the threshold of severity for it to amount to torture, found that: “*The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore it is institutionalised violence... (his) punishment constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity*”.<sup>72</sup>

However, this has not imposed an absolute prohibition on all forms of corporal punishment. In order to be considered a violation of Article 3, the punishment must still satisfy the minimum level of severity so as to come within the scope of Article 3 (discussed earlier).<sup>73</sup>

Yet, corporal punishment can encompass many different forms of punishment and treatment. Recently, this issue was re-examined in the case of *Jabari v Turkey*.<sup>74</sup> In this instance, Mrs Jabari alleged that, if she were to be expelled from Turkey to Iran, she would face the real risk of torture due to the nature of the penal sanctions imposed upon women for adultery. In support of her application Mrs Jabari submitted that in Iran, women still faced the possibility of stoning as a form of punishment for adultery. As noted above, a State has a duty to protect individuals from acts contrary to Article 3 when returning that individual, even when the receiving State imposes a sanction which is considered “lawful” under its domestic law. In this instance, in light of the nature of the punishment which Mrs Jabari faced on her return to Iran, the Court held that she faced a real risk of treatment contrary to Article 3.<sup>75</sup>

The dichotomy between on the one hand prohibiting torture in absolute terms and on the other allowing certain forms of lawful sanctions, has also arisen in relation to the imposition of the death penalty. This is a controversial area, and whilst the European human rights system restricts the imposition of the death penalty,<sup>76</sup> there is, as yet, no absolute prohibition. Progress has recently been made to prohibit the death penalty in all circumstances with the adoption, by the Council of Europe, of Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms. This Protocol will close the loophole left by an earlier Protocol, which did not exclude the death penalty from being imposed in respect of acts committed in time of war or imminent threat of war. Protocol No. 13 will exclude the death penalty in all circumstances and will enter into force with ten ratifications.<sup>77</sup>

Yet, whilst the imposition of the death penalty is currently not absolutely prohibited and nor is it considered to amount to torture, certain factors can bring the death penalty within the scope of a violation of Article 3. One of the leading cases on the issue of the death penalty is the case of *Soering v UK*.<sup>78</sup> This case concerned Soering, who was a West German national accused of committing

multiple murders in the USA. He was found in the United Kingdom and a request was made by the US government for his extradition to stand trial on charges of murder. If sentenced, Soering faced the prospect of the death penalty. An application was made on Soering's behalf to stay the extradition on the ground that, by sending him to face the possibility of the death sentence, the United Kingdom would be in violation of Article 3 of the Convention. It was argued that the finding of a violation would arise not because of the actual imposition of the death penalty, but rather the conditions within which he would be held whilst waiting on death row.

The Court noted that *"for any prisoner condemned to death, some elements of delay between the imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable"*.<sup>79</sup> Yet, they held that certain factors could bring this sanction within the scope of Article 3:<sup>80</sup>

*"Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."*<sup>81</sup>

In other words, whilst the death penalty was a lawful sanction, in certain circumstances the *"manner in which (the death penalty) is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as conditions of detention awaiting execution"* could be a violation of Article 3.<sup>82</sup>

## ■ 4. SUMMARY

From the jurisprudence outlined above, the following definitional characteristics of torture, inhuman and degrading treatment or punishment can be deduced:

### ■ 4.1 Entry Threshold for Article 3

To come within the scope of Article 3, an act or omission must first attain a "minimum level of severity."<sup>83</sup> The assessment of this "entry level" threshold of severity is relative and the Court can take note of the following:

- The duration of the treatment
- The physical effects of the treatment
- The mental effects of the treatment
- The sex, age and state of health of the victim

## ■ 4.2 Definition of Torture

Torture is an act or omission intentionally inflicted on a person for a purpose, which causes severe and cruel physical or mental suffering.

## ■ 4.3 Definition of Inhuman Treatment or Punishment

Inhuman treatment or punishment is an act or omission intentionally inflicted, which causes intense physical or mental suffering.

## ■ 4.4 Definition of Degrading Treatment or Punishment

Degrading treatment or punishment is that which humiliates or debases a person, showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and causes sufficiently severe physical or mental suffering.



## **II RECENT DEVELOPMENTS**

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## II. RECENT DEVELOPMENTS

As outlined in Chapter One, an expansive jurisprudence has emerged from the European Court and Commission on Human Rights concerning the definitional characteristics of the prohibited acts. However, recent developments in the jurisprudence relating to violations of Article 3 have focused not so much upon the definitions of torture, inhuman and degrading treatment or punishment, which are now well established, but rather upon the scope of the application of Article 3 and consequentially the extent of States Parties' obligations.

### 1. EXPANSION OF THE SCOPE OF APPLICATION OF ARTICLE 3

#### 1.1 Violations Due to the Lack of an Effective Investigation

This has been one of the most notable developments in the scope of application of Article 3. Following the decision in *Ribitsch v Austria*,<sup>84</sup> when an individual is taken into custody in good health, but is subsequently found to be injured at the time of release, it is incumbent upon the State to provide a plausible explanation of how the injuries were caused, failing which an issue arises under Article 3.<sup>85</sup> Therefore, in order to provide a plausible explanation of how the injuries were caused, the State must conduct an effective investigation into allegations of ill-treatment.

The finding of a violation due to the lack of an effective investigation would appear to have arisen in order to address difficulties encountered by the requirement that allegations of ill-treatment must be supported by appropriate evidence. In *The Greek Case* and *Ireland v UK* (discussed above), the Court and Commission held that the standard of proof for violations of Article 3 was proof "beyond reasonable doubt" that the ill-treatment had occurred.<sup>86</sup> However, the imposition of this standard of proof fails to take into account the difficulty for victims in obtaining supporting evidence, because, for example, of the denial of access to medical treatment or legal counsel, or a lack of an effective complaints procedure.

In *Ireland v UK* the Court appeared to have tried to address the dichotomy encountered between requiring proof beyond reasonable doubt and the difficulty in obtaining evidence from the alleged violator, i.e. the State authorities or its agents, that the ill-treatment had occurred. In this instance the Court held that, whilst the burden of proof was "beyond reasonable doubt", it agreed with the Commission's earlier decision that, to assess the evidence, proof may follow from "the coexistent of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account".<sup>87</sup>

However, this standard of proof leaves a “grey area” for the Court and can produce inconsistent judgements. In *Labita v Italy*,<sup>88</sup> despite the Government’s earlier acceptance of the poor conditions of detention and a statement before the Commission that “*these deplorable acts were committed by certain warders on their own initiative*”,<sup>89</sup> the Court nevertheless held that there was insufficient evidence that the injuries were caused by the prison warders. In this instance the applicant had complained of various forms of ill-treatment including injuries to his knees, fingers and testicles, body searches, as well as insults. The psychological disorders which he had suffered since being detained, as well the injuries to his knees, were confirmed by a medical certificate, although the other physical injuries were not. Without going into the substance of the case, it is instructive that the Court interpreted the burden of proof restrictively and found that there was insufficient evidence “beyond reasonable doubt” that the injuries were caused by the prison warders.<sup>90</sup>

Yet, it is evident that the Court is increasingly mindful of the difficulties facing victims in obtaining supporting evidence of ill-treatment. Consequently, it has imposed an obligation upon State authorities to carry out an effective investigation into allegations of ill-treatment. Without such a duty to investigate, perpetrators of ill-treatment would be free to act with apparent impunity.

The importance of this duty to investigate was emphasised by the Court in *Assenov v Bulgaria*.<sup>91</sup> This case involved two applicants, Mr Assenov, who was fourteen years old at the time of the incident, and his father. They alleged that Mr Assenov had been ill-treated by police officers whilst detained. The Court, finding it impossible to determine the exact cause of his injuries because there was some confusion as to whether the injuries were caused by the police officers or actually the second applicant, his father, nevertheless held that there had been a violation of Article 3 by the State, due to the lack of an effective investigation.

The Court noted that an investigation should “*be capable of leading to the identification and punishment of those responsible*”.<sup>92</sup> Without such a duty to investigate, the Court noted that “*the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity*”.<sup>93</sup>

The duty to investigate has also been a central issue in many cases relating to disappearances.<sup>94</sup> In *Kurt v Turkey*,<sup>95</sup> an application was made on behalf of a disappeared person and his mother. In respect of the disappeared man, the Court held that “*the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant’s son...They have failed to discharge their responsibility to account for him. Accordingly the Court...finds that there has been a particularly grave violation*”.<sup>96</sup>

As regards the violation in respect of the mother, the Court noted that the mother had been “left with the anguish of knowing that her son had been detained and there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time”.<sup>97</sup> Her suffering was therefore sufficiently severe so as to find the State in breach of Article 3.

Following this decision, the Court has been careful to avoid creating a “flood-gate” situation of claims from relatives. In *Cakici v Turkey*,<sup>98</sup> a claim was brought on behalf of a disappeared man and his brother. In its consideration of the allegations in respect of the brother of the disappeared man, the Court held that in order for claims by relatives to succeed, “special factors” must be established which “give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused by serious human rights violations”.<sup>99</sup> These “special factors” include the following:

- Proximity in time and space to the alleged violation
- Proximity in relationship (certain weight will attach to the parent-child bond)
- The nature of the relatives’ involvement with the attempts to obtain information
- The way in which the authorities respond to the inquiries<sup>100</sup>

In this instance, the Court was careful to distinguish between the circumstances in *Kurt v Turkey* and the present case under consideration. In this instance the brother’s claim failed to satisfy the above criteria as, unlike the relative in *Kurt v Turkey*, he was not present when the security forces took his brother, nor did he bear most of the responsibility for making enquiries into the whereabouts of his brother.

This restrictive interpretation of the category of and circumstances within which relatives can claim has been followed in subsequent cases. In *Akdeniz and others v Turkey*, the Court held that “the decision in the Kurt case does not however establish any general principle that a family member of a “disappeared person” is thereby a victim of treatment contrary to Article 3”.<sup>101</sup> Nevertheless, what is clear from these cases is that a State generally owes a duty to investigate not only to victims but also to their relatives. In relation to disappearances, the finding of a violation therefore arises, not so much in the fact of the disappearance, but “rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention.”<sup>102</sup>

## ■ 1.2 Developments in Extradition and Expulsion Cases

The jurisprudence on the nature of a State’s obligation to ensure that persons being extradited or expelled are not knowingly exposed to a real risk of ill-treatment by the accepting State has been discussed in detail earlier.<sup>103</sup> Traditionally,

the risk of ill-treatment has typically emanated from the State directly i.e. the imposition of the death penalty or corporal punishment, or because the receiving State could not adequately protect individuals from acts of ill-treatment by non-State actors. Recently however, the Court has considered the scope of this obligation in relation to ill-treatment caused by the lack of adequate medical care in the receiving State or because the returning State has accepted responsibility for the provision of medical care.

One of the leading cases regarding this responsibility is *D v UK (1997)*.<sup>104</sup> This case involved an individual who was arrested upon his arrival in the UK from St. Kitts for the possession of cocaine. Subsequently, he was sentenced to a term of imprisonment in a UK prison. Whilst in prison the individual was diagnosed as HIV positive and suffering from AIDS, the infection occurring prior to his arrival in the UK. Accordingly, whilst detained he received some medical treatment for his illness. However, upon his release the authorities sought to return him to St. Kitts.

D challenged the efforts to return him, alleging that if he were returned to St. Kitts, where hospital facilities were extremely limited, not only would this hasten his death but the conditions in which he would die would be inhuman and degrading.

The Court recalled the established principle that returning States owe a duty to ensure that persons are not subjected to treatment or punishment in violation of Article 3, regardless of the conduct of the person to be expelled, or whether that person has entered the returning State in a technical sense i.e. legal sense.<sup>105</sup> The Court observed that this principle has been applied, so far, in the context of risks emanating from the State directly or from non-State bodies from whom the State can not afford adequate protection.<sup>106</sup> However, the Court stressed that, given the importance of the protection afforded by Article 3, the Court must be sufficiently flexible to address other contexts that might arise.<sup>107</sup>

Accordingly, the Court held that the abrupt withdrawal of the medical treatment and the adverse conditions that awaited D upon his return would reduce his limited life expectancy and would amount to inhuman treatment. In this instance, the Court stressed that the State had assumed responsibility for D's treatment and he had become reliant on the medical and palliative care which he was receiving, and although the conditions which he would face in the receiving country were not in themselves a breach of Article 3, "*his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment*".<sup>108</sup>

This case does not, however, establish a precedent for a finding of a violation simply because the receiving State has less developed medical care than the returning State. In *Bensaid v UK* the Court was careful to distinguish between the "*exceptional circumstances*" in *D v UK* and those in the current case.<sup>109</sup> This case involved the expulsion of an individual suffering from schizophrenia. It was

alleged that this expulsion would cause a relapse in his condition due to the more limited availability of medical care in the receiving State. The Court however considered that, given the nature of Bensaid's mental illness, a relapse could occur in the UK in any respect. Thus, although the Court considered that the removal of Bensaid from the UK would be likely to increase the risk of a relapse, this was not considered a sufficiently real risk and therefore there was no finding of a violation.<sup>110</sup>

It can be seen, therefore, that the Court is applying the judgement of *D v UK* cautiously and restrictively. There must be a sufficiently real risk that a return would hasten the deterioration of a medical condition for there to be a finding of a violation of Article 3.

### ■ 1.3 Finding of a Violation in Respect of Property Damage

The flexibility of the Court to consider other less traditionally recognised forms of ill-treatment was demonstrated in its consideration of the case of *Bilgin v Turkey*,<sup>111</sup> wherein the Court considered an allegation of Article 3 resulting from deliberate property damage by Turkish security forces.

The Court, having determined that the security forces were responsible for the property damage, then had to consider whether this resulted in a violation of Article 3. The Court took note of the fact that the destruction of the applicant's home and possessions deprived him of his livelihood and shelter. The Court, whilst noting that the Commission had found no underlying motive for the destruction of the property, nevertheless stated that "*even assuming that the acts in question were carried out without any intention of punishing the applicant, but as a discouragement to others...would not provide a justification for the ill-treatment*".<sup>112</sup> The Court considered that the material losses had deeply affected the applicant and had caused suffering sufficiently severe so as to amount to ill-treatment.<sup>113</sup>

This decision was recently upheld in the case of *Dulas v Turkey*, where the Court also found that there had been a violation of Article 3 in respect of property damage.<sup>114</sup> The circumstances of this case were similar to those of *Bilgin v Turkey*, wherein the applicant alleged that her home had been deliberately destroyed by security forces and she was left destitute.

The Court recalled that the personal circumstances of the applicant must be taken into consideration.<sup>115</sup> In this instance the applicant was over 70 years old at the time of the incident and had been deprived of shelter and support, forcing her to leave her community where she had lived all her life. The Court therefore found that there had been a violation of Article 3.

## ■ 2. OTHER DEVELOPMENTS

### ■ 2.1 Assessment of Evidence and Conditions of Detention

The European Court and the Commission have for a long time been concerned with allegations of violations of Article 3 due to the conditions within which people have been detained.<sup>116</sup> When assessing conditions of detention the following cumulative effects have been taken into consideration: overcrowding, inadequate sanitation facilities, heating, lighting, sleeping arrangements, food, recreation and contact with the outside world. Previously, in order to assess these conditions, the Court and Commission would rely not only on witness testimony but could also conduct an on-site visit. Recently, however, in order to assess these factors, they have been assisted by and have made increasing use of the reports prepared by the European Committee for the Prevention of Torture (CPT), the regional visiting body established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>117</sup>

The CPT conducted its first visit in May 1990, and from then on has continued to conduct periodic and follow-up visits to the Member States of the Council of Europe who are party to the European Convention for the Prevention of Torture.<sup>118</sup> The reports, statements and recommendations of the CPT have therefore since this time been a useful tool for the European judicial bodies to use in consideration of an allegation of a violation of Article 3.

By way of example, in *Aydin v Turkey* (discussed previously) the CPT reports and statements were used by the European Commission in order to evaluate the reliability of the evidence presented by the applicant. In this instance, the Commission had recourse to the CPT statements which noted the deep-rooted practice of torture and ill-treatment in Turkish police stations, which added weight to the applicants' allegations of torture whilst she was detained by the police.<sup>119</sup>

In *Aerts v Belgium*,<sup>120</sup> in consideration of the conditions of detention in a psychiatric wing of a prison, the Court noted that, in assessing whether the treatment or punishment is incompatible with Article 3, in the case of mentally ill patients it is unreasonable to expect them to give a detailed or coherent description of suffering during their detention.<sup>121</sup> Accordingly, the Court considered the report produced by the CPT following a visit to the place in question. In this report the CPT severely criticised the conditions of detention. The CPT further noted that for prolonged and lengthy periods of detention, the standard of care fell below the minimum acceptable, from an ethical and humanitarian viewpoint, and carried an undeniable risk of a deterioration of mental health.<sup>122</sup>

Whilst giving certain weight to the report of the CPT, the Court, nevertheless, held that the poor living conditions did not seem to have caused the applicant to

suffer. In this instance the Court determined that there was insufficient evidence to establish “conclusively” that the conditions resulted in suffering contrary to Article 3.<sup>123</sup>

This case must now be read in the light of the decision in *Keenan v UK*,<sup>124</sup> wherein the Court held conversely that, notwithstanding the difficulties in establishing with any certainty to what extent the conditions of detention contributed to the symptoms of the prisoner, this is not “determinative of the issue as to whether the authorities fulfilled their obligation under Article 3”.<sup>125</sup> The Court determined that there are circumstances where proof of the actual effect on the person may not be a major factor, such as in the treatment of mentally ill persons, “who may not be able to or capable of pointing to any specific ill-effects”.<sup>126</sup>

The reports of the CPT were used to greater effect more recently in the case of *Dougoz v Greece*.<sup>127</sup> This case involved an allegation that the conditions within which the applicant was held whilst awaiting his expulsion amounted to inhuman and degrading treatment. The conditions complained of included the following: significant overcrowding, no beds or bedding (some detainees were sleeping in corridors), insufficient sanitary facilities and scarcity of food.

In this instance the Court did not undertake an on-site visit, but instead relied primarily upon the conclusions of a CPT report regarding the conditions of detention in the police station and detention centre in question. In light of the fact that the CPT had stressed that the cellular accommodation and detention regime were unsuitable for long periods and the fact that the CPT had felt it necessary to renew its visit to these places of detention, the Court considered that this evidence supported the claims advanced by the applicant.

Therefore, it would appear that, since the decision in *Aerts v Belgium*, in circumstances where it is difficult to assess the actual effect of the conditions of detention on a person, this will not necessarily be the determinative factor and, where relevant, the reports of the CPT will be considered in order to assess whether the conditions of detention are an actual violation of Article 3.

## ■ 2.2 Limitation of the Positive Duty Owed by States

Recently there have been two cases which, whilst dealing with substantially different issues, have had a significant impact upon the scope of application of the positive obligations imposed upon States in relation to Article 3. These cases are *Al-Adsani v UK*<sup>128</sup> and *Pretty v UK*.<sup>129</sup>

The first of these cases, *Al-Adsani v UK*, involved an allegation that the granting of immunity from civil suit to the Government of Kuwait by the UK Courts violated, inter alia, the applicant’s right to secure enjoyment of his right not to be tortured. In this instance the applicant, Mr Al-Adsani, had been subjected to

torture and ill-treatment whilst in Kuwait, from which he suffered considerable physical as well as mental injuries. He subsequently returned to England where he instituted civil proceedings for compensation from the Kuwaiti authorities. Initially the applicant was granted leave to serve a writ on the Kuwaiti authorities outside the English Court's jurisdiction. However, on appeal the English High Court held that the Kuwaiti Government was entitled to claim immunity from civil suit.

In its consideration of this case, the European Court of Human Rights restated that Article 3 (taken together with Article 1) of the European Convention imposed "*a number of positive obligations on the States Parties, designed to prevent and provide redress for torture and other forms of ill-treatment*".<sup>130</sup> However, recalling the decisions in *A v UK*, *Assenov and Others v Bulgaria* and *Aksoy v Turkey* (discussed previously), the Court held that the positive obligation only applies in relation to ill-treatment allegedly committed within the jurisdiction of the violator State. Further, noting that the case of *Soering v UK* (discussed above) recognised that Article 3 had some limited extraterritorial application concerning the expulsion of individuals, the Court recalled that this positive duty was imposed upon the returning State "*by reason of it having taken action which had a direct consequence on the exposure of an individual to proscribed ill-treatment*".<sup>131</sup>

However, in this instance the alleged ill-treatment had taken place outside the jurisdiction of the UK, and the UK authorities had no causal connection to the occurrence of the ill-treatment. Therefore the European Court held that there was no duty for a State to provide a civil remedy in respect of torture allegedly committed outside of the jurisdiction of that State.<sup>132</sup>

The second case, *Pretty v UK*,<sup>133</sup> involved an allegation of, inter alia, a violation of Article 3 due to the State's refusal to take steps to protect the applicant from undue suffering caused by a failure to provide the applicant's husband with immunity from criminal proceedings should he assist in her suicide.

This is a highly unusual and emotive case, as the applicant was suffering from a degenerative fatal disease from which she would die in a distressing and painful way. The applicant was seeking an assurance from the Government's prosecution service that should her husband assist in her suicide, he would not subsequently be prosecuted.

In its findings, the European Court restated that a positive duty was imposed upon States to provide protection against inhuman and degrading treatment. In support of this obligation, the Court cited *A v UK*, *Z and Others v UK*, *Keenan v UK* and *D v UK* (discussed above). Nevertheless, the Court distinguished between the positive duty imposed in respect of these cases and the circumstances of the case under consideration. The Court noted that, in respect of the previously cited cases, the States' obligation arose out of the necessity for "*the removal or mitigation of harm, for instance, preventing any ill-treatment by public bodies or*

*private individual or providing improved conditions or care.”<sup>134</sup> In this instance the positive duty claimed would “require the State to sanction actions intended to terminate life, an obligation that cannot be derived from Article 3”.*<sup>135</sup>

Accordingly, the Court held that no positive obligation arose under Article 3 which required the State to give an undertaking not to prosecute the applicant’s husband or to provide a lawful opportunity for any other form of assisted suicide.<sup>136</sup>



## CONCLUSION

Article 3 of the European Convention is a simple proclamation of the prohibition of torture, inhuman and degrading treatment and punishment that hides their complexity. The complex nature of these prohibited acts is reflected in the extensive body of jurisprudence which has subsequently emanated from the European judicial bodies, which have developed intricate and distinct definitions for these violations. Through this jurisprudence, the European Court and Commission of Human Rights have developed a standard approach, whereby the three prohibited acts are distinguished from each other, primarily, by a threshold of severity. This sliding scale places torture at the “top” of the severity scale, followed by inhuman and then degrading treatment or punishment.

Yet a distinction between the three acts can not be simply drawn by using a rather crude “measuring stick” of the level of pain or suffering caused. The jurisprudence outlined above illustrates that the European judicial bodies have taken many different factors into account when assessing the level of severity. The assessment of a violation will be relative and “*depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some circumstances the sex, age and state of health of the victim*”.<sup>137</sup> Further, more recently, the Court has even held that whilst the severity of suffering will be a significant consideration, “*there are circumstances where actual proof of the actual effect on the person may not be a major factor*”.<sup>138</sup>

Thus, whilst the European Court and Commission have stated that the three prohibited acts can and should be distinguished, nevertheless it can be difficult to pinpoint the distinguishing elements of such a categorisation. It should also be borne in mind that such an approach tends to lead to the conclusion that acts “falling short” of torture are therefore “only” inhuman or degrading. It must be remembered that acts of inhuman and degrading treatment are no less of a violation of Article 3 than acts of torture.

The importance and instructive nature of the European jurisprudence can not be overstated, and it has greatly influenced other regional and international judicial and quasi-judicial bodies when considering the definitions of torture, inhuman and degrading treatment. *The Greek Case*, for example, had a significant impact upon the drafting of the UN Declaration against Torture (1975) and the subsequent definition of torture contained within the UN Convention against Torture (1984). Furthermore, the judgements have had a profound impact upon penal reform within Europe, by proscribing various treatments or punishments as violations of Article 3.

Perhaps most significantly, the Court and Commission have always afforded themselves a degree of flexibility, considering the European Convention on Human Rights and Fundamental Freedoms as a living instrument. The Court and Commission have recognised that ideas and values do not remain static and acts

or omissions that were not previously considered a violation may later be considered as such. Thus the Court is not bound by previous judgements and can re-evaluate its decisions. By taking this approach, the Court and Commission have acknowledged that modernity does not always bring progress and these bodies have been able to and can continue to respond to the challenges faced by new as well as traditional forms of ill-treatment and abuse.





# ANNEX

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## ■ ANNEX

### ■ ANNEX I

#### ■ **European Convention for the Protection of Human Rights and Fundamental Freedoms. Section One (as amended by Protocol No. 11):**

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

#### **Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

#### **Section I – Rights and freedoms**

#### **Article 2 – Right to life**

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a

court following his conviction of a crime for which this penalty is provided by law.

- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Article 3 – Prohibition of torture**

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

### **Article 4 – Prohibition of slavery and forced labour**

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this article the term “forced or compulsory labour” shall not include:
  - a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - d any work or service which forms part of normal civic obligations.

### **Article 5 – Right to liberty and security**

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
  - 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
  - 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
  - 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## **Article 6 – Right to a fair trial**

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within

a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

### **Article 7 – No punishment without law**

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

### **Article 8 – Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.

- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### **Article 9 – Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### **Article 10 – Freedom of expression**

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **Article 11 – Freedom of assembly and association**

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of

disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### **Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

### **Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **Article 15 – Derogation in time of emergency**

- 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

### **Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

## Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

## Article 18 – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## ■ ANNEX II

### ■ List of Main Article 3 Cases

The Judgements of the European Court of Human Rights can be read and downloaded from the following website: [www.echr.coe.int](http://www.echr.coe.int).

#### **Abbreviations:**

*ECHR (Series A)*: European Court of Human Rights (Series A)  
*EHRR*: European Human Rights Reports

#### **CASES:**

- 1969 **The Greek Case** (1969) Yearbook: European Convention on Human Rights, No.12.
- 1973 **Amekrane v UK**, Application No. 5961/72, (1973) Yearbook: European Convention on Human Rights No. 16.
- 1978 **Ireland v UK**, (1978) ECHR (Series A) No.25.  
**Tyrer v UK**, (1978) ECHR. (Series A) No. 26.
- 1982 **Campbell and Cosans v UK**, (1982) ECHR (Series A.), no. 48.
- 1989 **Soering v UK** (1989) ECHR (Series A) No.161.
- 1991 **Cruz Varas v Sweden** (1991) ECHR (Series A) no.201.  
**Vilvarajah v UK** (1991), ECHR (Series A), No. 215.  
**Y v UK**, (1991) Comm Rep, No.8.
- 1992 **Tomasi v France** (1992) ECHR (Series A) No. 241.
- 1993 **Costello-Roberts v UK**, (1993) ECHR (Series A), No. 247-C.  
**Klass v Germany** (1993), ECHR (Series A) no. 269.
- 1995 **Loizidou v Turkey** (1995) ECHR (Series A) no.310.  
**Ribitsch v Austria**, (1995), ECHR (Series A) no. 336.
- 1996 **Aksoy v Turkey** (1996), 23 EHRR 553.  
**Chahal v UK** (1996), Reports of Judgements and Decisions 1996-V.

- 1997 **Raninen v Finland**, (1997) 26 EHRR 563.  
**D v UK** (1997) Judgement of 2 May.  
**Aydin v Turkey** (1997) Judgement of 25 September.  
**H.L.R. v France** (1997) 26 EHRR 29.
- 1998 **A v UK** (1998), 27 EHRR, 611.  
**Kaya v Turkey** (1998) EHRR 1998-I.  
**Selcuk and Asker v Turkey** (1998), EHRR 1998-1.  
**Kurt v Turkey** (1998), EHRR 1998-III.  
**Aerts v Belgium** (1998), EHRR 1998-V.  
**Assenov v Bulgaria**, (1998) EHRR 1998-VIII.
- 1999 **Selmouni v France**, (1999), 29 EHRR 403.  
**Cakici v Turkey** (1999) Judgement of 8 July.  
**V v UK** (1999) ECHR (Series A). No. 9.
- 2000 **Labita v Italy**, (2000) Judgement of 6 April.  
**Ilhan v Turkey** (2000), Judgement of 27 June.  
**Salman v Turkey** (2000) Judgement of 27 June.  
**Akkoc v Turkey** (2000), Judgement of 10 October.  
**Jabari v UK** (2000) Judgement of 11 November.  
**Bilgin v Turkey** (2000) Judgement of 16 November.
- 2001 **Dulas v Turkey** (2001) Judgement of 30 January.  
**Bensaid v UK** (2001) Judgement of 6 February.  
**Dougoz v Greece**, (2001) Judgement of 6 March.  
**Keenan v UK**, (2001), Judgement of 3 April.  
**Peers v Greece** (2001) Judgement of 19 April.  
**Z and others v UK**, (2001) Judgement of 10 May.  
**Akdeniz and others v Turkey** (2001) Judgement of 31 May.  
**Price v UK** (2001) Judgement of 10 July.  
**Al-Adsani v UK** (2001) Judgement of 21 November.
- 2002 **Pretty v UK** (2002), Judgement of 29 April.





- 1 For the purposes of this paper please read “acts” so as to include “omissions”.
- 2 Since 1998, following a review of the supervisory mechanisms of the European human rights system, the work of the European Commission of Human Rights has been subsumed by a restructured European Court of Human Rights. The Commission ceased to function on 1 November 1999 pursuant to Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms “restructuring the control machinery”.
- 3 Ireland v UK, (1978), European Court of Human Rights (Series A) No.25, §162. (Herein abbreviated to ECHR. (Series A)
- 4 “The Greek Case”, (1969), Yearbook: European Convention on Human Rights No. 12, page186. (Herein abbreviated to YB.Eur.Conv. on HR)
- 5 Ireland v UK, (1978), ECHR. (Series A) No.25, page 25.
- 6 For the purposes of this paper please read “treatments” so as to include “punishments”.
- 7 The Greek Case, (1969) Y.B: Eur.Conv. on HR, 12, page 186.
- 8 Morgan and Evans, “Preventing Torture”, (1998) Clarendon Press, Oxford, page 77.
- 9 Ireland v UK, (1978), ECHR. (Series A) No.25, §167.
- 10 Cf. dissenting opinion of Judge Zekia, who did not share the view that: “extreme intensity of physical or mental suffering is a requisite for a case of ill-treatment to amount to torture” because “the nature of torture admits gradation in its intensity, in its severity and in the methods adopted”. Also, he did not consider that the Court had jurisdiction to overturn the Commission’s earlier decision that the treatments amounted to torture. He stated that: “this was a finding of fact for the competent authority dealing with the case in the first instance”. Ibid.§ B.
- 11 Ibid. §167.
- 12 Cf. The Greek Case, idem, which considered that combined application of certain techniques did amount to torture.
- 13 Morgan and Evans, “Preventing Torture”, (1998) Clarendon Press, Oxford, page 82.
- 14 See for example: Aksoy v Turkey (1996), 23 European Human Rights Report 553, (Herein abbreviated to EHRR) Aydin v Turkey (1997) Judgement of 25 September, Selmouni v France, (1999), 29 EHRR 403.
- 15 Aydin v Turkey (1997) Judgement of 25 September.
- 16 Aydin v Turkey (1997) Judgement of 25 September, §83-86.
- 17 Tyrer v UK, (1978) ECHR. (Series A) No. 26 page 15. See also Soering v UK (1989) ECHR (Series A) No.161 page 15, § 31, Loizidou v Turkey (1995) ECHR (Series A) No. 310 page 21, §71
- 18 Selmouni v France, (1999), 29 EHRR.
- 19 Selmouni v France, (1999), 29 EHRR, §102.
- 20 See for example Aydin v Turkey (1997) Judgment of 25 September.
- 21 Article 1 UN Convention against Torture (1984), U.N.Doc. A/39/51.
- 22 Selmouni v France, (1999), 29 EHRR §100.
- 23 Ibid. §100.

- 24 Ilhan v Turkey (2000), judgement of 27 June, §85. See also Salman v Turkey (2000) Judgement of 27 June and Akkoc v Turkey (2000), judgement of 10 October.
- 25 The Greek Case, (1969), Y.B.Eur.Conv. on H.R. 12, page 186.
- 26 Ireland v UK, (1976), Commission Report (Series B.), Vol. 23-I. §389.
- 27 M. Evans and R. Morgan, Preventing Torture, Clarendon Press, Oxford, 1998, page 93.
- 28 Campbell and Cosans v UK, (1982) ECHR (Series A.), No. 48.
- 29 Ibid. § 26. See also Tyrer v UK (1978) ECHR. (Series A) No. 26, §29.
- 30 The Greek Case, (1969) Idem.
- 31 Tyrer v UK, (1978) ECHR. (Series A) No. 26, §32, 35.
- 32 Tyrer v UK, (1978) ECHR. (Series A) No. 26, § 30. 31.
- 33 Campbell and Cosans v UK, (1982) ECHR (Series A.), No. 48, § 28.
- 34 Raninen v Finland, (1997) 26 EHRR 563, §55.
- 35 V v UK (1999) ECHR (Series A). No. 9, §71.
- 36 Ibid. §71.
- 37 Peers v Greece (2001) Judgement of 19 April.
- 38 Peers v Greece (2001) Judgement of 19 April §74.
- 39 Ibid. §75.
- 40 Price v UK (2001) Judgement of 10 July.
- 41 Price v UK (2001) Judgement of 10 July §34.
- 42 Soering v UK, (1989), ECHR (Series A), No.161. See also the earlier communication, Amekrane v UK, Application No. 5961/72, (1973) 16 Yearbook of the European Convention on Human Rights 356. (Friendly settlement reached)
- 43 Soering v UK, Ibid. §92. Note that it was not claimed that the conditions would amount to torture.
- 44 See for example Cruz Varas v Sweden (1991) ECHR (Series A) No.201, Vilvarajah v UK (1991), ECHR (Series A), No. 215, H.L.R. v France (1997) 26 EHRR 29, D v UK (1997) Judgement of 2 May, Jabari v UK (2000) Judgement of 11 November. See also the Human Rights Committee decision on the communication NG v Canada (1993) 15 HRJL page 149.
- 45 Cruz Varas v Sweden (1991) ECHR (Series A) No.201.
- 46 Ibid. §76.
- 47 Vilvarajah v UK, (1991), ECHR (Series A), No. 215.
- 48 Ibid §108, citing Soering v UK (1989) ECHR (Series A), No.161 §88.
- 49 Chahal v UK (1996), Judgement of 15 November.
- 50 Ibid. §97.
- 51 Ibid. §78-9.
- 52 H.L.R. v France (1997), 26 EHRR 29.
- 53 H.L.R. v France (1997), 26 EHRR, §40.
- 54 A v UK (1998), 27 EHRR, 611.
- 55 Ibid. §22.
- 56 Ibid. §24. See also Z and others v UK, (2001) judgement of 10 May, §73.
- 57 Z and others v UK, (2001) judgement of 10 May, §73.
- 58 Ibid §73.
- 59 The Greek Case (1969), 12 Yearbook of the European Commission, 504.

- 60 See annex 1.
- 61 Ireland v UK (1978), ECHR. (Series A) No.25.
- 62 Ireland v UK (1978), ECHR. (Series A) No.25, §750. This issue was not revisited by the Court in its consideration.
- 63 Ibid. §752.
- 64 Tomasi v France (1992) ECHR (Series A) No. 241, §115.
- 65 Ibid. §78.
- 66 X v Germany, (1984) 7 EHRR 152.
- 67 Ibid. §153-154.
- 68 See Campbell and Cosans v UK, (1982) ECHR (Series A), No.48, §30, Y v UK, (1991) Comm Rep, No.8, Costello-Roberts v UK, (1993) ECHR (Series A), No. 247-C.
- 69 See Tyrer v UK, (1978) ECHR (Series A), No. 26, Campbell and Cosans v UK (1982) ECHR (Series A), No.48
- 70 Ibid. § 31.
- 71 Tyrer v UK (1978) Idem. § 31.
- 72 Ibid. §33.
- 73 See, for example, Campbell and Cosans v UK, UK (1982) ECHR (Series A), No.48, where the threatened corporal punishment was considered not to have caused sufficiently severe suffering so as to amount to degrading treatment.
- 74 Jabari v Turkey, (2000) Judgment of 11 July 2000.
- 75 Ibid. §41-42.
- 76 See Protocol No.6 to the European Convention on Human Rights and Fundamental Freedoms.
- 77 For more information please see the Council of Europe website: [www.coe.int](http://www.coe.int).
- 78 Soering v UK (1989) ECHR (Series A) No.161.
- 79 Ibid. §111.
- 80 Note: it may also come within the scope of Article 2 as well.
- 81 Soering v UK (1989), Idem. §111. See also Human Rights Committee, Pratt Morgan v Attorney General for Jamaica, (1986) communication No. 210/1986.
- 82 Soering v UK (1989) ECHR (Series A) No.161 §104.
- 83 Ireland v UK, 1978), ECHR (Series A) No.25, §162.
- 84 Ribitsch v Austria, (1995), ECHR (Series A) No. 336 §108-111.
- 85 Ibid. §108-111.
- 86 See The Greek Case, (1969) YB.EUR.Conv. on HR No.12 §30, Ireland v UK (1978) ECHR (Series A) No. 25 §161, cited in Labita v Italy, (2000) Judgement of 6 April, §121-128.
- 87 Ireland v UK (1978) ECHR (Series A) No. 25 §161.
- 88 Labita v Italy (2000) Judgement of 6 April.
- 89 Ibid. §113.
- 90 Ibid.
- 91 Assenov v Bulgaria, (1998) EHRR 1998-VIII. See also Indelicato v Italy (2001) Judgement of 18 October.
- 92 Ibid. §102. The requirements of the duty to investigate follow those required for Article 2. See, for example, McCann and Others v UK (1995)

ECHR (Series A) No. 324, page 49, §161, *Kaya v Turkey* (1998) EHRR 1998-I, page 324 §86.

- <sup>93</sup> *Assenov v Bulgaria*, (1998) EHRR 1998-VIII. §102. See also *Selmouni v France* (1999), 95 EHRR 1999-V, wherein the Court dismissed the Government's preliminary objection on the ground of non-exhaustion of domestic remedies, finding that "the notion of an effective remedy entails...a thorough and effective investigation...the authorities did not take the positive measures required in the circumstances of the case to ensure that the remedy referred to by the Government was effective". §79-80.
- <sup>94</sup> See for example, *Kurt v Turkey* (1998), EHRR 1998-III, page 1187, *Cakici v Turkey* (1999) Judgement of 8 July, *Akdeniz and others v Turkey* (2001) Judgement of 31 May.
- <sup>95</sup> *Kurt v Turkey* (1998), EHRR 1998-III, pp.1187, see also *Cakici v Turkey* (1999) Judgement of 8 July.
- <sup>96</sup> *Ibid.* §128-9.
- <sup>97</sup> *Kurt v Turkey* (1998), EHRR 1998-III, §134.
- <sup>98</sup> *Cakici v Turkey* (1999) Judgement of 8 July.
- <sup>99</sup> *Ibid.* §98-99.
- <sup>100</sup> *Ibid.* §99. In this instance, the applicant was the brother of the disappeared person. Unlike the mother in *Kurt v Turkey*, the applicant was not present when the security forces took his brother and whilst he was involved in making various inquiries he did not bear the brunt of the task. They also concluded that there had been no aggravating circumstances arising from the response of the authorities. Accordingly, there had been no violation in respect of the applicant.
- <sup>101</sup> *Akdeniz v Turkey*, Judgement of 31 May 2001, §101.
- <sup>102</sup> *Ibid.* §101.
- <sup>103</sup> See for example: *Vilvarajah and Others v. UK* (1991) ECHR (Series A) No. 215, *Cruz Varas and Others v. Sweden* (1991), ECHR (Series A) No. 201, *Soering v UK* (1989) ECHR (Series A) No. 161, *Jabari v Turkey* (2000), Judgement of 11 July.
- <sup>104</sup> *D v UK* (1997), 24 EHRR No. 423.
- <sup>105</sup> See for example *Chahal v UK* (1996) Reports of Judgements and Decisions 1996-V §80.
- <sup>106</sup> *D v UK* (1997), 24 EHRR No. 423, §49.
- <sup>107</sup> *Ibid.* §49.
- <sup>108</sup> *D v UK* (1997), 24 EHRR No. 423, §53.
- <sup>109</sup> *Bensaid v UK* (2001) §40, Judgement of 6 February.
- <sup>110</sup> *Ibid.* §41.
- <sup>111</sup> *Bilgin v Turkey* (2000) Judgement of 16 November.
- <sup>112</sup> *Ibid.* §102. Please note, as discussed earlier, that the European Court has held that there can never be a justification for ill-treatment (*Ireland v UK* (1978) ECHR (Series A No. 25)
- <sup>113</sup> *Ibid.* §96-104.
- <sup>114</sup> *Dulas v Turkey* (2001) Judgement of 30 January. See also *Matyar v Turkey* (2002) Judgement of 21 February.

- 115 Ibid. §44 and §54 citing *Selcuk and Asker v Turkey* (1998), EHRR 1998-1, §65-66.
- 116 See for example, *The Greek Case* (1969) 12 Yearbook of the European Convention on Human Rights (The Yearbook) page 504; *Soering v UK* (1989) ECHR (Series A), No.161, reproduced in 11 HRLJ (1990) 335.
- 117 For more information please see the CPT website: [www.cpt.coe.fr](http://www.cpt.coe.fr).
- 118 The CPT's first visit was to Austria.
- 119 *Aydin v Turkey* (1997) Judgement of 25 September.
- 120 *Aerts v Belgium* (1998), EHRR 1998-V.
- 121 Ibid. §66.
- 122 Ibid. §65.
- 123 Ibid. §66-67.
- 124 *Keenan v UK*, (2001), Judgement of 3 April. Note the Court did not have recourse to CPT reports during the consideration of this case.
- 125 Ibid. §112.
- 126 Ibid. §112.
- 127 *Dougoz v Greece*, (2001) Judgement of 6 March, See also *Peers v Greece* (2001), Judgement of 19 April.
- 128 *Al-Adsani v UK*, (2001) Judgement of 21 November.
- 129 *Pretty v UK* (2002), Judgement of 29 April.
- 130 *Al-Adsani v UK* (2001), Judgement of 21 November, §38.
- 131 Ibid. §39.
- 132 Ibid. §40.41.
- 133 *Pretty v UK* (2002), Judgement of 29 April.
- 134 *Pretty v UK* (2002), Judgement of 29 April, §55.
- 135 Ibid. §55.
- 136 Ibid. §56.
- 137 *Ireland v UK*, (1978), ECHR (Series A) No. 25, §162.
- 138 *Keenan v UK*, (2001), Judgement of 3 April §112.

