
# The prohibition of torture

***A guide to the implementation of Article 3 of the European Convention on Human Rights***

Aisling Reidy

**Human rights handbooks, No. 6**

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# Introduction to the Convention

The European Convention on Human Rights (hereinafter "the Convention") was signed in Rome on 4 November 1950, and came into force on 3 May 1953. Today, in 2003,[1] forty-four states have ratified the European Convention on Human Rights.

In practically all these states the Convention, as well as creating legal obligations under international law, is also part of domestic law. In this way the European Convention on Human Rights is part of the legal system and it is mandatory for the domestic courts and all public authorities to apply its provisions. In national proceedings individuals may directly invoke its text and case-law, which must be applied by the national courts. Moreover, the national authorities, including the courts, must give the Convention priority over any national law conflicting with the Convention.

This is in keeping with the overall scheme of the Convention, which is that the initial and primary responsibility for the protection of the rights set forth in the Convention lies with the contracting states. Article 1 of the Convention obliges each contracting state to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The European Court of Human Rights is there to monitor states' action, exercising the power of review.

This relationship between the legal systems of contracting states and the Court – the *subsidiarity principle* – whereby the enforcement of the Convention by the national authorities goes hand in hand with European supervision, has given rise to the existence of a so-called "margin of appreciation". The doctrine of the margin of appreciation recognises that in many instances national authorities are in a better position to decide on a particular case or issue. This is particularly true where there is a wide range of options as to how a matter can be resolved. However, the margin of appreciation is applied differently depending on the value at stake, and the existence of common standards applied across many member states, and accordingly the degree of discretion allowed to the states varies.

1 As at 30 June 2003.

In the context of Article 3, which prohibits torture, the article at the focus of this handbook, it is debatable as to whether there is a margin of appreciation at all.

For national legal and political systems to observe the obligations of the Convention it is appropriate that the protections and guarantees afforded by it are incorporated at all levels of those systems. In particular, those responsible for the drafting, implementation and enforcement of laws and regulations must be in a position to integrate the provisions of the Convention in their functions. This can only be achieved through a thorough knowledge of the Convention.

The European Convention on Human Rights is much more than just the text of the treaty. During the life of the Convention, additional protocols broadening its scope have been adopted, and hundreds of cases have been resolved before the organs of the Convention – namely the former European Commission of Human Rights ("the Commission") and the European Court of Human Rights ("the Court").[2]

It is primarily through this jurisprudence of both the Court and the Commission that an understanding and appreciation of the *scope* of the Convention has been developed. In dealing with thousands of applications from individuals who alleged that their rights protected by the Convention had been violated, the Commission and the Court developed sets of principles and guidelines on the interpretation of Convention provisions. They have elaborated in detail on the scope of the protection provided by the Convention, and what States Parties must do to comply with the guarantees of fundamental rights that are afforded by the Convention.

This jurisprudence, or case-law of the Convention organs, is the lifeblood of the Convention, and each case sets out standards and rulings which apply equally to all States Parties, irrespective of which State Party was the respondent state. In this respect, one must understand that nowadays even the traditionally civilian legal systems practise a mixed civilian and common-law system where the jurisprudence is given equal value to that of the laws enacted by the Parliament.

The Convention must also be understood from the standpoint of its "object and purpose", as the Court has put it, to protect individual human beings within the values of a democratic society, which means that its provisions must be interpreted and applied so as to make its safeguards *practical* and *effective*. This principle of effectiveness has very concrete consequences for the application of Article 3 of the European Convention.

Another central characteristic of the Convention text is that its interpretation is dynamic. That is, it is reflective of changing social mores, standards and expectations. It was in a case dealing

2 Protocol No. 11, which came into force on 1 November 1998, dissolved the former European Commission of Human Rights and created the current permanent European Court of Human Rights.

with Article 3 of the Convention that the Court took the opportunity to point out that the Convention is a living instrument which must be interpreted in the light of present-day conditions. In that case, the Court determined that judicial corporal punishment of juvenile offenders, which was acceptable in 1956, was no longer acceptable by Convention standards in 1978.[3]

Particularly the Court noted that, in determining whether the behaviour offended the Convention, it "cannot but be influenced by the development and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[4]

Accordingly, the Court is (and must be) influenced by changes and convergence of standards accepted in all member states. The purpose of this handbook is to assist judges and prosecutors at all levels in ensuring that the prohibition on torture, inhuman and degrading treatment and punishment is fully respected in conformity with the obligations imposed by Article 3 of the Convention. To do so one must first unravel this seemingly self-explanatory provision, and through a combination of the case-law and the interpretative principles discussed above, determine what in practical, as well as legal terms, the implementation of the guarantee means for practitioners in the judicial system.

3 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26.
4 *Ibid.*, §31.

## Introduction to Article 3

In the oft-repeated words of the European Court of Human Rights,

> Article 3 *enshrines one of the most fundamental values of democratic society.*
> Article 3 of the Convention states that
> No *one shall be subjected to torture or to inhuman or degrading treatment or punishment*.

At fifteen words, Article 3 of the Convention is one of the shortest provisions in the Convention.[5] However, the brevity of the article should not belie its depth. National authorities cannot afford to be complacent when understanding what it means to respect and enforce this provision.

Notwithstanding the depressing consistency with which reliable reports testify that torture continues to be practised around the world, the prohibition on torture is not just a prohibition contained in the Convention, but is also part of customary international law, and is considered to be *jus cogens*.[6]

A large panoply of international norms has been adopted to combat the scourge of torture: from Article 5 of the 1948 Universal Declaration of Human Rights "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment" to the 1998 Rome Statute of the International Criminal Court which declares torture committed as part of a widespread or systematic attack against civilians to be a crime against humanity.

In addition to the Convention, most Council of Europe states are also parties to the following treaties which all prohibit torture.[7]

- the four 1949 Geneva Conventions
- the 1966 UN International Covenant on Civil and Political Rights, Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"
- the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment

5 Article 4 of Protocol No. 2 provides that "Collective expulsion of aliens is prohibited". This is the shortest article of the European Convention on Human Rights and its protocols.

6 See *Prosecutor v. Furundzija*, 10 December 1998, case no. IT-95-17/I-T; *Prosecutor v.. Delacic and Others*, 16 November 1998, case no. IT-96-21-T, §454; and *Prosecutor v. Kunarac*, 22 February 2001, case no. IT 96-23-T and IT-96-23/1, §466.

7 For signatures and ratifications of Council of Europe conventions, see http://conventions.coe.int/. For United Nations treaties, see http://untreaty.un.org/.

The prohibition of torture is also to be found in almost all domestic legal systems.

The inclusion of the prohibition on torture and inhuman and degrading treatment at Constitutional level is an important element in ensuring that such prohibited behaviour does not occur within the jurisdiction of a member state. However the existence of the prohibition is not, in and of itself, sufficient to meet the obligations imposed by the Convention, and there have been many violations of Article 3 notwithstanding such provisions in the legal systems of member states.

It would also be misleading to suggest that enforcing Article 3 is chiefly based on the need to combat only torture. Cases of actual torture are of course the most grave and acute forms of the violation of Article 3, but the protection of Article 3 is against many different types of assault on human dignity and physical integrity. As was discussed above, it is the case-law and application of the Convention which gives it its lifeblood, and a review of that case-law demonstrates how broad the prohibition in Article 3 is, and how it should be given practical application.

The factual situations which have given rise to complaints of alleged violations of Article 3 range from complaints that persons in police custody have been ill-treated or that conditions of detention were inhuman or degrading, and complaints that a deportation would expose the deportee to inhuman treatment in the recipient, third state, to complaints that the courts have failed to protect victims from the abuse of other private individuals.

The range of cases brings out a number of points about the scope of Article 3, which we will explore in detail later.

- First, there is a large range of types of behaviour, as well as specific acts, which may fall foul of Article 3.
- Potential perpetrators of Article 3 violations are therefore similarly diverse.
- Whether specific behaviour or acts do offend Article 3 is to be determined on the basis of both objective and subjective tests.
- Article 3 contains both substantive aspects as well as procedural aspects, such as an obligation to investigate *prima facie* allegations of torture and other inhuman treatment.
- Article 3 can be infringed by both deliberate infliction of ill-treatment and also by negligence or failure to take specific action, or provide adequate standards of care.
- Article 3 imposes both negative and positive obligations: that is an obligation to refrain from certain action, and obligations to take positive action to secure individuals their rights and to protect them from prohibited treatment.

## The scope of Article 3

### De minimis rule

It is not all types of harsh treatment which fall within the scope of Article 3. The Court, from the beginning, has made it clear that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. However, it has also been recognised that the borderline between harsh treatment on the one hand, and a violation of Article 3 on the other, may sometimes be difficult to establish.[8]

In the seminal case on Article 3, *Ireland v. the United Kingdom*,[9] the Court made it clear that the assessment of the minimum level of severity is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[10] These words have been repeated again and again in the case-law of the Court.[11] In *Soering*, the Court added that the severity "depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution" as well as the factors above.[12]

It has in the past been acknowledged by the Strasbourg system that what is classified as unacceptable ill-treatment may also vary from place to place. The Commission has noted:

> *It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.*[13]

It is the case that different societies, and indeed individuals within a particular society, can have different perceptions of what amounts to ill-treatment. Specific treatment directed against women or children for example, taking into account religious or cultural tenets, could be viewed as more severe by some groups than others. The extent of the psychological effects which particular treatment has on someone can often depend on an individual's culture.

However, in the area of ill-treatment and the protection afforded by Article 3 it is evident that there is growing convergence of standards and practices which leads to much greater objectivity

8 *McCallum v. the United Kingdom*, Report of 4 May 1989, Series A no. 183, p. 29.
9 *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25.
10 *Ibid.*, §162.
11 See, amongst other authorities, *Ireland v. the United Kingdom*, p. 65; and more recently *Tekin v. Turkey*, judgment of 9 June 1998, ECHR 1998-IV, §52; *Keenan v. the United Kingdom*, judgment of 3 April 2001, §20; *Valašinas v. Lithuania*, judgment of 24 July 2001, §120; and specifically with relation to torture *Labita v. Italy*, judgment of 6 April 2000, ECHR 2000-IV, §120.
12 *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §100.
13 *Greek Case*, 5 November 1969, YB XII, p. 501.

in assessing the minimum threshold.[14] The work of the European Committee for the Prevention of Torture (CPT), which we will look at in detail later, has contributed significantly to this in the area of treatment of detainees.

## Definition

The three broad areas of prohibition in Article 3 have been described as being distinct but related. According to the European Commission of Human Rights in the *Greek Case*,

> *It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.*

To understand what type of behaviour is forbidden, and how that behaviour is to be classified, it is necessary to understand what the legal implications for each term set out in Article 3 are. Article 3 can be broken down into five elements:

- torture
- inhuman
- degrading
- treatment
- punishment

## Torture

Torture as a term of art has its own discrete legal implication. The Court has expressed the view that the intention of the drafters of the Convention in using both the terms "torture" and "inhuman or degrading treatment" was to make a clear distinction between them.[15]

Specifically, the Court considered that the intention was that a special stigma should attach to deliberate inhuman treatment causing very serious and cruel suffering.[16] The Court on that occasion referred to Article 1 of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares:

> *Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.*

The European Court of Human Rights, although it has identified the elements which characterise treatment or punishment as torture, has never tried to define exactly what the term means. However it has endorsed in part the definition provided in the United Nations Convention Against Torture, which came into force on 26 June 1987.[17] At Article 1, the Convention states that

> *the term* torture *means any act by which* ***severe pain or suffering****, whether physical or mental, is* ***intentionally inflicted*** *on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person*

14 The emergence of common acceptable standards, particularly with respect to the treatment of detainees of all kinds, is best reflected in the reports of the European Convention for the Prevention of Torture ("the CPT"), and its reports and recommendations on best practices. For reports of the CPT, see its website http://www.cpt.coe.int/ and in particular its report, *"Substantive" sections of the CPT's General Reports*.

15 *Ibid.* p. 186. See recent authority such as *Dikme v. Turkey* judgment of 11 July 2000, §93.

16 *Ibid.*, §167.

17 See, particularly, *Akkoç v. Turkey*, judgment of 10 October 2000, §115; *Salman v. Turkey*, judgment of 27 June 2000, §114.

*has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind* (emphasis added)

From the foregoing it is possible to extract three *essential elements* which constitute *torture*:

- the infliction of severe mental or physical pain or suffering
- the intentional or deliberate infliction of the pain
- the pursuit of a specific purpose, such as gaining information, punishment or intimidation

## Intensity

The Court has stated that the distinction between torture and other types of ill-treatment is to be made on the basis of "a difference in the intensity of the suffering inflicted". The severity, or intensity of the suffering inflicted can be gauged by reference to the factors referred to above:

- duration
- physical and mental effects
- the sex, age and state of health of the victim
- the manner and method of its execution.

The subjective elements of this criteria – the sex, age and state of health of a victim – are relevant to the assessment of the intensity of particular treatment. However the mitigating weight that such relative factors are given, in the assessment of whether acts amount to torture, must be minimal. Acts which objectively inflict sufficient severity of pain will be considered torture, whether or not a person is male or female, or of particularly strong constitution or not. The Court has recognised this in *Selmouni*,[18] where it noted that the treatment inflicted in that case was not only violent but would be heinous and humiliating for anyone, irrespective of their condition.[19]

The first case in which the Convention organs had to address a complaint of torture was an inter-state case against Greece, for practices carried out by the military junta governing Greece at the time. The Commission was the only body to investigate the claims, as the then Greek government denounced the Convention soon after the investigation. However the Commission found that there were practices of inflicting *falanga* (beating the soles of the feet with a blunt instrument), severe beatings, electro-shock treatment, mock executions, and threats to shoot and kill the victims.[20] The Commission concluded that there had been acts of both torture and ill-treatment.

In the second inter-state case, *Ireland v. the United Kingdom*, the Commission had unanimously found that the combined use of the so-called "five techniques" in the case before it, so-called "disorientation" or "sensory deprivation" techniques constituted a practice of inhuman treatment and of

18 *Selmouni v. France*, judgment of 28 July 1998, ECHR 1999-V.
19 *Ibid.* §103.
20 *Greek Case,* Commission Report of 5 November 1969, Yearbook 12.

torture in breach of Article 3. The so-called "five techniques" were

- wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
- hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud hissing noise;
- deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

The Court, however, did not agree with the Commission and by a majority classified the treatment as inhuman treatment rather than torture. The Court found that as the five techniques were applied in combination, with premeditation and for hours at a stretch, they caused at least intense physical and mental suffering to the persons subjected to them and also led to acute psychiatric disturbances during interrogation. They therefore fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. However, they did not occasion suffering *of the particular intensity and cruelty* implied by the word torture.

## Intention

It has already been noted that, in the definition of torture used by the Court, torture is further characterised by being a *deliberate* form of inhuman treatment. In *Aksoy v. Turkey,* in its first judicial determination that an individual had been tortured, the Court noted that "this treatment could only have been deliberately inflicted". The Court went on to say that in fact "a certain amount of preparation and exertion would have been required to carry it out". The treatment spoken of was so-called "Palestinian hanging" where the victim is suspended by his arms, tied behind his back.[21]

More recently, in *Dikme v. Turkey,* the Court likewise found that the treatment inflicted on the victim consisted of "at the very least a large num-

21 *Aksoy v. Turkey* judgment of 18 December 1996, ECHR 1996-VI, Vol. 26, §64.

ber of blows and other similar forms of torture". The Court considered that such treatment was intentionally meted out to Mr Dikme by agents of the State in the performance of their duties.

## Purposive

The word *torture* is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment. The Court has noted on a number of occasions that the purposive element is recognised in the definition of torture in the 1987 United Nations Convention, and that the definition refers to torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating. In *Dikme* the Court determined that the infliction of ill-treatment was carried out with the aim of extracting a confession or information about the offences of which Mr Dikme was suspected.[22] In other cases where torture has been inflicted on detainees, the Court has similarly found that the treatment was in the context of interrogation with the aim of extracting information or a confession.[23]

## Actus reus

In the first case where the Court held that there was torture, *Aksoy v. Turkey*, the victim had been subjected to "Palestinian hanging", in other words, he was stripped naked, with his arms tied together behind his back, and suspended by his arms. This led to a paralysis of both arms which lasted for some time. The seriousness and cruelty of this treatment led it to be described as torture by the Court.

In *Aydin v. Turkey* the applicant alleged, *inter alia*, that she was raped in police custody. The Court, in finding on the evidence that she had been raped, stated that

> *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 his 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. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.*

The Court went on to hold that the rape amounted to torture in breach of Article 3 of the Convention.

In *Selmouni v. France* the applicant was a Dutch and Moroccan national who was imprisoned in France. The applicant was subjected to

22 *Akkoç*, *op. cit.*, §64; *Dikme*, *op. cit.*, §95.

23 See *Aksoy v. Turkey*, judgment of 18 December 1996, ECHR 1996-VI; and *Akkoç* and *Salman*, *op. cit.*

a large number of intense blows covering almost all of his body. He was dragged along by his hair; made to run along a corridor with police officers positioned on either side to trip him up; made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; he was urinated over; and was threatened with a blow lamp and then a syringe.[24]

As noted above the Court observed that these acts were not only violent, but that they would be heinous and humiliating for anyone, *irrespective of their condition*. The element of the duration of the treatment was also taken into consideration in this case, and the fact that the above events were not confined to any one period of police custody, but rather were part of a repetitive and sustained pattern of assaults over a number of days of questioning, aggravated the situation.

> The Court again found that it was satisfied *that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.*[25]

In *Akkoç v. Turkey*, the victim in this case had amongst other things been subjected to electric shocks, hot and cold water treatment, blows to the head and threats concerning the ill-treatment of her children. This treatment left the applicant with long-term symptoms of anxiety and insecurity, diagnosed as post-traumatic stress disorder and requiring treatment by medication. Just as in *Selmouni* the Court considered the severity of the ill-treatment suffered by the applicant, and the surrounding circumstances, to justify a finding of torture.

In *Dikme v. Turkey* the blows inflicted on Mr Dikme were such as to cause both physical and mental pain or suffering, which could only have been exacerbated by the fact that he was totally isolated and that he was blindfolded. The Court found therefore that Mr Dikme was therefore treated in a way that was likely to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will. The Court also took into account the duration of the treatment and noted that the treatment was meted out to him during lengthy interrogation sessions to which he was subjected throughout his time in police custody. Coupled with the intentional infliction of the treatment with a purpose of extracting information, the Court held that the violence inflicted on the applicant, taken as a whole and

24 *Op. cit.*, §103.
25 *Ibid.* §105.

having regard to its *purpose and duration*, was particularly serious and cruel and was capable of causing "severe" pain and suffering. It therefore amounted to torture within the meaning of Article 3 of the Convention.

## Inhuman or degrading

Ill-treatment that is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading. As with all Article 3 assessments, the assessment of this minimum is relative.[26]

> In the *Greek* case, the Commission stated that *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*.

Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering. Many instances of inhuman treatment arise in the context of detention, where victims have been subjected to ill-treatment which has been severe, but not of the intensity required to qualify the treatment as torture.

It can also apply to a range of behaviour outside of detention where victims are exposed to deliberate cruel acts which leave them in extreme distress. In the cases of Mr Asker, Mrs Selçuk, Mrs Dulas and Mr Bilgin the applicants' homes were destroyed by members of the security forces conducting operations in the areas where the applicants lived. Both the Commission and Court found that the destruction of the homes constituted an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants who were left without shelter and in circumstances which caused anguish and suffering.[27] This was inhuman treatment within the meaning of Article 3 of the Convention.

Degrading treatment is that which is said to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them. This has also been described as involving treatment such would lead to breaking down the physical or moral resistance of the victim,[28] or as driving the victim to act against his will or conscience.[29]

In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, regard should be had as to whether its *object* is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.[30] However, the absence of such a purpose cannot rule out a finding of a violation of Article 3.

26 See, amongst other authorities, the *Tekin v. Turkey* judgment of 9 June 1998, ECHR 1998-IV, §52.

27 *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, ECHR 1998-II, p. 19, §78; *Dulas v. Turkey*, judgment of 30 January 2001, §55; *Bilgin v. Turkey*, 16 November 2000, §103.

28 *Ireland v. the United Kingdom*, p. 66, §167.

29 Commission's opinion in the *Greek Case*, Chapter IV, p. 186.

30 *Ranninen v. Finland* judgment of 16 December 1997, ECHR 1997-VIII, p. 2821-22, §55.

Relative factors such as age and sex of the victim can have a greater impact in assessing whether treatment is degrading, in contrast to whether treatment is inhuman or torture, as the assessment of whether an individual has been subjected to degrading treatment is more subjective. In this context, the Court has also held that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.

In one case before the Court,[31] a 15-year-old boy had been sentenced to corporal punishment, namely three strokes with a birch rod. The applicant was made to take down his trousers and underpants and bend over a table, where he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke. The applicant's father lost his self-control and after the third stroke "went for" one of the policemen and had to be restrained. The birching raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards.

The Court found that this punishment incorporated the element of humiliation and attained the level inherent in the notion of "degrading punishment".

Whilst factors such as the publicity surrounding particular treatment may be relevant in assessing whether a punishment is "degrading" within the meaning of Article 3, the absence of publicity does not necessarily prevent a given punishment from falling into that category.

## Treatment v. punishment

Most of the behaviour and acts which fall foul of Article 3 could be classified as "treatment". However, in certain circumstances it is clearly a form of punishment which is being imposed on the victim, and it must be determined whether that punishment is inhuman or degrading.

Whilst it can be argued that there is a naturally inherent humiliation in being punished *per se*, it is recognised that it would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is "degrading" within the meaning of Article 3. The Court rightly requires that some further criterion be read into the text. Indeed, Article 3, by expressly prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment in general.

Therefore the prohibition on degrading treatment does not necessarily have any bearing on the normal judicial sentence, even where the sentence passed may be severe. The Court has indicated that it would only be in exceptional circumstances that a heavy sentence would raise an issue under Article 3. It is in this instance that one could argue

31 *Costello-Roberts v. the United Kingdom*, Series A no. 247-C, p. 59, §30.

that states enjoy a discretion or a margin of appreciation in terms of what "punishment" they pass on convicts. Nevertheless, as we have seen above, in 1978 the Court ruled that a system of judicial corporal punishment for juvenile offenders in use in the United Kingdom violated Article 3.

The Court decided that this was so because the very nature of judicial *corporal* punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, the Court deemed it to be institutionalised violence, that is violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. It went on to hold that the institutionalised character of the violence was further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on his dignity and physical integrity. The Court also considered significant the fact that the punishment may have had adverse psychological effects.

Similar use of corporal punishment in schools has also been found to be degrading. In that case the Commission was of the opinion that the punishment inflicted on the applicant caused him significant physical injury and humiliation, which attained such a level of seriousness that it constituted degrading treatment and punishment within the meaning of Article 3 of the Convention. The Commission considered that the State was responsible for this ill-treatment in so far as the English legal system authorised it and provided no effective redress.[32]

Another area of institutionalised treatment which falls to be considered under the umbrella of the Article 3 protection is that of enforced medical treatment. However the Court has indicated that "the established practice of medicine" will hold precedence in the assessment of whether such treatment is permissible. It held that as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.[33]

It is wholly understandable that the Court, particularly exercising a supervisory role as it does, is reluctant to intervene in an area such as that of medical expertise, where it itself has no specific competence. National courts too are cautious of intervening in this field. Nevertheless, national judges and prosecutors would be advised to pay attention to this area, to the development of national jurisprudence in this area and any emerging convergence on the standards to be

32 *Y v. the United Kingdom*, 8 October 1991, Series A no. 247-A; 17 EHRR 233.

33 *Herczegfalvy v. Aus*tria, 24 September 1992, Series A no. 24, §82.

applied in this field. There are a growing number of norms being set and adopted through resolutions and recommendations of the minimum standards which apply to the treatment of patients, particularly psychiatric patients, and detainees who are patients.[34]

In on-going debates which may focus on such issues as religious belief about medical treatment and euthanasia, the question will also arise as to whether the absolute right to human dignity is infringed where an individual is forced to accept certain medical treatment. Development of a broader consensus on these matters will also help determine whether certain enforced medical treatment would be an assault on human dignity.

## Article 3 in the context of the Convention

The Court consistently and repeatedly ranks Article 3, the prohibition on torture and inhuman treatment, along with Article 2, the right to life, as one of the most fundamental rights protected by the Convention, whose core purpose is to protect a person's dignity and physical integrity.

Unlike some of the other articles of the Convention, Article 3 is stated in absolute and unqualified terms. In contrast to, for example Articles 8 to 11, there is no second paragraph setting out the circumstances when it is permissible to engage in torture, inhuman or degrading treatment or punishment. There is therefore no room for limitations by law on the provision.

The unconditional terms of Article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor.

The Court is consistently quick to remind states that the victim's conduct cannot be considered in any way as a justification for resort to prohibited behaviour. The Court has often reiterated that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punish-

34 Parliamentary Assembly Recommendation 1235 (1994) on psychiatry and human rights.

ment. Whether or not any individual has committed a terrorist or other serious criminal offence, or is suspected of such, it is irrelevant for determining whether the treatment inflicted on that person infringes the prohibition against ill-treatment.

The Court acknowledges that there are undeniable difficulties inherent in the fight against crime, particularly with regard to organised crime and terrorism. It also recognises the needs of the investigation into such crime. In this respect, the Court accepts that in the prosecution of such crime, certain exceptions to the rules of evidence and procedural rights can be permitted. However these same difficulties cannot in any way result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals. The prohibition on resort to ill-treatment during interrogations and interviews, together with the prohibition on use of any evidence obtained by resort to such behaviour, remains absolute.[35]

Similarly, irrespective of the crimes at stake, states are not permitted to sanction nor impose punishments on the grounds that they would have a deterrent effect, where the punishments would be contrary to Article 3.[36] In this context it should be noted that the Court has been slow to intervene simply on the grounds that a judicial sentence is severe with respect to the length of imprisonment imposed. However should the imprisonment be subject to strict conditions or a sentence involve elements which go beyond imprisonment, those conditions will fall to be assessed for their compatibility with Article 3.

The absolute prohibition in Article 3 also means that it is not permitted to derogate from the prohibition even in times of war. While Article 15 of the Convention permits states, in times of war and other public emergencies, to derogate, to the extent necessary, from the normal applicable standard of protection guaranteed by the majority of articles of the Convention and its protocols, there is no provision for derogation from Article 3. Rather, Article 15.2 makes it clear that even in the event of a public emergency threatening the life of the nation, a state which has signed up to the Convention is not permitted to ill-treat individuals in any way prohibited by Article 3.[37] No level of conflict or terrorist violence diminishes the right of individuals not be ill-treated.

This unconditionality has extra-territorial effect. It extends to protect individuals from being exposed to ill-treatment beyond the territory of a member state and by individuals for whom the member state is not responsible. There are a number of cases which deal with the application of Article 3 to cases of expulsion or deportation of individuals. In those cases, even where there may be factors such as a prior extradition treaty, the need to

35 *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A §115.

36 *Tyrer*, *op. cit.*, p. 15. See also below, the discussion on prohibited punishment.

37 *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, §163; *Selmouni v. France*, ECHR 1999-V, §95.

bring to justice suspected terrorists who have fled a jurisdiction, or indeed the national security of the deporting state, nothing would absolve a state of its responsibility not to send an individual to another state where they face a real risk of ill-treatment.

Finally, it should also be noted that the absolute prohibition applies equally to the case of treatment of persons detained on medical grounds and/or subject to medical treatment. In a case where there had been a complaint of such treatment the Court reiterated that

*while it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible,* ***such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation***[38] *(emphasis added).*

38 *Herczegfalvy v. Austria*, 24 September 1992, Series A no. 24, §82.

# Application of Article 3 in context

## Detention

The context in which most violations of Article 3 occur is with respect to the treatment of detainees. Here, the obligations of Article 3 are perhaps most plainly and explicitly relevant. Therefore it is the actions of members of the police, armed or security forces, and members of the prison service which are most often under scrutiny for whether or not they violate Article 3. However, persons involved in "civil detention", such as those who deal with medical, particularly psychiatric patients, may also be implicated.

Those who are deprived of their liberty, and therefore under the full control of the authorities, who are most vulnerable to and at risk of abuse of state power against them. The exercise of this control must therefore be subjected to strict scrutiny for compliance with Convention standards. It is of little surprise that the European Committee for the Prevention of Torture (CPT) is explicitly mandated to visit *persons deprived of their liberty* in order to examine their treatment, with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.[39]

In respect of persons deprived of their liberty, the starting point for assessing whether any ill-treatment has taken place is a determination of whether or not physical force has been used at all against the detainee in the first instance. The rule of thumb set by the Court is that recourse to physical force which has not been made strictly necessary by the detainee's own conduct is in principle an infringement of the right set forth in Article 3.[40] This is derived from the fact that the purpose of Article 3 is to protect human dignity and physical integrity and therefore any recourse to physical force diminishes human dignity.[41]

39 Article 1 of the European Convention for the Prevention of Torture.

40 *Ribitsch v. Austria*, judgment of 4 December 1995, Reports of judgments and decisions 1996 p. 26, §34; *Tekin*, pp. 1517-18, §§52 and 53; and *Assenov and others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, §94

41 *Ibid.*

One of the most obvious indications of recourse to physical force will be visible signs of physical injuries or observable psychological trauma. Where a detainee shows signs of injuries, or ill-health, either upon release or at any stage during their detention, the burden will be on the detaining authorities to establish that the signs or symptoms are unrelated to the period or fact of detention.

If the injuries were related to the period or fact of detention, and a result of use of physical force by the authorities, then the detaining authorities should be in a position to establish that it was necessitated by the detainee's own conduct and that only such force as was absolutely necessary was used. The burden of proof is firmly on the detaining authorities to provide a plausible account of how the injuries occurred. The account must be assessed for its credibility and the circumstances for their compatibility with Article 3.[42]

## Arrest and interrogation

The potential for violations of Article 3, in the context of detention, arises at each stage of detention – from the moment a person is placed under detention, usually by way of arrest or apprehension by a police or military officer, to the time when a person is released from custody.

In *Ilhan v. Turkey*, the applicant was severely beaten at the time of his arrest. The beatings, including to the head, were carried out, *inter alia*, with rifle butts when the security forces "captured" the applicant who was in hiding. A significant period of time then lapsed before the applicant had access to medical treatment. This treatment amounted, in the Court's view to torture.

In the case of *Assenov v. Bulgaria*, although it was not ultimately possible to establish how the injuries occurred, or who was responsible, the injuries sustained were also caused during his arrest. In *Rehbock v. Slovenia* the applicant sustained facial injuries during his arrest. The police submitted that the injuries were the result of resisting arrest. The use of force, however, was excessive and unjustified and the authorities could provide no basis for explaining why the injuries sustained were so serious: the arrest had been planned and therefore the risks assessed, the police far outnumbered the suspects, and the victim was not brandishing a weapon at the police.[43]

42 *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§108-111; *Ribitsch v. Austria* judgment of 4 December 1995, Reports of judgments and decisions 1996, p. 26, §34; *Aksoy v. Turkey* judgment of 18 December 1996, p. 17 §61.

43 *Assenov v. Bulgaria* judgment of 28 October 1998, Reports 1998-VIII.

In cases of torture, where ill-treatment is inflicted for the purpose of obtaining information or a confession, then the violation is most likely to occur during the initial arrest period, when interviews or interrogations are taking place. This is more likely to be a police station than a prison. This is also reflected in the cases which have come before the Court, and the experience of the CPT who noted that

> The CPT *wishes to stress that, in its experience, the period immediately following the deprivation of liberty is when the risk of intimidation and physical ill-treatment is at its greatest.*[44]

The CPT has also noted that for both adults and juveniles, the risk of being deliberately ill-treated is higher in police establishments than in other places of detention.[45]

The interpretation and application of Article 3 in accordance with the principle that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" means that certain acts which had previously been classified as "inhuman and degrading treatment" as opposed to "torture" might be classified differently in future. In *Selmouni v. France* the Court noted:

> *… 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.*[46]

This was endorsed by the Court in *Dikme*.[47]

Since the mid-1990s, the Court has been seized again with allegations that individuals have been victims of torture in the detention centres of member states. There here are a number of cases where behaviour has been deemed to constitute torture under the Convention. These include:

- Palestinian hanging: suspension by the arms, tied behind the back (*Aksoy v. Turkey*[48])
- severe forms of beating (*Selmouni v. France*, *Dikme v. Turkey*)
- severe beatings, combined with denial of medical treatment (*Ilhan v. Turkey*)
- electric shocks (*Akkoç v. Turkey*)
- rape (*Aydin v. Turkey*)
- *falaka/falanga*: beatings on the soles of the feet (*Salman v. Turkey*, *Greek* case[49])

In the cases of *Tomasi*, *Ribitsch*, and *Tekin* amongst others, the Court found that the detainees had been subjected to inhuman treatment in the form of beatings.

All of these cases happened during periods of detention. This reinforces how essential it is that, at this stage of detention, the legal system should provide fundamental safeguards against ill-treatment. The three key safeguards are

44 6th General Report of the CPT (1996), para. 15, and similar comments in 9th General Report of the CPT (1999), para. 23.
45 9th General Report of the CPT, para. 23.
46 *Selmouni*.
47 *Op. cit.*, §92.
48 *Aksoy v. Turkey* judgment of 18 December 1996, Reports 1996-VI.
49 *Greek case*, Commission Report of 5 November 1969, Yearbook 12.

- the right of the detainee to have the fact of his detention notified to a third party of his choice (family member, friend, consulate)
- the right of access to a lawyer
- the right to request a medical examination by a doctor of his choice.

These should apply from the very outset of deprivation of liberty. [50]

During the initial period of detention particularly, the detaining authorities must be able to account accurately for the movements of any detainees, for who may have had access to the detainees and where detainees were at any given moment.

In cases where a defendant complains of ill-treatment, judges should expect the detaining authorities to provide rebuttal evidence that any injuries or medical conditions which the detainee exhibits were either not sustained in detention, or were the result of legitimate action which can be documented. The Court has said that

> *Where death occurs in custody in connection with even minor injuries, there is a heightened burden on the Government to provide a satisfactory explanation.* ***In this context, the authorities bear the responsibility to ensure that they keep detailed and accurate records concerning the person's detention and place themselves in the position that they can account convincingly for any injuries*** [*emphasis added*].[51]

The CPT has also previously drawn attention to this duty. They advised that

> *the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, in which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc.; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.).*[52]

50 2nd General Report of the CPT, (1992), para. 36.
51 *Salman v. Turkey*.
52 2nd General Report of the CPT, para. 40.

## Conditions of detention

Conditions of detention may sometimes amount to inhuman or degrading treatment. This is also an area where there is a continuous evolution in the basic standards that are acceptable across societies.[53] The work of the CPT is a significant and crucial contribution in this area.

*Conditions of detention* refers both to the general environment in which prisoners are detained and to the prison regime and specific conditions in which inmates are kept. Assessing whether the surroundings of a prisoner, or the conditions imposed on him or her are in conformity with the Convention, the circumstances of the prisoner – his or her age and sex and health, the danger posed by the prisoner – must be taken into account, as well as whether the prisoner is on remand or not.

A person detained on remand, and whose criminal responsibility has not been established by a final judicial decision, enjoys a presumption of innocence, which applies not only in respect of the criminal procedure but also to the legal regime governing the rights of such persons in detention centres.

Likewise, some prisoners will have special needs, and the failure to attend to them will give rise to degrading treatment. In *Price* the victim was a four-limb-deficient as a result of medical problems during gestation, with numerous heath problems including defective kidneys, and was imprisoned for seven days for contempt of court in the course of civil proceedings. The sentencing judge took no steps, before committing the victim to immediate imprisonment – a sentence which the Court considered to be particularly harsh – to ascertain where she would be detained or to ensure that it would be possible to provide facilities adequate to cope with her severe level of disability. The conditions in which she was then detained were wholly inadequate to meet her medical condition. Whilst there was no evidence of any positive intention to humiliate or debase the applicant, the Court considered that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitute degrading treatment contrary to Article 3.

The evolving norms of detention require that practices or routine treatment common to prison systems be regularly reviewed to ensure that they continue to comply with the standards of Article 3, or that specific treatment which in and of itself may

53 In earlier cases the Court and the former Commission did seem reluctant to conclude that conditions of detention violated Article 3. There were even cases where there had been acknowledged violations of international standards on detention, but no violation found. See Decision of 11 December 1976, Yearbook 20; Decision of 11 July 1977 DR 10; *Krocher and Moller v. Switzerland,* Commission report of 16 December 1982, DR 34.

not be degrading is not executed in a manner which renders it degrading.

The imposition of solitary confinement, or seclusion, has often been the basis for complaints of inhuman or degrading conditions,[54] but neither the Court nor the CPT has deemed solitary confinement *per se* contrary to Article 3. Nevertheless, particular vigilance should be paid to persons who are held, for whatever reason (for disciplinary purposes; as a result of their "dangerousness" or their "troublesome" behaviour; in the interests of a criminal investigation; at their own request), in conditions akin to solitary confinement. For example, should the solitary confinement be prolonged, or imposed on a remand prisoner or a juvenile, the matter may be different.

The CPT has held that solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment.[55] The severity of the specific measure, its duration, the objective pursued by it, the cumulative effect of any further conditions imposed, as well as the effects on the individual's physical and mental well-being, will all be factors in assessing whether a specific instance of solitary confinement or segregation is in violation of the article.[56]

Strip-searching is another treatment which prisoners may have to endure, but in certain circumstances it can also be degrading. The Court has found that, whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging a male to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands, showed a clear lack of respect for the applicant, and diminished in effect his human dignity. The Court found that, as it must have left him with feelings of anguish and inferiority capable of humiliating and debasing him, that the search amounted to degrading treatment within the meaning of Article 3 of the Convention.[57]

Other practices and policies, such as handcuffing prisoners or use of other modes of restraint or other disciplinary measures, such as deprivation of outdoor exercise or visitation rights, must also be subject to review and scrutiny to ensure that the manner in which they are not imposed is not abusive, nor give rise to degrading treatment.

In the *Greek* case[58] the Commission concluded that conditions of detention which were overcrowded and had inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contacts with the outside world were degrading. Conditions like these, particularly overcrowding, are still problematic today and continue to violate the standards demanded by the Convention.

54 Decision of 11 December 1976, *Yearbook* 20; Decision of 11 July 1977, DR 10; *Krocher and Moller v. Switzerland*, Commission Report of 16 December 1982, DR 34.

55 2nd General Report of the CPT, para. 56.

56 Decisions of 11 July 1973, Collection 44; 8 July 1978, DR 14; and 9 July 1981.

57 *Valašinas v. Lithuania* judgment of 24 July 2001.

58 *Yearbook* 12, 1969.

In one case, for at least two months, a prisoner had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. The Court considered that the prison conditions complained of diminished the prisoner's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. Moreover, the Court has held that failure to make efforts to improve conditions, where there had been complaints about the standards, denoted lack of respect for the detainee. In sum, the Court considered that the conditions of the applicant's detention in the segregation unit of the prison amounted to degrading treatment within the meaning of Article 3 of the Convention.[59]

In another case, the prisoner was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. Reports from the CPT corroborated the allegations of the prisoner. In its report the CPT stressed that the cell accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling.

In conclusion the Court held that the conditions of detention of the prisoner, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.[60]

The outcome of these cases suggests that in the present day, in particular since the establishment of the CPT and the increase of NGOs monitoring prison conditions, there is little tolerance of prison conditions which fail to meet international standards. One can expect the Court to exercise increased levels of scrutiny and vigilance and demands will be made of national authorities to do the same.

As Article 3 permits no qualification, explanations to the effect that inadequate conditions such as overcrowding or lack of sleeping or sanitation facilities are result of economic or other inherited organisational or endemic factors will not justify failings.[61] The CPT has also pointed out that ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources.[62]

59 *Peers v. Greece* judgment of 19 April 2001.

60 *Dougoz v. Greece* judgment of 6 March 2001.

61 In a series of cases involving the length of civil proceedings the Court has repeatedly emphasised that there is a duty on states to organise their judicial system in such a way as to comply with the requirements of a fair trial (Article 6). See, for example: *Multi v. Italy*, Series A no. 281-C; *Susmann v. Germany* judgment of 16 September 1996, Reports 1996-IV. In the case of Article 3 the obligation on states to organise their system of detention to ensure that individuals are not kept in degrading conditions will be even more pressing.

62 2nd General Report of the CPT, para. 44.

Specific situations and practices which may be deemed to be degrading under Article 3, either alone or in combination, are: overcrowding,[63] lack of outdoor exercise for all prisoners, lack of contact with the outside world, inadequate standards of hygiene and toilet facilities,[64] and lack of adequate medical or dental care.[65] Authorities are under an obligation to protect the health of persons deprived of liberty.[66] The lack of appropriate medical treatment may amount to treatment contrary to Article 3.[67]

## Detention on medical grounds

In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.[68]

In a case against the United Kingdom, the Court found that the lack of effective monitoring of the victim's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk.

The belated imposition on him of a serious disciplinary punishment – seven days' segregation in the punishment block and an additional 28 days added to his sentence, imposed two weeks after the event and only nine days before his expected date of release – may well have threatened his physical and moral resistance and was not compatible with the standard of treatment required in respect of a mentally ill person. The Court considered that it must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention.[69]

In the context of psychiatric detention, in a case against Austria from 1983, Mr Herczegfalvy complained that his medical treatment violated Article 3, in that he had been forcibly administered food and medicines, isolated, and attached with handcuffs to a security bed. Although the Commission considered that the manner in which the treatment was administered had not complied with the requirements of Article 3, in that the measures had

63 7th General Report of the CPT (1997), para. 13: "The CPT has been led to conclude on more than one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention."

64 The CPT has highlighted this specifically with reference to hygiene needs of women. 10th General Report of the CPT, para. 31: "The specific hygiene needs of women should be addressed in an adequate manner. Ready access to sanitary and washing facilities, safe disposal arrangements ... as well as provision of hygiene items, such as sanitary towels and tampons, are of particular importance. The failure to provide such basic necessities can amount, in itself, to degrading treatment."

65 3rd General Report of the CPT (1993), para. 30: "An inadequate level of health care can lead rapidly to situations falling within the scope of the term 'inhuman and degrading treatment'."

66 *Hurtado v. Switzerland*, Comm. Report of 8 July 1993, Series A no. 280, p. 16, §79.

been violent and excessively prolonged, the Court disagreed.

The Government had submitted, *inter alia*, that the medical treatment was urgent in view of the deterioration in the applicant's physical and mental health and that it was the patient's resistance to all treatment together with his extreme aggressiveness towards the hospital staff, which explained why the staff had employed coercive measures including the use of handcuffs and the security bed. They further submitted that the sole aim had always been therapeutic, and that the measures had been discontinued as soon as the condition of the patient permitted this.

Although the Court noted that the position of inferiority and powerlessness, typical of patients confined in psychiatric hospitals, called for increased vigilance in reviewing whether the Convention has been complied with, it overturned the Commission's assessment. The Court did express concern over the length of time during which the handcuffs and security bed were used; however, it determined that the evidence before it was not sufficient to disprove the government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue.

However, standards of accepted treatment of psychiatric patients are also evolving. Special vigilance needs to be paid when resort to instruments of physical restraint – such as the handcuffs mentioned above, or straps, straight jackets, etc. – is made. This should only very rarely be justified, and a legal system which permits regular use of such techniques, or where such use is not expressly ordered by a doctor or immediately brought to the attention of a doctor with a view to seeking his approval, is likely to have problems complying with the Convention.

If, exceptionally, recourse is had to instruments of physical restraint, they should be removed at the earliest opportunity. Prolongation will give rise to a violation of Article 3. Moreover such instruments should never be applied, or their application prolonged, as a punishment. If the purpose or object of their use is *punishmen*t, this would likely fall foul of Article 3.

The CPT has publicly made clear that where it has encountered psychiatric patients to whom instruments of physical restraint have been applied for a period of days it does not consider it to have any therapeutic justification and amounts, in its view, to ill-treatment.[70]

The practice of seclusion (i.e. confinement alone in a room) of violent or otherwise "unmanageable" patients is also a matter which raises concerns over compliance with Article 3. The CPT

67 *Ilhan v. Turkey*, ECHR 2000-VII.

68 *Herczegfalvy v. Austria* judgment of 24 September 1992, Series A no. 244, §82; *Aerts v. Belgium* judgment of 30 July 1998, Reports 1998-V, p. 1966, §66.

69 *Keenan v. the United Kingdom* judgment of 3 April 2001.

70 8th General Report of the CPT, para. 48.

has set out that in the case of psychiatric patients, seclusion should never be used as a punishment.[71]

Where seclusion is used for purposes beyond punishment, the CPT recommends that it should be the subject of a detailed policy spelling out, in particular: the types of cases in which it may be used; the objectives sought; its duration and the need for regular reviews; the existence of appropriate human contact; and the need for staff to be especially attentive. In view of the clear emerging trend in modern psychiatric practice in favour of avoiding seclusion of patients, and in the light of doubts over the therapeutic effects of seclusion, the absence of the requisite conditions will call into question the compliance of the practice with Article 3.

In respect of specific *treatment* of psychiatric patients, there are also several areas where the consensus on whether or not they constitute degrading treatment is also growing. One such area is electroconvulsive therapy (ECT). Whilst it is still a recognised form of treatment according to generally accepted psychiatric principles, the CPT has expressed particular concern about the administration of ECT in unmodified form (i.e. without anaesthetic and muscle relaxants). It is of the opinion that this method can no longer be considered as acceptable in modern psychiatric practice. Specifically, it deemed the process as such to be degrading for both the patients and the staff concerned.[72]

As the administration of ECT could, even in its modified form, be considered degrading if it were to humiliate the patient in the eyes of others, the CPT has also concluded that ECT must be administered out of the view of other patients (preferably in a room which has been set aside and equipped for this purpose), by staff who have been specifically trained to provide this treatment.

## Other points of detention

Detention is not limited to prisons or police cells. Wherever persons are deprived of their liberty, then the standards surrounding that detention fall to be considered under the requirements of Article 3. The variety of custodial settings in which immigration detainees can be held, including holding facilities at points of entry such as ports and airports, are typical of this.

71 8th General Report of the CPT, para. 49.
72 *Ibid.*, para. 39.

The CPT has often found point-of-entry holding facilities to be inadequate, in particular for extended stays. More specifically, CPT delegations have on several occasions met persons held for days under makeshift conditions in airport lounges. It is axiomatic that such persons should be provided with suitable means for sleeping, granted access to their luggage and to suitably equipped sanitary and washing facilities, and allowed to exercise in the open air on a daily basis. Further, access to food and, if necessary, medical care should be guaranteed.[73]

## Deportation

There is a significant and increasing body of case-law where the Court has held that an expulsion or deportation of an individual to a country where they may be subjected to treatment in violation of Article 3 incurs the responsibility of the deporting state under the Convention.

This principle was first established in the *Soering* case where the United States sought the extradition from the United Kingdom of a fugitive who faced murder charges in the state of Virginia. The applicant sought to have the extradition halted on the grounds that should he be convicted of murder in the United States, he would face the death penalty, and more specifically the so-called "death-row phenomenon", which he claimed amounted to inhuman treatment. The death-row phenomenon is a combination of conditions of detention (namely a very strict and severe high-security prison regime, which a prisoner could endure for years owing to the length of the appeals process) and the mental anguish of living in the ever-present shadow of death. In Soering's case his age at the time of the offence – under 18 – and his then mental state also contributed to the Court's determining that the conditions did amount to inhuman and degrading treatment. The Court then ruled that for the United Kingdom to extradite to the United States under those circumstances would give rise to a violation of Article 3.

The series of cases which followed on from *Soering* cemented the principle that where substantial grounds can be shown for believing that an individual, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country, then the responsibility of the sending state will be engaged on the grounds that if it were to expel the individual, the exposure of the individual to proscribed ill-treatment would be a direct consequence of its action.[74]

It is therefore essential that a rigorous scrutiny be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.

73 7th General Report of the CPT, para. 26.

74 *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 35, §§90-91.

The existence of automatic and mechanical application of provisions such as a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.

The question of whether the decision-making process as a whole offers suitable guarantees against persons being sent to countries where they run a risk of torture or ill-treatment is the focus for the CPT too, as this best serves their preventive role. The CPT has expressed its desire to explore whether the applicable procedure offers the persons concerned a real opportunity to present their cases, and whether officials entrusted with handling such cases have been provided with appropriate training and have access to objective and independent information about the human rights situation in other countries. The CPT also recommends that, in view of the potential gravity of the interests at stake, a decision involving the removal of a person from a state's territory should be subject to appeal before another body of an independent nature prior to its implementation.[75]

Cases where the Court has determined that a deportation would give rise to issues under Article 3 include the deportation of an Indian national who supported a Sikh separatist movement in Punjab back to India; the deportation of an Iranian woman back to Iran where she would face near certain death as an alleged adulterer; and the deportation of a political opponent, who had previously been tortured, back to Zanzibar.[76]

## Disappearances

The phenomenon of disappearances raise an interesting issue with respect to potential violations of the Article 3. D*isappearances* occur where a person is taken into unacknowledged detention by agents of the state or by persons acting on behalf of or with the acquiescence of the official authorities. Unacknowledged detentions often result in the eventual confirmed death of the disappeared person or complete silence about the fate of the "disappeared" person, leaving relatives and friends to believe that the person has died. This sort of situation raises two questions: how is the dignity of the person who is the subject of the unacknowledged detention affected? and what is the impact on the family and loved ones of the disappeared person?

The Court chooses not to address the disappearance of a person *per se* as degrading or inhuman treatment, but to deal with it under Article 5 (deprivation of liberty). The Court does recognise that there may in some cases be evidence that an individual was ill-treated before they "disappeared".[77] However, it has pointed out that the

75 7th General Report of the CPT, para. 34.
76 *Jabari v. Turkey* judgment of 11 July 2001.
77 *Kurt v. Turkey* and *Kaya v. Turkey*.

treatment which a disappeared person may have suffered whilst "disappeared" can only be a matter of speculation. The Court's position is that the acute concern which must arise in relation to the treatment of persons apparently held without official record and excluded from the requisite judicial guarantees is an added and aggravated aspect of the issues arising under Article 5 (deprivation of liberty) rather than Article 3.

Nevertheless, the Court has recognised that there is a duty to examine the impact of a disappearance on the relative of the disappeared person. In *Kurt v. Turkey,* where the applicant complained about the disappearance of her son at the hands of the Turkish army and local "village guards", the applicant had approached the public prosecutor in the days following her son's disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety. However, the public prosecutor gave no serious consideration to her complaint. As a result, she was left with the anguish of knowing that her son had been detained and that there was a complete absence of official information as to his subsequent fate. This anguish had endured over a prolonged period of time.

In these circumstances, as well as finding that the complainant was the mother of the victim and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court found a breach of Article 3 in respect of the applicant. The Court, however, explicitly stated that the *Kurt* case does not establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.

Whether a family member is such a victim will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.

In the case of *Taş v. Turkey*, the Court found that having regard to the indifference and callousness of the authorities to the applicant's concerns and the acute anguish and uncertainty which he suffered as a result, the applicant was a victim of

the authorities' conduct, to an extent which breached Article 3. Similarly in *Timurtas* and *Cicek* the applicants were parents of the disappeared who had suffered from the indifference and callousness of the authorities.

The Court has emphasised that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.[78]

## Discrimination

In *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the Commission had found that institutional racism amounted to degrading treatment. On the facts the Court disagreed with the Commission; however, it did accept the principle that such discrimination could amount to degrading treatment. This approach has been endorsed by the current permanent Court. In the examination of an application from a group of individuals who were dismissed from the British Armed Forces for their sexual orientation, the Court said that it

> *would not exclude that treatment which is grounded upon a predisposed bias on the part of a … majority against a … minority could, in principle, fall within the scope of Article 3.*[79]

However, the Court found that although the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, having regard to all the circumstances of the case, the treatment did not reach the minimum level of severity which would bring it within the scope of Article 3 of the Convention.[80]

78 *Cakıcı v. Turkey* judgment of 8 July 1999, *Reports* 1999, §§98-99.

79 *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment of 28 May 1985, Series A no. 94, p. 42, §§90-91.

80 *Smith and Grady v. the United Kingdom*, judgment of 27 September 1999.

## Positive obligations under Article 3

The rights in the European Convention, if they are to be properly enjoyed, must be given practical and effective safeguards. In the context of ill-treatment preventive and protective safeguards against ill-treatment are essential. Many of these safeguards are to be found in the national legal system, in the protection they afford to individuals from all types of assault, as well as through the rights of victims to seek redress against those who commit assault.

These positive obligations can be divided into two categories: the requirement that the legal system provide protection from assault from other individuals and not just agents of the state, the so-called D*rittwirkung* effect; and the procedural obligations to investigate alleged instances of ill-treatment.

## Procedural rights under Article 3

Articles 1 and 3 of the Convention place a number of positive obligations on states designed to prevent, and provide redress for, torture and other forms of ill-treatment. In A*ssenov and* O*thers v.* B*ulgaria* the Court held that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other agents of the state unlawfully and in breach of Article 3, that provision, read in conjunction with the state's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires that there should be an effective official investigation. The investigation should be capable of leading to the identification and punishment of those responsible. However, in each case the state's obligation applies only in relation to ill-treatment allegedly committed within its jurisdiction.

In *Labita v. Italy* the Court confirmed this obligation, since otherwise the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance 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.

## Drittwirkung effect

In recent years a number of cases have come before the Court which involve infliction of degrading or inhuman treatment on individuals, but by private individuals rather than an agent of the State.

In addressing these cases the Court has set out how far-reaching the scope of Article 3 is, and also highlighted one of the areas where the positive obligations of Article 3 are to the forefront. These types of situation highlight the responsibility imposed on the State to put in place preventive measures and mechanisms which do protect individuals from inhuman treatment, whatever the source of that ill-treatment.

As has been pointed out above, the obligation 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, including such ill-treatment administered by private individuals.

In a groundbreaking case in the United Kingdom a young boy was beaten badly by his stepfather. The stepfather was prosecuted in the courts for assault; however, United Kingdom law permitted a parent to plead the defence of "parental chastisement" where there was a charge of assault by a parent on a child.[81] The child and his father challenged the law before the European Court of Human Rights, pointing out that in effect it amounted to failure to have a legal system which protected individuals from prohibited treatment. The Court agreed with the victim and noted that states are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.[82]

Similarly, in recent cases the Court has made it clear that states are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals. Those measures should provide effective protection, in particular, of children and other vulnerable persons and in-

81 Judgment of 23 September 1998, 1998-VI.

82 *A v. the United Kingdom* judgment of 23 September 1998, 1998-VI, §22.

clude reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. The same applies directly to situations where individuals are under the direct responsibility or charge of local authorities, for example under their care and supervision.

Other claims of neglect by social services in the United Kingdom have also been found to violate Article 3. In that case, four child applicants suffered abuse from private individuals which, it was not contested, reached the threshold of inhuman and degrading treatment. This treatment was brought to the local authority's attention. The local authority was under a statutory duty to protect the children and had a range of powers available to them, including removal from their home. The children were, however, taken into emergency care only at the insistence of the mother, at a much later date. Over the intervening period of four and a half years, they had been subject in their own home to "horrific experiences", as the child consultant psychiatrist who examined them stated. The United Kingdom Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence.

Whilst the European Court acknowledged the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life, it found that the present case left no doubt as to the failure of the system to protect the child applicants from serious, long-term neglect and abuse.[83]

83 *Z and others v. the United Kingdom* judgment of 10 May 2001.

## Responding to allegations of ill-treatment

The prohibition on torture demands a high standard of vigilance on the part of judicial authorities, and exposes the judicial authorities to the risk of themselves compounding violations of Article 3 as well as giving rise to discrete violations by their own actions.

In addition to the *prima facie* obligation on the judicial authorities themselves not to engage in any prohibited behaviour, such as in the imposition of an illegal punishment, there is an overriding obligation for the judicial authorities to investigate allegations of violations of Article 3. As violations of this article are serious breaches of core and fundamental human rights guarantees, the investigations into allegations must themselves be of a high standard – they must be thorough, effective and capable of leading to the identification of any perpetrators and their punishment.

To carry out this task, the judicial authorities must be able to identify and correctly analyse when behaviour offends the prohibition in Article 3 and be able to grant the appropriate redress where a violation has occurred.

Failure to adequately respond to allegations of violations may in and of itself give rise to a separate and discrete violation of Article 3 on the part of the judicial authorities. This can arise because the procedural aspects of Article 3 have not been fulfilled, or because the actions or failures to act on the part of the judicial authorities have themselves caused such anguish to those seeking a remedy.

Judicial authorities must have the tools at their disposal to offer and give effect to effective protection to persons from prohibitive behaviour.

That means that the legal system needs to be adequately structured, and used, to provide effective protection. Gaps in the legal system will leave the judicial authorities exposed to potentially violating Article 3.

## Investigating allegations of torture

The standard which the Court adopts in assessing evidence of violations of Article 3 is "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[84]

When domestic authorities are charged with investigating alleged incidents of torture, or inhuman treatment, the burden of proof will normally depend on whether the investigation is within the criminal sphere or in a civil context.

However, there are aspects of the burden of proof which domestic authorities must also apply within their investigations, if they are to comply with the requirements of Article 3. For example, the Court has made it clear that where an individual is taken into police custody in good health but is found to be injured at the time of release, the burden is on the authorities to provide a plausible explanation as to the causing of the injury.[85]

In a domestic context, this requires that the investigating authorities must also commence their investigation and inquiries on the basis that if victims provide *prima facie* evidence that they are injured at the time of release from custody although they were healthy at the time that they were taken into custody the burden is on the detaining authorities to provide a plausible explanation as to how those injuries were sustained.

As with an investigation under Article 2, an investigation into an allegation of torture or inhuman treatment should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, 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.

Those investigations must be sufficiently thorough and effective to satisfy the aforementioned requirements of Article 3. Judges and supervisors of such investigations should be particularly vigilant for flaws in the investigative process which the Commission and Court have found to exist in other systems. Those reviewing investigations should ensure that:

- Public prosecutors or investigating officers do not omit to, or are not inhibited from questioning, or taking statements from members of

84 *Ireland*, para. 161.

85 *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§108-111; *Ribitsch v. Austria* judgment of 4 December 1995, Reports 1996, p. 26 §34; *Aksoy v. Turkey* judgment of 18 December 1996, p. 17 §61.

the security forces or police with regard to allegations of misconduct.

- Public prosecutors or investigating officers take the necessary steps to verify documentary materials which may reveal the truth or otherwise of claims of ill-treatment, e.g. custody records, or to pursue any contradictions, inconsistencies or gaps in the information provided by the police or security forces.
- Prosecutors take steps to seek independent, corroborative evidence, including forensic evidence with respect to the allegation of torture. In the case of *Aydin v. Turkey*, although the applicant had lodged a complaint that she had been raped in detention, the public prosecutor failed to seek the appropriate medical test, sending the victim for a virginity test instead of a test to establish evidence of forced sexual intercourse.
- Prosecutors have not permitted delays to develop before seeking evidence, or statements from applicants or witnesses.
- Prosecutors react promptly to visible signs of ill-treatment or complaints of ill-treatment. In *Aksoy v. Turkey*, although the Public Prosecutor must have seen the extensive injuries caused to the applicant he failed to react. Similar situations arose in the cases of Tekin and Akkoç.
- Public prosecutors pursue investigations against perpetrators who are agents of the State, actively or vigorously. In some cases, instead of pursuing the perpetrators of torture, public prosecutors have chosen instead to prosecute the apparent victim of the misconduct. For example in *Ilhan v. Turkey*, where the applicant was injured on arrest he was prosecuted for failing to stop on order of the security forces, while no action was taken against the security forces who mistreated him.
- Public prosecutors do not display a deferential or blinkered attitude towards members of the law-enforcement or security forces, with a tendency to ignore or discount allegations of wrongdoing on their part. In particular, public prosecutors must not make assumptions that the agents of the State are in the right and that any signs of ill-treatment are the result of lawful action, or have been necessitated by the behaviour of the complainant. This is often the case where allegations of torture are made.[86]

Another area where scrutiny of the standards applied to an investigation needs to be high is the area of medical and forensic examinations. As the

86 *Aydin v. Turkey* judgment, *op. cit.*, para. 106; *Aksoy v. Turkey*, Comm. Rep., *op. cit.*, para. 189; *Cakıcı v. Turkey*, Comm. Rep., para. 284.

production of credible medical reports may constitute the deciding factor between two opposing stories, it is important that the evidence be not only available, but also independent and thorough. The Court has previously found there to be problems with the inadequate nature of the procedural rights of Article 3 in cases where there has been

- inadequate forensic medical examinations of detainees, including lack of examination by appropriately qualified medical professionals;[87]
- the use of brief, undetailed medical reports and certificates which do not include a description of the applicant's allegations or any conclusions;
- a practice of handing over an open report to police officers;
- inadequate forensic examinations of deceased persons, including reports which do not include thorough descriptions of injuries;
- failure to take photographs or make analyses of marks on the body or examinations carried out by doctors with insufficient expertise.

It is also essential that no legal impediments be placed in the way of the jurisdiction of public prosecutors to prosecute certain categories of offences committed by State officials, such as compromising the independence of the prosecutor in his or her decision to prosecute perpetrators of torture.

Another problematic aspect of investigations can be the lack accessibility of applicants or the relatives of alleged victims to the structures of remedies, including a failure to give information as to the progress of any proceedings or the results of investigations; and a lack of information, or delay in information, being passed on to relatives of persons involved in the incident.

All of the above flaws will only serve to aggravate the existing violations if there are allegations of widespread abuse.[88] The implications of this are discussed below.

## Failure to investigate

Where allegations are not properly or consistently investigated, the law-enforcement authorities run the risk of sowing the seeds for a cycle of impunity for perpetrators of inhuman treatment. Where such impunity exists, an administrative practice or policy of toleration of violations of Article3 could be said to exist.

In the first in a series of cases from Northern Ireland in the 1970s, individuals had claimed that they were not only victims of individual acts of torture, but that they were victims of a practice in violation of the Convention.[89]

87 *Akkoç v. Turkey*, Comm. Rep., *op. cit.*; *Aydin v. Turkey* judgment, *op. cit.*, para. 107.

88 *Labita v. Italy*, Appl. No. 26772/95, §121, ECHR 2000-IV; *Dikme v. Turkey*, Appl. No. 20869/92, 11 July 2000.

89 *Donnelly and others v. the United Kingdom*, 4 DR 4.

The elements that constitute a practice are *repetition of acts* and *official tolerance*. Repetition of acts means a substantial number of acts which are the expression of a general situation. Official tolerance means that, though acts are clearly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that in judicial proceedings a fair hearing of such complaints is denied.[90]

Therefore, the concept of official tolerance reflects far more than official endorsement of a particular practice. Rather it includes the attitude of the authorities in reacting to the existence of a practice or to evidence that a practice exists. In this regard the question of official tolerance focuses on action taken on behalf of the authorities to bring an end to the repetition of acts and the effectiveness of those steps in achieving that aim. The Commission has ruled that

> *an administrative practice may exist in the absence of, or even contrary to specific legislation … The question to be decided is whether or not the higher authorities have been effective in bringing to an end the repetition of acts.*[91]

The liability under the Convention to ensure that the Convention is not violated by agents of the State means that action taken by the authorities short of preventing repetition of acts can not be considered as a defence to the existence of official tolerance. To this end the governments should be able not just to show examples of sporadic prosecutions (particularly concerning only cases which have received a high level of public and media attention) but to demonstrate that on a regular basis investigations and prosecutions of alleged offenders are taking place.

It follows that compensation alone, in the absence of action being taken against perpetrators of violations of the Convention, would in effect permit a state, for example in the case of torture, to pay for the right to torture

A failure to investigate not only breaches of the procedural aspects, but also the impact of a non-responsive system, can give rise to vicarious liability for family members: again in the K*urt* case the Court found that the applicant had suffered a breach of Article 3 having regard to the particular circumstances of the case. It referred particularly to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress.

90 *Greek case*, Report, pp. 195-196.

91 Decision of 6 December 1983, 35 DR 143, 164.

## Other international standards

### Recommendations

In addition to the European Convention on Human Rights, there are a number of other international standards which the judicial authorities should consider when addressing the full implementation of safeguards to combat torture. They include:

- the 1957 and 1977 United Nations Standards Minimum Rules for the Treatment of Prisoners;
- Council of Europe Standard Minimum Rules for the Treatment of Prisoners, Recommendation No. R (73) 5 of the Committee of Ministers of the Council of Europe
- European Prison Rules, Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe
- the 1979 Declaration on the Police, Resolution 690 of Parliamentary Assembly of the Council of Europe
- the 1979 United Nations Code of Conduct for law-enforcement officials
- the United Nations 1988 Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment
- the United Nations 1990 Rules for the Protection of Juveniles Deprived of their Liberty
- the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")

### Co-operation with the CPT and observation of their recommendations

The Council of Europe has also adopted the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment in 1994. All member states of the Council have ratified this convention.[92]

Under the convention, a committee ("the CPT"), composed of as many independent and impartial experts as there are States Parties, drawn

92 The sole exception, at the time of going to press (July 2003), was Serbia and Montenegro, which had only recently become a member of the Council of Europe.

from various professions, is set up to conduct periodic and *ad hoc* visits in any places under the jurisdiction of a contracting state where persons are deprived of their liberty by a public authority (such as prisons, police and gendarmerie stations, public or private hospitals admitting interned patients, administrative detention centres for foreigners and disciplinary premises in military enclosures).

In such places, the experts are entitled to communicate freely and without witnesses with persons deprived of their liberty, on the model of visits conducted by the International Committee of the Red Cross (ICRC). The essential feature of the convention is the principle of co-operation between the CPT and the States Parties. The corollary of the obligation of the State to co-operate is the confidentiality of the entire procedure. The report on the visit and detailed recommendations sent to the Government are confidential unless the Government decides to publish them. The first amending protocol to the Convention opens the convention to non-member states of the Council of Europe which the Committee of Ministers invite to accede to it.

The CPT, in each of its visits, makes recommendations on ways to improve safeguards (legal or practical). As has been set out above, individuals deprived of their liberty are particularly vulnerable to potential infliction of torture or inhuman treatment. It can also be part of a general pattern in which conditions of detention themselves are gravely damaging to the mental and physical health of detainees and can amount to ill-treatment or even torture.

All authorities who deal with detainees should pay specific attention to the recommendations made by the CPT as to how conditions and safeguards may be improved.

For example, where there are problems of overcrowding, leading to appalling conditions of detention, this often stems partly from laws and practices allowing for long pre-trial detention not justified by particular danger of flight or risk of collusion of the suspect. Where such laws and practices still exist they should be amended to prevent situations of over-crowding. A particular concern in this respect is the situation of children in pre-trial detention, as children are more vulnerable to ill-treatment.

The CPT has also noted in previous reports that the prevailing economic circumstances can render it difficult to meet all of the Committee's requirements, notwithstanding the goodwill of the authorities concerned. So it has begun to reflect on whether a more proactive approach might be adopted as regards the implementation of its recommendations and to suggest that, in appropri-

ate cases, positive measures intended to assist states to implement the Committee's recommendations could contribute to solving this problem.

## Forensics

The CPT has pointed out in a public statement that, if the conditions of independence, specialised training and a wide mandate are not met with respect to forensic doctors, then the system will create the perverse effect of rendering it all the more difficult to combat torture and ill-treatment.[93]

It is therefore of the utmost importance that each legal system provide an independent institute, staffed with specialised forensics and a wide mandate which will act as a safeguard against those who seek to commit torture and inhuman treatment.

In addition to the need for forensics as a tool to investigate allegations of torture, it is important that forensics be used in the combat against crime. All too often, inhuman treatment or torture is resorted to in order to obtain a confession or information to allegedly assist in the solving crime. Where there are few forensic resources to assist in the fight against crime, then the pressure to extract information by way of resort to inhuman treatment will be greater.

Complementary to this is the requirement that all judges and prosecutors must be completely intolerant of any use of inhuman treatment to illicit information from a detainee or a suspect. Information which is obtained by resort to such methods must automatically become inadmissible evidence and should be disregarded. Emphasis should be placed on the unreliability of information obtained in circumstances where resort to inhuman treatment or torture is made.

A clear problem arises when a public prosecutor is advised by a detainee that he or she has been subject to unlawful treatment, but the public prosecutor displays no interest in the matter. Efforts must be made to stamp out any tendency to seek to defend the police rather than to view objectively the matter under consideration.

Whether a family member is a victim of a procedural breach of Article 3 as a result of the inactivity of the judicial authorities, will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.

In this context it is of utmost importance that there be a system for the independent and

93 CPT's public statement on Turkey, 1996.

thorough examinations of persons on release from detention. The European Committee for the Prevention of Torture (CPT) has also emphasised that proper medical examinations are an essential safeguard against ill-treatment of persons in custody.

Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations.

The practices of cursory and collective examinations illustrated by the present case undermine the effectiveness and reliability of this safeguard. Both the former Commission and the Court have endorsed this position.[94]

## Behaviour of the law-enforcement forces

In fact, most cases of ill-treatment happen during detention in police facilities, in the first hours of arrest, when no access to a lawyer or a doctor and no contact with the family are allowed. The aim is generally to extract a confession.

To combat this, judicial authorities should make all efforts to ensure that the rights of the detainees are both protected by law and implemented in practice. Such rights include procedural rights such as proper recording and registering of detainees, indicating when an individual is detained, by whom, where the individual is to be detained and any movement or transfer of the individual.

Other safeguards include access to a lawyer and a doctor in the early stages of detention. All detentions must also be subject to the rule of law and to review by an appropriate judicial officer.

All measures, legislative, administrative, judicial or other, to prevent torture and ill-treatment should be taken and enforced by the judicial authorities. Those measures include respect for the right to liberty and security and the right to a fair trial, review of interrogation rules, legislation that evidence obtained through the use of torture, including confessions, is excluded from judicial proceedings, regular independent inspections of all places of detention, respect for the principle of *non-refoulement*, organisation of information on preventing torture as well as training, especially for prosecutors and judges, law-enforcement, police and military forces and health personnel.

A strict regime of vigilance during this crucial period is essential, to ensure that safeguards against torture are as effective as possible.

Finally , there should also be discouragement of reliance on confessions as a mode of evidence, so that law-enforcement officers are not tempted

94 *Aydin v. Turkey*, judgment of 10 October 2000.

to seek to obtain confessions using inappropriate force.

### Situations of tension and conflict

Whilst it might be accepted that the prohibition of torture is absolute, security concerns are still often invoked to justify the worst practices of widespread ill-treatment.

Any efforts to undermine the protection against torture against the background of conflict must be prevented. It is imperative that investigating and judicial bodies respect the absolute nature of the guarantee against torture, and ensure in their work that in times of conflict, temptation to justify resort to prohibited behaviour is not tolerated. The same efforts should be made to ensure that where in times of conflict, incidents of torture or inhuman treatment have occurred that those responsible are held accountable.

### Groups at risk

Judicial and investigating authorities should be particularly sensitive to the fact that there are certain groups who are often particularly at risk of being tortured or ill-treated. This is often the case for members of minorities – as well as refugees and other foreigners.

A second group at risk is composed of persons making use of their freedom of expression, association and assembly (political opponents, journalists, human rights defenders), as well as lawyers complaining about the treatment inflicted on their clients. However, while members of this last group can sometimes bring their cases to international attention, the ordinary victims of, for instance, beating – which is said to be widely practised – often do not even dare to complain.

### Investigations and prosecutions

Engaging in prompt and impartial investigation, wherever there are reasonable grounds to believe that an act of torture has been committed, prosecuting the perpetrator and, if found guilty, imposing adequate punishment are essential to fulfil the obligations under Articles 1, 3 and 13 and to create a preventive mechanism against those who would otherwise engage in prohibited behaviour.

### Redress

Victims should be provided with prompt redress, including rehabilitation. This obligation explicitly exists in the United Nations Convention against Torture, to which most Council of Europe states have also acceded.

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These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and particularly judges, in mind, but are accessible also to other interested readers.