INTERIGHTS

Prohibition of Torture, Inhuman or Degrading Treatment or Punishment under the European Convention on Human Rights (Article 3)

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The manual includes judgments of the European Court of Human Rights up to December 2008. Any errors, omissions or faults are those of the authors.

Alternative formats of the manual are available upon request.

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1 INTRODUCTION

> Article 3 – Prohibition of Torture
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

1.1 The meaning and importance of the prohibition of torture and inhuman and degrading treatment

Article 3 of the European Convention on Human Rights (the "Convention") prohibits torture as well as other inhuman or degrading treatment or punishment. Article 3, as the European Court of Human Rights (the "Court") has observed on many occasions, "enshrines one of the fundamental values of democratic society." Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms such ill-treatment.

Article 3 is designed primarily to protect the physical integrity of person. In addition, the Court has interpreted the provision to protect against the infliction of pain or other acts that cause severe mental suffering. Article 3 requires the State to refrain from engaging in torture or inhuman or degrading treatment or punishment itself (i.e., a negative obligation). In this regard, the State is responsible for the actions of all of its agencies, such as the police, security forces, other law enforcement officials, and any other State bodies who hold the individual under their control, whether they act under orders, or on their own accord.

In certain circumstances, Article 3 imposes positive obligations on the State to protect against the infliction of treatment contrary to Article 3 by others. Article 3 has been interpreted by the Court, in conjunction with Article 1 of the Convention, to require States to take positive measures to ensure this, particularly with regard to vulnerable individuals. For example, where a privately run school inflicts punishment which reaches the level of severity envisaged by Article 3, the State's responsibility is engaged for such acts, because the State is ultimately responsible for securing the right to education. See in this context, for example, the case of **Costello-Roberts v United Kingdom (1993)**. Furthermore, the State's obligations extend to situations where private persons such as family members inflict pain and injury on children within their care. The Court has clearly stated that States are under an obligation to set up a framework that enables both public officials and private parties to be punished for, or discouraged from, treatment in violation of Article 3. See the cases of **A. v United Kingdom (1998)** and **Z. v United Kingdom (2001)**.

In order to satisfy the requirements of Article 3, the State must take appropriate action to sanction those who inflict the prohibited treatment or punishment. Thus, where an individual has raised an arguable claim of ill-treatment contrary to Article 3, the State is under a 'procedural' obligation to investigate and, following an investigation, to prosecute and bring to trial those responsible and, where found guilty, to punish them for their acts, in accordance with the law. The Court has made clear that the safeguards against torture in Article 3 would be ineffective if arguable claims of torture were not properly investigated by the authorities. As with the right to life, this obligation means that the State must provide not only for an accessible procedure for complaints and investigations, but also for an effective criminal justice system. The importance of such 'procedural obligations' is discussed in more detail in Interights' Manual for Lawyers on Article 2 of the Convention.

1.2 The absolute nature of the right

The fundamental importance of Article 3 is highlighted by the fact that it is an absolute prohibition, i.e., not subject to exceptions. Unlike other rights under the Convention, it is not subject to dero-

gation in time of war or other emergency threatening the life of the nation; Article 15(2) explicitly excludes Article 3 from derogations under the Convention.

The Court has emphasised that Article 3 is absolute regardless of either (i) the conduct or circumstances of the victim or the nature of any offence or (ii) the nature of any threat to the security of the State. This principle has been reiterated time and time again by the Court, for example, recently in **Ramirez Sanchez v France (2005)** at para. 96, and **Labita v Italy (2000)** at para. 119 and many others. The following cases are specific examples of this point:

- In **Aksoy v Turkey (1996)**, the applicant was arrested during an operation waged against the PKK (the Workers' Party of Kurdistan), the Kurdish nationalist organisation, in south-east Turkey. The applicant was subjected to torture while in custody. In considering the application of Article 3 to the applicant, the Court held at paragraph 62 that "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."

- In **Saadi v Italy (2008)**, where the applicant was facing deportation to Tunisia on the grounds of being a threat to national security, the Court noted that "all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3."

In a number of cases concerning the expulsion of undesired aliens (**Chahal v United Kingdom (1996)** at para. 79-80 and **N. v Finland (2005)** at para. 59 and others), the Court has made clear that, also in non-refoulement cases (see further below section 5.5.3), the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is absolute, and the activities of the individual in question past or possibly in the future, however undesirable or dangerous, cannot be a material consideration.

- In **D. v United Kingdom (1997)**, the Court held (at paragraph 47) that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question".

2 DEFINITIONS, NOTIONS AND STANDARDS UNDER ARTICLE 3

2.1 Minimum level of severity

Article 3 covers a wide spectrum of treatment and punishment. However, as noted in the **Greek Case (1969)** not all ill-treatment or punishment is prohibited. In order to fall within the scope of Article 3, the treatment suffered must reach a "minimum level of severity". The Court noted in **Ireland v United Kingdom (1978)** that ill-treatment must attain a minimum level of severity. The assessment of this minimum is, in the nature of things, 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".

Although certain treatment may be disapproved of on moral grounds, such as the chastisement of children through corporal punishment, or on general criminal grounds, such as the application of force by a police officer that inflicts bruising on a detainee, it may nevertheless not be prohibited by Article 3. Similarly, treatment that is permitted by Article 3 may nonetheless cause a person shame and embarrassment, such as the application of judicial sanctions. See, for example, **Tyrer v United Kingdom (1978)**.

One of the difficulties associated with Article 3 is that the Court has refrained from providing general and abstract standards against which to measure any given treatment or punishment Moreover, the assumptions in society regarding ill-treatment change over time. Hence, each case must be examined according to its particular facts and circumstances and with regard to personal characteristics of the alleged victim (see section 2.1.1 below). Nevertheless, a number of guidelines have evolved in the Court's case-law, which may assist in the assessment of whether torture or other ill-treatment can be established in a particular case.

While Article 3 does not explicitly require the Court to draw a distinction between the forms of impugned treatment (i.e., torture, inhuman and degrading treatment and punishment), since any such treatment will exceed the minimum level of severity, the Court has tended to state clearly the nature of the ill-treatment suffered by any given applicant. The boundary between torture and other forms of prohibited acts is relevant for the purposes of compensation which can be awarded under Article 41 of the Convention. Furthermore, as will be discussed below, a stigma is attributed to torture. Therefore, more serious consequences result from findings that a State engages in torture, and arguably the reputation of the State is more severely damaged at the international level.

Where the Court does not clearly define the treatment at issue in a case it is usually clear from the applicant's claim what was at stake. For example, in **Kurt v Turkey (1998)**, the applicant claimed that she had suffered inhuman and degrading treatment on account of her son's disappearance at the hands of the authorities. Although the Court held that the State had violated Article 3, it failed to state clearly the nature of treatment for which the State was responsible. However, it was clear from its consideration that it acknowledged the applicant's claim of having suffered inhuman and degrading treatment.

2.1.1 Relevance of the particular characteristics of the victim

From its consideration of the first cases alleging a breach of Article 3, the Court has consistently held that the assessment of the minimum level of severity is dependent upon a number of factors pertaining to the particular victim in question set against the treatment he or she has been subjected to. Thus, the Court will have regard to the age, sex, state of health, the duration of the treatment and

its physical or mental effects and still, in the large majority of cases it is difficult to discern which of the victim's characteristics is decisive. The Court assesses the cumulative effects of the impugned treatment on the particular victim.

The Court often comments upon the age of a victim where he or she is particularly young. Thus, in **Costello-Roberts v United Kingdom (1993)**, the applicant was a seven year old boy who attended a private school which used corporal punishment on disobedient pupils. The Court noted with concern the fact that the applicant was only seven years old when he was "slippered" three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster. The Court also noted with concern that the punishment was automatic in nature and that the applicant had to wait three days before its imposition. Notwithstanding these factors, the Court held that the minimum level of severity had not been attained in this case.

Age may be an important factor in ascertaining whether the severity of a particular sentence imposed on a person violates Article 3.

- In **Weeks v United Kingdom (1987)**, the applicant was sentenced to life imprisonment for an armed robbery. After pleading guilty, the domestic Court justified the imposition of a life sentence on the basis that the applicant was a very dangerous young man whose release should be dependent upon progress he made in prison towards becoming a responsible person. The Court stated that, having regard to his age at the time and to the particular facts of the offence he committed, if it had not been for the specific reasons advanced by the court for the sentence imposed, serious doubts as to its compatibility with Article 3 would have arisen.

- In **Soering v United Kingdom (1989)**, the Court took account of a number of personal factors in deciding that extradition would amount to a violation of Article 3, including the fact that the applicant was only 18 years old and there was psychiatric evidence that he was suffering from a mental illness.

- In **Toteva v Bulgaria (2004)**, the applicant, a 67 year old woman, suffered injuries when detained by the police. The Court considered that especially in view of the applicant's advanced age those injuries were serious enough to amount to ill-treatment within the meaning of Article 3 of the Convention. Contrast **Popov v Moldova (2005)** where the applicant complained under Article 3 of the Convention that the non-enforcement of a judgment for many years amounted to inhuman and degrading treatment. He claimed that, being an elderly person, he endured severe humiliation by having repeatedly to ask the authorities to execute the judgment. The Court considered that the suffering that he might have experienced due to the non-execution of the judgment was not sufficient to amount to inhuman and degrading treatment under Article 3 and, consequently, ruled the claim inadmissible.

In other cases age may be no more than an aggravating factor that affects the Court's assessment of the ill-treatment but is not determinative of whether the treatment falls within the scope of Article 3.

- In **Aydin v Turkey (1997)**, the applicant was a seventeen year old girl who was raped repeatedly and humiliated by her captors. The Court held 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.

In other cases, the closeness of the relationship between the person making the complaint and the person who has been subjected to Article 3 treatment has been regarded as highly relevant when considering whether the complainant also suffered Article 3 treatment. The closeness of the relationship has been particularly important in disappearance cases. See also **Rivas v France (2004)**.

The Court will also take account of other factors pertaining to the victim, such as his/her relative strength compared to the person effecting an arrest.

- In **Berlinski v Poland (2002)**, the Court took account of the fact that the applicants were practised bodybuilders resisting the legitimate actions of police officers. Similarly, see **Rivas v France** (cited above) where the applicant, a minor, suffered a blow in the genital area during police questioning, which resulted in a ruptured testicle requiring surgery. The Court noted, in particular, the age and adolescent build of the applicant in determining that there had been a violation of Article 3.

The Court is clear that the individual circumstances of the case, and especially factors pertaining to the victim, and sometimes his or her near relatives, must be taken into account. The question as to how much weight to attribute to such factors appears to depend on the nature of the allegations and other surrounding circumstances. Thus, a domestic court is bound to take all relevant factors into account, and engage in a delicate balancing act, in considering whether a person has been subjected to torture or one of the other prohibited forms of ill-treatment.

2.1.2 Cases in which the requisite level of severity has not been met

The Court and former Commission have ruled on a large number of cases alleging a treatment contrary to Article 3, many of which have not demonstrated the requisite level of severity, despite their being evidence of some ill-treatment or humiliation. The following cases provide examples of circumstances that have not been regarded as violations of Article 3 and are a useful contrast to other cases examined.

- In **Lopez Ostra v Spain (1994)**, the applicant claimed suffering health problems amounting to treatment contrary to Article 3, due to the proximity to his house of a waste processing plant that emitted noxious fumes and was very noisy. While accepting that the applicant and her family had suffered as a result, it concluded that such suffering did not bring the case within the scope of Article 3.

- In **Smith and Grady v United Kingdom (1999)**, the applicants were members of the armed forces. Upon discovering evidence suggesting that the applicants were homosexuals, investigations were carried out, during which the applicants were asked detailed questions about their sex lives, preferences and habits. When the evidence was confirmed, the applicants were discharged from the armed forces, in accordance with the existing army policy. The Court held that while the policy, together with the investigation and discharge which ensued, were undoubtedly "distressing and humiliating for each of the applicants", it did not consider that the treatment reached the minimum level of severity which would bring the case within the scope of Article 3 (see also next sub-paragraph).

- In **Kudla v Poland (2000)**, the applicant was held in pre-trial detention for various offences. During his period of detention, he was found to be suffering from mental illness and was transferred to a psychiatric ward of a prison hospital. He was later returned to a remand centre. In considering his detention, the Court stated that in order to warrant a finding of a violation of Article 3, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. While measures depriving a person of his liberty may often involve such an element, it cannot be said that the execution of detention on remand in itself raises an issue under Article 3; nor can Article 3 be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment (but see below in that connection **Riviere v France (2006)**.

- In **Yurtas v Turkey (2004)**, the applicant alleged that he suffered inhuman and degrading treatment when kept in police custody. The Court noted that during his time in police custody the applicant was not kept in complete sensory isolation or total social isolation. Admittedly, he was forbidden all contact with the outside world, but he did have contact with members of staff working on the premises and, for the most part, with his fellow detainees. The Court therefore considered that it not attain the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of Article 3.

- In **Gelfmann v France (2004)**, medical opinions differed as to whether the applicant, suffering from aids (contracted prior to his imprisonment), should be released. The Court found that the care and treatment with which he was being provided were of a similar standard to that available outside the prison and concluded that neither his state of health nor the distress which he claimed to suffer reached the level of severity required to constitute inhuman or degrading treatment.

- In **Matencio v France (2004)**, the Court held that the continued detention of a handicapped person did not reach the level of severity required to bring the matter within the scope of Article 3.

- In **Narcisio v Netherlands (2005)**, the applicant was detained in a police cell where he was deprived of basic necessities such as running water and proper sanitary facilities. The Court held that the lack of access to running water and sanitary facilities complained of could not be considered of sufficient severity to bring it within the scope of Article 3.

- In **Georgiev v Bulgaria (2005)**, with regard to the applicant's conditions of detention, the Court found that he had been held on his own in a cell measuring eight square metres, that he had not been allowed any exercise or other activities outside his cell and that he had not had access to natural light and only limited access to sanitary facilities. However, the Court, taking into account the applicant's state of health, took the view (by four votes to three) that those conditions did not attain the minimum level of severity, since they had lasted a relatively short time – 1,5 months (but see below **Becciev v Moldova (2005)**, where the applicant also spent relatively short time in detention (37 days), but nevertheless the Court found his conditions in violation of Article 3).

- In **Ntumba Kabongo v Belgium (2005)**, the applicant was held in detention for over ten months with a view to expulsion, as his application for asylum had been refused. The Court held that any mental suffering that the applicant may have undergone because of her detention for over ten months did not attain the minimum threshold of seriousness such as to constitute inhuman or degrading treatment. The extending of her detention for over ten months had not been intended to humiliate or degrade her and had not infringed her personality rights in contravention of Article 3.

- In **Reggiani Martinelli v Italy (2005)**, the applicant was held in detention even though he had a cerebral disease which caused physical and psychological suffering, having had a tumour removed from the brain prior to his imprisonment. The Court noted that the applicant received appropriate medical care in detention and his worsening health condition was not relevant to the detention itself but rather to the development of disease that arose prior to the detention. It found no violation of Article 3.

- In **Ramirez Sanchez v France (2005)**, the applicant was detained in solitary confinement for eight years and two months. He was kept in a single cell, had no contact with other prisoners or the prison warders, was not allowed outside his cell apart from a two-hour daily walk, and had very restricted visiting rights. He was, however, allowed to read newspapers and watch televi-

sion. The Court noted that he was not suffering from complete sensory isolation – in addition to TV and newspapers, his lawyer visited him 57 times, and he received regular visits by doctors. The Court concluded that the general and very particular conditions in which the applicant had been detained, and the length of that detention, did not reach the minimum level of severity necessary to constitute inhuman treatment, particularly in view of the applicant's personality and the exceptional level of danger that he posed (but see **Mathew v Netherlands (2005)** where the applicant's solitary confinement for an excessive and unnecessarily protracted period was found in violation of Article 3).

- In **Stefan Iliev v Bulgaria (2007)**, the applicant, aged 72 at the time, was detained by two police officers for disturbing the peace. When being taken to security guard duty room by the police officers, the applicant, who admitted to having shown some resistance, alleged that he had been beaten repeatedly with a truncheon. Mr Iliev, who had been drinking, was transferred to the Sofia police sobering-up centre and discharged the next day with a warning. The Court observed that the injuries sustained by the applicant were of a type consistent with having been beaten by truncheons. No other convincing or satisfactory explanation as to how they had occurred having been put forward, the Court considered that those injuries had been the result of treatment for which the Bulgarian authorities had been responsible. However, the Court noted that the applicant had been inebriated and showed some resistance to the police officers. Given that the injuries had been limited to his hands and had not been particularly excessive, the Court did not consider them to be sufficiently serious to amount to inhuman and degrading treatment. Accordingly, the Court held, by four votes to three, that there had been no violation of Article 3 regarding the allegations of ill-treatment.

2.1.2.1 Link to other Articles of the Convention

Where an applicant fails to prove a claim under Article 3, he or she may nevertheless succeed in proving a violation of Article 8, the rights to privacy, home and family life. Thus, in **Smith and Grady v United Kingdom (1999)**, while the humiliation suffered during their interrogation concerning their sexual orientation did not amount to inhuman or degrading treatment, the Court held that it did amount to an unjustified interference with their right to private life under Article 8 of the Convention. In **Lopez Ostra v Spain (1994)**, the Court held that the nuisance caused by the waste processing plant constituted an unjustified interference with the applicant's home and private life contrary to Article 8. In **Wainwright v United Kingdom (2006)**, the Court held that, although there was a regrettable lack of courtesy during the searching of the applicants, there was no verbal abuse by the prison officers and, importantly, there was no touching of the applicants. The Court admitted that the treatment caused them distress but did not, in the Court's view, reach the minimum level of severity prohibited by Article 3. Rather the Court found a violation of Article 8.

In **L. v Lithuania (2007)**, the applicant was unable to change the personal code on his new birth certificate and passport after his gender reassignment, which still identified his gender as female. Noting that the applicant had suffered understandable distress and frustration the Court however found that there were no circumstances of such an intense degree as to warrant considering the applicant's complaint under Article 3. The Court found it more appropriate to analyse that aspect of the applicant's complaint under Article 8.

Conversely, when the Court concludes that a set of facts violates Article 3 it will most often deem it necessary to examine whether other provisions of the Convention are violated by the same facts as well. Priority is given to consideration of the most ponderous provision to have been violated, which as mentioned before is of an absolute nature and does not allow for derogations of any kind. If the Court cannot conclusively rule on a violation of Article 3, it will consider the relatively

'lesser ranked violation'. Still, in **Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2006)** the Court considered the effects of detaining a minor girl on her own in a detention facility designed for adults both under Articles 3 and 8.

2.2 Torture

2.2.1 Degree of severity

The Court has held in **Ireland v United Kingdom (1978)** that "torture" consists of "deliberate inhuman treatment causing very serious and cruel suffering" which attracts a special stigma.
The distinction between torture and the other forms of prohibited treatment or punishment in Article 3 is one of degree and intensity and will depend, as noted above, on the individual circumstances of the victim. Therefore, it is impossible to state categorically that a particular type of treatment will always fall into one category or another.

Moreover, the Court has indicated that the degree of suffering required in order to secure a finding of torture is not fixed in time. The Convention is a living instrument that must be interpreted "in light of present day conditions." This means that certain acts which were classified in the past as "inhuman or degrading treatment" as opposed to "torture" could be classified differently in the future: "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." See **Elci and Others v Turkey (2003)** at para. 634 and also **Selmouni v France (1999)**. In that regard, it is noteworthy that the Court held in **Aydin v Turkey (1997)**, that rape of a woman by her captors could amount to torture. The Court's judgement in **Aydin** reflects the seriousness with which rape by State agents is regarded in international criminal law; it is now regarded as a crime against humanity where carried out as part of a widespread or systematic attack against a civilian population.

Recently the Court has further broadened the scope situations which amount to torture. In **Nevmerzhitsky v Ukraine (2005)** it considered that the manner in which the applicant, who was on hunger strike, was subjected to forced feeding constituted torture (see in more detail section 2.2.3 below).

So far, the Court has found that victims have suffered torture in cases involving physical violence or a combination of physical violence and mental anguish. One could imagine, however, that the Court would be at some point prepared to accept that mental anguish alone could constitute torture, provided that it is sufficiently severe. For example, it might be possible to prove that mental anguish amounts to torture where a person is detained for a prolonged period, during which he or she is told that family members would be tortured and/or killed if he or she did not confess. Additional evidence might be needed to show that these threats were real and immediate, such as bringing a child of the detainee into his or her cell and demonstrating the sort of punishment that might be meted out to the child.

A useful definition of torture can be found in the **UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)**. Article 1 states:

> 1. For the purposes of this Convention, 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 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

While this definition is not binding on the Court, it has assisted the Court in interpreting the meaning of torture under Article 3 and the Court's jurisprudence is generally consistent with this definition. It has been cited in a number of cases included **Aydin**, **Soering**, and **Selmouni** (see index of cases).

2.2.2 Deliberate and Purposive Treatment

With respect to torture, not only must a certain level of intensity be attained, but it must be shown that the ill-treatment was purposive, either towards resulting in cruel suffering or order to achieve an objective. This is in keeping with the UN Convention Against Torture's definition of torture as set out above.

- In the **Greek Case (1969)**, the Commission found that the political prisoners in question had been subjected to an administrative practice of torture and ill-treatment. The Commission stated that torture was an "aggravated form of inhuman treatment which has a purpose, such as the obtaining of information or confession, or the infliction of punishment".

- In **Aksoy v Turkey (1996)**, the Court held that the ill-treatment suffered by the applicant had been deliberately inflicted. It emphasized that a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant.

- In **Salman v Turkey (2000)**, the Court stated that, in addition to the need to show that the treatment was deliberate, it must be shown that there was a purposive element to torture, for example, the extraction of a confession or the infliction of a punishment as is recognised in the UN Convention Against Torture. Here the Court stated that very serious and cruel suffering amounting to torture was inflicted on the applicant, having regard to the nature and degree of ill-treatment and to the strong inferences that could be drawn from the evidence that they were inflicted during interrogation about the applicant's suspected participation in PKK activities.

The requirement of deliberate and purposive treatment is therefore essential in the notion of torture. Accordingly ill-treatment that reaches the minimum level of severity contemplated by Article 3 will be prohibited as inhuman or degrading treatment even where it is not sufficiently purposive to be prohibited as torture. In **Labzov v Russia (2005)** the Court reiterated (at para. 48) that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3 (see also **Kalashnikov v Russia (2002)** further below).

2.2.3 Examples of torture from the case-law

The following cases serve as examples of ill-treatment that the Court has deemed to amount to torture.

"Palestinian hanging"

- In **Aksoy v Turkey (1996)**, the applicant was arrested and detained in the context of the State's fight against the PKK in south-east Turkey. He was subjected to "Palestinian hanging:" he was stripped naked, his arms were tied together behind his back, and he was suspended by his arms. The Court noted that the treatment was deliberately inflicted and that a certain amount of preparation and exertion would have been required to carry it out. It was administered with the aim of obtaining admissions or information from the applicant. The Court noted that not only did the applicant suffer severe pain but the medical evidence showed that it led to a paralysis of both arms which lasted for some time. The Court held that this treatment was of such a serious and cruel nature that it amounted to torture.

Electric shocks

- In **Çakici v Turkey (1999)**, the victim had been detained by the security forces in south-east Turkey and subsequently disappeared. The Court found that there was evidence that the victim had been subjected to electric shocks; witnesses had seen him covered in blood and had been told that he had been beaten, one of his ribs was broken and his head slit open. The Court concluded that this treatment amounted to torture.

- In **Mikheyev v Russia (2006)** the applicant was arrested and questioned in relation to a young girl's disappearance. He alleged that he was tortured to make him corroborate a co-suspect's confession and that police officers administered electric shocks to his ears through metal clips connected by a wire to a box. He was also threatened that he would be severely beaten and that an electric current would be applied to his genitals. Unable to withstand the torture, Mr Mikheyev submitted that he broke free and jumped out of the window of the second floor of the police station to commit suicide. The Court accepted that, while in custody, Mr Mikheyev was seriously ill-treated by agents of the State, with the aim of extracting a confession or information about the offences of which he was suspected. The ill-treatment inflicted on him caused such severe physical and mental suffering that he attempted suicide, resulting in a general and permanent physical disability. The Court found that the severity of the ill-treatment amounted to torture and constituted a violation of Article 3.

Combination of torture methods

- In **Abdulsamet Yaman v Turkey (2004)**, the applicant alleged that when detained by police he had been kept blindfolded, stripped naked and immersed in cold water. He contended that he had been suspended by the arms from ceiling pipes and made to stand on a chair and that electric cables had been attached to his body, in particular to his sexual organs. He further averred that the chair on which he had been placed had then been pulled away and he had been left hanging while electric shocks were administered to his body. He stated that the police officers at times discontinued the electric shocks and squeezed his testicles. The applicant relied on two medical reports. The Court stated that, having regard to the nature and degree of the ill-treatment and to the strong inferences that could be drawn from the evidence that it was inflicted in order to obtain information from Abdulsamet Yaman about his suspected connection with the PKK, the ill-treatment involved very serious and cruel suffering that could only be characterised as torture.

Beating, threats against life and family, sexual intimidation and humiliation

- In **Selmouni v France (1999)**, the applicant claimed that he had been tortured during his pre-trial detention. The Court noted that the applicant had sustained numerous blows evidenced by widespread marks on this body. The Court stated that whatever a person's state of health, it can be presumed that such intensity of blows would cause substantial pain, even if they did not leave visible marks on the body. Further, there was evidence that the applicant was dragged along by his hair, that he was made to run along a corridor with police officers positioned on either side to trip him up, that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing", that one police officer then showed him his penis, saying "Here, suck this", before urinating over him and that he was threatened with a blow lamp and then a syringe. Besides the violent nature of the above acts, the Court observed that they would be heinous and humiliating for anyone, irrespective of their condition. The applicant endured repeated and sustained assaults over a number of days of questioning. Accordingly, the Court concluded that the physical and mental violence committed against the applicant, considered as a whole, caused "severe" pain and suffering. As it was particularly serious and cruel, it amounted to torture for the purposes of Article 3.

- In **Ilhan v Turkey (2000)**, the applicant was kicked and beaten, and struck on the head with a rifle, by the police while in custody. This caused severe bruising and brain damage resulting in long-term impairment of function. There was also a 36-hour delay in seeking medical attention for the applicant. Having regard to the severity of the injuries and the significant lapse in time before he received medical attention, the Court concluded that the applicant was a victim of torture.

- In **Elci and Others v Turkey (2003)**, sixteen applicants were taken in detention on suspicion of being involved with the PKK. The applicants were tortured and ill-treated while in custody. The conditions of detention were cold, dark and damp, with inadequate bedding, food and sanitary facilities. Some applicants were insulted, humiliated, slapped and terrified into signing confessions. At crucial moments applicants were blindfolded. The Court concluded that given the circumstances of the case as a whole, four of the applicants suffered physical and mental violence of a particularly serious and cruel nature at the hands of the gendarmerie, which amounted to torture.

- In **Bati and Others v Turkey (2004)**, the Court found that all the thirteen applicants four of whom had been aged eighteen or less and one of whom was pregnant – had lived throughout their time in police custody in a permanent state of physical pain and anxiety owing to uncertainty about their fate and the intensity of the violence to which they had been subjected. In the Court's opinion, such treatment had been intentionally meted out by agents of the State in the performance of their duties, with the aim of extracting confessions or information. The violence inflicted on them, taken as a whole and having regard to its purpose and duration, had been particularly serious and cruel, had been capable of causing "severe" pain and suffering and had amounted to "torture".

- In **Bursuc v Romania (2004)**, the applicant was stopped by two traffic police officers and addressed in an impolite manner. After responding in the same manner he was hit on the head with a rubber truncheon, handcuffed, beaten on the way to the police car and taken to the police station. At the station, the applicant was dragged by his hands, face-down, along the ground, and six other officers hit and kicked him. He was taken to the hospital at 2 a.m. and was diagnosed as having "acute injuries to the skull and brain and an injury to the eye retina". Ten days later he was transferred to another hospital where he was treated for "a swelling of the brain, the effects of angina aggravated by trauma, and tearing of the anus". The Court found that the violence to which the applicant had been subjected was particularly serious and cruel and capable of causing "severe" pain and suffering; as such, it had to be regarded as torture within the meaning of Article 3. It accordingly held that there had been a violation of the Convention on that account.

- In **Corsacov v Moldova (2006)**, the applicant, who was 17 years old at the time, was arrested on charges of theft. He was handcuffed and assaulted all the way to the police station and further at the station. In particular he was kicked, punched and beaten with batons all over his body and on the soles of his feet. Then he was suspended on a metal bar for a long period of time. He was released from detention next evening and the criminal proceedings against him were later dropped. He spent approximately 70 days in hospital at different periods as a result of his injuries. His state of health declined to such an extent that he was registered as having second-degree invalidity status, which, under Moldovan law, corresponds to a loss of working capacity of 50-75%. The Court attached great importance to the applicant's young age. But it found that the decisive element in determining the form of ill-treatment was the practice of falaka (beating of the soles), which is particularly reprehensible form of ill-treatment, which presupposed an intention to obtain information, inflict punishment or intimidate and amounted to torture.

- The **Dedovskiy and Others v Russia (2008)** case concerned the applicants' allegation that, while serving a prison sentence at a correctional colony in Chepets (Russia), they were ill-treated by the "Varyag" squad, a special unit created to maintain order in detention facilities. The squad was called into a correctional colony, allegedly to intimidate detainees who were being encouraged to be subversive by the leader of a criminal gang. The squad had instructions to maintain order by carrying out body searches of the detainees and searches of all quarters within the colony. The whole squad, except for its commander, wore balaclava helmets and camouflage uniforms with no indication of their rank and were armed with rubber truncheons. The officers of the squad subjected the applicants to repeated strip-searches and beatings with truncheons. The beatings took place indiscriminately: during the wake-up call, when they returned from work, in the canteen while they were eating, in their cells and the punishment ward. Certain applicants were made to squat and waddle to the canteen; others were beaten for replying too quietly to an officer's request. The Court found that the squad's use of truncheons had had no basis in law. There was no evidence that the applicants had attacked officers or other detainees, the beatings had been individual, rather than collective, in nature, which rendered the ground of repressing mass disorders inapplicable, and even though some applicants had allegedly disobeyed or resisted officers' orders, no attempt had been made to arrest them. The Court accepted that the officers might have needed to resort to physical force in order to make the applicants leave their cells or to search them but found that it had been disproportionate and ineffective to hit them with a truncheon to make them obey. In such a situation, a truncheon blow had been a form of reprisal or corporal punishment. The Court therefore concluded that the squad had resorted to deliberate and gratuitous violence and had intended to arouse in the applicants feelings of fear and humiliation, which would break their physical or moral resistance. The purpose of that treatment had been to debase the applicants and drive them into submission. The truncheon blows must have caused them intense mental and physical suffering and, in those circumstances, the Court found that the applicants had been subjected to torture, in violation of Article 3.

Accumulation of circumstances: fear of execution, detention conditions, no medical treatment

- In **Ilascu and Others v Moldova and Russia (2004)**, four applicants were arrested and accused of anti-Soviet activities, fighting by illegal means against the State of Transdniestria and other offences, including murder. They were ill-treated while in custody. Three of them were taken to the garrison of the Russian army, where they claim they were guarded and tortured by soldiers of that army. They had no access to the outside world and were held in cells which had no toilets, water or natural light, and were allowed only 15 minutes of outdoor exercise each day. The applicants were subsequently held at a police headquarters. The cells had no natural light and the applicants were not permitted to send or receive mail, had no access to a lawyer and received family visits only on a discretionary basis. Following their conviction, the applicants were held in single cells with no natural light. The conditions of their detention led to a deterioration in their health but they did not receive proper medical treatment. The Court noted that the applicants had lived in constant fear of execution, unable to exercise any remedy, and the anguish was aggravated by fact that the sentence had no legal basis or legitimacy, in view of the patently arbitrary nature of the circumstances in which the applicants were tried. The conditions in which the first applicant was held had a deleterious effect on his health and he did not receive proper medical care or nutrition. Moreover, the discretionary powers in relation to correspondence and visits were arbitrary and had made the conditions of detention even harsher. There had been a failure to observe the requirements of Article 3 and the treatment to which the first applicant had been subjected amounted to torture. The treatment of the third applicant and the conditions in which he had been kept, denied proper food and medical care, amounted to torture.

Forced feeding in a particularly violent and humiliating manner

- In **Nevmerzhitsky v Ukraine (2005)**, the applicant went on hunger strike while in detention and was subjected to force-feeding, which he claimed caused him substantial mental and physical suffering. He had frequently been handcuffed to a chair or heating facility and forced to swallow a rubber tube connected to a bucket with a special nutritional mixture. The Court held that whilst the authorities had complied with the manner of force-feeding prescribed by the relevant decree, the restraints applied – handcuffs, mouth-widener, a special tube inserted into the food channel – with the use of force, and despite the applicants resistance, had constituted treatment of such a severe character warranting its characterisation as torture.

Rape (and/or threat of rape)

- In the case of **Aydin v Turkey** a woman was arrested together with her father and her sister-in-law. They were taken by village guards and gendarme officers to the gendarmerie headquarters. During her detention the applicant was blindfolded. She was beaten, stripped naked, placed in a tyre and hosed with pressurized water. She was then taken to another room where she was stripped and raped by a member of the security forces. She and the other members of her family were released after three days. According to the Government the applicant and the other members of her family were never held in custody. The applicant was 17 years old at the time and had also been subjected to other forms of physical and mental suffering. These terrifying and humiliating experiences and the accumulation of acts of violence, especially the act of rape, were held by the Court to amount to torture.

- In **Maslova and Nalbandov v Russia (2008),** the 19 year-old Ms Maslova, who was a witness in a murder case, was called for questioning to the police station. She was initially questioned by policemen concerning her alleged possession of items belonging to the murder victim. On denying any involvement in the murder, the officers threatened her and beat her with her soccer scarf. Later they put thumb cuffs on Ms Maslova, beat her, raped her and then forced her to perform oral sex. Subsequently both officers repeatedly hit her in the stomach, put a gas mask over her face, blocking the air to cause suffocation, and ran electricity through wires attached to her earrings. Eventually Ms Maslova confessed. She was subsequently handed over to the prosecution authorities, based at the police station, for further questioning. Ms Maslova's requests to be released were denied. When allowed to go to the lavatory she attempted to cut the veins of her wrists. After the interrogation, the prosecution officials repeatedly raped her. Ms Maslova was finally released at 10 p.m. The Court found that the physical violence, especially the cruel acts of repeated rape, to which Ms Maslova had been subjected, had amounted to torture.

- In **Menesheva v Russia (2006)**, the applicant, a 19 year-old woman, was arrested by police officers, investigating a murder in which they believed her supposed boyfriend, L., was a suspect. They handled her roughly and made threats against her and her family during the arrest. The applicant claimed that she was ill-treated in the police station, in particular she was throttled and beaten with sticks by several police officers. They also insulted her and threatened her with rape and violence against her family. Later in the day she was taken home but then re-arrested and suffered more ill-treatment. The Court noted that the pain and suffering was inflicted on her intentionally, in particular with the view of extracting information from her. The Court observed that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, thus being particularly vulnerable. The Court further noted that the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral impact. It concluded that taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

2.3 Inhuman treatment or punishment

2.3.1 "Treatment" and "punishment"

"Treatment" and "punishment" are distinguished according to the ordinary meaning of the terms. There is little case law concerning punishment; the majority of cases before the Court have involved treatment while in custody. However, there are a number of cases such as **Tyrer v United Kingdom (1978)**, where the application of a punishment has been at issue. It is usually clear when punishment has taken place.

- In **Chember v Russia (2008)**, the applicant during his military service suffered from a recurrent knee problem and was treated on several occasions in the company's medical unit. In particular, due to his condition, the applicant was exempted from physical exercise and squad drill. Despite that, he was ordered to do 350 knee bends as a punishment for not cleaning the barracks adequately, which has left him disabled. The Court reiterated that, even though challenging physical exercise might be part and parcel of military discipline, it should not endanger the health and well-being of conscripts or undermine their human dignity. The Court noted that despite having been fully aware of the applicant's health problem, his commanders had forced him to do precisely the kind of exercise which had put great strain on his knees and spine. The severity of that punishment could not be accounted for by any disciplinary or military necessity. The Court therefore considered that that punishment had been deliberately calculated to cause the applicant intense physical suffering. Accordingly, it found that the applicant had been subjected to inhuman punishment, in violation of Article 3.

2.3.2 Distinguishing torture, inhuman treatment and degrading treatment

The distinction between torture and inhuman treatment derives principally from a difference in the intensity of the suffering inflicted. (See **Ireland v United Kingdom** (cited above) at para. 167). In addition, while torture on the one hand generally requires the proof of a particular purpose as outlined above, the other forms of ill-treatment do not.

Frequently the Court concludes that a victim has suffered both inhuman and degrading treatment. However, its case law has drawn a distinction between the two types of treatment.

The Court has considered treatment to be "inhuman" when, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" when it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a particular form of treatment is "degrading" within the meaning of Article 3, the Court has regard 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. However, yet again as noted above the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. See, among others, **Becciev v Moldova (2005)**; **I.I. v Bulgaria (2005)** at para. 67.

Below, concrete cases from the Court's practice will be discussed in order to show in which situations and how the Court comes to findings of inhuman or degrading treatment or punishment.

2.3.3 Examples of inhuman treatment

2.3.3.1 Arrest and detention

The infliction of physical violence may not amount to torture in a particular case, but it is still possible for the Court to find a violation of Article 3 on the basis that the treatment amounts to inhuman treatment. The infliction of inhuman treatment arises most frequently in respect of persons held in custody. Beatings by police officers, for example, have been held to amount to inhuman treatment.

- In **Ireland v United Kingdom (1978)** some of the persons detained complained that they had been kicked and punched by members of the security forces. Medical evidence showed that they had sustained bruising and contusions which were inflicted at the time of their detention. The Court held that the beatings led to intense suffering and to physical injury that on occasion was substantial; it thus fell into the category of inhuman treatment.

- In **Tomasi v France (1992)**, medical evidence suggested that the applicant had sustained bruises and abrasions, and that they had been inflicted during the period he spent in police detention. The Court found that the medical evidence established both the large number of blows inflicted on Mr Tomasi and their intensity. It concluded that these two elements were sufficiently serious to render such treatment inhuman and degrading.

- In **Hulki Gunes v Turkey (2003)**, the applicant claimed to have been subjected to ill-treatment. The medical examinations carried out while he was in custody revealed a number of grazes and bruises. The Court stated that the acts complained of were of a certain gravity, and lasted for fifteen days. The treatment was held to be inhuman and degrading.

- In **Balogh v Hungary (2004)**, during a police interrogation, one of the interrogating officers repeatedly slapped the applicant across the face and left ear. Two days after the release, the applicant underwent an operation to reconstruct his ear drum. The Court stated that the injury suffered was sufficiently serious to amount to ill-treatment within the scope of Article 3.

- In **R.L. and M.-J.D. v France (2004)**, police officers, without deliberately striking the applicants, had used force to bring them under control. The applicants had put up resistance and fought back. The Court concluded that the bruises and swellings found on the applicants were too numerous and too large, and the resulting periods of unfitness for work too long to correspond to the use of force made absolutely necessary by the applicant's conduct. It held that the actions of the officers constituted a violation of Article 3. See also **Krastanov v Bulgaria (2004)** and **Barbu Anghelescu v Romania (2004)**.

- In **Rivas v France (2004)**, during an interrogation in custody, a police officer prevented the applicant's escape by kneeing him in the groin. This resulted in a ruptured testicle which required surgery and caused temporary unfitness for work lasting five days. The Court held that having regard to the suffering caused and to the applicant's age, the treatment inflicted on him had been inhuman and degrading.

- In **Kucheruk v Ukraine (2007),** the applicant diagnosed with chronic schizophrenia was detained on remand in the medical wing of police temporary detention facility ("SIZO"). When he became particularly agitated, the medical staff called three prison guards who ordered him to face the wall and put his hands behind his back. When he failed to obey, the guards beat the applicant with truncheons, forced him to the floor and handcuffed him. On that same day, two prison officers and a doctor examined the applicant and reported that his shoulders and buttocks showed signs of injuries inflicted by truncheons. He was, however, declared apt to be placed in solitary confinement as ordered by the Prison Governor. He spent nine days there, confined to his cell at least 23 hours per day. For seven of those nine days he was handcuffed

at all times. When he was visited by a psychiatrist no medication was given to the applicant as he had apparently refused to take any. The prison doctor's medical notes observed that the applicant repeatedly attempted to free himself from his handcuffs, banging his head against the wall, rolling on the floor and trying to pull his legs between his handcuffed hands. The Court noted that the use of truncheons in the applicant's case had been unjustified and amounted to inhuman treatment, as the three guards involved had outnumbered the applicant, and at no stage of the proceedings had the applicant attempted to attack, or that his behaviour had in any way endangered, the guards or his fellow inmates.

- In **Gafgen v Germany (2008)**[1], during his interrogation the applicant was threatened with physical violence which would have caused him considerable pain in order to make him reveal whereabouts of the boy whom the applicant had kidnapped. The Court noted that he applicant's treatment had to have caused him considerable mental suffering, which had indeed been illustrated by the fact that, having persistently refused to make correct statements until then, he had confessed to where he had hidden the boy when threatened. The Court therefore found that the treatment the applicant had been threatened with would, if carried out, have amounted to torture. However, as the questioning had only lasted ten minutes and had taken place in an atmosphere of heightened tension and emotions owing to the fact that the police officers, completely exhausted and under extreme pressure, had believed that they had just a few hours to save the boy's life, the Court considered that the applicant had been subjected to treatment during his interrogation which it considered inhuman, in breach of Article 3.

2.3.3.2 Inappropriate/insufficient medical care

- In **Mouisel v France (2002)**, the applicant, a convicted prisoner, developed leukaemia which became progressively more serious during his detention. A medical report stated that he required sustained medical treatment in hospital. The French authorities adopted no specific measures in response to this report. The Court held that Article 3 might have been satisfied had the applicant been admitted to a hospital under supervision especially at night. The Court noted that the domestic authorities had accordingly failed to ensure that the applicant received appropriate health care. The Court concluded that applicant had suffered inhuman treatment contrary to Article 3.

- In **McGlinchey v United Kingdom (2003)**, the applicant's daughter was admitted to prison in poor health on 7 December 1998. She was treated for asthma and withdrawal from heroin addiction. Upon admission to prison, her weight was checked and noted as 50 kilos. The victim vomited almost continuously during her detention and suffered a dramatic loss of weight of almost 10 kilos during the first five days of her imprisonment. She was unable to keep any food down and very little fluid. During the first five days the victim was seen frequently by doctors. However, on the first weekend following her admission, she was not seen by any doctors. On the morning of Monday 14 December, she was visited by a doctor and was found to have collapsed and was therefore admitted to hospital. She never made a recovery and died about two weeks later. During the inquest, evidence came to light that the prison scales were inaccurate and as a result, one of the doctors placed less reliance on the scales than on his clinical assessment of the victim. The Court held that there was a failure to meet the standards imposed by Article 3. It took a particular note of the fact that of the failure of the prison authorities to provide accurate means of establishing the victim's weight loss, which was a factor that should have alerted the prison to the seriousness of her condition, but was largely discounted due to the discrepancy of the scales. In addition, it noted the fact that there was a gap in the monitoring of her condition by a doctor over the weekend when there was a further significant drop in weight and a failure of the prison to take more effective steps to treat her condition, such as her admission to hospital to

1 At the time of writing the case was pending before the Grand Chamber.

ensure the intake of medication and fluids intravenously, or to obtain more expert assistance in controlling the vomiting. The prison authorities' treatment of the victim therefore contravened the prohibition against inhuman and degrading treatment contained in Article 3.

- In **Tekin v Turkey (1998)**, the applicant who had only one kidney, was held in sub zero temperatures for four days in a cell with no bed or blankets, and denied food and liquids. For days the applicant had nowhere to lie down. The Court held this treatment amounted to inhuman and degrading treatment.

- In **Istratii and Others v Moldova (2007)**, Mr Istratii had an acute attack of paraproctitis with rectal haemorrhaging while being detained on remand. He claimed that, at the time, no medical staff were present and that he had to wait three hours before being taken to hospital. On arrival at the hospital he was handcuffed to a heater, while waiting for his operation, and was guarded at all times by two CFECC[2] officers. Four hours after the operation, the officers requested Mr Istratii's transfer to a detainee hospital, two-and-a-half hours away, despite his not being able to move independently due to the pain and risk of bleeding and despite the recommended one-month recovery period after such surgery. In the Court's view, the failure to provide immediate medical assistance to the applicant in an emergency situation, as well as his transfer to another hospital prior to his recovery, together with the humiliation of being handcuffed while in hospital, amounted to inhuman and degrading treatment.

- In **Gorodnichev v Russia (2007)**, the Court noted that, despite his tuberculoses, the applicant had been held in a disciplinary isolation cell for 25 consecutive days. Such a measure was in many respects one of the severest punishments that could have been imposed on him during his detention, since it meant that he was prohibited from buying foodstuffs and receiving parcels of food, which his father could otherwise have sent him. In view of the food restrictions resulting from placement in a disciplinary isolation cell, and having regard to the fact that the applicant had been denied a 5B-type dietary regime, which, according to doctors, was necessary to improve his health, the Court considered that his allegations that he had been severely undernourished while in prison were not without foundation. It held that the authorities' failings were particularly deserving of criticism in that food was often an important part of the treatment normally provided to those suffering from tuberculosis. In conclusion, the Court considered that the authorities had inflicted particularly acute hardship on the applicant, causing suffering beyond that inevitably associated with a prison sentence. It therefore considered that, during the relevant period, the applicant had been subjected to conditions of detention that amounted to inhuman treatment.

- In **Mechenkov v Russia (2008)**, the applicant while serving a prison sentence had been regularly prescribed and given hepatotoxic anti-tuberculosis treatment, known to cause liver damage. The evidence which had been provided to the Court did not establish the exact date on which the applicant had been diagnosed with chronic hepatitis C. More than 11 months had elapsed between the moment when the applicant's hepatitis had been mentioned for the first time in his medical records in 2003 and the date when the first blood test had been carried out to confirm the diagnosis in 2004. The Court could not therefore conclude that the applicant had been promptly diagnosed with chronic hepatitis C. The Court inferred from the Government's failure to submit copies of relevant medical documents that the applicant had not received adequate medical assistance in detention for chronic hepatitis C after 25 October 2005. It therefore concluded that the applicant had not been provided with the minimum level of medical supervision for prompt diagnosis and treatment of hepatitis C while in detention and had not received the medical assistance required for his condition, which had amounted to inhuman and degrading treatment, in violation of Article 3.

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2.3.3.3 Medical intervention in order to obtain evidence

The Court has had to deal with cases where an applicant had to undergo a medical intervention. The applicants in those cases argued that the forced interference with their physical integrity amounted to a breach of Article 3. The Court's has not always accepted that the intervention was sufficient to meet the standard of the minimum level of severity test, It has also held that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence (see **X. v Netherlands (1978)** and if necessary to provide the necessary (urgent) medical assistance. Bearing this in mind, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny.

- In **Jalloh v Germany (2006)**, the applicant, who was arrested on suspicion of carrying drugs on him, swallowed a tiny bag he had in his mouth. As no drugs were found on him, the competent public prosecutor ordered that he be given an emetic (Brechmittel) to force him to regurgitate the bag. The applicant refused to take medication to induce vomiting, four police officers held him down while a doctor inserted a tube through his nose and administered a salt solution and Ipecacuanha syrup by force. The doctor also injected him with apomorphine, a morphine derivative. As a result the applicant regurgitated a small bag containing 0.2182 g of cocaine. The Court was not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the applicant's system naturally, that being the method used by many other member States of the Council of Europe to investigate drugs offences. As to the manner in which the emetics were administered, the Court noted that, after using force verging on brutality, a tube was fed through the applicant's nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was then subjected to a further bodily intrusion against his will through the injection of another emetic. The Court said that account also had to be taken of the applicant's mental suffering while he waited for the emetics to take effect and of the fact that during that period he was restrained and kept under observation. Being forced to regurgitate under such conditions must have been humiliating for him, certainly far more so than waiting for the drugs to pass out of the body naturally. In conclusion, the Court found that the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will.

2.3.3.4 Detention of children

Detention of children merits special attention and scrutiny. There must exist very good and urgent grounds to take a minor in detention. More than in anything this must be an *ultimum remedium*. Moreover, special facilities must be put in place to accommodate the needs, including educational, of minors. Putting children together with adults, in particular on their own, constitutes inhuman treatment.

- In **Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2006)** a girl, who was five years old, was travelling with her uncle from the DRC to Belgium on her way to Canada who had been granted refugee status there. Due to a lack of papers she was stopped and put on her own in aliens detention. There, she was held in the same conditions as adults. She was detained for almost two months in a centre that had initially been intended for adults, even though she was unaccompanied by her parents and no one had been assigned to look after her. No measures had been taken to ensure that she received proper counselling and educational assistance from a qualified person specially assigned to her. Indeed, the Belgian Government acknowledged that the place of detention was not adapted to her needs and that there had been no adequate structures in place at that time. The Court considered that owing to her very young age, the fact that she was an illegal alien in a foreign land, that she was unac-

> companied by her family from whom she had become separated and that she had been left to her own devices, the girl was in an extremely vulnerable situation. The measures taken by the Belgian authorities were far from adequate in view of their obligation to take care of the child and the array of possibilities at their disposal. The conditions of detention had caused Tabitha considerable distress. The authorities who detained her could not have been unaware of the serious psychological effects that her detention in such conditions would have on her. In the Court's view, her detention demonstrated a lack of humanity to a degree that amounted to inhuman treatment.

In other cases, where appropriate facilities were put in place to accommodate the needs of children and were, moreover, aimed at protecting/disciplining them, the Court did not conclude that the prerequisite level of severity had been met (see e.g. **Aerts v Belgium (1998)** and **D.G. v Ireland (2002)**).

2.3.3.5 Mental Suffering

Treatment that causes mental rather than physical suffering can under certain circumstances amount to inhuman treatment.

- In **Ireland v United Kingdom (1978)**, terrorist suspects were held for hours during which the so-called five techniques were applied to them. These were being forced to stand with their hands and legs spread apart, with their hands held above their heads, food deprivation, sleep deprivation, subjection to constant noise and the forcible wearing of a dark hood over their faces. The Court held that the five techniques which were applied in combination, with pre-meditation and for hours at a stretch, caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3.

Threats of violence against the victim can constitute inhuman treatment where such threats are sufficiently real and immediate. It must be shown that the threats caused the level of suffering normally associated with inhuman treatment. According to the Court in **Campbell and Cosans v United Kingdom (1982)**, at para. 26, threats of torture made to a detainee might constitute inhuman treatment, where the threat is real and immediate and causes intense mental suffering (see, to the contrary, **Tekin v Turkey (1998)**, where the applicant's allegations of being threatened with torture were not, in the Court's view, sufficient to amount to Article 3 violation).

2.3.3.6 Fear and anguish as a result of forced disappearance or other ill-treatment of family members

The Court has held that where the State is responsible for the disappearance of a person in their custody in violation of Article 2, the State can also be held responsible for the mental suffering which the disappearance caused to the family of the victim. The applicant must be able to show that s/he has suffered severe anguish as a result of the disappearance and the authorities' failure to conduct a serious investigation into the person's whereabouts.

- In **Kurt v Turkey (1998)**, the applicant was the mother of a young man who was taken into custody in south-east Turkey and later disappeared. The applicant claimed, among other things, that she was the victim of a violation of Article 3 on account of the suffering she endured through not knowing what had happened to her son. The Court, noting that the applicant had witnessed her son being taken into custody, and that she had made numerous enquiries as to his subsequent fate, which were met with inaction, held that the applicant was a victim of a violation of Article 3, and that she had suffered inhuman treatment.

However, the Court in **Çakici v Turkey (1999)** held that the **Kurt** case did not establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3. The Court placed emphasis upon a number of factors and stated that whether a family member is such a victim 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.

The Court has held that relevant elements 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. The Court emphasised that the essence of 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". In **Çakici** the applicant was the brother of the disappeared person. He had not witnessed the victim being taken into custody, nor had he borne the brunt of making enquiries as to his subsequent whereabouts. The Court concluded that in these circumstances the applicant could not be regarded as a victim of treatment contrary to Article 3.

- In **Tanis v Turkey (2005)** the Court considered whether the emotional distress suffered by the applicants because of the forced disappearance of their relatives amounted to a violation of Article 3. It considered that the applicants' anxiety was attested by the numerous steps they had taken in order to find out what had happened to their relatives. Noting that the applicants' distress with regard to the fate of their relatives had not been relieved, the Court considered that the latter's disappearance amounted to inhuman and degrading treatment in respect of the applicants themselves. See also the cases of **Ipek v Turkey (2004)**, **Koku v Turkey (2005)**, **Tanli v Turkey (2001)** and **Tahsin Acar v Turkey (2004)**

- In **Bazorkina v Russian Federation (2006)** the Court considered the applicant's complaint regarding the suffering inflicted upon her in relation to her son's disappearance. The Court noted that the applicant was the victim's mother, and had seen her son, on video, being questioned and led off by soldiers following remarks inferring that he would be executed. Furthermore, despite her requests, the applicant had never received any plausible explanation or information as to what became of her son following his detention. The Court found that those facts caused her to suffer distress and anguish. It considered that the manner in which her complaints had been dealt with by the authorities could be construed as amounting to inhuman treatment.

In future cases not involving disappearances, for parents of those who have been ill-treated contrary to Article 3, recent case-law reveals that they can claim that they have also endured mental suffering in violation of Article 3, as a result of the anguish imposed on them by authorities.

- In **Berktay v Turkey (2001)**, the applicant was the father of a young man who fell from his balcony while under arrest. The applicant claimed that he suffered anguish as a result of being forced to sign a statement to the effect that his son had fallen from the balcony and that the police were not to blame, before being permitted to take his comatose son from the general hospital to a more specialised hospital. In this case the Court did not find that the applicant was a victim of Article 3. The Court noted that the son did indeed receive the treatment he required, albeit, once the applicant had signed the statement against his will. It therefore concluded that the applicant had not suffered inhuman treatment. It went on to consider whether the applicant had suffered degrading treatment; it found on the facts that the requisite level of intensity had

not been reached. However, the Court did not discount the possibility of a parent establishing him/herself as a victim of a violation of Article 3 in similar circumstances.

- In **Musayev and Others v Russia (2007)**, the Court noted that the application of Article 3 is usually not extended to the relatives of persons who have been killed by the authorities in violation of Article 2 or to cases of unjustified use of lethal force by State agents, as opposed to the relatives of the victims of enforced disappearances. However, the Court found that the situation of the applicant went beyond that of a relative of victims of a violation of Article 2. On the day in consideration the applicant was a witness to the extrajudicial execution of several of his relatives and neighbours. He was subjected to threats from the perpetrators and forced at gunpoint to lie on the ground, fearing for his own life. The Court has no doubt that the shock he experienced on that day, coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events, caused the first applicant suffering attaining the threshold of inhuman and degrading treatment proscribed by Article 3.

- In **Sultan Oner and Others v Turkey (2006)**, the first applicant accompanied by her two minor children (the second and the third applicants) was arbitrarily arrested by members of the security forces and beaten in the process. Apart from finding a violation of Article 3 in respect of the first applicant, the Court, taking into account the cumulative effect of the circumstances of the case, came to the same conclusion in respect of the second and the third applicants, who witnessed their mother's humiliation. The Court held that they had been subject to neglect and had suffered undeniable physical and psychological harm directly attributable to the conditions imposed on their mother.

- In **Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2006)** – see above under "detention of children"- the Court held with regard to the mother's rights, the evidence indicated that the only action which the Belgian authorities had taken with respect to Ms Mubilanzila Mayeka was to inform her that her daughter had been detained and to provide her with a telephone number where she could be reached. Accordingly the Court observed that it had no doubt that, as a mother, Ms Mubilanzila Mayeka had suffered deep distress and anxiety as result of her daughter's detention. Furthermore, the Court observed that the Belgian authorities had not troubled to advise Ms Mubilanzila Mayeka of her daughter's deportation and that she only became aware of her daughter's expulsion when she tried to reach her on the telephone after she had already been deported. The Court had no doubt that this caused Ms Mubilanzila Mayeka deep anxiety. The disregard such conduct showed for her feelings and other evidence in the file led the Court to find that the threshold of gravity had been attained. It concluded to a violation of the mother's rights under Article 3 on account of both her daughter's detention and deportation.

2.3.3.7 Destruction of villages and homes

The Turkish struggle against the PKK in south-east Turkey, led to a series of cases alleging that the State was responsible for the destruction of villages. It was alleged that the security forces entered particular villages and burned down houses and all their contents. In a number of such cases, the Court found violations of Article 3, on the basis that these acts amounted to inhuman treatment.

- In **Bilgin v Turkey (2000)**, the applicant claimed that security forces destroyed his home, his possessions and his harvested tobacco leaves and thereby deprived him of his livelihood. All the other houses in the hamlet in which he lived were also destroyed. As a result of the destruction of the applicant's house, he and his family had to abandon his village and settle somewhere else. He claimed that such an interference with his private and family life amounted to a violation of Article 3. The Court noted that the Commission made no findings as regards the underlying motive for the destruction of the applicant's home and possessions. The Court stated that, even

assuming that the acts in question were carried out without any intention of punishing the applicant, but instead as a discouragement to others or to prevent his home from being used by terrorists, this would not provide a justification for the ill-treatment. It concluded that having regard to the circumstances in which the applicant's home and possessions were destroyed and his personal circumstances, this must have caused the applicant suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment.

- In **Dulas v Turkey (2001)**, gendarmes entered the applicant's village and ordered all the inhabitants to congregate at specified places. Thereafter, the gendarmes began setting fire to all the houses. The applicant's house, the family's stored provisions, crops and wheat inside, along with the furniture and other household goods, were destroyed. About fifty houses in the village were burned down. After the departure of the gendarmes, the village was left in ruins and villagers were forced to leave. The applicant was over 70 years old at the time of the events and she was deprived of shelter and means of support. No steps were taken by the authorities to give assistance to her in her plight. The Court held that the applicant must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.

With regard to village destruction, see also **Mentese and Others v Turkey (2005)**; and **Hasan Ilhan v Turkey (2004)**.

2.3.3.8 Other examples

Inhuman treatment may arise outside the context of detention. Thus, for example, in **D. v United Kingdom (1997)** the removal of a person in the last stages of a terminal illness to a country where s/he will not be able to receive the appropriate treatment, has been found by the Court to expose a person to inhuman treatment (see also section 4.1.3 on Article 3 in expulsion/extradition cases).

2.4 Degrading treatment or punishment

In **Ireland v United Kingdom (1978)** the Court held (at paragraph 167) that a treatment can be classified as degrading where it is "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of debasing them and possibly breaking their physical or moral resistance".

This formula (or similar forms of it) has been used in many subsequent cases, e.g., **Bekos and Koutropoulos v Greece (2005)**.

Like the other forms of ill-treatment, degrading treatment or punishment must attain a particular level of severity to be prohibited by Article 3. In considering whether a particular form of treatment is "degrading" within the meaning of Article 3, the Court has regard 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. However, as noted above the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

2.4.1 Degrading punishment

According to the Court's case-law, a person who has received judicial punishment can only claim to have been degraded where the humiliation goes beyond that usual element of humiliation inherent in any punishment (see **Tyrer** below at para. 30). What is relevant for the purposes of Article 3 is that he or she should be humiliated not simply by his or her conviction but by the execution of the punishment which is imposed. It is sufficient if the victim is humiliated in his or her own eyes.

- In **Tyrer v United Kingdom (1978)**, the applicant juvenile was sentenced to judicial corporal punishment upon pleading guilty to an offence of assault occasioning actual bodily harm. Nearly two months after his conviction, the punishment was administered by a police officer to the applicant's bare posterior while he was held down by two more police officers. He claimed that the application of this punishment was, *inter alia*, degrading. The Court held that the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, namely violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. The Court concluded that the applicant was the victim of degrading treatment.

2.4.2 Degrading treatment

2.4.2.1 Arrest and detention

In order for an arrest or detention in connection with Court proceedings to be considered to be degrading within the meaning of Article 3, the humiliation or debasement to which it gives rise must be of a special level and in any event different from the usual degree of humiliation inherent in arrest or detention. Therefore, the use of handcuffs when arresting a suspect and transporting him/her to or from a place of detention will not normally involve a violation of Article 3. However an unnecessary strip-search might amount to degrading treatment.

- In **Wieser v Austria (2007)**, following accusations by the applicant's wife of the applicant's violent behaviour, sexual assault and possessing of a firearm, six masked and armed members of a special police task force forcibly entered the applicant's home. The police officers then forced the applicant to the ground and handcuffed him. After that he was laid on a table where he was stripped naked, searched for arms, dressed again, then forced to the ground where he remained for some 15 minutes, with a police officer's knee against the back of his neck, while other police officers searched his house. The Court noted that Mr Wieser had been particularly defenceless when undressed by the police officers. The Court found that that procedure had been invasive and potentially debasing and should not have been used without a compelling reason. However, the Court found that the strip search had neither been proved necessary nor justified for security reasons, noting, in particular, that Mr Wieser, who had already been handcuffed, had been searched for arms and not for drugs or other small objects. The Court therefore considered that, in the particular circumstances of the applicant's case, the strip search of the applicant during the police intervention at his home had constituted unjustified treatment of sufficient severity to be characterised as "degrading" and accordingly held that there had been a violation of Article 3.

2.4.2.2 Physical force inflicted on persons during arrest and in detention

The Court has pointed out that where a person has been deprived of his or her liberty, recourse to physical force which was not made strictly necessary by his or her own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3. See, for example, **Labita v Italy**, and **Selmouni v France** discussed herein. Thus, while it may be legitimate to use a certain degree of force against a violent detainee in order to restrain him or her, it is in principle not legitimate to subject a docile detainee to physical force. The incidence of bruising and other injuries sustained during detention tends to suggest ill-treatment of a kind forbidden by Article 3.

Interrogation techniques which include beatings, threats and other abuse will tend to violate Article 3.

- In **Ireland v United Kingdom (1978)** use of five different interrogation techniques (see section 2.3.3.5 above) was held to violate Article 3.

- In **Aksoy v Turkey (1996)**, the applicant was kept blindfolded during interrogation, which caused disorientation. He was suspended from his arms, which were tied together behind his back ("Palestinian hanging"); and then subjected to electric shocks (the effects of which were exacerbated by throwing water over him), beatings, slapping and verbal abuse. In considering the "Palestinian hanging", the Court found that in addition to the severe pain it must have caused at the time, it also led to a paralysis of both arms which lasted for some time. This treatment was of such a serious and cruel nature that it amounted to torture.

- In **Salman v Turkey (2000)**, the victim was taken into custody in good health and later died. He sustained bruising and abrasions to his feet, and a broken sternum. His family alleged that he had been subjected to "falaka" (beatings to the feet) and had been also struck in the chest. The Court held that, having regard to the nature and degree of the ill-treatment and to the strong inferences that could be drawn from the evidence that it occurred during interrogation concerning the victim's suspected participation in PKK activities, the victim was subjected to very serious and cruel suffering amounting to torture.

- In **Akdeniz v Turkey (2001)**, eleven persons were detained for approximately one week and all but one of them was bound. They were held outdoors, day and night. Some were beaten. All suffered from cold and from fear and anguish as to what might happen to them. The Court held that this treatment amounted to inhuman and degrading treatment.

- In **Rivas v France (2004)**, the applicant was taken into a custody and questioned by a police officer. In circumstances which were disputed, the police officer struck the applicant in the groin with his knee, resulting in a ruptured testicle which required surgery and caused temporary unfitness for work lasting five days. Having regard to the suffering caused and to the applicant's age, the Court concluded that the treatment inflicted on him had been inhuman and degrading.

2.4.2.3 Conditions of detention

Even where those holding a person use appropriate interrogation techniques and refrain from inflicting pain, there may still be a violation of Article 3 where the conditions in which a person is held amount to inhuman or degrading treatment.

The Court has consistently stressed that the suffering and humiliation involved must in any event exceed the inevitable element of suffering or humiliation connected with a legitimate deprivation of liberty. Nevertheless, in the light of Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured (see **Kudla v Poland (2000)**, paras. 92-94), with the provision of the requisite medical assistance and treatment (see, *mutatis mutandis*, the **Aerts v Belgium (1998)** para. 64 et seq.). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as the specific allegations made by the applicant (see **Dougoz v Greece (2001)**, para. 46).

Overcrowding and failure to provide sleeping facilities can amount to treatment contrary to Article 3. Further, inadequate heating, sanitation, food, recreation and contacts with the outside world can also amount to inhuman treatment and degrading treatment.

- In **Dougoz v Greece (2001)**, the applicant was held for several months in a detention centre pending expulsion. He claimed, and the respondent State did not deny, that the cells in which he was detained were built to house 20 persons but frequently housed up to 100 persons. There were no beds and the detainees were not given any mattresses, sheets or blankets. Some detainees had to sleep in the corridor. The cells were dirty and the sanitary facilities insufficient, since they were supposed to cater for a much smaller number of persons. Hot water was scarce and for long periods of time there was no hot water at all. There was no fresh air or natural daylight and no yard in which to exercise. The only area where the detainees could take a walk was the corridor leading to the toilets. The Court held that the conditions in which the applicant was held, 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.

- In **Kalashnikov v Russia (2002)**, the applicant was held for 4 years and 10 months in a cell designed for eight inmates. The Court commented that it was questionable whether such accommodation could be regarded as attaining acceptable standards. It recalled that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment has set 7 sq. m per prisoner as an approximate desirable guideline for a detention cell, i.e., 56 sq. m for 8 inmates. In fact, the applicant's cell routinely held between 18 and 24 inmates, with 2 or 3 inmates sharing a bed. The Court noted that at any given time there was 0.9-1.9 sq. m of space per inmate in the applicant's cell. The Court held that the continuous nature of the severe overcrowding in the cell "raised an issue under Article 3. It concluded that the applicant's conditions of detention, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment.

- In **Poltoratskiy v Ukraine (2003)**, the applicant was detained on death row in a single cell that was starkly furnished and contained an open toilet. For a period of 8 months, the cell was lit 24 hours per day, there was no natural light and the applicant was kept in the cell 24 hours per day. There was very little opportunity for human contact and few opportunities for the applicant to occupy himself. The circumstances were aggravated by the fact that the applicant was subject to a death sentence throughout the period. The Court concluded that while there was no intention to humiliate or debase the applicant, the absence of any such purpose could not conclusively rule out a finding of a violation of Article 3. The Court concluded that the conditions of detention, which the applicant had to endure in particular during the eight months in question, must have caused him considerable mental suffering, diminishing his human dignity. Serious economic difficulties experienced by Ukraine could not explain or excuse the unacceptable conditions of the applicant's detention. See also **Khokhlich v Ukraine (2003)** and **Kuznetsov v Ukraine (2003)**.

- In **Mayzit v Russia (2005)**, the applicant was detained in very small, overcrowded cells, which allowed for only 1 square metre per person on average. Detainees were obliged to sleep in turns and allowed to wash only every 10 days. The Court found that the applicant had been kept for a total of 9 months and 14 days in cells for six to ten inmates, leaving very little space for each inmate. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has set 7 square metres per prisoner as desirable. The Court noted that leaving less than 2 square metres on average per prisoner raised an issue under this provision. The Court did go into details concerning the sanitary conditions; the applicant had claimed that the cells were dirty, infested with bugs and let in very little light. The Court concluded that applicant's conditions of detention had amounted to degrading treatment.

- In **Novoselov v Russia (2005)**, the applicant was serving a sentence in a detention facility which he alleged was overcrowded, and lacked proper ventilation or basic sanitary and hygienic conditions. The Court held that the cells were overpopulated at the detention facility in question. The applicant was afforded less than 1 sq. m of personal space and shared a sleeping place with other inmates. Save for one hour of daily outside exercise, the applicant was confined to his cell for 23 hours a day. This aspect weighed heavily in considering whether there had been a breach of this provision. The Court reiterated that the absence of the purpose to humiliate or debase a victim could not exclude a finding of a violation of Article 3.

- In **Khudoyorov v Russia (2005)**, the applicant complained that the conditions of his detention in a Russian detention facility and transport to and from the courthouse were in breach of Article 3. He cited the UN Standard Minimum Rules for the Treatment of Prisoners (1977) in support of his claims.

    - *Conditions of Detention*. Although the parties were in dispute as to some of the facts, the Court was able to find that the conditions of detention violated the applicant's Article 3 rights based on the facts undisputed by the State. The Court noted the following facts, in particular – the small size of the cells and the very limited personal space, the inmates had to share sleeping facilities taking turns to rest, the inmates spent 23 hours per day in their cells, with only one hour of outdoor exercise, and the number of months the applicant spent in these conditions. Citing **Kalashnikov v Russia (2002)**, the Court noted that overcrowding in itself could amount to a violation of Article 3, even in the absence of aggravating factors such as the lack of light or ventilation. It considered that in cases such as this where no violation of Article 3 is found, the overcrowding is usually compensated by freedom of movement (citing **Valasinas v Lithuania (2001)** at para. 103 and 105, and the admissibility decision of **Nurmagomedov v Russia (2004)**. The Court also noted that, while it had not been established beyond all reasonable doubt that the ventilation, heating, light or sanitary facilities were inadequate, it did have some concerns in this regard. All of these facts together demonstrated that the applicant's detention conditions went beyond the threshold tolerated by Article 3.

    - *Transport conditions*. The applicant claimed that the conditions of transport between the detention facility and the court were inhuman and degrading. "Assembly cells" and passenger compartments were severely overcrowded and gave no access to natural light or air. He was not given food or drink for the entire day and the cumulative effect of these conditions was mental and physical exhaustion. This was the first case in which the Court examined the compatibility of transport conditions with Article 3. It sought support in the decisions of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment. The Court again considered the size of the transport, the degree of overcrowding, the number of times and period during which the applicant was transported in this way, and whether he was fed and given exercise. It noted that it was highly relevant that this ill-treatment occurred on days he had to appear in court when he most needed his powers of concentration. The Court concluded that the treatment violated Article 3 of the Convention.

- In **Ostrovar v Moldova (2005)**, the applicant complained under Article 3 of the Convention about the conditions of detention in a Moldovan remand centre. He invoked reports of the European Committee for the Prevention of Torture about the remand centre in support of his complaints. Again the Court noted the extreme overcrowding in the cells, which in itself raised issues under Article 3. The Court also noted the fact that prisoners were allowed to smoke in the cells even though the applicant had asthma. In this regard, the Court considered that the State failed in its obligation to safeguard the applicant's health. The Court also noted the poor quality of medical

assistance, the poor sanitary standards and the poor quality of the food. Having regard to the cumulative effects of all these factors, the Court considered that the applicant's conditions of detention went beyond the threshold of severity under Article 3 of the Convention.

- In **Alver v Estonia (2005)**, the applicant complained that his prolonged detention on remand in poor conditions, leading to liver disease and tuberculosis, had amounted to treatment contrary to Article 3 of the Convention. The Court noted first of all that detention on remand could in itself raise an issue under Article 3 of the Convention. Furthermore, Article 3 could not be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment. With regard to conditions of detention, the failure by the State to provide specific information on overcrowding requested by the Court enabled the Court to infer that the conditions were overcrowded. Unlike **Valasinas v Lithuania** and similar cases, the scarce amount of space was not compensated for by other factors (such as freedom during the day). The 'degrading' nature of the overcrowding in the cells was compounded by the generally poor conditions in the facility – for example, poor sanitation, poor ventilation, and inadequate food. The Court drew support for its conclusions from a report on the detention facility by the European Committee for the Prevention of Torture. The Court noted that the applicant was diagnosed with tuberculosis more than two years after he had been taken into custody and that it appeared probable that he was infected while in detention. While recognising that this fact in itself did not imply a violation of Article 3, in particular, as the applicant had received treatment, the Court considered this to be a characteristic element of the overall conditions of the applicant's detention. The Court considered it irrelevant that the authorities had no desire to cause physical or mental suffering to the applicant. The Court concluded that all the facts of the applicant's case – the overcrowding, generally poor conditions, his state of health and the length of detention – taken together were sufficient were sufficient to cause distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

- In **Dougoz v Greece (2001)**, the applicant was held for several months in a dirty cell that often housed 10 persons, had no beds, mattresses, sheets or blankets and had insufficient sanitary facilities. The Court found such conditions to amount to degrading treatment contrary to Article 3.

- In **Modarca v Moldova (2007)**, the applicant being in detention on remand shared his 10 sq. m cell with three other detainees and, since more than half the space was filled with furniture and a toilet, each detainee was left with only 1.19 sq. m. The cell had very limited access to daylight since the window was covered with three layers of metal netting. It was not properly heated or ventilated. He and other detainees had to bring their own clothing and bed linen and to repair and furnish the cell. Water and electricity were only provided on a schedule and were unavailable for certain periods, including during the night. Detainees had to refrain from using the toilet during such periods in order to limit the smell. On bath day there was virtually no running water in the cell throughout the day. The table was placed near the toilet, which smelt foul and the area for daily walks was placed below the opening of the ventilation system in the part of the remand centre where detainees with tuberculosis were treated, creating a real danger of infection. Moreover, the State allocated approximately EUR 0.28 per day for purchasing food for each detainee (representing 35-40% of the sum required for food, as estimated by the authorities). The Court further noted that the CPT had reported that the food was "repulsive and virtually inedible", following a visit to the prison. The Court concluded that the cumulative effect of the conditions of the applicant's detention and the time he was forced to endure those conditions (almost nine months) amounted to a violation of Article 3.

- In **Riad and Idiab v Belgium (2008)**, the applicants, both Palestinian nationals, arrived in Belgium and were refused entry into the country, as neither applicant possessed a visa. While

being in detention they submitted applications for asylum, which were refused. The orders for their release were upheld on appeal, on 30 January 2003 in Mr Riad's case and on 3 February 2003 in Mr Idiab's case. Nevertheless, in both cases the applicants were transferred on the very same day to the transit zone of Brussels-National airport pending their removal from Belgium. The applicants asserted that it did not have beds and that they were housed in the mosque which is located there; that they went several days without being given anything to eat or drink and received food only from the cleaning staff or the company which ran the airport; that they were not able to wash themselves or launder their clothes; that they were repeatedly subjected to security checks by the airport police; that on a number of occasions they were taken to the cells and left there for several hours without being given anything to eat or drink, in an attempt to force them to leave the country voluntarily, before being taken back to the transit zone. They accordingly left the transit zone on 15 February 2003, but, following an identity check soon after, they were served with an order to leave Belgian territory and were taken to the detention centre for illegal aliens. The Court considered that the transit zone was not an appropriate place for the period of detention which the applicants had been obliged to spend in it. The transit zone, the nature of which could arouse in detainees a feeling of solitude, had no external area for walking or taking physical exercise, no internal catering facilities, and no radio or television to ensure contact with the outside world; it was in no way adapted to the requirements of a stay of more than ten days. The Court considered that the conditions of detention had indeed caused them considerable mental suffering, undermining their human dignity and arousing in them feelings of humiliation and debasement. In addition, the humiliation felt by the applicants had been exacerbated by the fact that, having obtained a decision ordering their release, they had been deprived of liberty in other premises. The applicants must also have felt humiliated by the obligation to live in a public place, without support. In those circumstances, the Court considered that the fact of detaining the applicants for more than ten days in the premises in question had amounted to inhuman and degrading treatment, in violation of Article 3.

With regard to conditions of detention, see also **Karalevicius v Lithuania (2005)**; **Labzov v Russia (2005)** (on almost identical issues to **Khudoyorov**); **Romanov v Russia (2005)**; **Becciev v Moldova (2005)**.

2.4.2.4 Handcuffing

The Court has had to deal with applications where the issue of the use of handcuffs of detainees and isolation was alleged to amount to inhuman and degrading treatment. The Court's case-law in this respect is quite divergent, keeping as always the circumstances of the specific case in mind.

- In **Raninen v Finland (1997)**, the applicant was handcuffed when being taken from prison to army barracks, a journey of approximately two hours. The officer who applied the handcuffs did so in the belief that he was complying with army orders. The Court held that handcuffing does not normally violate Article 3 where the measure is imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In such circumstances, it is of importance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence. In this case, the measure was applied in the context of an unlawful arrest and detention and the applicant was seen briefly in public with his handcuffs. However, the applicant was unable to supply evidence that this treatment affected him physically, or affected his mental state, nor was he able to prove that the handcuffing was aimed at debasing or humiliating him. The Court concluded that he was not the victim of degrading treatment.

- In **Ocalan v Turkey (2005)**, the applicant was handcuffed from the moment of his arrest by the Turkish security forces on the aircraft in Kenya until his arrival at the prison in Turkey the fol-

lowing day. He complained that his treatment during the transfer amounted to inhuman and degrading treatment. The Grand Chamber of the Court followed the Chamber judgment in its rulings in this respect. The Chamber took into account the fact that the applicant was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish security forces and that he was considered dangerous. It accepted the Government's submission that the sole purpose of requiring the applicant to wear handcuffs as one of the security measures taken during the arrest phase was to prevent him from attempting to abscond or cause injury or damage to himself or others. There was accordingly no violation of Article 3 in this regard.

- By contrast in **Henaf v France (2003)**, the Court found a violation of Article 3 when an elderly applicant was shackled to a hospital bed for an entire night before he underwent surgery. The applicant was serving a prison sentence. The prison medical service considered that he required an operation to his throat. The administration considered that there was no prima facie need for the applicant to be handcuffed and that he would be guarded by two police officers while in hospital. The applicant arrived at the hospital on the day before his operation and remained in handcuffs during the day. During the night, however, he was shackled: a chain was attached to one of his ankles and to the bedpost. The applicant complained that owing to the tension of the chain every movement was painful and that sleep was impossible. In the morning, the applicant stated that in such circumstances he preferred to postpone the operation until after he had been released from prison. The Court noted the applicant's age (75 years), his state of health, the absence of previous events that suggested there was a serious fear of a risk to security, the prison governor's written instructions that the applicant was to be given normal, and not special, supervision, and the fact that he was admitted to hospital on the day before he was to have an operation. In those circumstances, the Court held that the shackling of the applicant was disproportionate in the light of the requirements of security (to prevent the applicant from absconding or from committing suicide), a fortiori since two police officers had been specially stationed outside his hospital ward. The Court found violation of Article 3.Regarding solitary confinement, the Court has made clear that complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment (see, among other authorities, **Messina v Italy (1999)**. On the issue of solitary confinement and the factors the Court takes into account in this regard, see, in particular the case of **Rohde v Denmark (2005)**.

- In more recent case **Avci and Others v Turkey (2006)**, the applicants, all of whom were serving prison sentences, embarked on a hunger strike. Initially admitted to hospital in the prison, they were later transferred to the hospital's intensive-care unit, where they were restrained by having one ankle tied to the bedpost by means of a metre-long chain, although they were all in a state of coma and in danger of dying. The Court was not therefore satisfied that the applicants would have been able to abscond in view of their condition, particularly since there were gendarmes on guard outside the door of the room. Thus, the restraint measure was disproportionate to the security requirements and, as a result, in violation of Article 3.

- In case of **Kucheruk v Ukraine (2007)** when the applicant diagnosed with chronic schizophrenia was charged and certified fit for detention on remand. Three months later the district court became particularly agitated, the medical staff called three prison guards who ordered him to face the wall and put his hands behind his back. When he failed to obey, the guards beat the applicant with truncheons, forced him to the floor and handcuffed him. On that same day, two prison officers and a doctor examined the applicant and reported that his shoulders

and buttocks showed signs of injuries inflicted by truncheons. He was, however, declared apt to be placed in solitary confinement as ordered by the Prison Governor. He spent nine days there, confined to his cell at least 23 hours per day. For seven of those nine days he was handcuffed at all times. The prison doctor's medical notes observed that the applicant repeatedly attempted to free himself from his handcuffs, banging his head against the wall, rolling on the floor and trying to pull his legs between his handcuffed hands. The Court found that the handcuffing for a period of seven days of the applicant, who was mentally ill, without psychiatric justification or medical treatment had to be regarded as constituting inhuman and degrading treatment.

Artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure, which can amount to degrading or even inhuman treatment. The Court has to examine the effect of such treatment in the special circumstances of each case.

- In **Salman v Turkey (2000)**, the applicant was the wife of a man who had been arrested and later died in police custody in south-east Turkey. She submitted an application to the European Commission on Human Rights, as a result of which she was interrogated, while kept blindfolded, by Turkish police officers. The Court, examining the issue of her interrogation under former Article 25 of the Convention (now Article 34), held that the blindfolding would have increased the applicant's vulnerability causing her anxiety and distress and disclosed, in the circumstances of this case, oppressive treatment. The Court did not consider these circumstances under Article 3, but it is certainly arguable that such treatment would amount at least to degrading treatment.

- In **Ocalan v Turkey (2005)**, the applicant was blindfolded from the moment of his arrest in Kenya until his arrival in prison in Turkey the following day. The Grand Chamber followed the Chamber's ruling that accepted that this was a measure adopted by the security forces in order that they should not be identified by the suspect who was arrested on suspicion of very serious terrorist charges. The Chamber had also accepted the State's assertion that blindfolding the suspect was a mean of preventing him from attempting to escape or injuring himself or others. The Grand Chamber again accepted the Chamber's finding that found it significant that the applicant was not interrogated while blindfolded. In the circumstances, the application of the blindfold did not amount to inhuman or degrading treatment.

2.4.2.5 Inappropriate/insufficient medical care

State authorities are under an obligation to protect the health of persons deprived of liberty. The lack of appropriate medical treatment may amount to treatment contrary to Article 3.

- In **Hutardo v Switzerland (1994)**, the applicant was not permitted to see a doctor until 6 days after he requested to see one, some 8 days after he was arrested. X-rays then revealed that he had sustained a fractured rib. The Commission found that Article 3 had been violated on account of the fact that the applicant had not been seen by a doctor until 8 days after his arrest.

- In **Farbtuhs v Latvia (2004)**, the applicant, an 83-year-old paraplegic, was convicted of crimes against humanity and genocide. He remained in prison for over a year after the prison authorities acknowledged that they had neither the equipment nor the staff to provide appropriate care. Despite medical reports recommending release, the domestic courts had refused to order it. The Court stated that the detention conditions were unsuited to the applicant's

health: the situation in which he had been put was bound to cause him permanent anxiety and a sense of inferiority and humiliation so acute as to amount to "degrading treatment".

- In **Khudobin v Russia (2006)**, the applicant was HIV-positive and suffered from a serious mental disorder. That increased the risks associated with any illness he suffered during his detention and intensified his fears on that account. In those circumstances the absence of qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical suffering, the Court found it amounted to degrading treatment.

- In **Popov v Russia (2006)**, the Court found a violation of Article 3 in respect of the applicant's conditions of detention and lack of adequate medical assistance. Very distinctive and important moment of this case is that the Court decided to apply Rule 39 of the Rules of Court, indicating to the Government not to require the applicant to perform any physical activity in the prison concerned, including physical labour and physical exercise, until further notice. Furthermore, the Government were called upon to take the initiative of securing an independent medical examination of the applicant in a specialised uro-oncological institution within one month after receipt of the notice and further to secure such medical treatment as might be required according to the results of the examination. The Government were requested to inform the Court of the measures thus taken.

- In **Aleksanyan v Russia (2008)**, the applicant was remanded in custody for more than two years. Over this period his health has progressively deteriorated, in addition he was diagnosed as HIV-positive. He had developed AIDS and was suffering from a number of opportunistic infections. The applicant was transferred from the remand prison to the hospital of another remand prison, where the doctors concluded that the applicant needed to undergo treatment in a specialist hospital. The investigator in charge of the applicant's case sought before the court the applicant's release on bail on health grounds. However, the court refused to examine that motion. The Court invited the Government, under Rule 39 of the Rules of Court, to secure immediately the in-patient treatment of the applicant in a specialised hospital. Four weeks later the Court confirmed its previous measure and in addition invited the Russian authorities to form a medical commission, to be composed on a bipartisan basis, to diagnose the applicant's health problems and suggest treatment. A week later the Government replied that the applicant could receive adequate medical treatment in the medical facility of the detention centre, and that his examination by a mixed medical commission was against Russian law. Next month doctors diagnosed the applicant with AIDS-related lymphoma. The applicant was then placed in an external haematological hospital, where he was guarded round-the-clock by policemen; the windows of his room were covered with an iron grill. The applicant was not released until the Court has delivered its judgement. The Court concluded that as from the moment when the applicant was diagnosed with AIDS, at the very least, his medical condition required his transfer to a hospital specialised in the treatment of AIDS. It followed that the national authorities had failed to take sufficient care of the applicant's health at least until his transfer to an external hospital. This had undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment.

However, the Court does not always find the failure to provide certain medical treatment while in detention to be in violation of Article 3.

- In **Gelfmann v France (2004)**, the Court found that the continued detention of a convicted prisoner who had aids was in compliance with Article 3. In that case the applicant had suffered

from aids for almost twenty years and had contracted several so-called opportunistic infections, which appeared to have been treated or to have stabilised. Three experts noted that the applicant was "uncooperative" and had refused or interrupted treatment on several occasions. All three experts considered that the applicant's short- and medium-term chances of survival were reasonable, since there had been considerable progress in treatment to manage aids. In one doctor's opinion, the applicant's state of health required hospitalisation and was incompatible with ordinary imprisonment; a second doctor had concluded that his illness was compatible with detention, as treatment was simple and could be administered in prison, and the third doctor thought that the medical care provided in prison was entirely suitable, although detention in a hospital setting would be more coherent. In addition, the authorities were attentive to the applicant's state of health. Thus, the applicant was hospitalised for assessment following deterioration in his general health, then, in view of the tests carried out and his state of health, the hospital had authorised his release and return to prison, since the treatment in prison for his illness was of the same quality as that which could be provided outside. In those circumstances, the Court considered that neither the applicant's state of health nor his alleged distress were so severe as to entail a violation of Article 3. In any event, were the applicant's health to deteriorate further, French law provided the national authorities with the means of taking action.

- In **Mathew v Netherlands (2005)**, the applicant was suffering from a serious spinal condition. The neurosurgeon found that the applicant had a Lumbar Discal Hernia and considered surgery to be appropriate. The applicant was provided with a wheelchair in August 2002, but permission to use it was withdrawn following an incident in February 2003, when he ripped a piece of metal off his wheelchair and used it as a weapon against prison staff. The applicant received physiotherapy in hospital at certain periods, but it was discontinued allegedly because his physical condition prevented him from walking from his cell to the vehicle which was to take him to hospital, and from sitting up straight in the vehicle. The applicant complained about a lack of medical care. The Court noted that the applicant's spinal condition probably made physical activity painful and difficult. However, the applicant was not incapacitated to the point of immobility. The Court noted that Article 3 could not be interpreted as requiring a prisoner's every wish and preference regarding medical treatment to be accommodated. The practical demands of legitimate detention might impose restrictions which a prisoner would have to accept. Concerning the withdrawal of the permission to use the wheelchair, the authorities were entitled to consider this a necessary measure on safety grounds. As to the physiotherapy which the applicant required, the question was whether treatment in prison was made necessary by the applicant's state of health. While it was accepted that transport to hospital caused the applicant discomfort at such a level that he might have well preferred to be visited by a physiotherapist in prison, it was not established that the applicant's condition dictated the latter course. At some moments, the applicant had apparently been capable of extreme physical resistance (ripping of metal from the wheelchair), and a physiotherapist who examined him prior to release stated that despite going nine months without treatment, he could walk a distance of at least 90 meters and carry out complex physical actions such as twisting his body and walking stairs. In these circumstances, the Court concluded that it had not been established that the applicant had been denied necessary medical care.

- In **Sakkopoulos v Greece (2004)**, the applicant submitted that, on account of his medical condition, his pre-trial detention of 9 months and 19 days had amounted to treatment in breach of Article 3. While the Court acknowledged that his medical condition had given cause for concern, it considered that it did not appear from the evidence that the deterioration of his health during his detention was attributable to the prison authorities. He had received regular medical attention while in prison and there was not evidence to support his allegations of overcrowding and poor sanitary conditions in the prison clinic. The Court also found that omissions and delays in transferring the applicant to the ordinary hospital following a heart attack did not attain

the level of severity required by Article 3, even if the authorities could be held responsible for them. The Court held that there was no breach of Article 3.

- In **Matencio v France (2004)**, the applicant complained of his continued detention and the conditions in which he had been detained despite being seriously ill. The Court noted that French law allowed the national authorities to intervene where detainees were suffering from serious medical problems. The judicial procedures in effect in France were capable of providing sufficient guarantees to ensure the protection of prisoners' health and well-being, which States had to reconcile with the legitimate requirements of a custodial sentence. As to whether the applicant's continued detention had attained a sufficient level of severity to amount to treatment in breach of Article 3, the Court noted that the applicant's degree of autonomy had enabled him to "look after his everyday needs, personal hygiene and diet and, above all, to read and write, which seems to be of fundamental importance to him". Moreover, the applicant had rejected the proposal by the governor to transfer him to a prison where medical care was available on a permanent basis. The Court concluded that it had not been established that the applicant had been subjected to treatment attaining a sufficient level of severity to fall within the scope of Article 3 of the Convention.

2.4.2.6 Mental health care

Failure to provide psychiatric treatment for detainees suffering from mental illness can involve a violation of Article 3. Inappropriate medical treatment of detainees in need of psychiatric care can also involve a violation of Article 3. With regard to such detainees, the Court will always 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.

- In **Herczegfalvy v Austria (1992)**, the applicant, who was suffering from a severe mental illness, was violent and frequently attacked his prison warders. He complained that he had been forcibly administered food and sedatives, isolated and attached with handcuffs to a security bed for a period. The Court noted that it was necessary, in view of the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals, to be particularly vigilant in reviewing whether Article 3 has been complied with. It further stated that while it is for the medical authorities to decide 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. The medical necessity of the treatment must be proved. On the facts, the Court held that the evidence before the Court 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.

- In **Kudla v Poland (2000)**, the applicant, who was detained on remand was suffering from chronic depression and during his pre-trial detention, he made two suicide attempts and also went on a hunger strike. He received medical and psychiatric attention throughout the period of his pre-trial detention. He claimed that he had been given inadequate psychiatric treatment while in pre-trial detention contrary to Article 3. The Court accepted that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear. It also took note of the fact that for four months, the applicant was kept in custody despite a psychiatric opinion that continuing detention could jeopardise his life because of a likelihood of attempted suicide. The Court found, assessing the case as a whole, that it was not established that the applicant was subjected to ill-treatment of a severity to come within the scope of Article 3. It noted that the applicant had been kept under constant psychiatric supervision and had received appropriate treatment. However, the Court stated (at paragraph 94) that the State must ensure that a person

is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.

- In **Riviere v France (2006)**, the applicant, who was sentenced to life imprisonment, after making an application to be released on licence, was examined by three psychiatric experts. They concluded that the applicant, whose psychiatric disorder had emerged during his time in prison, was now suffering from a chronic mental illness, in particular involving a compulsion towards self-strangulation. Nevertheless, the regional parole court refused an application for the applicant's release. According to the Code of Criminal Procedure of France, the prisoners with mental disorders could not be held in an ordinary prison but were to be compulsory admitted to hospital. Furthermore, the Recommendation No. R (98) 7 of the Committee of Ministers of the Council of Europe concerning the ethical and organisational aspects of health care in prison provided that prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility that was adequately equipped and possessed appropriately trained staff. The Court concluded that prisoners with serious mental disorders and suicidal tendencies require special measures geared to their condition, regardless of the seriousness of the offence of which they had been convicted. In those circumstances, the Court found a violation of Article 3 on account of the applicant's continued detention without medical supervision appropriate to his current condition as a person with a mental disorder.

- In the case of **Kucheruk v Ukraine (2007)** the applicant diagnosed with chronic schizophrenia was charged and certified fit for detention on remand. Three months later the district court found that the applicant's personal disorder made it impossible at that stage to consider punishment and committed him for compulsory psychiatric treatment. The criminal proceedings against him were suspended until such time as he had recovered. Three days later Mr Kucheruk, detained in the medical wing of the Pre-trial Detention Centre ("SIZO"), became particularly agitated. The medical staff called three prison guards who ordered him to face the wall and put his hands behind his back. When he failed to obey, the guards beat the applicant with truncheons, forced him to the floor and handcuffed him. On that same day, two prison officers and a doctor examined the applicant and reported that his shoulders and buttocks showed signs of injuries inflicted by truncheons. He was, however, declared apt to be placed in solitary confinement as ordered by the Prison Governor. He spent nine days there, confined to his cell at least 23 hours per day. For seven of those nine days he was handcuffed at all times. When he was visited by a psychiatrist no medication was given to the applicant as he had apparently refused to take any. The prison doctor's medical notes observed that the applicant repeatedly attempted to free himself from his handcuffs, banging his head against the wall, rolling on the floor and trying to pull his legs between his handcuffed hands. The applicant's solitary confinement and handcuffing suggested that the domestic authorities had not provided appropriate medical treatment and assistance to the applicant. The examination report's recommendation that the applicant be given treatment in a specialised hospital was not immediately complied with. Indeed, he was transferred back to an ordinary cell in Pre-trial Detention Centre, only having been examined once by a psychiatrist before he had ended up assaulting an inmate. In the Court's view, that could not be considered to be adequate and reasonable medical attention in the light of the applicant's serious mental condition.

2.4.2.7 Accommodation of disability

Failure to make adequate provision for forms of disability other than serious illness during detention can also amount to treatment which violates Article 3.

- In **Price v United Kingdom (2001)**, the applicant, who was limbless from birth and also suffered kidney problems, was imprisoned for contempt of Court in relation to civil proceedings. When she was committed to prison, she asked for, and was refused permission to obtain her battery charger for her wheel chair. She variously suffered from severe cold (exacerbated by her inability to move round) was unable to sleep because of lack of an appropriate bed, experienced humiliation being assisted by male officers while using the toilet and had difficulties keeping clean. The Court held 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 constitutes degrading treatment contrary to Article 3.

- In **P.M. v Hungary (1998)**, the Commission found that the failure to provide adequate sanitary care to a detainee, who was paralysed from the waist down and thus incontinent, amounted to a violation of Article 3.

- In **Vincent v France (2006)**, the applicant, who was paraplegic and could not move around without the aid of a wheelchair, complained that the prison cell, where he was held after being convicted for involvement in the abduction of an infant, was not designed for wheelchairs and that he experienced practical difficulties on a daily basis. The applicant could neither leave his cell nor move about the prison independently. In order to pass through a door, the applicant had had to be carried while a wheel on his wheelchair had been taken through the door. In addition, the applicant had been entirely subject to other people's availability. He had lived in such conditions for 4 months, although the situation had been noted by the prison integration and probation service and by a doctor, and he could have been transferred to one of the many other prisons in the Paris region. The Court found that to detain a handicapped person in a prison where he could not move about and, in particular, could not leave his cell independently, amounted to "degrading treatment" within the meaning of Article 3.

- In **Huseyin Yildirim v Turkey (2007)**, the applicant was disabled to such an extent that, throughout his imprisonment, he had been incapable of feeding himself, washing, sitting, moving about, dressing himself or going to the toilet alone. In spite of his disability, Mr Yildirim had been left to the supervision and assistance of his fellow prisoners, who had acted out of a sense of solidarity, and, in the prison wing of hospital, it had been his brother and two sisters who had taken turns to provide for his needs, regularly remaining with him round the clock. The Court considered that that situation, in which the applicant had been placed for about three years, could not but arouse in him constant feelings of anguish, inferiority and humiliation that were sufficiently strong to amount to "degrading treatment" within the meaning of Article 3. That was compounded by the applicant's transfers to the security court, when at the close of the hearing, the gendarmes who were accompanying him allegedly dropped him; the press published photographs which showed him on the ground attempting to rise. The Court wondered how responsibility for such a disabled prisoner could have been entrusted to gendarmes who were certainly not qualified to foresee the medical risks inherent in the transportation of such an ill person. Consequently, it concluded that the events of that day had also amounted to degrading treatment. In conclusion, the Court considered that the applicant's detention, in spite of the protection system offered by Turkish law, had infringed his dignity and had undoubtedly caused him both physical and psychological suffering, beyond that inevitably associated with a prison sentence and medical treatment. Accordingly, it held that there had been a violation of Article 3.

- In **Bragadireanu v Romania (2007)**, the imprisoned applicant being unable to control his bowel movements due to perianal tumour asked to be transferred to a single-bed cell, but his request was rejected on the ground that no such cells existed in the penitentiary, except those for

solitary confinement. The applicant had not had a personal assistant in prison, required by his poor health, and had been forced to rely on his inmates for the most basic sanitary needs. The applicant's medical condition was severe and his basic sanitary needs were difficult to attend to, but he had still been detained in an ordinary prison and shared a cell with other people. He also had no showers or warm water at his disposal and had not received regular assistance. His poor condition had led to social segregation from the rest of the prison population. The Court found that the conditions in prison, in particular the overcrowding and lack of access to hygiene and other facilities appropriate to his health situation, caused the applicant suffering attaining the threshold of inhuman and degrading treatment.

2.4.2.8 Intimate searches of detainees

Where a detainee has to undergo a strip search, it must be justified for reasons of security and be conducted in a manner which preserves the dignity of the person as much as possible. Thus, abusive remarks made during the search, or the presence of a prison officer of the opposite sex may amount to a violation of Article 3.

- In **Iwanczuk v Poland (2001)**, the applicant was in detention awaiting trial on fraud charges. He applied for permission to vote in parliamentary elections. Permission was subject to a body search. The applicant stripped down to his underpants whereupon he was subjected to humiliating remarks about his body and verbal abuse. He was told to remove his underpants which the applicant refused to do and permission to vote was denied. The Court, noting that the applicant had no previous convictions or history of violence, held that no compelling reasons had been adduced justifying the strip search, for example, reasons of security. Further, it held that while strip searches may be necessary on occasions to ensure prison security or prevent disorder in prisons, they must be conducted in appropriate manner. It noted that the prison officers' behaviour was intended to cause the applicant feelings of humiliation and inferiority. This showed a lack of respect for applicant's human dignity. It concluded that the applicant had been subjected to degrading treatment contrary to Article 3.

- In **Valasinas v Lithuania (2001)**, the applicant was a serving prisoner. After a personal visit in which he received food, he was ordered to undergo a strip search in the presence of a female prison officer. His testicles were examined by a male officer who did not wear gloves. His food was also searched by an officer with his bare hands and returned to the applicant. He was ordered to do sit-ups in order to ascertain whether he was concealing anything in his anus. No unauthorised item was found on him. The Court held that while strip searches may be necessary to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant 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 his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The applicant had suffered degrading treatment.

The Court has found that the routine use of strip and in particular skin searches over a prolonged period without a clear indication of the necessity for the latter, taken with other strict security measures, violates Article 3.

- In **Van der Ven v Netherlands (2003)**, the applicant was in detention on remand for a number of violent offences including murder and rape, as well as drug offences. He was transferred to an extra-secure institution following the receipt of intelligence that suggested he was planning an escape. The security regime involved, inter alia, restrictions on the applicant's contact with other detainees, restrictions on his family visits to one visit of one hour per week, behind a glass partition. Once a month he was allowed an "open" visit, during which the only physical contact

he had with his family was by means of a handshake. He was subjected to strip searches prior to and following an "open" visit as well as after visits to the clinic, the dentist or the hairdresser. In addition, for a period of three and a half years, he was subjected to weekly strip searches, including anal inspections at the time of the weekly cell-inspection, even if in the week preceding that inspection he had had no contact with the outside world, and despite the fact that he would already have been strip-searched had he received an "open" visit or visited the clinic, dentist or hairdresser. Thus, the weekly strip-search was carried out as a matter of routine and was not based on any concrete security need or applicant's behaviour. The Court held that taking into account all the other security measures, the routine strip searches diminished the applicant's human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. There was a violation of Article 3. In this regard the Court referred to reports of the European Committee for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment.

2.4.2.9 Mutilation of corpses

In the case of **Akkum and Others v Turkey (2005)** the Court has found that the mutilation of the corpse of the son of the applicant amounted to degrading treatment prohibited by Article 3. This principle was confirmed in the recent case of **Akpinar and Altun v Turkey (2007).**

2.4.2.10 Other examples

In **Tastan v Turkey (2008)**, the applicant was forced to do military service aged 71. Mr Tastan had been a shepherd since his childhood, his wife died in childbirth and that he stopped working to look after their son. As a result, the villagers – annoyed that he wasn't working for them anymore – denounced him as a deserter. He also claimed to be illiterate and to speak only Kurdish. The applicant was called up to do military service and taken by gendarmes to the military recruitment office. He was certified medically fit to perform military service and transferred to undergo military training for recruits for one month. He was forced to take part in the same activities and physical exercises as 20-year-old recruits. Mr Tastan alleged that he was subjected to degrading treatment during his training, such as being offered cigarettes by his hierarchical superiors in exchange for posing with them for a photo, and had been the target of various jokes. As he had no teeth, he had had problems eating at army barracks; he had also suffered from heart and lung problems on. After his military training the applicant was transferred to an infantry brigade, where his state of health deteriorated. He was admitted to a hospital, and finally obtained a certificate exempting him from military service on grounds of heart failure and old age. The Court observed that the Turkish Government had not referred to any particular measure taken with a view to alleviating, in the applicant's specific case, the difficulties inherent in military service or to adapting compulsory service to his case. Nor had they specified whether there had been any public interest in forcing him to perform his military service at such an advanced age. The Court found that calling the applicant up to do military service and keeping him there, making him take part in training reserved for much younger recruits then himself, had been a particularly distressing experience and had affected his dignity. It had caused him suffering in excess of that which would be involved for any man in being obliged to perform military service and had, in itself, amounted to degrading treatment within the meaning of Article 3.

2.4.3 Discrimination

Discrimination based on race or sex may amount to degrading treatment. The Commission first recognised this in **East African Asians v United Kingdom (1973)**. In that case, the Commission found that immigration law that deprived Asians who were citizens of the United Kingdom and Colonies and living in east Africa of the right to enter the United Kingdom, discriminated against

them on the ground of race. The relevant law was passed at a time when policies of "Africanisation" in east Africa were depriving Asians of their livelihoods. The Commission stated that a special importance should be attached to discrimination based on race and that publicly to single out a group of persons for differential treatment on the basis of their race might, in certain circumstances constitute a "special form of affront to human dignity," and thereby amount to degrading treatment contrary to Article 3. It further stated that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question. The Commission found a violation of Article 3 in the special circumstances of the case.

The Court has taken the view in the **Abdulaziz** case discussed below, that while States should not implement immigration policies of a purely racist nature, giving preferential treatment to its nationals or to persons from countries with which it has the closest links does not amount to racial discrimination. Nevertheless, it did go on to consider the intention of such laws in considering whether they might be regarded as degrading. An intention to humiliate or degrade members of a particular racial group would be evidence of racism and would arguably amount to a breach of Article 3.

- In **Abdulaziz, Cabales and Balkandali v United Kingdom (1985)**, the applicants who were lawfully settled in the United Kingdom were unable, due to the operation of immigrations laws, to have their alien husbands join them in United Kingdom. The Court found that the intention of the laws was crucial in deciding whether the laws violated Article 3. It concluded that the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase. The law was intended solely to protect the domestic labour market and to foster good race relations.

In cases which do not involve the thorny issue of immigration policies, the Court has recognised that discrimination may amount to a violation of Article 3.

- In **Cyprus v Turkey (2001)**, the Court found that Greek Cypriots living in northern (Turkish) Cyprus were the object of very severe restrictions which curtailed the exercise of basic freedoms and had the effect of ensuring that, inexorably, with the passage of time, the community would cease to exist. The Greek Cypriots were not permitted by the authorities to bequeath immovable property to a relative, even the next-of-kin, unless the latter also lived in the north; there were no secondary-school facilities in the north and Greek-Cypriot children who opted to attend secondary schools in the south were denied the right to reside in the north once they reached the age of 16 in the case of males and 18 in the case of females. Greek Cypriots lived and were compelled to live in conditions that were isolated, in which their movements were restricted, controlled and with no prospect of renewing or developing their community. The Court concluded that the treatment to which they were subjected was based on the features which distinguished them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The conditions under which that population was condemned to live were debasing and violated Article 3.

- In **Moldovan and Others v Romania (2005)**, the 24 applicants were all Romanian nationals of Roma origin who lived in the same village. In September 1993 a dispute broke out between three Roma men and another villager that led to the death of the latter's son who tried to intervene. The three men fled to a nearby house. A large, angry crowd gathered outside, including the local police commander and several officers. The house was set on fire. Two of the men managed to emerge from the house, but were pursued by the crowd and beaten to death. The third was prevented from escaping from the building and died in the fire. The applicants allege that the police encouraged the crowd to destroy more Roma property in the village. By the following day, thirteen Roma houses had been completely destroyed and several more had been very badly damaged. Much of the applicants' personal property

was also destroyed. Shortly after the attack on Roma property, the Romanian Government allocated funds for the reconstruction of the houses damaged or destroyed. Only four houses were rebuilt with these funds. In November 1994, the Government allocated further funds and four more houses were rebuilt. The applicants have submitted photographs to show that these houses were very badly built. The Regional Court awarded damages for houses that had not been rebuilt and maintenance allowances for the children of the deceased. The applicants' claims for loss of personal property were all dismissed as unsubstantiated. Their claims for non-pecuniary damages were also dismissed. The Court held that the remarks concerning the applicants' honesty and way of life made by some authorities dealing with the case appeared to be purely discriminatory. As discrimination based on race could of itself amount to degrading treatment within the meaning of Article 3 such remarks should be taken into account as an aggravating factor in the examination of the applicants' complaint under that provision. The applicants' living conditions and the racial discrimination to which they had been publicly subjected by the way in which their grievances had been dealt with by the various authorities, had constituted an interference with their human dignity which, in the special circumstances of the case, had amounted to "degrading treatment" within the meaning of Article 3.

The Court has also recognised that discrimination on other grounds might possibly violate Article 3.

- In **Smith and Grady v United Kingdom (1999)**, in which the applicants were dismissed from the armed services on account of their homosexuality, the Court held (at paragraph 121) that it:

  > ...would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.

It is certainly arguable that any form of discrimination which is prohibited under Article 14 of the Convention, that is clearly intended to exclude such a group from benefits accorded to the rest of society, could be deemed by the Court an "affront to human dignity", following on from its comments in **Smith and Grady**.

The Commission has stated that an action which lowers a person in rank, position, reputation or character may be degrading and therefore contrary to Article 3, provided it reaches a certain level of severity. Any action which grossly humiliates a victim before others, or drives him to act against his will or conscience as in **East African Asians v United Kingdom (1973)** case may be degrading.

The Court has intimated **in Abdulaziz, Cabales and Balkandali v United Kingdom (1985)** that where it can be proved that the discriminatory acts denote contempt or lack of respect for the personality of those discriminated against, and were designed to, and did in fact humiliate or debase, this will amount to degrading treatment contrary to Article 3. However, this may be difficult to prove on the facts.

- More recently the Court indicated that it may not be necessary to prove that the purpose of a particular treatment was to humiliate the victim in question. In **Labita v Italy (2000)**, the applicant was detained on suspicion of offences connected with the mafia. He complained that he had been subjected to a variety of forms ill-treatment. In considering whether the applicant had been subjected to degrading treatment the Court held (at paragraph 120) that "the question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3". In **Kurt v Turkey (1998)**, the complainant was the mother of the victim who had disappeared in circumstances engaging the responsibility of the State. The

Court held that the complainant was herself a victim of inhuman and degrading treatment on account of the fact that she endured years of inaction on the part of the State authorities and years of knowing nothing of her son's fate.

2.4.4 Death Penalty: Relationship with Article 2

The Court recently considered the question of whether the death penalty, specifically permitted by Article 2 of the Convention, violates Article 3. Article 2 provides, in relevant part, that:

> "No one shall be deprived of his life intentionally save in the execution of a sentence following his conviction of a crime for which this penalty is provided for by law".

Until recently, therefore, it had been difficult to challenge the death penalty per se. The only permissible challenges in this regard have related to factors such as the conditions to which a person was likely to be subject while held on death row awaiting execution, or where the imposition of the death penalty was disproportionate to the crime committed or where the personal circumstances of the condemned person were a central issue, as, for example, in the **Soering** case. However, the Court has now accepted that despite Article 2, the death penalty can now, in principle, be regarded as violating Article 3, on the basis of the practice of all contracting states that has evolved since ratification of the Convention.

- In **G.B. v Bulgaria (2004)**, the applicant submitted that his detention pending the moratorium on executions amounted to torture and inhuman and degrading treatment within the meaning of Article 3, given the fear of a possible resumption of executions, the long time spent in uncertainty and the detention's material conditions and regime. That situation was exacerbated by the fact that no judicial remedies capable of improving his situation were available. He stressed that he was a victim of the 'death row phenomenon' described in the **Soering** case. The Court noted the relevance of present-day attitudes in the Contracting States to capital punishment for the assessment whether the acceptable threshold of suffering or degradation has been exceeded. It recognised that the fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. However, the Court considered that, in the light of the available information about the abolition of the death penalty in Bulgaria and the safeguards that existed during the relevant period, the applicant's situation was not comparable to that of persons on "death row" in countries practising executions. Although the Court did not agree that the detention pending the moratorium on executions alone grounded a violation of Article 3, it considered that the conditions of detention in light of his personal situation exceeded the threshold of severity of Article 3. See also, **Iorgov v Bulgaria (2004)**.

- In **Ocalan v Turkey (2005)**, the applicant was sentenced to death following his conviction for terrorist offences. He claimed that imposition of the death penalty constituted inhuman and degrading treatment under Article 3, in addition to violating the right to life under Article 2. The Grand Chamber felt itself unable to conclude that the death penalty per se constitutes inhuman and degrading treatment contrary to Article 3 but it made clear that the imposition of the death penalty after an unfair trial would clearly violate Article 3, in particular, by subjecting a person wrongfully to the fear that he will be executed. The Court considered that the fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. In the instant case, the Court felt that, in light of doubts about the independence

and impartiality of the trial court, imposition of the death penalty would constitute inhuman treatment in violation of Article 3, in addition to violating Article 2 (the right to life). See also the **Ilascu** case discussed above.

- In **Bader and Others v Sweden (2005)**, where the applicant was sentenced to death in Syria in his absence, the Court considered that Mr Bader had a justified and well-founded fear that the death sentence against him would be executed if he was forced to return to his home country. Moreover, since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause Mr Bader considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out. Furthermore because of the summary nature of the judgment and the total disregard of the rights of the defence, the proceedings had to be regarded as a flagrant denial of a fair trial. Naturally, that gave rise to a significant degree of added uncertainty and distress for the applicants as to the outcome of any retrial in Syria. The Court considered that the death sentence imposed on Mr Bader following an unfair trial would inevitably cause the applicants additional fear and anguish as to their future if they were forced to return to Syria as there existed a real possibility that the sentence would be enforced in that country. The Court concluded that there were substantial grounds for believing that Mr Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3 if deported to his home country.

3 THE BURDEN AND STANDARD OF PROOF IN RELATION TO ARTICLE 3

3.1 Burden of proof

With regard to proof of treatment contrary to Article 3, the Court generally relies on the rule that allegations of ill-treatment must be supported by appropriate evidence. In other words, the applicant bears the responsibility of providing evidence of treatment or punishment contrary to Article 3. Evidence may take the form of medical reports of injuries, but also witness statements, photographs etc. Such evidence must be able to provide concrete strongholds in order to allow the Court to asses whether the injuries indeed existed and whether they were sufficiently serious to reach the threshold of severity under Article 3

However, the Court has recognised that Convention proceedings "do not in all cases lend themselves to a rigorous application of the principle affirmanti incumbit probatio (he who alleges something must prove that allegation) because in certain instances the respondent Government alone have access to information capable of corroborating or refuting these allegations." See **Khudoyorov v Russia (2005)** at para. 112-113. Where the Government fails to submit such information without satisfactory explanation, the Court may draw inferences as to the well-foundedness of the applicant's allegations. Indeed, the Court has emphasised on many occasions that proof sufficient to reach the standard of proof of 'beyond all reasonable doubt' (discussed below) may "follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." See, for example, **Salman v Turkey** at para. 100 discussed below and **Mathew v Netherlands (2005)** at para. 154.

- Thus, in **Salman v Turkey (2000)**, the Court stated that "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation".

The Court has shown itself very willing to draw inferences from the State's failure to provide evidence in cases where the applicant has been held in the custody of the authorities. It has made clear that where evidence is produced that suggests the victim suffered ill-treatment while in the custody of State authorities, the burden may shift to the State to produce evidence to show that the State was not responsible. In other words, in custody situations it is incumbent on the State to provide a plausible explanation for injuries. This is important because in such cases the evidence of the events in question often indeed lie wholly or in large part within the exclusive knowledge of the authorities.

- In **Berktay v Turkey (2001)**, the applicant was arrested by police and taken to his home, a fourth floor apartment, in order to conduct a search. Eight police officers were present during the search. When the applicant opened the door to the balcony, he claimed he was thrown over the wall to the ground. When he was medically examined, it was discovered that his condition was life-threatening. The Court found that the police witnesses' explanations for the applicant's injuries were contradictory. It held, in accordance with its previous jurisprudence concerning persons held in custody, that it was incumbent upon the State to produce evidence that casts doubt on the victim's version of events.

- In **Ribitsch v Austria (1995)**, the applicant claimed that while in police custody he had undergone ill-treatment. The Government did not dispute that the applicant's injuries were sustained

while he was in police custody, but pointed out that it had not been possible during the domestic criminal proceedings to establish culpable conduct on the part of the policemen. The Court noted discrepancies in the explanations of a police officer statements made by another officer, the driver of the car, to the effect that he had not seen applicant fall. There was no convincing explanation by the Government, that the injuries were caused by a fall against a car door. The Court held that in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle a violation of Article 3. The injuries in the instant case revealed ill-treatment which amounted to both inhuman and degrading treatment.

- In **Tomasi v France (1992)**, the applicant claimed he had been tortured while in custody. On his first appearance before the investigating judge, two days after his arrest, he drew attention to the bruises on his body. Four doctors examined the applicant following the end of his police custody and concluded that the occurrence of the injuries corresponded to the period spent in custody on police premises. No one claimed that the marks noted on the applicant's body could have dated from a period prior to his being taken into custody or could have originated in an act carried out by the applicant against himself or as a result of an escape attempt. The Court concluded that the evidence presented was sufficient to prove that the applicant had suffered ill-treatment at the hands of the police.

- In **Aydin v Turkey (1997)**, the victim claimed that she had been raped and beaten whilst in police custody. The Court accepted the Commission's findings of fact that there was sufficient evidence to support a finding that the applicant had been tortured. The authorities denied that the applicant had been detained on the day in question. They further alleged that the police station in issue was never used for the interrogation of alleged terrorist suspects. The Commission expressed doubts regarding the veracity of the custody register for the relevant year; there were only 7 entries and a 90% drop in the number entered for the previous year, a fact that was not adequately explained by the police. A medical report drawn up nine days after the applicant was detained stated that the applicant's hymen had been torn more than one week prior to examination and she had widespread bruising on her inner thighs. The applicant was seen by another doctor one month later who confirmed that her hymen had been torn, but that after 7– 10 days, it was impossible to date it. The police officers had failed to mention the existence of a basement or cellar when describing the layout of the building; it clearly emerged from a video of the building and a plan of the premises that there was in fact a basement used as a security area comprising two custody rooms and an office. The Commission concluded on the basis of this evidence, together with the oral evidence of the applicant, and her demeanour giving evidence, that the applicant had suffered rape and other acts contrary to Article 3.

- In **Sunal v Turkey (2005)**, the applicant complained that he had been subjected to treatment contrary to Article 3 while in police custody. The Court reiterated that where a person sustained injuries during police custody, when he or she was entirely under the control of police officers, the Government was under an obligation to provide a plausible explanation for how those injuries were caused. However, in this case, the Government's explanations were not plausible – they were contradictory and did not explain fully all of the injuries suffered. In those circumstances, the Court concluded that the Government had not satisfactorily established that Mr Sunal's injuries had been caused by anything other than the treatment meted out during his detention in police custody. The injuries sustained by the applicant indicated abuse which amounted to treatment that was both inhuman and degrading in violation of Article 3.

Other similar cases include **Afanasyev v Ukraine (2005)**, **Abdulsamet Yaman v Turkey (2004)** and **Fedotov v Russia (2005)**.

The burden of proof also shifts to the State in respect of persons who are injured during an arrest. Where a person is injured in such circumstances, the burden rests with the State to show that the use of force applied during the arrest was not excessive.

- In **Rehbock v Slovenia (2002)**, thirteen police officers took part in a pre-planned arrest of three suspects, including the applicant, all of whom were suspected drug dealers. The applicant sustained a double fracture of his jaw and facial contusions during the arrest. There was no evidence that the applicant used or threatened violence against the police during his arrest. An investigation was held, but neither the applicant, nor others who were arrested with him, or other witnesses apart from the police, were interviewed. The respondent government claimed that the police had used only force that was necessary to affect the arrest. In view of the seriousness of the injuries, together with the fact that as the facts of the dispute were not the subject of any determination by a national court, the Court held (at paragraph 72) that the burden rested with the respondent State to demonstrate with convincing arguments that the use of force was not excessive.

However, the actions of the victim may also be taken into account in assessing the degree of burden on the State to prove that the use of force was not excessive.

- In **Berlinski v Poland (2002)**, the applicants were bodybuilders who claimed they were beaten up by the police after they were arrested at an athletics club. The facts were disputed, but the Court accepted that the applicants suffered injuries inflicted on them during their arrest. The Court noted that the applicants were arrested in the course of an operation giving rise to unexpected developments to which the police were called upon to react. While the six police officers outnumbered the two applicants, account had to be taken of the fact that the applicants were practising bodybuilders, and that they resisted the legitimate actions of the police officers by refusing to comply with the verbal demands to leave the athletics club, resisting the attempts of the policemen to apprehend them and kicking two officers. Worse still, the applicants submitted to the arrest only when threatened with a gun and were subsequently convicted of an assault on the policemen. The Court agreed with the domestic courts' conclusion that the applicants lacked a critical judgment of their own conduct when faced with a simple obligation to submit to the legitimate requirements of the law enforcement officers - an obligation which is part of the general civil duty in a democratic society. These circumstances counted heavily against the applicants. The Court established (at para. 62) that where it can be shown that the alleged victims used violence to resist arrest, "the government's burden to prove that the use of force was not excessive in this case is less stringent".

3.2 Standard of proof

In **Ireland v United Kingdom (1978)**, a case concerning complaints under Article 3, the Court noted that in assessing evidence, it has generally applied the standard of proof "beyond reasonable doubt".

However such standard is not equivalent to the criminal standard in national legal systems. In the case of **Mathew v Netherlands (2005)** the Court noted that in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard: as applied by the Court, it has an autonomous meaning. The Court's role, be it remembered, is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention.

Even though the words 'beyond reasonable doubt' suggest a very high burden for the applicant to discharge, it is clear from the Court's case-law that it will apply a thorough scrutiny to claims

of violations of Article 3 – in cases where the evidence is in the hands of the State, it may require the State to explain injuries, for example, or hold it accountable for failure to investigate arguable claims of Article 3 violations, rather than for the substantive violations themselves.

The following cases provide some indication of the kind of evidence that will be insufficient to substantiate a claim of violation of Article 3.

- In **Labita v Italy (2000)**, the applicant claimed that he had been treated in a manner contrary to Article 3 but there was no medical evidence supporting his allegations. There was no evidence that he was denied access to a doctor while in prison. Indeed, he had been seen by the prison doctors on a number of occasions. He had access to lawyers and had made several applications for release. The applicant's first claim of mistreatment occurred some six months after his arrest. The Court deemed reports of ill-treatment in the prison to be too general to amount to evidence in the case. Thus, the Court found no violation of Article 3.

- In **Indelicato v Italy (2001)**, the applicant claimed that he had been kicked, punched, and insulted in prison and subjected to cold showers in the middle of the night. However, he failed to produce any medical evidence to substantiate his claim. Other evidence submitted was not regarded as sufficient to prove beyond reasonable doubt that the applicant had suffered the treatment claimed. The evidence presented included an Amnesty International report and a report by an Italian judge, both of which asserted that detainees held in the same prison as the applicant had been subjected to ill-treatment. The Court stated that these reports could not constitute evidence in the case, since they did not address the specific situation of the applicant. Accordingly it did not find a violation of Article 3.

- In **Tanli v Turkey (2001)**, the victim died while in custody. The applicant, the victim's father, claimed that his son had been tortured prior to his death. The post mortem, which was carried out after the body had been exhumed from the grave, proved inconclusive. Some witnesses claimed to have seen bruising on the victim's body, but there was no medical substantiation that this was attributable to traumatic injury rather than post mortem changes in the body. The Court concluded that there was no evidence, apart from the unexplained cause of death, to support a finding that acts of torture had been carried out.

- In **Khashiyev and Akayeva v Russia (2005)**, each applicant was a resident of Grozny (capital of the Chechen Republic) up to the time of the military operations there towards the end of 1999. With the outbreak of hostilities, the applicants took the decision to leave their home and move to Ingushetia. In each case, they entrusted their homes to relatives (the first applicant's brother and sister as well as the latter's two adult sons, the second applicant's brother), who remained in the city. At the end of January 2000, the applicants learned of the deaths of their relatives. They returned to Grozny and found the bodies lying in the yard of a house and in a nearby garage. All bodies bore multiple gunshot and stab wounds. There was also bruising and, in some cases, broken bones and mutilation. The applicants brought the bodies back to Ingushetia for burial. On a subsequent trip to Grozny, the second applicant visited the scene of the killings and found spent machine gun cartridges and her brother's hat. In a nearby house she saw five bodies, all of which bore gunshot wounds. Having learned that a sixth victim had survived, the second applicant managed to trace her in Ingushetia and was told that the victims had been shot at by Russian troops. A criminal investigation, opened in May 2000, was suspended and reopened several times, but those responsible were never identified. In 2003 a civil court in Ingushetia ordered the Ministry of Defence to pay damages to Mr Khashiyev in relation to the killing of his relatives by unidentified military personnel. In a subsequent claim under the Convention, the Court, however, held that it was unable to find that beyond all reasonable doubt the applicants' relatives before being killed had been subjected to treatment contrary to Article 3.

3.2.1 International standards and reports in detention cases

The Court's case-law shows that in assessing the alleged conditions of detention the Court increasingly takes notice of standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which operates under the European Convention on the Prevention of Torture.[3] The Court has in some cases also referred to standards developed by the UN in its Standard Minimum Rules for the Treatment of Prisoners.

As for the CPT its general reports containing the 'CPT standards' and recommendations and country visit reports have been proven a relevant factor in the Court's consideration of cases. Although the CPT recommendations and findings of facts are not binding on the Court, the reports are be relevant when arguing that particular prison conditions in which an applicant was held were substandard. Also where the CPT made specific findings as to the conditions in a particular detention centre, these findings can serve as a factual substantiation of his claims.

- In the cases of **Van der Ven v Netherlands (2003)** and **Lorsé and Others v Netherlands (2003)**, the applicants had been detained for a lengthy period of time in the Extra Security Institution (Extra Beveiligde Inrichting, "EBI"), The EBI regime was considered by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) to amount to "inhuman treatment", characterised by excessive severity resulting in an insufficiency of privacy and human contact, leading to the deterioration of prisoners' psychological and physical condition. The Court took note of psychological reports submitted by the applicants and of a report from the Committee for the Prevention of Torture, following a visit to the prison complex in question in November 1997, which concluded that "the regime being applied in the [institution] could be considered to amount to inhuman treatment. To subject prisoners classified as dangerous to such a regime could well render them more dangerous still". Accordingly, the Court concluded that the combination of routine strip-searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment, in violation of Article 3.

- In **Cenbauer v Croatia (2006)**, the applicant alleged that conditions in B wing were very poor. In particular he complained that his cell was small and had no sanitary facilities or running water. The walls were damp and mouldy and there was no heating. He maintained that his cell was dirty and that the bed sheets were not changed for very long periods of time. The Court made its assessment relying on the parties' submissions and the findings of the CPT and the Court's delegation. The Court noted that it was undisputed that from 3 January 2001 until 8 April 2003 the applicant was kept in a cell measuring 5.6 sq. m with another inmate, i.e. he was afforded less than 4 sq. m of space, which is the minimum requirement for single inmate in multi-occupancy cells under both domestic law and the CPT standards.

3.2.1.1 Reports from International Organisations and NGOs in expulsion/extradition cases

In expulsion/extradition cases the Court has attached significant value to submissions and reports by International Organisations and NGOs. While general reports by themselves do not provide proof of a risk of a violation of Article 3 in a particular case, the Court has taken them into account in assessing the credibility and probability of the claims submitted by the applicant.

- In **Hilal v United Kingdom (2001)**, the applicant, a Tanzanian national from one of the Zanzibar islands, requested asylum in the United Kingdom. This was refused on the grounds that his claim lacked credibility and that his answers given during his asylum interview were

3 See http://www.cpt.coe.int/en/default.htm

factually inconsistent. The applicant claimed that, before leaving Zanzibar, he was an active member of an opposition party. In August 1994 he alleged he was detained in Madema police station (Zanzibar) for three months because of his involvement with the opposition party and tortured; repeatedly locked in a cell full of cold water for days at a time, hung upside down with his feet tied together until he bled through the nose and subjected to electric shocks. He maintained that his expulsion to Tanzania would place him at risk of torture or inhuman or degrading treatment, that he would not receive a fair trial and that he had no effective remedy available. The Court found no reasons to conclude that the applicant's submissions on the treatment he had received were not credible or unreliable in view of the materials submitted. The Court also noted that reports on Tanzania from, among others, Amnesty International and the US Department of State, showed there was still active persecution of members of the opposition party, that the Government's human rights record remained poor, that police committed extra-judicial killings and mistreated suspects, that prison conditions remained harsh and life-threatening and that arbitrary and prolonged detention remained problems. The Court found that the applicant's deportation to Tanzania would breach Article 3.

- In **Soldatenko v Ukraine (2008),** relying on reports of the US State Department and international human rights reports the Court agreed with the applicant's argument that the mere fact of being detained as a criminal suspect in Turkmenistan provided sufficient grounds for fear that he would be at serious risk of being subjected to treatment contrary to Article 3 of the Convention.

Conversely, in **Thampibillai v Netherlands (2004)** and **Venkadajalasarma v Netherlands (2004)** the Court noted, referring to various international reports, that the security situation in Sri Lanka had improved considerably in recent years and that for some time, no round-ups and no large-scale and/or arbitrary arrests of Tamils had taken place, Tamils no longer required prior permission before travelling to certain areas and people arrested on suspicion of membership of, or involvement in, the LTTE[4] were no longer subjected to ill-treatment and torture. The Court thus found that no substantial grounds had been established for believing that the applicants, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment.

4 The Liberation Tigers of Tamil Eelam is a militant terrorist organization based in northern Sri Lanka

4 STATE RESPONSIBILITY

4.1 Negative Obligations

4.1.1 Under direct State control

States have an obligation to refrain from acts of torture and other forms of ill-treatment foreseen in Article 3. They are responsible for the acts of all public officials such as police and security forces. States cannot escape responsibility for acts contrary to Article 3 by claiming that they were unaware of such acts.

- In **Ireland v United Kingdom (1978)**, the respondent State was found to have violated Article 3 in respect of the application of the "five techniques". The Court held (at paragraph 159) that "it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected".

A State may avoid liability for Article 3 treatment where there appears to be individual acts of ill discipline in respect of which the State takes appropriate action. The State must take rigorous steps to discipline those responsible and adopt measures to ensure there is no repetition of such actions.

- In **Cyprus v Turkey (1976)** Turkish soldiers had rounded up Greek Cypriot men and women and arbitrarily detained them. The Commission found there was evidence that soldiers had engaged in "wholesale and repeated acts of rape" against women and children in their custody. The Commission stated that:

  > "The evidence shows that rapes were committed by Turkish soldiers and at least in two cases even by Turkish officers, and this not only in some isolated cases of indiscipline. It has not been shown that the Turkish authorities took adequate measures to prevent this happening or that they generally took any disciplinary measures following such incidents. The Commission therefore considers that the non-prevention of the said acts is imputable to Turkey under the Convention".

4.1.2 Territorial issues

Two situations may be distinguished where the State's negative responsibility is engaged under Article 3 while the actual torture or ill-treatment occurs outside the State's effective area of control or even territory.

The first scenario was considered by the Court among others in the **Ilascu and Others v Moldova and Russia (2004)** case:

- The applicants were arrested as separatists and later detained in the "Moldavian Republic of Transdniestria" (MRT), a region of Moldova known as Transdniestria, which declared its independence in 1991. The applicants complained of a violation of Article 3. They submitted that the Moldovan authorities were responsible for the violations they alleged since they had not taken adequate measures to put a stop to them. In their submission, the Russian Federation shared that responsibility as the territory of Transdniestria was under Russia's de facto control owing to the stationing of its troops and military equipment there and the support it gave to the separatists. The Court ruled as regards Moldova that the Moldovan Government,

who was the only legitimate government of the Republic of Moldova under international law, did not exercise authority over part of its territory, namely that part which was under the effective control of the MRT. However, even in the absence of effective control over the Transdniestrian region, Moldova still had a positive obligation under Article 1 of the Convention to take the measures that it was in its power to take and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention. Consequently, the applicants were within the jurisdiction of the Republic of Moldova for the purposes of Article 1, but its responsibility for the acts complained of was to be assessed in the light of its positive obligations under the Convention. These related both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release. The Court concluded that Moldova's responsibility was capable of being engaged on account of its failure to discharge its positive obligations with regard to the acts complained of.

As regards Russia the Court ruled that the Russian authorities had contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, part of the territory of the Republic of Moldova. In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, were capable of engaging responsibility for the consequences of the acts of that regime. The "MRT" remained under the effective authority, or at the very least under the decisive influence, of Russia. The applicants therefore came within the "jurisdiction" of Russia and its responsibility was engaged with regard to the acts complained of.

4.1.3 Exposure to a risk of ill-treatment abroad (the 'principle of non-refoulement')

The second situation occurs in extradition and deportation cases where a person is handed over to a State where there are substantive grounds to believe that this person will be subjected to a treatment contrary to Article 3. The Court has ruled that Article 3 read in conjunction with Article 1 of the Convention entails that extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3.

The Convention does not explicitly provide for a right to asylum or protection against refoulement (i.e., return). However, by virtue of Article 1 States should also refrain from actively bringing persons within their jurisdiction into a situation in another State where they risk being treated in a manner contrary to consistent with Article 3.

In this regard, the Court has made clear that Article 3 applies to persons who are threatened with extradition[5] (see **Soering** discussed below) or deportation (**Cruz Varas and Others v Sweden (1991)**), or other form of removal to a country where there are substantial grounds for believing there is "a real risk that they will be subjected to torture or other forms of ill-treatment." Thus, refusal of admission or expulsion or extradition from a State may amount to a violation of Article 3. It has already been seen (in **East African Asians**) that refusal of admission which is based on racial grounds may amount to a violation of Article 3.

- In **Soering v United Kingdom (1989)**, the United Kingdom wished to extradite the applicant to the USA, where he would face murder charges for which the penalty was the death sentence. The applicant claimed that if extradited and if found guilty, he would be sentenced to death and would suffer the consequences of "the death row phenomenon". This phenomenon involved being placed with other prisoners sentenced to death, enduring many years

5 For the purposes of this section, the use of the word "removal" is intended to cover extradition and deportation.

of uncertainty pending the outcome of numerous appeals and severe mental stress awaiting execution. The applicant claimed that being on death row amounted to inhuman and degrading treatment contrary to Article 3. The Court held that the respondent State had an obligation not to extradite where there were "substantial grounds" for believing that the person concerned would be faced in the receiving State by a real risk of exposure to torture or to inhuman or degrading treatment or punishment, no matter how heinous the crime for which the person was wanted.

4.1.3.1 Determining risk of ill-treatment

In deciding whether removal will be likely to violate Article 3, the Court considers what the sending State knew or ought to have known at the time of the proposed extradition or expulsion. The Court may, in addition, take account of information which comes to light subsequent to an expulsion. Furthermore, the risk must be a real one and not a mere possibility (See **Cruz Varas** cited above). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (See **Saadi v Italy** cited above).

- In **Said v Netherlands (2005)**, the applicant was an Eritrean national who applied for asylum in the Netherlands. The applicant claimed that he fought for Eritrea as a soldier in the war against Ethiopia, but had deserted from military service, criticised the army and therefore could not return to Ethiopia since he would be "exposed to a real risk of being executed and/or exposed to torture or inhuman or degrading treatment" contrary to Article 3. The State questioned the credibility of his story, which required the Court to engage in an assessment of the general credibility of his statements. The Court accepted the argument of desertion as a fact and noted that although the war had ended in June 2000, the information available suggested that the Eritrean authorities had not demobilised their troops quickly and were eager to keep their army at full strength. In the overall circumstances it was difficult to imagine by what means other than desertion the applicant might have left the army. Even if the account of his escape might have appeared somewhat remarkable, the Court considered that it did not detract from the overall credibility of the applicant's claim that he was a deserter. As to whether he would risk ill-treatment if returned the Court noted various country reports describing the treatment of deserters in Eritrea which constituted inhuman treatment. The applicant had maintained that he had already been arrested and detained by Eritrean military authorities after he had spoken out at the battalion meeting. The Court noted that in the overall circumstances substantial grounds had been shown for believing that, if expelled at that time, the applicant would have been exposed to a real risk of being treated or punished in violation of Article 3.

- In **Bader and Others v Sweden (2005)**, the first applicant applied for asylum claiming that if deported to Syria he would face death sentence, since the Regional Syrian Court delivered judgment convicting him in absentia of complicity in a murder and sentenced him to death. When his application for asylum was denied, he complained to the Court that his deportation would violate Article 3. The Court considered that the Syrian trial was not fair and if returned to Syria he would face fear and anguish for the future, as there existed a real possibility that the sentence would be enforced in the country. Accordingly, the Court considered that there were substantial grounds for believing that Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Article 2 and 3.

- In **D. and Others v Turkey (2006)**, the applicants, Iranian nationals, got married in spite of the objection of the bride's father and brother. Their wedding was conducted at a Sunni ceremony and therefore in breach of Shia sharia law. Some time later a national judge sentenced the applicants to 100 lashes for fornication. They fled Iran to Turkey, where they were refused permanent asylum seeker status and thus ran the risk of deportation. The Court noted that in Iran corporal punishment was the standard penalty for certain categories of offences regarded as immoral, such as adultery and fornication. They were prescribed by law, imposed by the judiciary and inflicted by agents of the State. After noting the conditions under which sentences of flagellation were executed in Iran, the Court considered that the mere fact of permitting a human being to commit such physical violence against a fellow human being, and in public moreover, was sufficient for it to classify the sentence imposed as "inhuman".

- In **Garabayev v Russia (2007)**, the applicant was a citizen of Russia and Turkmenistan, who was detained for extradition under request of prosecutor general of Turkmenistan. Immediately after the applicant's arrest several letters by the applicant, his lawyers and various public figures had been addressed to the prosecutor general of Russia, expressing fears of torture and personal persecution of the applicant for political motives and seeking to prevent his extradition on those grounds. They also referred to the general situation in Turkmenistan. The Court therefore found that at the date of the applicant's extradition to Turkmenistan there existed substantial grounds for believing that he faced a real risk of treatment proscribed by Article 3. However, no assurances of the applicant's safety from treatment contrary to Article 3 were sought, and no medical reports or visits by independent observers were requested or obtained. Furthermore, the applicant was informed of the decision to extradite him only on the day of his transfer to Turkmenistan and he was not allowed to challenge it or to contact his lawyer. The decision of the domestic court which found the extradition unlawful after it had occurred also failed to take into account the submissions under Article 3. In such circumstances, the Court concluded that no proper assessment was given by the competent authorities to the real risk of ill-treatment. The extradition was thus carried out without giving a proper assessment to that threat. The Court observed that, not only was the applicant extradited to Turkmenistan, he was returned to Russia three months later. The Court was thus able to look beyond the moment of extradition and to assess the situation in view of those later developments. According to that evidence, the applicant was subject to ill-treatment. The Court therefore concluded that there had been a violation of Article 3.

Most applications submitted to the Court however, involving complaints that deportation would lead to a risk of torture, are declared by the Court inadmissible or not disclosing a violation (See, for example, **Salkic v Sweden (2004)**; **Tomic v United Kingdom (2003)**; **Nasimi v Sweden (2004)** and **Fashkami v United Kingdom (2004)**). The Court applies a very high standard, stating that the mere possibility of ill-treatment in the country is not enough; however, it has stressed that a certainty that a violation will occur is not required **(Soering**, para. 94**)**.

- In **Saadi v Italy (2008)**, the Court rejected the proposition by the UK government that a higher standard of proof is required in cases where the applicant is considered a threat to the national security of the host state. The Court reaffirmed the standard it had previously laid down in **Chahal**, stating that it is necessary and sufficient for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to prohibited ill-treatment.

- In **Vilvarajah v United Kingdom (1991)**, the applicants were Sri Lankan Tamils who were refused asylum in the United Kingdom. When told that they would be returned to Sri Lanka, they claimed that they would be at risk of ill-treatment by the security forces as a result of the struggle between the State forces and the Tamil liberation movement. They were in fact removed

and three of them were in fact subjected to ill-treatment there. The Court noted that at the time of their removal, there had been a significant improvement in the security situation in Sri Lanka. Further, the UN High Commissioner for Refugees had been supervising a programme of voluntary repatriation, during the course of which many Tamils had returned safely. The Court held that although there had been a significant improvement in the situation, it was still unsettled and therefore there existed the possibility that the applicants might be detained and ill-treated. However, a mere possibility of ill-treatment, was not in itself sufficient to give rise to a breach of Article 3.

In expulsion cases (discussed below) the Court applies a high standard of proof and requires the discrimination not to be of a general nature, but to directly affect the individual. In **Fashkami v United Kingdom (2004)** the Court declared an application to be inadmissible, even though the applicant claimed to face the risk of death or ill-treatment as a homosexual if returned to Iran. The Court, however, stated that while the general situation in Iran did not foster the protection of human rights and homosexuals could be vulnerable to abuse, the applicant had not established that there were substantial grounds for believing that he would face treatment contrary to Articles 2 and 3.

- In **Venkadajalasarma v Netherlands (2004)** and **Thampibillai v Netherlands (2004)**, the applicants were Tamils who faced deportation from the Netherlands to Sri Lanka. The Court held that the deportations would not violate Article 3, in the absence of substantiation of a real and direct risk to the applicants in their country of origin. In that respect, the Court, while recognising that the situation in Sri Lanka was not yet stable, referred to the commitment of the main parties to the conflict to the peace process and the "very real progress that has been made which led to a substantial relaxation of the previously precarious situation".

- In **Muslim v Turkey (2005)**, the applicant was Iraqi national of Turkmen origin who submitted that his deportation from Turkey to Iraq after the fall of Saddam Hussein's government would place him at risk of being ill-treated or even killed owing to the lack of a legal system or government, particularly in the area where the applicant was born which was now the scene of tribal conflict between Arabs, Kurds and Turkmens. The Court found on the basis of documents and reports by non-governmental and international organisations on the situation in Iraq that there were continuing security problems in the north of the country where the applicant risked being sent. However, the evidence furnished to the Court concerning the applicant's past and the general context in Iraq did not in any way establish that his personal situation might be worse than that of other members of the Turkmen minority, or even, perhaps of other inhabitants of northern Iraq, an area of the country that appeared to be less affected by violence than other parts of the country. A mere possibility of ill-treatment as a result of temporary instability in the country did not in itself entail a breach of Article 3.

The burden of proof on the applicant is, on the other hand also not so high as to having to prove that he will certainly be ill-treated or worse upon return.

- In **N. v Finland (2005)**, the applicant arrived in Finland and immediately applied for asylum, stating that he had left the Democratic Republic of Congo (DRC) in May 1997, when Laurent-Désiré Kabila's rebel troops had seized the power from President Mobutu. He alleged that his life was in danger in the DRC on account of his having belonged to the President's inner circle, notably by forming part of his special protection force (Division Spéciale Présidentielle) located on the presidential compound. However his application for asylum was refused because the domestic authorities found his account to be unreliable. He then complained to the Court that his impending expulsion would, if enforced, violate Article 3. The Court carried out its own assessment of the facts, which included taking fresh oral evidence from the applicant and others and concluded that he was credible and consistent.

The Court stated that decisive regard had to be to the applicant's specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President. In this respect, the Court contrasted the **Vilvarajah** case where the evidence did not establish that the personal position of the applicants was any worse than the generality of other members of their community. The risk of ill-treatment to which he would be exposed in the DRC at that moment in time might not necessarily emanate from the then authorities but from relatives of dissidents seeking revenge on the applicant for his past activities in the service of President Mobutu. In the specific circumstances there was reason to believe that the applicant's situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him against the threats referred to. The Court also noted the possible negative effects of publicity surrounding his asylum claim in Finland. Accordingly, it concluded that the enforcement of the expulsion order would violate Article 3 for as long as the risk of ill-treatment persisted.

4.1.3.2 Absolute prohibition of refoulement where risk of ill-treatment exists

Since Article 3 is an absolute right, the sending State, in considering whether or not to remove a person from its jurisdiction, is not entitled to balance the risk of potential Article 3 ill-treatment in the receiving State, against any threat to the security he or she poses if permitted to remain (see the **Chahal** case discussed below at paragraph 80). If there is a real risk of treatment contrary to Article 3, the State may not remove the person in question.

- **Saadi v Italy (2008)** concerned the decision of the Italian authorities to deport Mr Saadi, a Tunisian national lawfully residing in Italy, to Tunisia. In his absence, Mr Saadi had been convicted in Tunisia of terrorism-related offences, and was sentenced to 20 years imprisonment. Before the Grand Chamber of the Court Mr Saadi claimed that he would be at risk of torture and ill-treatment in Tunisia where mistreatment of alleged terrorists is routine and well-documented. The Government of the United Kingdom intervened in the case to try to overturn the absolute prohibition on torture and ill-treatment. It argued that the right of a person to be protected from such treatment abroad should be balanced against the risk he posed to the deporting state. The Grand Chamber reaffirmed the approach established by its earlier decisions such as **Chahal** and followed by other international courts and bodies, that no circumstances, including the threat of terrorism or national security concerns, can justify exposing an individual to the real risk of such serious human rights abuses.

- In **Ahmed v Austria (1996)**, the applicant is a Somali citizen, had been granted refugee status in Austria in 1992. In 1994 his refugee status was forfeited following a judgment which sentenced the applicant to two and a half year's imprisonment for attempted robbery. The Court held that the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the United Nations Convention on the Status of Refugees. The Court attached particular weight to the fact that the applicant had been granted refugee status within the meaning of the Geneva Convention, finding credible his allegations that his activities in an opposition group and the general situation in Somalia gave grounds to fear that, if he returned there, he would be subjected to persecution. Although the applicant lost his refugee status two years later, this was solely due to his criminal conviction. The consequences of expulsion for the applicant were not taken into consideration. In view of the absolute nature of Article 3 the Court reached the same conclusion which was not invalidated by the applicant's criminal conviction or the current lack of State authority in Somalia. It followed that the applicant's expulsion to Somalia would breach Article 3 for as long as he faces a serious risk of being subjected to torture or inhuman or degrading treatment.

4.1.3.3 The fight against terrorism and extradition/expulsion

The absolute nature of the protection has recently come under strain in cases of alleged terrorists in which a number of States have argued in order to protect their own population from terrorist attacks they should be able to deport terrorism suspects even to possibly unsafe countries. The States concerned suggested that a balancing of interests should be made between the interests of the society and those of the alleged terrorist, taking into account the speculative nature of the alleged risk of ill treatment upon return.[6] Such a reasoning would run counter to the absolute nature of the prohibition of torture also in expulsion cases as established in the Court's case-law starting from the **Chahal** case.

- In **Chahal v United Kingdom (1996)**, the applicant, an Indian living in London, was a leading figure in the Sikh separatist movement. He was investigated several times for alleged terrorist activities, and was charged and acquitted of public order offences relating to disturbances at a London Sikh temple. He was later notified that he would be deported on the ground that his presence was not conducive to the public good for national security reasons. Mr Chahal claimed that if removed to India he would be subjected to torture. There was evidence before the Court that, at the time, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants. There was also evidence that the situation had significantly improved by the date of judgment in the case. However, the Court noted that there were still problems among the police and Mr Chahal and his political sympathies were well known in India. It considered that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise. The respondent government argued that the threat posed by an individual to the national security of the State was a factor to be weighed in the balance when considering the issues under Article 3. This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. The Court rejected this balancing approach. It stated that the prohibition provided by Article 3 against ill-treatment is absolute. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the State to safeguard him or her against such treatment is engaged in the event of expulsion. The Court concluded that there was a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he was returned to India.

4.1.3.4 Procedural requirements in asylum laws

The imposition of strict time limits for making a claim of asylum risks falling foul of the requirements of Article 3 if they are applied mechanically. Indeed, it is arguable that any administrative procedures which serve to limit the protection afforded by Article 3 would violate that Article. Although on the national level it will normally be a judge who in last instance decides whether an extradition or expulsion is permissible, the procedures governing these cases do not fall under the scope of Article 6 (see **Maaouia v France (2000)**). The effectiveness and fairness of the procedures relating to extradition and expulsion cases are therefore considered under Article 3 in conjunction with Article 13 (see also below under procedural obligations).

- In **Jabari v Turkey (2000)**, the applicant fled Iran, after authorities discovered that she had committed adultery with a married man. Adultery committed by a woman in Iran was an offence for which the applicant risked being stoned to death. She entered Turkey illegally in November 1997, and in February 1998 tried to fly to Canada via France with a forged passport. The French

6 Case of Ramzy v Netherlands, see press release of the Court dated 20 October 2005.

authorities sent her back to Turkey. Upon arrival back in Turkey, the applicant claimed asylum. She was informed that the law required that she should have lodged her claim within five days of arrival in Turkey. The United Nations High Commissioners Office for Refugees (UNHCR) intervened and granted her refugee status on the ground of her well-founded fear of persecution in Iran. The Turkish authorities granted her a residence permit, pending the outcome of her application to the Commission. The respondent government stated that since the applicant failed to comply with the 5 day rule, it was entitled to send her back to Iran. The Court held that a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose individual to the treatment prohibited by Article 3. It stated that the respondent State failed to conduct any meaningful assessment of the applicant's claim, including its arguability. The applicant's failure to comply with the five-day registration requirement denied her any scrutiny of the factual basis of her fears about being removed to Iran. It held that the automatic and mechanical application of such 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. Having due regard to the UNHCR's findings, the Court held that the applicant faced a real risk of treatment contrary to Article 3, if sent back to Iran. An order of deportation would accordingly violate Article 3.

- In **Chahal v United Kingdom (1996)**, the Court rejected the Government's suggestion that the effectiveness of the review of a real risk upon return could be marginalised. It held that the requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial. It continued that in such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance attached to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State."

4.1.3.5 Risk of ill-treatment by non-State actors

Responsibility attaches to the State not only where there is a real risk of State agents inflicting Article 3 treatment on the individual; but also applies where there is a real risk of non-state bodies inflicting such treatment, for example, where it can be shown that the receiving State would be incapable of providing appropriate protection.

- In **H.L.R. v France (1997)**, the applicant, a Colombian national, was convicted of drugs trafficking offences in France, after which he was served with a deportation notice. Prior to his conviction, he assisted the police by giving information which led to the conviction of a fellow Colombian drugs trafficker. He claimed that if returned to Colombia, he would be exposed to vengeance by the drug traffickers, amounting to Article 3 treatment. The Court held that owing to the absolute character of Article 3, the possibility that Article 3 may apply where the danger emanates from persons or groups of persons who are not public officials, must not be ruled out. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

- In **N. v Finland (2005)**, The Court noted that the risk of ill-treatment to which the applicant would be exposed if returned to the DRC at the relevant time might not necessarily emanate from the current authorities but from relatives of dissidents who may seek revenge on the applicant for his past activities in the service of President Mobutu. The Court recalled that its case law where it did not rule out the possibility that Article 3 may also apply where the danger ema-

nates from persons or groups of persons who are not public officials. The Court recalled that it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

4.1.3.6 Lack of medical treatment following expulsion

Responsibility may attach to the sending State where there is a real risk that the victim would suffer treatment contrary to Article 3 standards as a result of inadequate medical treatment in the receiving State. However, not all cases in which the applicant claims he or she will receive a lesser standard of care in the receiving state will result in a finding of a violation of Article 3. The standard of care in the receiving State must be such that the applicant's life would be threatened, or that his or her life expectancy would be significantly reduced.

- In **D. v United Kingdom (1997)**, the applicant arrived in the United Kingdom from the island of St. Kitts and was found in possession of a considerable amount of cocaine. He pleaded guilty to an offence relating to the illegal importation of drugs and was given a sentence of imprisonment. While serving his sentence, it was discovered that he was suffering from aids. Upon completion of his sentence, the United Kingdom authorities sought to remove the applicant to St. Kitts. The applicant complained that if he was sent back to St. Kitts, he would be condemned to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. He claimed that the withdrawal of his current medical treatment would hasten his death on account of the unavailability of similar treatment in St Kitts. He had no close relatives or friends in St Kitts to attend to him as he approached death. He had no accommodation, no financial resources and no access to any means of social support. The Court held that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

- In **Bensaid v United Kingdom (2001)**, the applicant, an Algerian suffering from schizophrenia, was receiving treatment for his condition in the United Kingdom when he was served with a deportation notice. He claimed that if sent to Algeria, he would not receive adequate medical care and there was a likelihood that he would suffer a relapse. He complained that this would involve a violation of Article 3. The Court stated that it was not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. It therefore examined whether there was a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. It concluded that as he would have had access to appropriate medication and medical assistance, there would not be a violation of Article 3. The Court noted that the fact that his circumstances in Algeria would have been less favourable than those he enjoyed in the United Kingdom was not decisive from the point of view of Article 3. Accordingly, it did not find that there was a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3.

- In **Arcila Henao v Netherlands (2003)**, the applicant was found to be HIV positive while serving a sentence of imprisonment. Arcila claimed that he should receive a residence permit because of the medical treatment he required. Despite a number of reports from a Medical Advice Bureau indicating that if treatment was stopped a health relapse was likely, and that possible delays in treatment could be expected in Colombia, the State Secretary declined the application and concluded that as treatment was available in Colombia there was no life-threatening situation outweighing public order considerations. The Court stated that although the situation

in Colombia would be less favourable for the applicant, his condition did not appear to have reached an advanced or terminal stage, and treatment was in principle available in Colombia. The circumstances were not of such an exceptional nature that expulsion would amount to treatment proscribed by Article 3.

- **Ndangoya v Sweden (2004)** and **Amegnigan v Netherlands (2004)** also concerned applicants with aids. The Court took into account the fact that in neither case was the applicant's illness at an advanced stage, as well as the fact that the applicants were not without prospects of medical care and family support in their countries of origin, Tanzania and Togo respectively. It further observed that the fact that the applicants' circumstances in their countries of origin would be less favourable than those they enjoyed in Sweden and the Netherlands could not be regarded as decisive from the point of view of Articles 2 and 3. Both applications were declared inadmissible.

- In **Dragan and Others v Germany (2004)**, the Court declared inadmissible applications concerning alleged lack of adequate psychiatric care. The applicant in Dragan, who was of Romanian origin, suffered from physical and psychological illness, including hepatitis C and severe depression. The Court stated that the fact that the situation with regard to the first applicant's health care provision would be less favourable in Romania than in Germany was not decisive from the perspective of Article 3. Admittedly, the applicant's health was a matter of concern. Having regard, however, to the high threshold set by Article 3, particularly where the case did not concern the Contracting State's direct responsibility for the infliction of harm, in the absence of exceptional circumstances and in the light of the Court's recent case-law on the deportation and expulsion of aliens to third countries, the Court did not find that there was a sufficiently real risk that the applicants' removal to Romania - a Contracting State to the Convention - would be incompatible with Article 3.

4.1.3.7 Insuffcient indication of serious enough hardship upon return

- In **Tomic v United Kingdom (2003)**, the applicant, an ethnic Serb from Croatia, was a member of the "Scorpions" paramilitary organisation set up by Serbs after Croatia's declaration of independence in 1991 at the outbreak of the war. He claims to have been beaten by the Croatian police prior to the war on account of his ethnic origin and that his wife was killed for these same reasons in 1992. He moved to Serbia in 1997 for fear of imprisonment and stayed there until 2001. In 2002 he entered the United Kingdom illegally and applied for asylum but was denied. The Court stated that although some reports indicated incidents of occasional violence against ethnic Serbs in Croatia, they did not identify any particular ill-treatment of ex-combatants. A general amnesty for all those who had participated in the war had been issued, and the applicant had not substantiated how his return to Croatia would expose him to a risk of ill-treatment as an ex-combatant. The applicant had not specified particular problems of discrimination which he would be faced with on return, and the general hardship of a war-affected region to which he might be exposed would not reach the level of severity required to engage Article 3. Moreover, the case concerned an expulsion to a High Contracting Party to the Convention, which has undertaken to secure the rights guaranteed under its provisions.

4.1.3.8 Application to stay deportation (Rule 39)

In cases when deportees allege that they will be at risk of ill-treatment or even death if returned to their country of origin, applicants may request for Court's intervention under Rule 39 of the Rules of Court to stay deportation. Applicants may invoke not only the original grounds on which they sought asylum but also the current risks with which they will be faced if deported at the time before the application is considered. The large majority of these requests are rejected by the Presidents of the respective Sections of the Court. In principle, it is insufficient to show that the general situation

in the country of destination is dangerous; an applicant must establish that he runs a direct and personal risk, for example by showing that he has previously been subjected to ill-treatment and/or that he is actively being sought by the authorities who engage in torture of persons who are in a similar position. In order for Rule 39 to be applied the applicant should make a strong prima facie case as to the irreversible harm he will incur upon arrival to the country concerned.

In addition, there is less likelihood of an interim measure being applied if the deportation is to another Contracting State. A Rule 39 indication, once given is binding on the State concerned. A failure to abide by a Rule 39 interim measure will amount to a finding of a violation of Article 34 of the Convention, i.e. the right to unhindered exercise of the right of individual petition.

- In **Mamatkulov and Askarov v Turkey (2005)**, the applicants were extradited to Uzbekistan despite an indication by the Court that they should not be extradited until it had had an opportunity to examine the matter. The applicants were nevertheless extradited by the Turkish authorities and were unaccounted for. Although the Court subsequently found that it could not establish there had been no a violation of Article 3 since it did not know what actually happened to the applicants after their extradition, it took the view that the failure to comply with its indication amounted to a hindrance of the effective exercise of the right of petition and thus constituted a violation of Article 34 of the Convention.

4.2 Positive obligations

Article 3 imposes a number of positive obligations on the State that flow from its obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights protected by the Convention, in this case, the right to be free from torture and other forms of ill-treatment. Such positive obligations require the State, for example, to take action against the individuals responsible for acts of torture, and to provide training for its police and military personnel to ensure they exercise their powers lawfully. The State also has a general obligation under Article 3 to ensure that all persons within its jurisdiction are protected from Article 3 ill-treatment. This involves the State taking action to prevent the occurrence of such treatment.

4.2.1 Obligation to provide an effective legal framework to prevent and protect against a treatment contrary to Article 3

The State's responsibility may arise when it fails to provide an effective legal and practical framework to protect all person under its jurisdiction against torture and or inhuman.

- In **M.C. v Bulgaria (2003)**, the applicant, a 14 year-old girl, claimed that she had been raped by two men. An investigation had been conducted by the police but the prosecutor had ultimately discontinued the proceedings on the ground that there was insufficient evidence of rape, and in particular of coercion. In its judgment, the Court identified certain shortcomings in the investigation but also considered that undue emphasis had been given to the lack of direct evidence of the use of violence. In that respect the approach of the State essentially amounted to a finding that the definition of the offence in domestic law required proof of physical resistance on the part of the victim. The Court felt that this was not broad enough to provide sufficient protection against other sexual acts of a non-consensual nature. Referring to comparative studies which showed a trend towards defining rape more widely than in the past, the Court expressed the view that the State's positive obligations "must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim". In other words, in the context of the State's positive obligations to adopt "measures designed to secure respect for private life even in the sphere of the relations of individuals between them-

selves," it may not be enough for the State to establish that a criminal offence is recognised and effectively prosecuted. The Court may also examine whether the content of the law and the elements of the offence are in conformity with the wider requirements of the Convention.

The Court has accordingly emphasized that in particular children and persons in a vulnerable position deserve special care and protection, even where the ill-treatment is meted out by private persons.

- In **A. v United Kingdom (1998)**, the applicant child claimed that the State was responsible for protecting him from the violent acts inflicted upon him by his step-father. A consultant paediatrician, who examined the child at age 9, found that he had been beaten hard with a garden cane on more than one occasion. The stepfather was charged with assaulting the child occasioning actual bodily harm. However, his defence that the treatment he gave the child was reasonable chastisement was accepted by the domestic court and he was acquitted. The Court held that Article 3, when taken together with Article 1, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. It stated (at paragraph 22) that "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity".

- In **Z. v United Kingdom (2001)**, the applicants were four child siblings who had been severely neglected and ill-treated by their natural parents. Their condition was monitored for a time by the social services; they were eventually taken into care on the insistence of their mother some four and a half years after the social services first became aware of their circumstances. The Court held that the respondent State should provide effective protection of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

Thus, in the cases mentioned above, **A. v United Kingdom (1998)** and **Z. v United Kingdom (2001)**, the State was required to provide a framework of law and practice to protect the children. In **A. v United Kingdom**, the availability of the defence of reasonable chastisement undermined the protection afforded to the child. In **Z. v United Kingdom**, the social services for which the State was responsible, failed to act with diligence to protect the children.

4.2.2 Obligation to protect physical integrity of inmates

- In **Pantea v Romania (2003)**, the applicant was detained in the same cell as repeat-offenders and was assaulted by other prisoners on a number of occasions. The cell in question was generally known in the prison as "a cell for dangerous prisoners". Several witnesses had given evidence that the prison warder had not come promptly to the applicant's aid and furthermore that he had been required to continue to occupy the same cell. Medical reports attested to the number and severity of the blows the applicant had received. In those circumstances, the Court held that there had been a violation of Article 3, as the authorities had failed to discharge their positive obligation to protect the applicant's physical integrity.

- In **Georgescu v Romania (2008)**, the applicant during the first four weeks of his pre-trial detention he had been severely beaten by masked police officers and fellow inmates, on the orders of the investigators. Once he was punched in the liver by the investigators for two hours until he almost lost consciousness. His fellow detainees, encouraged by the investigators, raped the applicant, broke his teeth and forced him to eat food on which they had urinated. The applicant's lawyer, informed by the applicant's wife about the ill-treatment, managed to have him moved to a different cell, where he was again assaulted and humiliated. The applicant then informed the prosecutor that he was suffering from mental disorders. The medical report stated that

the applicant should have received 6 to 7 days' medical treatment for the injuries. The Court pointed out that both the prison authorities and the military prosecutor had been informed of the applicant's mental disorders. Even assuming that, as the prosecutor had concluded, the applicant's injuries had been inflicted by his fellow inmates because of his behaviour and his mental problems, the Court considered that, far from exonerating the Romanian authorities of any responsibility, that fact indicated their failure to provide the applicant with prison conditions appropriate to his medical condition, at least from the moment when his allegations of ill-treatment had been brought to their attention. The Court concluded that the Government had not satisfactorily established that the applicant's injuries had been caused by anything other than the treatment to which he had been subjected while under the authorities' supervision, and considered that the injuries had been the result of inhuman and degrading treatment.

- In **Rodic and 3 Others v Bosnia and Herzegovina (2008)**, the applicants of Serb origin were convicted of war crimes against Bosniacs and detained in an ordinary wing of a prison with a majority of Bosniac prisoners. They were subject to several violent attacks and declared a hunger strike. The Court did not find the Government's policy of integrating those convicted of war crimes into the mainstream prison system to be inherently inhuman or degrading. However, the Court recalled that it was well known that the three main ethnic communities in Bosnia and Herzegovina (Bosniacs, Croats and Serbs) were at war against each other from 1992 until 1995. The inter-ethnic relations were still strained and occurrences of ethnically-motivated violence were still relatively frequent during the relevant period. Taking into consideration the number of Bosniacs in the prison and the nature of the applicants' offences, it was clear that their detention there entailed a serious risk to their physical well-being. Despite that, the applicants were placed in ordinary cell blocks, where they had to share a cell with up to 20 other prisoners and share communal facilities with an even larger number of prisoners. It was significant that no specific security measures were introduced in the prison for several months. The Court concluded that the applicants' physical well-being was not adequately secured from the time of their arrival at the prison until they were provided with separate accommodation in the hospital, which occurred only after attacks, their declaration of a hunger strike and the consequent media attention, almost ten months after the first of the applicants came to the prison. The Court therefore considered that the hardship the applicants endured, in particular the constant mental anxiety concerning the threat of physical violence, was in violation of Article 3.

4.2.3 Procedural Obligations

4.2.3.1 Obligation to conduct an effective official investigation

As with the right to life, the prohibition of torture and other forms of ill-treatment under Article 3 requires that States engage in effective investigations where persons claim they have been ill-treated by public officials. The Court has stated in number of cases, including in **Assenov v Bulgaria** described below, that where an individual raises an arguable claim[7] that he has been seriously ill-treated by the police or other State agents unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation.

Any investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the

7 An arguable claim is a claim which is backed up with at least some evidence. A claim of torture would amount to an arguable claim where, for example, the victim has medical evidence that s/he sustained injury during the period in question, or where, for example, a claim is made to a judge and the victim's bruises are plain to see.

rights of those within their control with virtual impunity. This principle has also been applied in a number of other cases. It is of particular significance where the Court is unable to conclude, on the evidence before it, that the State was responsible for the ill-treatment itself; in such a case, it can be held responsible for failure to properly investigate. See, for example, the cases of **Labita v Italy**, **Veznedaroglu v Turkey** and **Indelicato v Italy** discussed herein.

- In **Aydin v Turkey (1997)**, the victim alleged that she had been raped and subjected to other forms of torture. The Court stated that, although the victim may not have displayed any visible signs of torture, the public prosecutor could reasonably have been expected to appreciate the seriousness of her allegations bearing in mind also the accounts that the other members of her family gave about the treatment which they alleged they suffered. In such circumstances, he should have been alert to the need to promptly conduct a thorough and effective investigation capable of establishing the truth of her complaint and leading to the identification and punishment of those responsible.

- In **Assenov v Bulgaria (1998)**, the victim was a 14 year old boy. He and his parents claimed that he was arrested and beaten up by the police, detained and then released 2 hours later. The victim was examined by a doctor the next working day after his detention. The doctor noted bruising and grazes and concluded that these injuries could have been inflicted in the manner described by the victim. The Court noted the medical evidence, the victim's testimony, the fact that he was detained for two hours at the police station and the lack of any account from any witness of the applicant's father beating his son (as was asserted by the State) with sufficient severity to cause the reported bruising. The Court concluded that together these facts raised a reasonable suspicion that these injuries may have been caused by the police. The Court equated reasonable suspicion here with "arguable case" and stated that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such 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 to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation.

- In **Veznedaroglu v Turkey (2000)**, the applicant was arrested on suspicion of being a member of the PKK, a prohibited organisation. She alleged that during her 11 day detention she was tortured by means of electric shocks to her genitals and mouth and threatened with rape and death. She lodged complaints as soon as she was brought before a Court and consistently thereafter up to the date of her trial. Nothing was done in respect of her complaints. She was seen by doctors who recorded bruising to her upper arm and leg. The Court was unable to determine from the evidence whether the applicant had in fact been tortured. The Court stated that the difficulty in determining whether there was any substance to her allegations rested with the failure of the authorities to investigate her complaints. The applicant's insistence on her complaint of torture taken with the medical evidence in the file should have been sufficient to alert the public prosecutor to the need to investigate the substance of the complaint, particularly as she had been held in custody for 11 days. The applicant accordingly had an arguable claim that she had been tortured which the State authorities were obliged, in accordance with Articles 1 and 3, to investigate.

- In **Poltoratskiy v Ukraine (2003)**, the applicant complained that he had been beaten on a number of occasions while in prison. The Court held that this allegation had not been proved beyond a reasonable doubt and that there was therefore no violation of Article 3 in this regard. However, the Court held that the official investigation of the allegations of ill-treatment was perfunctory and superficial and did not reflect a serious effort to discover what had really occurred. Accordingly there had been a breach of the procedural guarantee contained in Article 3, namely the obligation to conduct an investigation into the applicant's arguable claim that he had been ill-treated.

- In **Kmetty v Hungary (2003)**, the applicant complained that he was ill-treated by the police, and that the investigations into his related complaints had been inadequate, in breach of Article 3 of the Convention. He claimed that he had been assaulted by police officers while being arrested and again subsequently in police custody. The Court found that the injuries the applicant was proven to have suffered fell within the scope of Article 3. However, it found it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police exceeding the force necessary to overcome his resistance to a lawful police measure, either while immobilising and taking him to the police station or during his custody. The Court did, however, consider that, taken together, the medical evidence, the applicant's testimony and the fact that he was detained for more than three hours at the Police Department give rise to a reasonable suspicion that he may have been subjected to ill-treatment by the police. This 'arguable claim' of ill-treatment ought to have been investigated properly by the authorities. In this case, the Court was not persuaded that this investigation was sufficiently thorough and effective to meet the requirements of Article 3. For example, the authorities failed, without good explanation, to interview key witnesses, in particular the doctor who examined the application after his arrest. If the injuries occurred after arrest, the burden would have fallen on the State to explain how the applicant sustained his injuries. The Court concluded that there had been a violation of Article 3 on this ground.

Where the Court is unable to find a substantive violation of Article 3 because it is unable to substantiate the claims because of, for example, the passage of time, it may instead by able to focus on the procedural violations by the State in investigating the arguable claim of an Article 3 violation. See, for example, **Martinez Sala and Others v Spain (2004)**.

4.2.3.2 An effective, independent, prompt and transparent investigation

The Court has held that the investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. A number of criteria can be deducted from the Court's case-law for an investigation to be considered effective. These criteria are similar to those developed under the procedural limb of Article 2:

- A timely investigation which allows for discovery and preservation of evidence as well as the realistic identification of the perpetrators.

- Collecting all relevant evidence, such as interrogating the (law enforcement) officers involved, taking (eye) witness statements, gathering forensic evidence, and, where appropriate, carry out an medical expertise and/or autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings;

- A prompt trial of the perpetrators to prevent the prosecution from being time barred;

- Provide reasonable access of to and scrutiny by the victim or his relatives to the investigation.

- In **Khashiyev and Akayeva v Russia (2005)**, each applicant was a resident of Grozny until the commencement of military operations there towards the end of 1999. With the outbreak of hostilities, the applicants left their homes and moved to Ingushetia. In each case, they entrusted their homes to relatives (the first applicant's brother and sister as well as the latter's two adult sons, the second applicant's brother), who remained in the city. At the end of January 2000, the applicants learned of the deaths of their relatives. They returned to Grozny and found the bodies lying in the yard of a house and in a nearby garage. All of the bodies bore multiple gunshot and stab wounds. There was also bruising and, in some cases, broken bones and mutilation. The applicants brought the bodies back to Ingushetia for burial. On a subsequent trip to Grozny,

the second applicant visited the scene of the killings and found spent machine gun cartridges and her brother's hat. In a nearby house she saw five bodies, all of which bore gunshot wounds. Having learned that a sixth victim had survived, the second applicant managed to trace her in Ingushetia and was told that the victims had been shot by Russian troops. A criminal investigation, opened in May 2000, was suspended and reopened several times, but those responsible were never identified. In 2003 a civil court in Ingushetia ordered the Ministry of Defence to pay damages to Mr Khashiyev in relation to the killing of his relatives by unidentified military personnel. The Court noted while an investigation had taken place, the lack of appropriate forensic reports, and failure to identify and question other possible witnesses of the events possibly prevented any concrete evidence of ill-treatment coming to light and thereby the identification and punishment of those responsible. It was found that these investigations were insufficiently thorough and effective to satisfy the requirements of Article 3.

- In **Zeynep Özcan v Turkey (2007)**, the applicant filed a complaint claiming that in detention she had been subject to ill-treatment. The Assize court sentenced the police officers to ten months' imprisonment and 15 days of exclusion from public service for acts of torture and inhuman or degrading punishment or treatment in respect of the applicant, with a view to extracting a confession from her. The court then ordered a stay of execution of this sentence. The Court noted that, in spite of the seriousness of the offences with which they were charged, the police officers had continued to exercise their duties within the police force, without being troubled. For example, no disciplinary measure had been taken against them at any stage of the proceedings, even after the latter had terminated, with a view to excluding them permanently or temporarily from public service. In addition, both the manner in which the proceedings were conducted before the Assize court and the sentences imposed on the police officers in question, sentences which amounted to de facto impunity, were elements which called into question the State's vigilance.

- In **Maslova and Nalbandov v Russia (2008)** the applicant was subject to physical violence and repeatedly raped by police and prosecution officers during her interrogation. An investigation was immediately opened. Witnesses were interviewed, the police station was searched and the evidence gathered submitted for forensic examination. A used condom found in the station was proven to have a 99.99% probability of having traces of Ms Maslova's vaginal cells. Disposable wipes found had traces of sperm. The clothes Ms Maslova had worn at the relevant time were also found to have traces of sperm and policeman clothes had traces of vaginal tissue of the same antigen group as Ms Maslova. Other evidence included a medical certificate confirming that Ms Maslova had attempted to cut her veins and her handwritten confession, described by an expert as written with "a shaking hand". The four accused officers were formally charged and the case was referred to the trial court for examination. That court discovered that certain rights of the accused had been breached. In particular, a special procedure for bringing proceedings against prosecution officers had not been followed. Those breaches in domestic procedural rules meant that all the evidence so far gathered in the case was inadmissible. The case was remitted for fresh investigation but later discontinued due to lack of evidence of a crime. The Court noted that the authorities appeared to have reacted diligently and promptly in order to identify and punish those responsible for Ms Maslova's ill-treatment. However, procedural errors had led to a stalemate in the criminal proceedings. In the absence of any plausible explanation for those errors, the Court found no other reason than the prosecution authorities' obvious incompetence in conducting the investigation. Accordingly, the Court found that there had been a violation of Article 3 on account of the lack of an effective investigation into Ms Maslova's allegations of ill-treatment.

- In **Dedovskiy and Others v Russia (2008)**, the applicants while serving a prison sentence were ill-treated by the "Varyag" squad, a special unit created to maintain order in detention facilities. The Court concluded that the squad had resorted to deliberate and gratuitous violence and had intended to arouse in the applicants feelings of fear and humiliation, which would break their physi-

cal or moral resistance. The purpose of that treatment had been to debase the applicants and drive them into submission. The truncheon blows must have caused them intense mental and physical suffering and, in those circumstances, the Court found that the applicants had been subjected to torture, in violation of Article 3. The Court also considered that, by allowing the squad to cover their faces and not to wear any distinctive signs on their uniforms, the Russian authorities had knowingly made it impossible to have them identified by their victims. That ground was even given as the main reason for discontinuing the criminal proceedings against those officers. Nor had the reports on the use of rubber truncheons specified which officers had used their truncheon. The Court therefore found that the Russian authorities had deliberately created a situation in which any identification of the officers suspected of inflicting ill-treatment had been impossible.

For recent another example see **Ognyanova and Choban v Bulgaria (2006)** paras 102-107 and 124.

4.2.3.3 With regard to violence between private actors

- The case of **97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia (2007)** concerns a violent attack against members of the Congregation by a group of Orthodox believers, led by "Father Basil". When the group of Father Basil's supporters burst into the meeting room, shouting and waving sticks and large iron crosses, several members of the Congregation succeeded in escaping, but about sixty of them remained blocked in the hall and were subject to inhuman and degrading treatment. The police officers registered one applicant's statement but decided not to intervene; another applicant was informed by the head of the police station that "in the attackers' place, he would have given the Jehovah's Witnesses an even worse time". The police finally went to the site of the attack. The investigator responsible for the case stated that, on account of his Orthodox faith, he could not be impartial in conducting the investigation. The Court regretted that the Georgian Government continued to claim that it had been impossible to identify the perpetrators of the violence. Justifying the authorities' inaction in that way was all the more shocking in that the police who had gone to the site of the events had not arrested a single attacker; that, on the very day of the attack, Father Basil and another person had been present at the police station beside one of the victims, who had been the only person arrested; that the television channels broadcast entire sequences illustrating the violence committed against the applicants; that the recording of one of those broadcasts in the Court's possession showed very clearly not only the identity of Father Basil, but also makes it possible to identify the majority of the attackers; that, in an interview broadcast the following day, Father Basil, questioned in front of the fire on which the applicants' religious literature was burning, expressed his satisfaction with regard to his actions and explained their validity. To sum up, the Court noted that the police had refused to intervene promptly at the scene of the incident in order to protect the applicants concerned and the children of some of them from ill-treatment and that the applicants were subsequently faced with total indifference on the part of the authorities who, for no valid reason, refused to apply the law in their case. Such an attitude on the part of authorities under a duty to investigate criminal offences was, in the Court's opinion, tantamount to undermining the effectiveness of any other remedies that may have existed.

- In **Secic v Croatia (2007)**, the applicant of Roma origin was attacked by two unidentified men. They beat him all over his body with wooden planks while shouting racial abuse. Shortly afterwards, the police arrived; they interviewed people at the scene and looked for the attackers. The Court observed that, since the event complained of had taken place, the police had not brought charges against anyone and the criminal proceedings had been pending in the pre-trial phase for almost seven years. The Court noted that the police had concluded that the attack had been committed by members of a skinhead group, which had been known to participate in similar incidents in the past. Yet the police appeared never to have questioned anyone belonging to that group or to have followed up that information in any way. In addition, the police did not ask the competent court to order the journalist, who had interviewed a person well informed about the attack to

reveal his source, despite the fact that such a legal provision had existed. Lastly, the Court noted that the police had not made use of any other investigative measures allowed for under domestic law, other than interviewing witnesses proposed by the applicants' lawyer. The Court considered that the failure of the State authorities to further the case or obtain any tangible evidence with a view of identifying and arresting the attackers over a prolonged period of time indicated that the investigation did not meet the requirements of Article 3. The Court also considered it unacceptable that, being aware that the event at issue was most probably induced by ethnic hatred, the police allowed the investigation to last for more than seven years without undertaking any serious steps to identify or prosecute the perpetrators. Consequently, the Court considered that there had been a violation of Article 14 taken in conjunction with the procedural aspect of Article 3.

4.3 Relationship between Article 3 procedural obligations and Article 13 (right to an effective remedy)

4.3.1 Scope of Article 13

Article 13 provides that "everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority...". The Court has stated on numerous occasions that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. See, in particular, **Ilhan v Turkey (2000)**.

In respect of Article 3 claims, where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by the State, the notion of "effective remedy" under Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure. There is clearly then a degree of overlap with so-called 'procedural' obligations of the State under Article 3 itself, which also require there to be, among other things, an effective investigation of complaints of ill-treatment.

4.3.2 Article 3 procedural obligations and Article 13

Procedural obligations have been implied in various contexts under the Convention where necessary to guarantee that the rights under the Convention are practical and effective. The Court has noted specific support for procedural obligations in Article 2, which states that the right to life must be "protected by law." By contrast, Article 3 is phrased in substantive terms; it does not include in its wording any support for procedural requirements. Moreover, the Court has noted that the practical exigencies of situations of torture or other ill-treatment will often differ from cases of deprivation of life: because the victim is deceased it may be much more difficult to establish the facts, as they may be exclusively within the knowledge of State officials. For this reason, in **Ilhan v Turkey (2000)** the Court indicated that it views Article 13, rather than Article 3 procedural obligations, as the primary guarantor of the right to an effective remedy in the case of Article 3 substantive violations. It has noted that Article 13 will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials.

In certain circumstances where the Court is unable to make any conclusive findings of fact (and in particular to reach any conclusion as to whether the applicant's injuries were caused by the authorities) because of the failure of the authorities to react effectively to Article 3 complaints, it may find a procedural breach of Article 3 as an alternative to any Article 13 violation. In **Ilhan**, as the Court determined that the applicant had suffered torture at the hands of the security forces, the complaints concerning inadequate investigation fell to be considered under Article 13. However, in **Assenov v Bulgaria** and **Labita v Italy** discussed herein, the inability to make any conclusive findings of fact led the Court to consider procedural breaches of Article 3 due to inadequate investigation. By contrast, in Article 2 cases, the Court has indicated a willingness to consider both 'procedural' claims under Article 2 itself and Article 13 in the same case, suggesting that the requirements of Article 13 are broader in that they include the availability of compensation where appropriate. See, for example, **Kaya v Turkey (1998)**.

It must be noted that the jurisprudence on this issue does not seem to be fully settled and the Court has shown a degree of flexibility in striving to ensure that the protection of Article 3 is fully effective. In **Dikme v Turkey (2000)** the Court was willing to examine the applicant's complaint of inadequate investigation under Article 3 where he failed to make any claim at all under Article 13. Given that the procedural requirements under both Articles 3 and 13 are broadly the same, it might be advisable to plead both Articles 3 and 13 whenever a 'procedural' issue arises.

4.3.3 Content of Article 13 requirements

The notion of effective remedy under Article 13 in Article 3 cases includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigative procedure. An effective investigation will normally require the State authorities to interview all eye-witnesses and other relevant witnesses and draw conclusions based on evidence (see **Assenov** below at para. 102, and **Ilhan v Turkey (2000)**). It may also require the payment of compensation to victims (see **Aksoy** below at para. 98). The remedy must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see **Aydin** below at para. 103).

The following cases are examples of the operation of Article 13 in Article 3 cases:

- In **Aksoy v Turkey (1996)**, the Court examined the nature of an effective investigation under Article 13. It stated that given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. An "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure. In addition, the Court held that the investigation should be prompt and impartial.

- In **Aydin v Turkey (1997)**, the Court noted that applicant was entirely reliant on the public prosecutor and the police acting on his instructions to assemble the evidence necessary for corroborating her complaint. The public prosecutor had the legal powers to interview members of the security forces at Derik gendarmerie headquarters, summon witnesses, visit the scene of the incident, collect forensic evidence and take all other crucial steps for establishing the truth of her account. His role was critical not only to the pursuit of criminal proceedings against the perpetrators of the offences but also to the pursuit by the applicant of other remedies to redress

the harm she suffered. The Court noted that the ultimate effectiveness of those remedies depended on the proper discharge by the public prosecutor of his functions. The Court noted that the public prosecutor who was responsible for the investigation failed to ascertain who might have witnessed the victim's arrest. He took no meaningful steps to ascertain whether the Aydın family were held at the police station as alleged. No police officers were questioned at critical stages of the investigation. The prosecutor readily accepted the police denial that the Aydin family had been detained, and was prepared to accept at face value the reliability of the entries in the custody register. Had he been more diligent, he would have been led to explore further the reasons for the low level of entries for the year 1993 given the security situation in the region. The prosecutor's deferential attitude towards the police was a particularly serious shortcoming in the investigation. The medical investigations centred on whether the victim had lost her virginity when it should have focussed on whether she had been raped. These factors, together with others, led the Court to conclude that the investigation had not been effective.

- In **Assenov v Bulgaria (1998)**, the victim who was 14 years old at the time, claimed that he was arrested and beaten up by the police. In this case the Court concluded that the investigation was not effective. Its finding was based on several grounds. First, the investigator appointed by the Bulgarian authorities concluded that the victim's father inflicted the injuries, though he failed to cite any evidence in support of such a conclusion. Second, although the arrest took place in public in full view of about 40 persons, no attempt was made to interview any witnesses in the immediate aftermath of the incident to ascertain the truth. Other assumptions were made during the course of the investigation, none of which were based on evidence.

- In **Ivan Vasiliev v Bulgaria (2007)**, the applicant who was 14, had been running to join friends and was chased by two trainee police officers, who mistook him for a person suspected of vandalism. The applicant tripped, fell to the ground and the police officers caught up with him. They hit him repeatedly with their truncheons on the back and legs and kicked him. While the lower court convicted and sentenced the police officers who assaulted the applicant, the conviction and sentence had been subsequently quashed and the officers had been acquitted. The lower courts had clearly established that the applicant had suffered numerous injuries as a result of excessive force. Without questioning those findings, the Supreme Court of Cassation held that that the officers had lawfully assaulted the applicant, as he had tried to escape and had been – albeit wrongfully – identified as the person wanted by the police. In so doing, the Supreme Court had treated as irrelevant a number of other factors – that at the time of the events the applicant had been 14 years old, that the violence against him had continued after he had been subdued, and that the beating had been wilful – all of which were material for determining whether the act complained of amounted to a breach of Article 3. That approach was wholly inconsistent with the standards stemming from the Strasbourg case-law in this field. The Supreme Court of Cassation had thus failed to address the substance of the applicant's Convention complaint and there had therefore been a violation of Article 13.

- In **Yesil and Sevim v Turkey (2007)**, the Court observed that the criminal proceedings as a whole had been very long: five years and seven months after the facts, the assize court had found seven police officers guilty of torturing the applicants. It was particularly struck by the fact that the Court of Cassation had waited two years and one month before ruling on the appeal and deciding that the prosecution of the applicants' presumed torturers, who had continued to carry out their duties throughout the proceedings, had lapsed. The proceedings had thus been terminated as being time-barred over eight years after the facts. Given the overall length of the criminal proceedings, which had lasted for over eight years, the Court found that the Turkish authorities could not be considered to have acted with sufficient promptness or with reasonable diligence, with the result that the perpetrators of the violence had enjoyed impunity, notwithstanding the fact that they had been found guilty of torture.

5 SELECTED EXCERPTS FROM CONVENTION JURISPRUDENCE

5.1 The meaning and importance of the prohibition of torture and inhuman or degrading treatment

Costello-Roberts v United Kingdom (1993), at para. 27

27. The Court notes first that, as was pointed out by the applicant, the State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1. It recalls that the provisions of the Convention and its Protocols must be read as a whole. Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process...

Secondly, in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two.

Thirdly, the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.

5.2 The absolute nature of the right

Ireland v United Kingdom (1978), at para. 163

163. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation there from even in the event of a public emergency threatening the life of the nation.

Aksoy v Turkey (1996), at para. 63

63. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

D. v United Kingdom (1997), at para. 47

47. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

Ramirez Sanchez v France (2005), at para. 96

96. The Court is well aware of the difficulties faced by States in modern times in protecting their communities from terrorist violence. However, unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.

Saadi v Italy (2008), at para. 127

127. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.

5.3 Definitions, notions and standards under Article 3

5.3.1 Minimum level of severity

Ireland v United Kingdom (1978), at para. 162

162. As was emphasised by the Commission, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.

5.3.2 Torture

Ireland v United Kingdom (1978), at para. 167

167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly 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. On these two points, the Court is of the same view as the Commission. In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. Moreover, this seems

to be the thinking lying behind Article 1 in fine 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". Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."

Aksoy v Turkey (1996), at para. 64

64. The Court recalls that the Commission found, inter alia, that the applicant was subjected to "Palestinian hanging", in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms. In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.

Salman v Turkey (2000), at para. 114

114. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (Article 1 of the un Convention).

Selmouni v France (1999), at para. 101

101. The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

Elci and Others v Turkey (2003), at para. 634

634. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Selmouni v France judgment cited above, § 96). However, as the Court has further observed, certain acts which were classified in the past as "inhuman or degrading treatment" as opposed to "torture" could be classified differently in the future: 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 (ibid. § 101).

Ilascu and Others v Moldova and Russia (2004), at para. 426

426. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction embodied in Article 3 between this notion and that of inhuman or degrading treatment. As it has previously found, it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering; the same distinction is drawn in Article 1 of the United Nations Convention (see the previously cited **Selmouni** judgment, § 96):

> For the purposes of this Convention, 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 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ...

Menesheva v Russia (2006), at paras. 57 - 59

57. The Court finds that in the instant case the existence of physical pain or suffering is attested by the medical expert and the applicant's statements regarding her ill-treatment in custody. The sequence of events also demonstrates that the pain and suffering was inflicted on her intentionally, in particular with the view of extracting from her information concerning L (see §§ 53-54 above).

58. To assess the severity of the "pain or suffering" inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim (see **Bati**, cited above, § 120). The Court observes that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral impact.

59. In these circumstances, the Court concludes that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

Mikheyev v Russia (2006), at paras. 128 and 135

128. The Court notes that the parties did not dispute the fact that the applicant had sustained serious injuries by jumping out of the window of the police station, and that he had done it himself. However, differing versions of what had driven the applicant to attempt suicide were put forward by the parties. The authorities maintained that the questioning of 19 September 1998 had been lawful, and that the applicant's own psychological problems had led him to attempt suicide. The applicant opposed that view. He stressed that before the incident he had not shown any signs of mental disorder, and that he had attempted to kill himself solely because he could not withstand the torture and wanted to bring his sufferings to an end...

135. In these circumstances, despite the fact that the judgment of 30 November 2005 has not yet become final, the Court is prepared to accept that while in custody the applicant was seriously ill-

treated by agents of the State, with the aim of extracting a confession or information about the offences of which he was suspected. The ill-treatment inflicted on him caused such severe physical and mental suffering that the applicant attempted suicide, resulting in a general and permanent physical disability. In view of the Convention case-law in this respect and in particular the criteria of severity and the purpose of the ill-treatment (see, among other authorities, **Ilhan v Turkey** [GC], no. 22277/93, § 85, ECHR 2000-vii), the Court concludes that the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

5.3.3 Inhuman treatment or punishment

Ireland v United Kingdom (1978), at para. 167

167. [...] In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

Labita v Italy (2000), at para. 120

The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3

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, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.

Becciev v Moldova (2005), at para. 39

39. The Court has considered treatment to be "inhuman" when, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" when it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, for example, **Kudla v Poland** [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a particular form of treatment is "degrading" within the meaning of Article 3, the Court will have regard 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. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, **Raninen v Finland**, judgment of 16 December 1997, Reports of Judgments and Decisions, 1997-VIII, pp. 2821-22, § 55, and **Peers v Greece**, no. 28524/95, § 74, ECHR 2001 III).

I.I. v Bulgaria (2005), at para. 67

67. 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. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see **Kudla v Poland** [GC], no. 30210/96, § 92, ECHR 2000 XI). The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3 (see **Peers v Greece**, no. 28524/95, § 74, ECHR 2001 III, and **Kalashnikov v Russia**, no. 47095/99, § 101, ECHR 2002 VI).

5.3.3.1 Mental suffering

Campbell and Cosans v United Kingdom (1982), at para. 26

26. However, the Court is of the opinion that, provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least "inhuman treatment".

Çakici v Turkey (1999), at para. 98

The Court observes that in the Kurt case, which concerned the disappearance of the applicant's son during an unacknowledged detention, it 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. The Kurt case does not however establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.

Whether a family member is such a victim 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. 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. The Court would further emphasise 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.

5.3.3.2 Fear and anguish as a result of forced disappearance or other ill-treatment of family members

Bazorkina v Russian Federation (2006), at paras. 139 - 141

139. The Court reiterates that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 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.

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 (see **Orhan**, § 358, **Çakici**, § 98, and **Timurtas**, § 95, all cited above). The Court would further emphasise that the essence of such a violation does not mainly 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.

140. In the present case, the Court notes that the applicant is the mother of the disappeared individual, Khadzhi-Murat Yandiyev The applicant watched the video tape showing the questioning of her son, which ends with the words that he should be executed and with him being taken away by soldiers. For more than six years she has not had any news of him. During this period the applicant has applied to various official bodies with inquiries about her son, both in writing and in person (see §§ 21-40 above). Despite her attempts, the applicant has never received any plausible explanation or information as to what became of Yandiyev following his detention on 2 February 2000. The responses received by the applicant mostly denied the State's responsibility for her son's detention and disappearance or simply informed her that an investigation was ongoing. The Court's findings under the procedural aspect of Article 2, set out above, are also relevant here (see §§ 120-125), especially the fact that the criminal investigation into the disappearance started only one and a half year after the event.

141. In view of the above, the Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and of her inability to find out what happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

5.3.4 Degrading treatment or punishment

Ireland v United Kingdom (1978), at para. 167

167. [...] 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.

East African Asians v United Kingdom (1973), at para. 189

189. [...] The term "degrading treatment" in this context indicates that the general purpose of the provision is to prevent serious interferences with the dignity of man of a particularly serious nature. It follows, that an action which lowers a person in rank, position, reputation or character, can only be regarded as "degrading treatment" in the sense of Article 3 where it reaches a certain degree of severity.

Abdulaziz, Cabales and Balkandali v United Kingdom (1985), at para. 91

91. The Court observes that the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase but was intended solely to achieve the aims referred to ... It cannot therefore be regarded as "degrading".

Labita v Italy (2000), at para. 120

120. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and,

in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

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, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.

5.4 The burden and standard of proof

Ireland v United Kingdom (1978), at para. 161

161. [...] The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.

Ribitsch v Austria (1995), at para. 34

34. It is not disputed that Mr Ribitsch's injuries were sustained during his detention in police custody, which was in any case unlawful, while he was entirely under the control of police officers. Police Officer Markl's acquittal in the criminal proceedings by a court bound by the principle of presumption of innocence does not absolve Austria from its responsibility under the Convention. The Government were accordingly under an obligation to provide a plausible explanation of how the applicant's injuries were caused. But the Government did no more than refer to the outcome of the domestic criminal proceedings, where the high standard of proof necessary to secure a criminal conviction was not found to have been satisfied. It is also clear that, in that context, significant weight was given to the explanation that the injuries were caused by a fall against a car door. Like the Commission, the Court finds this explanation unconvincing; it considers that, even if Mr Ribitsch had fallen while he was being moved under escort, this could only have provided a very incomplete, and therefore insufficient, explanation of the injuries concerned.

On the basis of all the material placed before it, the Court concludes that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than – entirely, mainly, or partly – by the treatment he underwent while in police custody.

Aksoy v Turkey (1996), at para. 61

61. The Court, having decided to accept the Commission's findings of fact, considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.
Rehbock v Slovenia (2002), at para. 72

72. In the instant case the applicant was not arrested in the course of a random operation which might have given rise to unexpected developments to which the police might have been called upon to react without prior preparation. The documents before the Court indicate that the police planned the arrest operation in advance and that they had sufficient time to evaluate the possible risks and to take all necessary measures for carrying out the arrest. There were thirteen policemen involved and they clearly outnumbered the three suspects to be arrested. Furthermore, the applicant did not threaten the police officers arresting him, e.g. by openly carrying a weapon or by attacking them. Against this background, given the particularly serious nature of the applicant's injury and seeing that the facts of the dispute have not been the subject of any determination by a national Court, the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive.

Ireland v United Kingdom (1978), at para. 160

160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material proprio motu.

Popov v Russia (2006), at para. 193

193. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court has adopted the standard of proof "beyond reasonable doubt", but has added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see **Labita v Italy** [GC], no. 26772/95, § 121, ECHR 2000-IV). Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (see **Tomasi v France**, judgment of 27 August 1992, Series A no. 241-a, pp. 40-41, §§ 108-11, and **Ribitsch v Austria**, judgment of 4 December 1995, Series A no. 336, pp. 25-26, § 34).

Boicenco v Moldova (2006), at paras. 105 - 111

105. It is not disputed in the present case that between his arrest in the afternoon of 20 May 2005 and his subsequent admission to a hospital at 11.37 p.m., the applicant was in custody at the CFECC. It is also undisputed that before his arrest the applicant did not exhibit any particular abnormality in his normal physical state (see paragraph 8 above), but, after leaving the police station, he was unconscious for more than fours hours (see paragraphs 12-13 above).

106. The Government argued that the applicant lost consciousness as a result of stress and was not ill-treated, as demonstrated by the absence of bruises on his body. Moreover, the Government expressed their doubts about the diagnosis determined by the doctors from the Prison Hospital concerning the applicant's acute head trauma and concussion.

107. The Court does not see any reason not to trust that diagnosis. In this respect it notes that the diagnosis was determined by the doctors from the Prison Hospital. The Government have not presented any counter medical opinion and, in any event, the diagnosis was subsequently confirmed by the forensic investigation of 28 October 2005 and in the reports of the psychiatric investigation of 20 September and 15 November 2005, which had both been ordered by a domestic court (see paragraphs 21-22 above).

108. Moreover, the head trauma is not the only injury of the applicant to be unaccounted for. According to the medical file from the Prison hospital, he also suffered pain in his kidneys and had red urine (see paragraphs 15-16 above). The Government have not presented any evidence that these symptoms were due to any causes other than his alleged ill-treatment on 20 May 2005.

109. The fact that the applicant did not have bruises and other visible signs of ill-treatment on his body is not conclusive in the Court's view. The Court is well aware that there are methods of applying force which do not leave any traces on a victim's body.

111. On the basis of all the material placed before it, the Court concludes that the Government have not satisfied the burden on them to persuade it that the applicant's injuries were caused other than by ill-treatment while in police custody. Accordingly, there has been a violation of Article 3 of the Convention in that he was subjected to inhuman and degrading treatment.

5.5 State responsibility

5.5.1 Negative obligations

5.5.1.1 Under direct State control

Ireland v United Kingdom (1978), at para. 159

159. [...] It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.

5.5.2 Disputed/occupied territory

Ilascu and Others v Moldova and Russia (2004), at paras. 311, 316-317, 319

311. It follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction".

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.
...
Those obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.
...
According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration (ibid.).
...
316. Where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support (see **Cyprus v Turkey**, cited above, § 77).

317. A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction. Thus, with reference to extradition to a non-Contracting State, the Court has held that a Contracting State would be acting in a manner incompatible with the underlying

values of the Convention, "that common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, if it were knowingly to hand over a fugitive to another State where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (see **Soering v the United Kingdom**, judgment of 7 July 1989, Series A no. 161, p. 35, §§ 88-91).

...

319. A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see **Ireland v the United Kingdom**, judgment of 18 January 1978, Series A no. 25, p. 64, § 159; see also Article 7 of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts ("the work of the ILC"), p. 104, and the Cairo case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).

5.5.3 Exposure to a treatment contrary to Article 3 upon expulsion or extradition

Soering v United Kingdom (1989), at para. 88

88. [...] The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

Saadi v Italy (2008), at paras. 139-141

139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and

sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

141. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the Chahal judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3.

Said v Netherlands (2005) at paras. 46, 48-49.

46. The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, **H.L.R. v France**, judgment of 29 April 1997, Reports of Judgments and Decisions 1997-iii, p. 757, §§ 33-34).

48. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see **Vilvarajah and Others v the United Kingdom**, 30 October 1991, Series A no. 215, p. 36, § 107, and **H.L.R. v France**, cited above, p. 758, § 37). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see **Chahal v the United Kingdom**, judgment of 15 November 1996, pp. 1856 and 1859, §§ 86 and 97, Reports 1996-v, and **H.L.R. v France**, cited above).

49. In determining whether it has been shown that the applicant runs a real risk, if expelled to Eritrea, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu. The Court has recognised in this context that direct documentary evidence proving that an applicant himself or herself is wanted for any reason by the authorities of the country of origin may well be difficult to obtain (see **Bahaddar v the Netherlands**, judgment of 19 February 1998, Reports 1998-I, p. 263, § 45). It is nevertheless incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail.

N. v Finland (2005) at para. 160

160. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 must necessarily be a thorough one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed

before it and, if necessary, material obtained of its own motion (ibid., p. 1859, §§ 96-97). The assessment of the existence of the risk must be made on the basis of information concerning the conditions prevailing at the time of the Court's consideration of the case, the historical position being of interest in so far as it may shed light on the present situation and its likely evolution (ibid., p. 1856, § 86).

Jabari v Turkey (2000), at paras. 39-40

39. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily 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.

40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that her failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (see paragraph 16 above). In the Court's opinion, the automatic and mechanical application of such 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. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court on her application for judicial review limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

H.L.R. v France (1997), at para. 40

40. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

D. v United Kingdom (1997), at paras. 49-50

49. It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection. Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.
50. Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health.

Bader and Others v Sweden (2005), at paras. 46-47

46. [t]he Court considers that the first applicant has a justified and well-founded fear that the death sentence against him will be executed if he is forced to return to his home country. Moreover, since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause the first applicant considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out.

47. ... it transpires from the Syrian judgment that no oral evidence was taken at the hearing, that all the evidence examined was submitted by the prosecutor and that neither the accused nor even his defence lawyer was present at the hearing. The Court finds that, because of their summary nature and the total disregard of the rights of the defence, the proceedings must be regarded as a flagrant denial of a fair trial. Naturally, this must give rise to a significant degree of added uncertainty and distress for the applicants as to the outcome of any retrial in Syria.

In the light of the above, the Court considers that the death sentence imposed on the first applicant following an unfair trial would inevitably cause the applicants additional fear and anguish as to their future if they were forced to return to Syria as there exists a real possibility that the sentence will be enforced in that country.

Ahmed v Austria (1996), at para. 41

41. ... the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees (see paragraph 24 above and the above-mentioned **Chahal** judgment, p. 1855, para. 80).

Garabayev v Russia (2007), at paras. 79-80

79. The Court will next examine whether prior to extradition this information received proper assessment. The Court does not discern any evidence in the present case to support a positive answer to this question. For example, no assurances of the applicant's safety from treatment contrary to Article 3 were sought, and no medical reports or visits by independent observers were requested or obtained (see **Mamatkulov and Askarov v. Turkey** [GC], cited above, § 76-77). The reply of 11 November 2002 from the PGO to the applicant's lawyer referred only to the criminal proceedings that had served as formal ground for extradition and did not address any of the concerns relevant to Article 3.

80. Furthermore, it is not in dispute between the parties that the applicant was informed of the decision to extradite him only on the day of his transfer to Turkmenistan and that he was not allowed to challenge it or to contact his lawyer. The decision of the domestic court which found the extradition unlawful after it had occurred also failed to take into account the submissions under Article 3, and did not contain any reference to steps that could remedy the applicant's situation in this respect. In such circumstances, the Court can only conclude that no proper assessment was given by the competent authorities to the real risk of ill-treatment. The extradition was thus carried out without giving a proper assessment to that threat.

5.5.4 Positive obligations

5.5.4.1 General obligations

A. v United Kingdom (1998), at para. 22

22. It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather.

The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity

Z. v United Kingdom (2001), at para. 73

73. The Court re-iterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. 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. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

5.5.4.2 Obligation to provide effective legal framework

M.C. v Bulgaria (2003) at paras. 149-153, 186-187.

(a) The existence of a positive obligation to punish rape and to investigate rape cases

150. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.

151. In a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation. Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents.

153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

181. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature.

187. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention.

5.5.5 Procedural obligations

5.5.5.1 Obligation to conduct an effective official investigation

Assenov v Bulgaria (1998), at para. 102

102. The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such 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 by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

Ilhan v Turkey (2000), at paras. 91-92

91. Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective. The obligation to provide an effective investigation into the death caused, inter alia, by the security forces of the State was for this reason implied under Article 2 which guarantees the right to life. This provision does however include the requirement that the right to life be "protected by law". It also may concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of state officials.

92. Article 3 however is phrased in substantive terms. Furthermore, though the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of the use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention for a person with an arguable claim of a violation of Article 3 to be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by state officers. The Court's case-law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.

Valasinas v Lithuania (2001), at para. 122

122. [...] Article 3 ensures the right to an adequate domestic investigation of "credible assertions of ill-treatment" within the meaning of Article 3 of the Convention, "leading to the identification and punishment of those responsible" for such treatment.
[...] the Court found a violation of Article 3 on the ground that the authorities had not investigated the alleged violation of Article 3.

Khashiyev and Akayeva v Russia (2005) at paras. 177-180

177. Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical and illusory but practical and effective. In a number of judgments the Court found that

where a credible assertion is made that an individual has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, 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 by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation 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.

178. The procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, deriving, at least in part, from the failure of the authorities to react effectively to such complaints at the relevant time.

179. The Court notes that the State authorities conducted certain investigations into the allegations of the applicants that their relatives suffered torture and inhuman treatment before their deaths. However, no autopsies and no appropriate forensic reports were prepared, with the result that the exact nature and circumstances of the deaths were not established. Failure to identify and question other possible witnesses of the events [...] and the servicemen of the military units deployed there at the time also possibly prevented any concrete evidence of ill-treatment coming to light and thereby the identification and punishment of those responsible. Bearing in mind its findings about the efficiency of the investigation (see §§ 156-166 above), the Court is not satisfied that those investigations were sufficiently thorough and effective to satisfy the aforementioned requirements of Article 3.

180. In these circumstances, having regard to the lack of a thorough and effective investigation into the credible allegations made by the applicants that their relatives were victims of treatment contrary to Article 3, the Court dismisses the Government's preliminary objection as to exhaustion of domestic remedies and holds that there has been a violation of the procedural requirements of Article 3 of the Convention.

Maslova and Nalbandov v Russia (2008), at paras. 95 - 96

95. Having examined the circumstances of the case, the Court considers that it may indeed be accepted that the authorities undertook appropriate steps towards the identification and punishment of those responsible for the incident and, had it not been for breaches of domestic procedural rules by the authorities in the first five months following the opening of the case which, as acknowledged by the domestic courts, rendered the principal body of evidence inadmissible (see paragraphs 49, 51-52 and 58-59), the proceedings might arguably have complied with the requirements of the procedural aspect of Article 3. The fact remains, however, that the competent authorities committed procedural errors of an irremediable nature leading to the ultimate stalemate in the criminal proceedings against the allegedly implicated officers.

96. In the absence of any other plausible explanation for these mistakes by the Government, the Court finds that the principal reason for these errors lay in the manifest incompetence of the prosecution authorities which conducted the investigation between 26 November 1999 and 5 July 2000.

Ognyanova and Choban v Bulgaria (2006), at paras. 105 - 107

105. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means.

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see **Anguelova**, cited above, §§ 136-39, with further references).

106. A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see **McKerr v the United Kingdom**, no. 28883/95, § 114, ECHR 2001-iii, with further references).

107. For the same reason, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in, or tolerance of, unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (ibid., § 115; and **Anguelova**, cited above, § 140, with further references).

5.6 Typical situations where Article 3 violations occur

5.6.1 Detention

5.6.1.1 Physical force inflicted on persons in detention

Labita v Italy (2000), at para. 120

120. [...] In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

5.6.1.2 General conditions of detention

Dougoz v Greece (2001), at para. 46

46. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the Greek case, the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contacts with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant.

Kalashnikov v Russia (2002), at para. 95

95. [...] Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment.

Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant.

5.6.1.3 Medical intervention in order to obtain evidence

Jalloh v Germany (2006), at para. 82

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

5.6.1.4 Lack of appropriate medical care

Ilhan v Turkey (2000), at paras. 86-87

86. The Court has accepted the findings of the Commission concerning the injuries inflicted upon Abdüllatif Ilhan, namely, that he was kicked and beaten and struck at least once on the head with a g3 rifle. This resulted in severe bruising and two injuries to the head, which caused brain damage and long term impairment of function. Notwithstanding the visible injuries to his head and the evident difficulties which Abdüllatif Ilhan had in walking and talking, there was a delay of some 36 hours in bringing him to a hospital.

87. Having regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture.

Herczegfalvy v Austria (1992), at para. 82

82. The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. 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.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.

Kudla v Poland (2000), at paras. 93-94

93. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.

94. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.

Khudobin v Russia (2006), at paras. 95-96

95. ...the Court refers to its finding that the applicant was not given the requisite medical assistance. Even while in the prison hospital, he clearly suffered from the physical effects of his medical condition. As to the mental effects, he must have known that he risked at any moment a medical emergency with very serious results and that no qualified medical assistance was available (see paragraphs 29 et seq. above). Not only was the applicant refused appropriate medical assistance by the detention centre authorities, but he was also denied the possibility to receive it from other sources (see paragraph 27 above). This must have given rise to considerable anxiety on his part.

96. What is more, the applicant was HIV-positive and suffered from a serious mental disorder. This increased the risks associated with any illness he suffered during his detention and intensified his fears on that account. In these circumstances the absence of qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical sufferings, it amounted to degrading treatment within the meaning of Article 3.

5.6.1.5 Accommodation of disability

Bragadireanu v Romania (2007), at paras. 94, 97

94. In the present case the Court cannot but notice that the Government, which provided very detailed information from the penitentiary authorities concerning the medical surveillance of the applicant, could not produce a single piece of information on the facilities offered to the applicant in detention, including on the question of a the personal assistant. This allows the Court to conclude that no such facilities were provided to the applicant.

The Court recalls thus that the applicant's medical condition is severe, his basic sanitary needs are difficult to attend to and he has severe functional deficiencies. Although the authorities are aware of these facts, he is still detained in a regular penitentiary, is sharing the cell with other persons, has no showers or warm water at his disposal and is not regularly assisted for his needs. His poor condition has led to social segregation from the rest of the prison population.

97. The foregoing considerations are sufficient to enable the Court to conclude that the conditions in prison, in particular the overcrowding and lack of access to hygiene and other facilities appropriate to his health situation, caused the applicant suffering attaining the threshold of inhuman and degrading treatment proscribed by Article 3.

5.6.1.6 Intimate searches of detainees

Iwanczuk v Poland (2001), at para. 59

59. In addition, whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder in prisons, they must be conducted in an appropriate manner. In the present case, the prison's guards verbally abused and derided the applicant. Their behaviour was intended to cause in the applicant feelings of humiliation and inferiority. This, in the Court's view, showed a lack of respect for the applicant's human dignity. Given that such treatment was afforded to a person who, as stated above, wished to exercise his right to vote within the framework of arrangements specially provided for in Wrocł aw prison for persons detained on remand, and in view of the absence of persuasive justification therefore, the Court is of the view that in the present case such behaviour which humiliated and debased the applicant, amounted to degrading treatment contrary to Article 3.

Valasinas v Lithuania (2001), at para. 117

117. The Court considers 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 the applicant 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. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The Court concludes, therefore, that the search of 7 May 1998 amounted to degrading treatment within the meaning of Article 3 of the Convention.

Wieser v Austria (2007) at paras. 40-41

40. In the present case, the Court notes first that the applicant in the present case was not simply ordered to undress, but was undressed by the police officers while being in a particular helpless situation. Even disregarding the applicant's further allegation that he was blindfolded during this time which was not established by the domestic courts, the Court finds that this procedure amounted to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason. However, no such argument has been adduced to show that the strip search was necessary and justified for security reasons. The Court notes in this regard that the applicant, who was already handcuffed was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely.

41. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the strip search of the applicant during the police intervention at his home constituted an unjustified treatment of sufficient severity to be characterised as "degrading" within the meaning of Article 3 of the Convention.

5.6.2 Discrimination as a form of degrading treatment

Cyprus v Turkey (2001), at paras. 307 – 310

307. With these considerations in mind the Court cannot but observe that the United Nations Secretary-General, in his progress report of 10 December 1995 on the "Karpas Brief" stated that the review carried out by UNfiCYP of the living conditions of the Karpas Greek Cypriots confirmed that they were the object of very severe restrictions which curtailed the exercise of basic freedoms and had the effect of ensuring that, inexorably, with the passage of time, the community would cease to exist. He made reference to the facts that the Karpas Greek Cypriots were not permitted by the authorities to bequeath immovable property to a relative, even the next-of-kin, unless the latter also lived in the north; there was no secondary-school facilities in the north and Greek-Cypriot children

who opted to attend secondary schools in the south were denied the right to reside in the north once they reached the age of 16 in the case of males and 18 in the case of females.

308. The Court notes that the Humanitarian Review reflected in the "Karpas Brief" covered the years 1994-95, which fall within the period under consideration for the purposes of the complaints contained in the present application. It recalls that the matters raised by the United Nations Secretary-General in his progress report have, from the perspective of the Court's analysis, led it to conclude that there have been violations of the enclaved Greek Cypriots' Convention rights. It further notes that the restrictions on this community's freedom of movement weigh heavily on their enjoyment of private and family life and their right to practise their religion. The Court has found that Articles 8 and 9 of the Convention have been violated in this respect.

309. For the Court it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The Court would further note that it is the policy of the respondent State to pursue discussions within the framework of the inter-communal talks on the basis of bi-zonal and bi-communal principles. The respondent State's attachment to these principles must be considered to be reflected in the situation in which the Karpas Greek Cypriots live and are compelled to live: isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community. The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members.

310. In the Court's opinion, and with reference to the period under consideration, the discriminatory treatment attained a level of severity which amounted to degrading treatment.

Moldovan and Others v Romania (2005) at para. 111.

111. [t]he remarks concerning the applicants' honesty and way of life made by some authorities dealing with the applicants' grievances (see the decisions of the civil and criminal courts and remarks made by the mayor of Chetani, paragraphs 44, 66 and 71 above) appear to be, in the absence of any substantiation on behalf of those authorities, purely discriminatory. In this connection the Court reiterates that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention (see **East African Asians v the United Kingdom**, Commission Report, 14 December 1973, dr 78, p. 5, at p. 62).

Such remarks should therefore be taken into account as an aggravating factor in the examination of the applicants' complaint under Article 3 of the Convention.

Smith and Grady v United Kingdom (1999), at para. 121

121. The Court has outlined above why it considers that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defence were of a particularly grave natures. Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3

5.6.3 Destruction of villages and homes

Bilgin v Turkey (2000), at paras. 99 and 102

99. The Commission found that there had been a violation of Article 3 of the Convention in that the damaging of the applicant's possessions and the burning of his house constituted an act of violence

and deliberate destruction in utter disregard of the safety and welfare of the applicant who, together with his family, was left without shelter and in circumstances which caused him anguish and suffering. In this context, the Commission recalled its Delegates' impression of the applicant as a modest and simple man, whose material losses had deeply affected him as it had deprived him of his livelihood.

102. The Commission has made no findings as regards the underlying motive for the destruction of the applicant's home and possessions. However, even assuming that the acts in question were carried out without any intention of punishing the applicant, but instead as a discouragement to others or to prevent his home from being used by terrorists, this would not provide a justification for the ill-treatment.

5.6.4 Death penalty

Ocalan v Turkey (2003), at paras. 194-204 and 207 (cited in Grand Chamber judgment)

194. It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1950 and indeed since the Court's **Soering v the United Kingdom** judgment in 1989.

195. Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since the **Soering** case was decided. The de facto abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a de jure abolition in forty-three of the forty-four Contracting States – most recently in the respondent State – and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

196. Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 (1), particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2.

197. In expressing this view, the Court is aware of the opening for signature of Protocol No. 13 which provides an indication that the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. However this Protocol seeks to extend the prohibition by providing for the abolition of the death penalty in all circumstances – that is to say both in time of peace and in times of war. This final step toward complete abolition of the death penalty can be seen as a confirmation of the abolitionist trend established by the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

198. In the Court's view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 (1) in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

(b) Unfair proceedings and the death penalty

199. In the Court's view, present-day attitudes in the Contracting States towards the abolition of the death penalty, as reflected in the above analysis, must be taken into account when examining the compatibility with Articles 2 and 3 of any death sentence. As noted above, the Court will postulate that the death penalty is permissible in certain circumstances.

200. As already highlighted by the Court in the context of Article 3, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention while awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.

201. Since the right to life in Article 2 of the Convention ranks as one of the most fundamental provisions of the Convention – one from which there can be no derogation in peacetime under Article 15 – and enshrines one of the basic values of the democratic societies making up the Council of Europe, its provisions must be strictly construed, a fortiori the second sentence of Article 2.
202. Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that "Everyone's right to life shall be protected by law". An arbitrary act cannot be lawful under the Convention.

203. It also follows from the requirement in Article 2(1) that the deprivation of life be pursuant to the "execution of a sentence of a Court", that the "Court" which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided. Lastly, the requirement in Article 2(1) that the penalty be "provided by law" means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be "accessible" and "foreseeable" as those terms are understood in the case-law of the Court.

204. It follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible.

207. In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection

by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.

5.6.5 Rape (and/or threat of rape)

Aydin v Turkey (1997), at para. 83

83. While being held in detention the applicant was raped by a person whose identity has still to be determined. 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.

Menesheva v Russia (2006), at para. 61

61. To assess the severity of the "pain or suffering" inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim (see Batı and Others, cited above, § 120). The Court observes that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral abuse.

Maslova and Nalbandov v Russia (2008), at paras. 107-108

107. The Court observes that according to its settled case-law a 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 victims which do not respond to the passage of time as quickly as other forms of physical and mental violence. The victim also experiences the acute physical pain of forced penetration, which leaves her feeling debased and violated both physically and emotionally (see Aydın, cited above, § 83).

108. In view of the above, the Court is satisfied that the accumulation of the acts of physical violence inflicted on the first applicant (see paragraphs 13, 14, 17, 21 and 31-32) and the especially cruel acts of repeated rape to which she was subjected (see paragraphs 14 and 31-32) amounted to torture in breach of Article 3 of the Convention.

6 INDEX OF CASES

