

# GRADING SCALE OF DEGRADATION: IDENTIFYING THE THRESHOLD OF DEGRADING TREATMENT OR PUNISHMENT UNDER ARTICLE 3 ECHR

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## *Abstract*

*Among international human rights instruments, the rich jurisprudence on Article 3 of the European Convention on Human Rights (ECHR) has yielded meaningful and workable principles for defining the normative parameter of freedom from torture and other forms of maltreatment. While identification of torture has been limited to a small number of straightforward cases of assault giving rise to physical and mental anguish of an especially aggravated character, the overwhelming majority of cases raised under Article 3 have related to degrading or inhuman treatment or punishment. By focusing upon threshold cases involving freedom from degrading treatment or punishment, the least serious absolute right under Article 3, this article seeks to delineate the boundaries of the effective guarantee provided by this absolute right in the Strasbourg organs judicial policy. The examination suggests an encouraging sign that the Strasbourg organs have funnelled considerable vigour and creativity into their law-making policy, elaborating on the most succinct provision in the ECHR. They have capitalised on the graduating scale of degrading treatment so as to diversify the protective scope of Article 3, in a continued search for progressive European public order. They have supplied to individual victims a horizon of possible arguments, which can unfold along lines conducive to the shaping and restructuring of the emerging European constitutional system.*

## 1. INTRODUCTION

Freedom from torture and other forms of ill-treatment is recognised as a right of paramount significance under international human rights law.<sup>1</sup> Among international human rights instruments, the rich jurisprudence on Article 3 of the European Convention on Human Rights has yielded

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<sup>1</sup> See, generally, Bank, R., 'International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?', 8 *EJIL*, 1997, p. 613; and Donnelly, J., 'The Emerging International Regime Against Torture', 33 *Nth. IJR*, 1986, p. 1.

meaningful and workable principles for defining the normative parameter of this fundamental right.<sup>2</sup> Article 3 prohibits torture, or inhuman or degrading treatment or punishment in ‘absolute’ terms. It is not subject to any express limitation by reference to saving clauses. Nor can the prohibition be derogated from, even in time of war or other public emergency, under Article 15.<sup>3</sup> In view of the absolute nature of the prohibition, the rights envisaged in Article 3 constitute ‘one of the fundamental values of the democratic societies making up the Council of Europe’,<sup>4</sup> with the infringement of these rights viewed as an assault not only on the dignity of an individual person but also on the public order of Europe as a whole.<sup>5</sup> The non-derogable character of Article 3 and its obligations *erga omnes* lend support to the view that prohibition of torture or other forms of ill-treatment constitutes part of *jus cogens* in the normative hierarchy of international law.<sup>6</sup>

For Article 3 to come into play, there must exist a minimum level of severity relative to a particular treatment or condition. The European Court of Human Rights (the Court) has recognised that there is a three-tier hierarchy of proscribed forms of ill-treatment: torture (“seuil supérieur”), inhuman treatment or punishment, (“seuil intermédiaire”) and degrading treatment or punishment (“seuil minimum de déclenchement de l’article 3”).<sup>7</sup> In the *Greek Case*, the now defunct European Commission of Human Rights (the Commission) confirmed this hierarchy, stating that all torture must be inhuman and degrading treatment, and inhuman treatment also

<sup>2</sup> As regards Article 3 ECHR, see M.K. Addo and Grief, N., ‘Is There a Policy Behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?’, 20 *ELR*, 1995, p. 178; ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’, 9 *EJIL*, 1998, p. 510; Cassese, A., ‘Prohibition of Torture and Inhuman or Degrading Treatment or Punishment’ in: MacDonald, R.J., Matscher F., and Petzold, H., (eds.), *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff, 1993, Ch. 11; van Dijk, P., and van Hoof, G.H.J., *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> ed., The Hague, Kluwer, 1998, Ch. VII, para. 3; Duffy, P.J., ‘Article 3 of the European Convention on Human Rights’, 32 *ICLQ*, 1983, p. 316; and Harris, D. J., O’Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, London, Butterworths, 1995, Ch. 3.

<sup>3</sup> *Ireland vs United Kingdom*, Judgment of 18 January 1978, A 25, para. 163; and *Ribitsch vs Austria*, Judgment of 4 December 1995, A 336, para. 32.

<sup>4</sup> *Soering vs United Kingdom*, Judgment of 7 July 1989, A 161, para. 88.

<sup>5</sup> In the *First Greek Case*, the Commission observed that ‘a Contracting party, when bringing an alleged breach of the Convention before the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as raising an alleged violation of the public order of Europe’: Nos. 3321-23 & 3344/67, Decision of 24 January 1968, 1968, 11 *Yearbook of the European Convention on Human Rights* (hereinafter Ybk) p. 730, at pp. 762-764. See also the applicant States’ argument in No. 9940-44/82, *France and Others vs Turkey*, where they assailed administrative practice of ill-treatment proscribed by Article 3: Decision of 6 December 1983, 1983, 26 Ybk Part. Two, p. 1, at p. 19.

<sup>6</sup> See Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11, para. 11.

<sup>7</sup> Sudre, F., ‘Article 3’, in: Pettiti, L-E., Decaux E. and Imbert, P.-H., *La Convention Européenne des Droits de l’Homme – Commentaire article par article*, Paris, Economica, 1999, at p. 159.

degrading<sup>8</sup> Similarly in the *Tyrer* Case, the Court observed that not all degrading treatment or punishment would amount to the level described as inhuman.<sup>9</sup> Hence both the Court and the Commission (the Strasbourg organs) have introduced an element of gradation or relativity into what is termed an ‘absolute right’, with the threshold of gravity set at the lowest level for degrading treatment or punishment. Further, as the Court emphasised in the *Selmouni* Case,<sup>10</sup> the order or hierarchy distinguishing the three categories of ill-treatment is fluid in nature. According to the Court, the interpretation recognising the Convention as a ‘living instrument’ requires the minimum standard of severity to be assessed in harmony with societal progress. This entails two seminal implications. First, acts which were classified as inhuman or even *degrading* treatment in the past might be recognised as torture in the future.<sup>11</sup> Second, as seen in the prevalence of abolitionist approach to capital punishment,<sup>12</sup> the strength of subsequent State practice and *opinio juris* among the member States might be such that it could help remove even a clear textual barrier<sup>13</sup> to the teleological construction and identify inhuman and degrading treatment.<sup>14</sup> There is, however, some doubt as to whether the threshold of torture can be lowered to such an extent as to encompass conditions formerly regarded only as degrading.

While identification of torture has been limited to a small number of straightforward cases of assault giving rise to physical and mental anguish of an especially aggravated character, the overwhelming majority of cases raised under Article 3 have related to degrading or inhuman treatment or punishment. Presumably due to the lower level of threshold, complaints of degrading treatment have encompassed a plethora of issues ranging from prison and detention conditions, corporal punishment, sex and racial discrimination, to treatment of transsexuals. By exploring ‘threshold cases’ involving freedom from degrading treatment or punishment, the ‘least serious’ absolute right under Article 3, this article seeks to delineate the

<sup>8</sup> 12 Ybk (the *Greek Case*) 1969, p. 1 at p. 186.

<sup>9</sup> *Tyrer vs United Kingdom*, Judgment of 25 April 1978, A 26, para. 29.

<sup>10</sup> *Selmouni vs France*, Judgment of 28 July 1999, para. 101.

<sup>11</sup> This *Selmouni* principle was also upheld by the Inter-American Court of Human Rights in the *Cantoral Benavides* Case: Judgment of 18 August 2000, 8 IHRR 1049, para. 99.

<sup>12</sup> Note that in order to remove the possibility of capital punishment in relation to acts committed in time of war or of imminent threat of war, on 3 May 2002 the Council of Europe adopted Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. The Protocol has come into force since 1 July 2003 when 10 instruments of ratification were attained.

<sup>13</sup> The second sentence of Article 2(1) reads that ‘[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which penalty is provided by law’.

<sup>14</sup> This possibility is suggested by the Court in *Öcalan vs Turkey*, Judgment of 12 March 2003, paras. 191, 193, 198 and 207.

boundaries of the effective guarantee provided by this ‘absolute’ right in the Strasbourg organs’ judicial policy.

The article firstly examines the general principles governing the Strasbourg organs’ interpretation and application of the norm forbidding degrading treatment or punishment. To obtain insight into the special features of such treatment or punishment as distinct from other types of maltreatment, the appraisal deals in some detail with issues of general importance, including elements of ill-treatment, the question of fault, identification of degradingness relative to mental and psychological suffering, and the expanding scope of State responsibility based on the horizontal effect of Article 3. The article finally focuses on the path of development along which the supervisory bodies have guided their adjudicative policy in a variety of specific areas where the concept of degradingness has been pleaded. The manner in which the Strasbourg organs have addressed these issues will elucidate the nature of their contribution to the elaboration and implementation of the standard relative to degrading treatment.

## 1.1. Elements of Ill-Treatment

### 1.1.1. Torture

The Court has defined torture as ‘deliberate inhuman treatment causing very serious and cruel suffering’.<sup>15</sup> Unlike the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UN Convention Against Torture),<sup>16</sup> the laconic style in which Article 3 is drafted leaves open a number of definitional elements of torture or other forms of ill-treatment. As with the flexible interpretation of the UN Convention Against Torture that defines both ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’ only in terms of *acts*,<sup>17</sup> omission should also be considered sufficient to amount to torture under

<sup>15</sup> *Ireland vs United Kingdom*, Judgment of 18 January 1978, A 25, para. 167.

<sup>16</sup> For the UN Convention Against Torture and the activities of the Committee against Torture, see Bank, R., ‘Country-Oriented Procedures under the Convention Against Torture: Towards a New Dynamism’, in: Alston, P., and Crawford, J., (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press, 2000, Ch. 7; Baruh-Sharvit, P., ‘The Definition of Torture in the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment’, 23 *Israeli YHR*, 1993, p. 147; Burgers, J.H., and Danelius, H., *The United Nations Convention against Torture*, Dordrecht, Martinus Nijhof, 1988; and Byrnes, A., ‘The Committee against Torture’, in: Alston, Philip (ed.), *The United Nations and Human Rights – A Critical Appraisal* –, Oxford, Clarendon, 1992, Ch. 13.

<sup>17</sup> Although Articles 1(1) and 16(1) of the UN Convention Against Torture 1984 define maltreatment in terms of acts, they have been interpreted to embrace omissions such as the withholding of food and drink. See, for instance, Report of the Special Rapporteur on Torture (Kooijmans), UN Doc. E/CN/4/1986/15, 19 February 1986, at 30; as referred to in: Baruh-Sharvit, *ibidem*, at 153.

Article 3 ECHR, provided that the relevant criteria are satisfied. This is in accordance with the position of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which made clear in the *Furundzija* Case that war crimes of torture amounting to grave breaches comprise ‘act or omission’.<sup>18</sup>

While Article 3 ECHR does not clarify whether there is a requirement of intention for torture, from as early as *Ireland vs United Kingdom* the Court has defined torture as ‘deliberate inhuman treatment’ and construed the term ‘deliberate’ as requiring that suffering be caused *intentionally*.<sup>19</sup> In the *Mahmut Kaya* Case, the Court, relying on the UN Convention Against Torture, pronounced on the special elements of torture that make it distinguishable from other types of ill-treatment, alluding to the ‘deliberate’ and ‘purposeful’ nature of acts that comprise or transcend the level of suffering required of inhuman treatment.<sup>20</sup> The Court’s approach suggests that, as in the definition of torture laid down in Article 1 of the UN Convention Against Torture and Article 2 of the Inter-American Convention to Prevent and Punish Torture, there must be some *purpose* for inflicting torture. The absolute nature of the right guaranteed in Article 3 means that the requirement of purpose does not proffer justification for torture on grounds of public purpose, however compelling they may be.<sup>21</sup> The ECHR’s case-law has not offered guidance on whether torture needs to be premeditated. While the absolute nature of the right to freedom from torture, the most heinous form of ill-treatment, militates in favour of a victim-friendly and lower standard of fault or negligence on the part of State authorities, the element of *purpose* suggests that the minimum degree of fault required for torture should lie somewhere between recklessness and premeditation.

### 1.1.2. Inhuman Treatment or Punishment

Inhuman treatment or punishment has been described as treatment or punishment which is ‘premeditated (...) applied for hours at a stretch and caus[ing] either actual bodily injury or intense physical and mental suffering’.<sup>22</sup> The difference between torture and inhuman treatment depends on the degree of physical or mental suffering, which needs to be both objectively and subjectively examined. Cassese avers that at least three elements are necessary for inhuman treatment: the intent to ill-treat, a severe suffering (physical or psychological) and the absence of justification

<sup>18</sup> ICTY Appeals Chambers, *Prosecutor vs Anto Furundzija*, Case No. IT-95-17/1-A, 21 July 2000, para. 111.

<sup>19</sup> *Ireland vs United Kingdom*, Judgment of 18 January 1978, A 25, para. 167.

<sup>20</sup> *Mahmut Kaya vs Turkey*, Judgment of 28 March 2000, para. 117.

<sup>21</sup> This was affirmed in *Chahal vs United Kingdom*, Judgment of 15 November 1996, paras. 79-81.

<sup>22</sup> *Kudla vs Poland*, Judgment of 26 October 2000, para. 92; and *Kalashnikov vs Russia*, Judgment of 15 July 2002, para. 95.

for such suffering.<sup>23</sup> While the erstwhile Commission at times flirted with the notion of intention or even premeditation,<sup>24</sup> the Court's approach to this question remains inconsistent: its definition of inhuman treatment has on some occasions included the element of premeditation,<sup>25</sup> but on other occasions the requirement of intention appears to be discarded.<sup>26</sup>

### 1.1.3. Degrading Treatment or Punishment

Degrading treatment or punishment is characterised as such treatment or punishment that humiliates or debases an individual in such a manner that shows a lack of respect for, or diminishes, his or her human dignity, or arouses feelings of fear, anguish and inferiority capable of breaking an individual's moral and physical resistance.<sup>27</sup> Publicity is not an essential component of degrading treatment, since s/he can be humiliated in his/her own eyes.<sup>28</sup> Among the required elements described above, added emphasis has been placed upon psychological and subjective elements,<sup>29</sup> which are inherent in the two higher forms of ill-treatment (torture or inhuman treatment). The suffering and humiliation involved must in any event go beyond the inevitable element of suffering or humiliation resulting from legitimate treatment or punishment.<sup>30</sup> The fact that the elements of degrading treatment consist chiefly of psychological factors makes it difficult to search for any objectively verifiable act or conditions that can be uniformly perceived as degrading. Just as with the borderline between torture and inhuman treatment, the distinction between maltreatment causing degradation and treatment not caught by the prohibition under Article 3 cannot be precisely drawn, with an element of relativity arising in the subjective response of the victim to maltreatment<sup>31</sup> and his/her

<sup>23</sup> Cassese, *loc.cit.* (note 2), at p. 229.

<sup>24</sup> The Commission expressly required the element of premeditation in the *Greek Case*, 12 Ybk (the *Greek Case*) p. 1 at p. 186, 1969. In *Soering vs United Kingdom*, the Court referred to *Ireland vs United Kingdom* (Judgment of 18 January 1978, A 25, para. 167), noting that there it had found the use of 'five techniques' to be inhuman 'because it was premeditated ...': Judgment of 7 July 1989, A 161, para. 100. See also Cassese, *loc.cit.* (note 2), at p. 246; and Harris *et al.*, *op.cit.* (note 2), at 62, footnote 8.

<sup>25</sup> *Kalashnikov vs Russia*, Judgment of 15 July 2002, para. 95.

<sup>26</sup> *Ireland vs United Kingdom*, Judgment of 18 January 1978, A 25, para. 167.

<sup>27</sup> *Price vs United Kingdom*, Judgment of 10 July 2001, paras. 24-30; *Valasinas vs Lithuania*, Judgment of 24 July 2001, para. 117; and *Pretty vs United Kingdom*, Judgment of 29 April 2002, para. 52.

<sup>28</sup> *Tyrer vs United Kingdom*, Judgment of 25 April 1978, A 26, para. 32.

<sup>29</sup> *Idem*. See also the *Greek Case*, 12 Ybk (the *Greek Case*), p. 1, at 186, 1969, which described the element of degrading treatment as the conduct that 'grossly humiliates'.

<sup>30</sup> See, *inter alia*, *Tyrer vs United Kingdom*, para. 30; *Soering vs United Kingdom*, para. 100; and *Valasinas vs Lithuania*, Judgment of 24 July 2001, para. 102.

<sup>31</sup> Rodley, N., *The Treatment of Prisoners under International Law*, Oxford, Clarendon, 1987, at pp. 94-95.

particular cultural values.<sup>32</sup> One might well argue that any attempt to isolate and delineate the bounds of universally condemnable form of degrading treatment is simply unnecessary. The essence of human rights resides in their capacity to ‘transfer their claims to ever-expanding domains and new types of (...) subjectivity’.<sup>33</sup> Nevertheless, as Baruh-Sharvit notes,<sup>34</sup> an entirely subjective standard must not be relied upon. In the *Campbell and Cosans* Case, the Court found that ‘a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading’.<sup>35</sup>

## 1.2. Questions of Fault

General international law on State responsibility leaves at abeyance the need for and the form of fault (wrongful intent, lack of due diligence and other *mens rea*), making the question contingent on primary rules, breach of which would incur international responsibility.<sup>36</sup> International criminal law, albeit dealing with establishment of individual criminal responsibility, calls for mental elements (*mens rea*), which vary on a scale from mere negligence to recklessness and premeditation.<sup>37</sup> In respect of Article 3 ECHR, the Strasbourg organs have not provided guiding principles on the level of fault or *mens rea* required of a Member State to recognise any of the three proscribed forms of ill-treatment. There has been no clear differentiation between deliberate and reckless or negligent conduct.<sup>38</sup> Nor have the Strasbourg organs clarified whether there can be different degrees of *mens rea*, depending on the type of ill-treatment. In the case of acts of private persons, it is not clear what level of State knowledge and ability to forestall their occurrence is necessary before it can be argued that the acts have been done as consequences of State conduct or omission. A State knowledge of a violation, at the time the violation occurred in a private sphere, should not be considered indispensable.<sup>39</sup> The absence in Article 3 of the qualifying

<sup>32</sup> Baruh-Sharvit, *loc.cit.* (note 16), at p. 173; and Rodley, *op.cit.* (note 31), at p. 93.

<sup>33</sup> Douzinas, C., ‘Justice and Human Rights in Postmodernity’, in: Gearty, C., and Tomkins, A. (eds.), *Understanding Human Rights*, London, Pinter, 1999, Ch. 6, at p. 131.

<sup>34</sup> Baruh-Sharvit, *loc.cit.* (note 16), at p. 173.

<sup>35</sup> *Campbell & Cosans vs United Kingdom*, Judgment of 25 February 1982, A 48, para. 30. The Court continues to observe that ‘conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word’.

<sup>36</sup> Crawford, J., *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, at pp. 12-14.

<sup>37</sup> Schabas, W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001, at p. 86.

<sup>38</sup> Harris *et al.*, *op.cit.* (note 2), at p. 59, footnote 13.

<sup>39</sup> McCorquodale, R., and La Forgia, R., ‘Taking Off the Blindfolds: Torture by Non-State Actors’, 2001, *Human Rights Law Review*, Vol. 1, p. 189, at p. 206.

terms, ‘by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity’ as laid down in Article 1 of the UN Convention Against Torture, enables the Strasbourg organs to justify much broader obligations on Member States. Their critical appraisal of the failure of a State to take preventive, punitive or remedial action is not confined to egregious instances of torture.<sup>40</sup>

In the cases of *VS vs United Kingdom* and *Peers vs Greece*, the Court held that absence of purpose ‘cannot conclusively rule out a finding of violation of Article 3’.<sup>41</sup> The applicability of this dictum may be envisaged especially in a horizontal situation, where States fail to protect a private individual from assaults by another. Yet even in a traditional, vertical context of human rights violations, identification of proscribed maltreatment should not necessarily be hamstrung by the ‘purpose requirement’. Good-faith efforts of a government may not prevent general conditions of detention from deteriorating to an undesirable level falling within the purview of Article 3.<sup>42</sup> Nevertheless, it is not clear whether the Court is implying the abandonment of the element of purpose for *all* types of maltreatment in a vertical scenario. One may argue that its relevance is limited to instances of degrading treatment or punishment only. In the realm of international criminal law, both the Rome Statute of the International Criminal Court (ICC) and the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court (PCNICC) indicate that the element of purpose, though necessary for war crimes of torture in furtherance or pursuit of war, is dispensed with in relation to torture as a crime against humanity,<sup>43</sup> suggesting that particular purpose is not a *sine qua non* requirement for torture.

The question remains whether in respect of breaches of Article 3 in a conventional, vertical context, as in cases of ill-health caused by conditions of detention or prison, the lower standard based on mere negligence is sufficient to implicate a Member State’s responsibility for degrading or inhuman treatment. Setting the standard of fault or negligence is determinative for identifying State responsibility under Article 3 in the horizontal context. The difference between the vertical and horizontal effects of Article 3 does not necessarily affect the standard of fault. In the case of *D.P. & J.C. vs United Kingdom*, the Court was asked to determine

<sup>40</sup> See, for instance, *A vs United Kingdom*, Judgment of 23 September 1998 (corporal punishment at home).

<sup>41</sup> *V. vs United Kingdom*, Judgment of 16 December 1999, para. 71; and *Peers vs Greece*, Judgment of 19 April 2001, para. 74; *Van der Ven vs the Netherlands*, 4 February 2003, para. 48. See also *Aliiev vs Ukraine*, Judgment of 29 April 2003, para. 149; *Dankevich vs Ukraine*, Judgment of 29 April 2003, para. 122; *Kuznetsov vs Ukraine*, Judgment of 29 April 2003, para. 126.

<sup>42</sup> See *Price vs United Kingdom*, Judgment of 10 July 2001 (special requirement for a severely disabled detainee with serious health problems).

<sup>43</sup> Compare Article 7(1)(f), ‘Crime against humanity of torture’, with Article 8(2)(a)(ii) –1, ‘War crime of torture’, in the Elements of Crimes.



whether the British Government was liable for its failure to protect the applicants who were allegedly subjected to child abuse by their step-father in their childhood. The Court stressed that the standard of negligence capable of establishing State responsibility for ill-treatment in horizontal context under Article 3 was not so high as to be equated to 'gross negligence' or 'wilful disregard' of the duties to prevent such maltreatment. Relying on the principle established in *Osman vs United Kingdom* under Article 2,<sup>44</sup> the Court ruled that the need for practical and effective guarantee of rights of an 'absolute' nature enabled the standard of negligence to be tuned at a low level, with an individual applicant required to prove only that the authorities of a Member State 'had or ought to have had knowledge' of such ill-treatment.<sup>45</sup> In this respect, State responsibility will arise from the omission of relevant national authorities to take reasonable protective measures that *could have prevented* the abuse in private.<sup>46</sup>

The question of whether there is need for fault or negligence on the part of a Member State is of marked importance in the evaluation of cases involving 'anticipatory ill-treatment'.<sup>47</sup> The responsibility of a Member State is engaged by the decision to extradite or remove an individual person to a third country where there is a 'real risk' that s/he would face ill-treatment contrary to Article 3. Sources of risk in those circumstances are not confined to official acts of a third State but include private acts committed by insurgents, terrorists, and others. In *D vs United Kingdom*, the sources of risk in a third country were stretched even to conditions that could not be imputed to an actor at all, namely poor medical conditions inadequate for a patient dying of AIDS. The equally liberal move to recognise State responsibility for 'speculative violations' by non-State actors in a 'risk country' can be exhibited in the policy of the Human Rights Committee in relation to Article 7 of the International Covenant on Civil and Political Rights (ICCPR) as well as in the approach followed by the Committee against Torture under the *non-refoulement* obligations laid down in Article 3 of the UN Convention Against Torture.<sup>48</sup> While some authors deduce from

<sup>44</sup> *Osman vs United Kingdom*, Judgment of 28 October 1998, para. 116.

<sup>45</sup> *D.P. J.C. vs United Kingdom*, Judgment of 10 October 2002, para. 109. However, the Court concluded that the local authority dealing with social services was not negligent in its duty to take effective steps to protect the applicants from sexual abuse inflicted by their step-father, absent proof that the authority should have been aware of such abuse: *ibidem*, para. 114.

<sup>46</sup> *E. and Others vs UK*, Judgment of 26 November 2002, paras. 92, 96 and 99. See also *Z and Others vs UK*, paras. 74-75; and *Pantea vs Romania*, Judgment of 3 June 2003, para. 190.

<sup>47</sup> The first such move can be discerned in *Soering vs United Kingdom*, Judgment of 7 July 1989, A 161.

<sup>48</sup> For the case-law of the Human Rights Committee see, for example, *Joseph Kindler vs Canada*, No. 470/1991, 25 September 1991, 1994, 1 IHRR 98; and *T.T. vs Australia*, No. 706/1996, 10 May 1996, 1998, 5 IHRR 737. For the approach of the Committee against Torture, see, in particular, *Sadik Shek Elmi vs Australia*, No. 120/1998, 7 IHRR 603, 2000; and cases cited in: Arai-Takahashi, Y., 'Uneven, But in the Direction of Enhanced Effectiveness – A Critical Analysis of 'Anticipatory Ill-Treatment' under Article 3 ECHR', *NQHR*, Vol. 20, No. 1, 2002, pp. 2-27 at p. 9.

such developments the notion of ‘indirect responsibility’,<sup>49</sup> it may be premature to apply such a concept to the ECHR, as it is the *direct* consequence of the decisions of a Member State to deport or take other measures that would lead to a breach of Article 3. Nor can one assume that the case-law *as it stands now* allows the Court, in exceptional circumstances, to dispense with the requirement of fault and to recognise the notion of absolute responsibility under Article 3.

### 1.3. Mental Suffering and Psychological Damage

Since the early case-law, the Strasbourg organs have upheld the view that Article 3 is applicable not only to physical injuries but also to mental or psychological suffering.<sup>50</sup> In the *First Greek Case*, the Commission observed in its report that ‘[t]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, *mental or physical*, which in the particular situation is unjustifiable’.<sup>51</sup> In the *East African Asian Case*, the Commission, extending this principle, rejected the submission by the United Kingdom Government that degrading treatment referred only to physical acts and emphasised that ‘[e]ven in the case of torture and inhuman treatment such a physical element is not essential’.<sup>52</sup> The subsequent case-law of the Court confirms that degrading and/or inhuman treatment may be involved if psychological anguish reaches a sufficiently intense and serious level.<sup>53</sup> Given that degrading treatment or punishment consists mainly of the sense of debasement and humiliation, such maltreatment or punishment takes on special significance when ascertaining psychological and mental suffering. Threats of torture will amount to serious mental suffering that can cross the threshold of at least ‘inhuman treatment’, if they are ‘sufficiently real and immediate’.<sup>54</sup> Similarly, the fear

<sup>49</sup> McCorquodale and La Forgia, *loc.cit.* (note 39), at p. 193.

<sup>50</sup> Apart from the cases mentioned in the text, see also *X vs United Kingdom*, No. 9261/81, Decision of 3 March 1982, 28 DR, p. 177, at p. 182 (expropriation of a home alleged to cause emotional stress and anxiety); and *Hendriks vs the Netherlands*, No. 9427/78, Commission’s Report of 8 March 1982, 29 DR 5, at p. 20, (court decisions to refuse the applicant a right of access to his son on the basis of the overriding interests of the child).

<sup>51</sup> *First Greek Case*, 1969, 12 Ybk, p. 186 (*Greek Case*), emphasis added.

<sup>52</sup> *East African Asian Case*, 1981, 3 EHRR 76, para. 191. The Commission observed in the same paragraph that ‘[i]f torture does not necessarily require a ‘physical act or condition’, then *a fortiori* this element cannot be a prerequisite of degrading treatment’.

<sup>53</sup> See, *inter alia*, *Ireland vs United Kingdom*, Judgment of 18 January 1976, A 25, para. 167; *Campbell and Cosans vs United Kingdom*, Judgment of 25 February 1982, A 48, para. 29 (threat of corporal punishment at school); *Soering vs United Kingdom*, Judgment of 7 July 1989, A 161, paras. 100 and 108 (the ‘death row phenomenon’); *V. vs United Kingdom*, Judgment of 16 December 1999, para. 71; and *X and Y vs the Netherlands*, Commission’s Report of 5 July 1983, A 91, para. 93. In *V. vs United Kingdom*, the Court left open the possibility that a failure to fix a tariff for a child offender in detention and leaving him/her in uncertainty over many years as to his/her future, might disclose mental and psychological suffering sufficient to reach the minimum level of severity under Article 3: *ibidem*, para. 100.

and uncertainty arising from the combination of the denial of a fair trial and the imposition of a death sentence would cause such degree of anguish as to be described as 'inhuman treatment'.<sup>55</sup> However, the Court, unlike the UN Human Rights Committee<sup>56</sup> and the Inter-American Court of Human Rights,<sup>57</sup> has yet to pronounce on 'psychological torture',<sup>58</sup> with its recognition of mental or psychological suffering limited to inhuman and degrading treatment.

While assessment of mental or psychological suffering will be dependent on the specific circumstances of each case, which may be objective or subjective in nature, the level of judicial review will need to be intensified when a 'suspect classification' on the ground of race,<sup>59</sup> sex,<sup>60</sup> ethnic origin or religion<sup>61</sup> is involved. Likewise, objective elements based on race, sex, gender, sexual orientation, religion, age or disability prove decisive for assessing the minimum level of degrading treatment that can arise outside the context of discrimination.<sup>62</sup> A threat of rape,<sup>63</sup> genital mutilation or of

<sup>54</sup> *Campbell and Cosans vs United Kingdom*, Judgment of 25 February 1982, A 48, para. 26.

<sup>55</sup> *Öcalan vs Turkey*, Judgment of 12 March 2003, para. 207.

<sup>56</sup> The Human Rights Committee upheld the view that the threat of serious physical injury constituted a form of psychological torture: *Miguel Angel Estrella vs Uruguay*, No. 74/1980, 19 March 1983, paras. 8.6 and 10. See also *Pratt and Morgan vs Jamaica*, Nos. 210/1986 & 225/1987, 6 April 1989, Doc. A/44/40, para. 13.7.

<sup>57</sup> *Cantoral Benavides Case*, Judgment of 18 August 2000, 8 IHRR 1049, paras. 102-103.

<sup>58</sup> *Labita vs Italy*, Judgment of 6 April 2000, paras. 38 & 117 (no violation of Article 3). See also cases in which applicants alleged that their disappeared family members endured 'psychological torture' in detention: *Kurt vs Turkey*, Judgment of 25 May 1998, paras. 111-117; *Çiçek vs Turkey*, Judgment of 27 February 2001, paras. 152-157; and *Orhan vs Turkey*, Judgment of 18 June 2002, paras. 353-355.

<sup>59</sup> In *Twenty-five Applications vs United Kingdom (East African Asian cases)*, the Commission recognised that discrimination based on race could amount to degrading treatment in the sense of Article 3: Decision of 10 October 1970, 13 Ybk 928, at 994. In contrast, in *XvsAustria*, No 8142/78, the Commission rejected the complaint of degrading treatment in relation to the Austrian linguistic census, which was alleged to prevent the declaration of the applicant's Slovenian minority status: Decision of 10 October 1979, 18 DR 88.

<sup>60</sup> In *Abdulaziz, Cabales and Balkandali vs United Kingdom*, the Court found discrimination based on sex (but not on race) in breach of Article 14 read together with Article 8, but pronounced that the difference in treatment did not amount to any such contempt or lack of respect for the personality of the applicants as to reveal 'degrading' treatment: Judgment of 28 May 1985, A 94, paras. 90-91. See also Nos 9214/80, 9473/81 and 9474/81, *Mmes X, Cabales and Balkandali vs United Kingdom*, Decision of 11 May 1982, 25 Ybk Part II, Chapter 1, B, p. 159, at pp. 178-179.

<sup>61</sup> In *Cyprus vs Turkey*, the Court found that various interfering measures against Greek-Cypriot community members by the Turkish-controlled authorities constituted degrading treatment in view of discriminatory treatment based on ethnic origin, race and religion: Judgment of 10 May 2001, No. 25781/94, paras. 309-310.

<sup>62</sup> See *Price vs United Kingdom*, Judgment of 10 July 2001, para. 28 (a severely disabled female detainee compelled to rely on the assistance of male prison officers to use a toilet).

<sup>63</sup> The Commission found rape by Turkish soldiers to constitute inhuman treatment in *Cyprus vs Turkey*: (1975) 2 DR 125, paras. 358-74. A Grand Chamber of the Court considered an act of rape committed by a State official against a detainee as torture: *Aydin vs Turkey*, Judgment of 25 September 1997.

another sexual assault is an obvious example that can reveal both degrading and inhuman aspects. Further, conditions of detention or imprisonment that fail to pay adequate regard to the special needs of women, including sanitary and maternity requirements, may amount not only to a physical but also to a mental form of degrading or inhuman treatment. The element of age can sway the outcome of determining the minimum threshold of severity in relation to the detention conditions of an elderly person, or in relation to a threat of corporal punishment against a young pupil. Age provides an essential criterion for evaluating whether subjecting juvenile offenders to the procedure of an adult court would exceed acceptable bounds and reveal degrading treatment in accordance with Article 3. Unless special aggravating factors can be demonstrated, the cumulative effects of attribution of criminal responsibility to juvenile offenders, use of a public and adversarial process in an adult court, disclosure of identity and exposure to the media, would not *per se* meet the threshold of severity sufficient to call Article 3 into play.<sup>64</sup>

Where mental anguish is alleged to be caused by separation from one's family, as in cases of deportation or expulsion, but also in the child care and foster parent system,<sup>65</sup> the prevailing tendency of the Strasbourg organs is to treat such complaints as absorbed into the right to family life under Article 8,<sup>66</sup> finding it unnecessary to make separate ascertainment under Article 3. In contrast, the cogency of claims based on Article 3 has proved more potent with regard to arguments that distress and anguish caused by disappearance of family members reached the minimum threshold of ill-treatment. As established in *Kurt vs Turkey*, 'severe mental distress and anguish' experienced over a prolonged period by a close family member of a disappeared person would, in view of the uncertainly, doubt and apprehension, meet the level of 'degrading' or even 'inhuman' treatment. As with 'anticipatory ill-treatment', there appears to be a hesitancy on the part of the

<sup>64</sup> *V. vs United Kingdom*, Judgment of 16 December 1999, paras. 72-80. In contrast, the Court found a violation of Article 6 as regards the trial and the initial uncertainty of a tariff setting: *ibidem*, paras. 81-91.

<sup>65</sup> See *Olsson vs Sweden*, Judgment of 24 March 1988, A 130, paras. 85-87, Commission's Report of 2 December 1986; and *Aminoff vs Sweden*, No. 10554/83, Decision of 15 May 1985, 43 DR 120.

<sup>66</sup> See *Moustaquim vs Belgium*, Judgment of 18 February 1991, A 193; *Beldjoudi vs France*, Judgment of 26 March 1992, A 234-A; and *X and Y vs Switzerland*, Nos. 7289/75 and 7349/76, Decision of 14 July 1977, 20 Ybk 372, at pp. 407-408, para. 4. By contrast, in *Berrehab and Koster vs the Netherlands*, No. 10730/84, the Commission pointed out that where an expulsion raised issues under Article 8 as to family life, a complaint under Article 3 based on the same facts should not be rejected: Decision of 8 March 1985, 41 DR 196, para. 2. However, both the Court and the Commission took the view that the applicant did not undergo the level of suffering inherent in the notions of 'inhuman' or 'degrading' treatment: Judgment of 21 June 1988, A 138, pp. 16-17; and Commission's Report of 7 October 1986, para. 92.

Court to specify which category of ill-treatment is appropriate.<sup>67</sup> In the subsequent *Çakici vs Turkey*, contrary to the Commission's opinion,<sup>68</sup> a Grand Chamber of the Court attempted to constrain the *Kurt* judgment, curbing the possibility that a family member of a disappeared person can generally claim to be a victim under Article 3.<sup>69</sup> A Grand Chamber's narrow construction seems to be prompted by wariness in conferring upon a wide circle of family members the entitlement to victim status under Article 34.<sup>70</sup> There must exist 'special factors' distinguishing the suffering from emotional distress inevitably encountered by relatives of a victim of a serious violation of human rights.<sup>71</sup> No such special factors that would warrant an additional finding of a violation of Article 3 were found to exist on the facts of *Çakici*.<sup>72</sup> The subsequent decision of a Chamber of the Court in *Çiçek vs Turkey*, however, cleaved to its broader notion of victim as set forth in the *Kurt* Case,<sup>73</sup> raising the question of how future decisions of a Grand Chamber would respond to such a 'rebellious' move by a Chamber.

<sup>67</sup> So far only in *Orhan vs Turkey* did the Court specifically refer to 'inhuman treatment' endured by the family member of disappeared persons in breach of Article 3: Judgment of 18 June 2002, paras. 357-360. In the *Kurt* case, while the Commission found 'inhuman and degrading treatment' with respect to the acute suffering experienced by the mother of a disappeared person, the Court, though finding a violation of Article 3, stopped short of identifying a form of proscribed conditions: *Kurt vs Turkey*, Commission's Report of 5 December 1996 (19 votes to 5); and Judgment of 25 May 1998, paras. 133-134 (6 votes to 3).

<sup>68</sup> In its report of 12 May 1998, the Commission found that the applicant could claim to be a victim of 'inhuman and degrading treatment'; as referred to in: *Çakici vs Turkey*, Judgment of 8 July 1999, para. 96.

<sup>69</sup> *Çakici vs Turkey*, Judgment of 8 July 1999, para. 98.

<sup>70</sup> The first sentence of Article 34 reads that '[t]he Court may receive applications from any person (...) or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto'. Compare cases where family members of a disappeared person claimed mental suffering under Article 3 with the cases where the Strasbourg organs adopted a flexible twist on the so-called 'victim requirement' under Article 34 (ex 25). They have admitted the complaints by homosexuals alleging a violation of Article 8 on the basis of mere existence of law penalising private homosexual acts, without concrete measures taken against them: *Dudgeon vs United Kingdom*, Judgment of 22 October 1981, A 45; *Norris vs Ireland*, Judgment of 26 October 1988, A 142; and *Modinos vs Cyprus*, Judgment of 22 April 1993, A 259. For analysis of the *locus standi* under the ECHR, see Zwart, T., *The Admissibility of Human Rights Petitions – The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht, Kluwer, 1994, at pp. 50-71.

<sup>71</sup> The Grand Chamber suggested the following five such special factors: 'the proximity of the family tie', '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': *Çakici vs Turkey*, Judgment of 8 July 1999, para. 98. These factors should be treated as merely exemplary and not exhaustive.

<sup>72</sup> The conclusion was reached with 14 votes to 3. In contrast, a Grand Chamber agreed that the applicant met the standard of proof beyond reasonable doubt as regards the claim that his brother endured torture during his detention: *ibidem*, para. 92.

<sup>73</sup> *Çiçek vs Turkey*, Judgment of 27 February 2001, paras. 173-174.

#### 1.4. Horizontal Effects and Positive Obligations

The accumulated case-law since the *Soering* decision in 1989 concerning anticipatory ill-treatment in a third country, has witnessed liberal judicial policy gradually broadening sources of risk to include conduct of private actors such as terrorists and organised criminals.<sup>74</sup> Reflecting this, the policy approach of the Strasbourg organs has moved to recognise positive obligations on States to prevent ill-treatment committed by private actors *within* the territory of a Member State.<sup>75</sup> It was in the *A vs United Kingdom* decision of 1997 involving corporal punishment at home that the Court unambiguously endorsed the horizontal effects of Article 3 based on such positive duties.<sup>76</sup> As noted by McCorquodale and La Forgia,<sup>77</sup> it has been fully established in international human rights law that positive obligations on States encompass a duty to conduct prompt and effective investigation even where it is a private person that infringes human rights.<sup>78</sup> In the case of Article 3 ECHR, this duty is intertwined with the right to an effective remedy under Article 13.<sup>79</sup> The duty to investigate alleged violations of human rights can be understood as part of what some commentators regard as an emerging customary international law obligation to investigate, prosecute and provide redress.<sup>80</sup> The outcome of recognising responsibility of a State for acts of private persons might, in the future, prove sustainable long past the point where the traditional line drawn between vertical and horizontal effects of human rights could be said to be blurred.

The recognition of horizontal effects (*Drittwirkung*) of Article 3 within the discourse of the ‘privatisation’ of human rights concepts,<sup>81</sup> will be

<sup>74</sup> For analysis of torture by non-State actors in international human rights law in general, see McCorquodale and La Forgia, *loc.cit.* (note 39).

<sup>75</sup> Harris *et al.*, *op.cit.* (note 2), at p. 57, footnote 20.

<sup>76</sup> *A. vs United Kingdom*, Judgment of 23 September 1998, para. 22 (however, the Court failed to identify a specific type of ill-treatment).

<sup>77</sup> McCorquodale & La Forgia, *loc.cit.* (note 39), at p. 200.

<sup>78</sup> The Human Rights Committee pronounced in its General Comment on Article 7 that ‘it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity’: General Comment 20, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 2.

<sup>79</sup> See, for instance, *Z vs United Kingdom*, Judgment of 10 May 2001, para. 109.

<sup>80</sup> See McCorquodale & La Forgia, *loc.cit.* (note 39), at p. 201; Méndez, J.E., ‘Accountability for Past Abuses’, *Human Rights Quarterly*, Vol. 19, 1997, p. 261; and Rhot-Arriaza, N., ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, *California Law Review*, No. 78, 1990, p. 449.

<sup>81</sup> See Clapham, A., *Human Rights in the Private Sphere*, Oxford, Clarendon, 1993. For the doctrine of *Drittwirkung* in particular, see Alkema, E.A., ‘The third-party applicability or ‘Drittwirkung’ of the European Convention on Human Rights’, in: Matscher, F., and Petzold, H. (eds.), *Protecting Human Rights: the European Dimension – studies in honour of Gérard J. Wiarda*, Cologne, Carl Heymanns, 1988, p. 34; and Jagers, N., ‘The Legal Status of the Multinational Corporation Under International Law’, in: Addo, M.K. (ed.), *Human Rights and the Responsibilities of Transnational Corporations*, Deventer, Kluwer, 1999, p. 259, section 2.

pivotal for addressing issues specifically of gender concern. Such recognition serves to pierce the conceptual framework of international law based on a public/private distinction that leaves out of account infringements of women's rights in the private sphere. It can benefit women's struggle against domestic violence, marital rape<sup>82</sup> and violence associated with traditional practices, all of which remain invisible in many societies.<sup>83</sup> In her second report (1996), the UN Special Rapporteur on Violence against Women classified severe forms of domestic violence as torture.<sup>84</sup> The outcome of these efforts to invoke *Drittwirkung* of Article 3 strengthens the move to forge a *general* nexus between violence against women and abuse of human rights.<sup>85</sup>

Horizontal effects of Article 3 should be considered valid not only as regards physical ill-treatment but also in relation to *mental* suffering. In that sense, ideally, a threat of torture or of rape by private actors should invite the Court to review the adequacy of steps taken by national authorities with as much rigour as in cases of actual physical assault. Mental suffering on a non-vertical arena can include uneasiness and distress caused by constant exposure to noise pollution from private factories. Application of Article 3 to horizontal cases of mental anguish, apart from its application to physical assaults themselves, can furnish an additional and potentially forceful tool for victims of trauma caused by private or domestic violence. However, there are impediments to broadening State responsibility under Article 3 for mental suffering inflicted by private sources. Besides the difficulty of obtaining evidence of the requisite causal relationship, an obstacle lies in reconciling efforts to amplify the protective reach of Article 3 with the law on State responsibility, which *generally* requires that elements of *culpa* or fault on the part of a State must be established to incur responsibility for its omission.<sup>86</sup>

There may arise a claim that the omission of a State to provide adequate legal protection for the victim of an assault committed by a private actor

<sup>82</sup> Note that the European Court of Human Rights did not find conviction for marital rape to contravene Article 7 of the ECHR (prohibition of retroactive application of criminal law): *S.W. vs United Kingdom*, Judgment of 22 November 1995, A 335-B; and *C.R. vs United Kingdom*, Judgment of 22 November 1995, A 335-C.

<sup>83</sup> In her preliminary report, the Special Rapporteur on Violence against Women, Radhika Coomaraswamy, criticised governmental inaction with respect to these types of violence against women and emphasised that 'States are under a positive duty to prevent, investigate and punish crimes associated with violence against women': UN Doc. E/CN.4/1995/42 (1994), 22 November 1994, para. 72 (available at <http://www1.umn.edu/humanrts/commission/thematic51/42.htm>).

<sup>84</sup> Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Radhika Coomaraswamy, 5 February 1996, UN Doc. E/CN.4/1996/53, paras. 42-50.

<sup>85</sup> See, for instance, Charlesworth, H., and Chinkin, C., *The Boundaries of International Law – A Feminist Analysis*, Manchester, Manchester Univ. Press, 2000, at pp. 234-236.

<sup>86</sup> See *Corfu Channel Case (Merits)*, *United Kingdom vs Albania*, ICJ Reports, 1949, 4, Dissenting Opinion of Judge Krylov.

causes mental anguish sufficient to reach the threshold of Article 3. Though this scenario resembles instances of horizontal effects of Article 3, such a claim is grounded on the familiar, vertical paradigm of human rights violations, namely on the mental form of maltreatment for which State authorities are directly responsible. The Strasbourg organs have focused on the *physical* side of maltreatment and showed reluctance to uphold such a claim. In *X and Y vs the Netherlands*,<sup>87</sup> where sexual abuse committed against a mentally handicapped girl at a privately run institution was at issue, the applicants' complaint under Article 3 was that mental suffering as a result of the failure by the Dutch Government to proffer legal safeguards against sexual abuse in private constituted not only degrading but also inhuman treatment. According to the then Dutch criminal law, a perpetrator of a sexual assault on a girl aged more than sixteen was rendered immune from criminal proceedings, because the victim, on account of a mental handicap, was unable to determine her wishes. In its opinion in 1983, the Commission found no 'close and direct link' between negligence by the Netherlands' legislator in the protection of the sexual integrity of vulnerable persons, and the field of protection covered by Article 3.<sup>88</sup> The Court took an evasive course, finding a breach of Article 8 and obviating the need to carry out a separate examination under Article 3.<sup>89</sup> The applicants in *X & Y vs the Netherlands* were forced to rely on the claim of mental suffering precisely because at that juncture it was inconceivable that the Court would endorse the application of Article 3 to physical assaults in a private context. In view of the subsequent landmark decision of *A vs United Kingdom*,<sup>90</sup> which set the course for stretching the parameters of State responsibility under Article 3, it may simply be a doctrinal question whether in a scenario like *X & Y vs the Netherlands*, there remains any scope, or indeed necessity, of separately identifying a violation of Article 3 with respect to *mental* pain. It is most likely that the Court would be satisfied with examination of physical maltreatment alone or would find a violation of Article 3 on the basis of the combined effects of physical and mental suffering.

Where States are requested to employ positive measures to alleviate physical and mental suffering not imputable to any actor, official or private, but such measures would result in the infringement of another fundamental right protected under the Convention, this poses a dilemma for the Court. In the *Pretty Case*, the applicant claimed that suffering from an irreversible disease in its final stages, leading to imminent death in a distressful and undignified manner, qualified as degrading treatment. She alleged that the

<sup>87</sup> *X and Y vs the Netherlands*, Commission's Report of 5 July 1983, A 91, at p. 18.

<sup>88</sup> The Commission noted that 'sexual abuse and inhuman or degrading treatment (...) are by no means congruent concepts. The 'gap' in the law relating to the protection of the sexual integrity of vulnerable persons cannot therefore be assimilated to a 'gap' in the protection of persons against inhuman or degrading treatment': *idem*.

<sup>89</sup> *X and Y vs the Netherlands*, Judgment of 26 March 1985, A 91, para. 34.

<sup>90</sup> *A vs United Kingdom*, Judgment of 23 September 1998.



refusal of the British Director of Public Prosecutions (DPP) to grant immunity from prosecution to her husband if he were to assist her to commit suicide, would amount to failure to protect her from physical and mental suffering, constituting degrading and even inhuman treatment within the meaning of Article 3. Distinguishing the instant case from the case of *D vs United Kingdom* where an AIDS sufferer was to be removed to a country lacking appropriate medical facilities to treat his illness,<sup>91</sup> the Court noted that '[t]here is no comparable *act* or 'treatment' on the part of the United Kingdom in the present case'.<sup>92</sup> The Court's reasoning suggests circumspection in relation to the claim based on the *omission*, rather than on an act, of a State that responsibility should be established for degrading or inhuman conditions not attributable to any actor. The Court's prudent approach also indicates limits, in the absence of European consensus on the legalisation of euthanasia,<sup>93</sup> on a teleological move to expand positive obligations to cover acts contravening another absolute right, the right to life.

## 1.5. Field of Application

### 1.5.1. General Overview

The vast majority of complaints of degrading treatment or punishment under Article 3 have arisen from deprivation of liberty and ill-treatment in detention. However, the two Strasbourg organs have extended the application of degrading treatment or punishment under Article 3 to a variety of areas such as immigration, expulsion and corporal punishment both at educational institutions and at home. Discrimination based on race<sup>94</sup> or sex<sup>95</sup> may occasion a degree of humiliation sufficient to be recognised as degrading treatment, albeit that Article 14, of its nature, incorporates condemnation of the 'degrading' aspects of sexual and other forms of discrimination.<sup>96</sup> Similarly, there has been a recognition that the failure to

<sup>91</sup> *D vs United Kingdom*, Judgment of Judgment of 2 May 1997.

<sup>92</sup> *Pretty vs United Kingdom*, Judgment of 29 April 2002, para. 53 (emphasis added).

<sup>93</sup> See Keown, J., *Euthanasia, Ethics and Public Policy: An Argument against Legislation*, Cambridge, Cambridge University Press, 2002.

<sup>94</sup> *Twenty-five Applications vs United Kingdom (East African Asian cases)*, Decision of 10 October 1970, 13 Ybk 928, at p. 994. The Commission actually admitted that discrimination based on race could amount to degrading treatment in the sense of Article 3. See also *Nos 9214/80, 9473/81 and 9474/81, Mmes X, Cabales and Balkandali vs United Kingdom*, Decision of 11 May 1982, 25 Ybk, Part II, Chapter 1, B, p. 159, at pp. 178-179.

<sup>95</sup> In *Abdulaziz, Cabales and Balkandali vs United Kingdom*, the Court suggested that if a differential treatment on the ground of sex in the immigration control denotes contempt or lack of respect for personality, this might constitute degrading treatment in the sense of Article 3: Judgment of 28 May 1985, A 94, para. 91.

<sup>96</sup> *Abdulaziz, Cabales and Balkandali vs United Kingdom*, A 94, Commission's Report of 12 May 1983, para. 122.

issue a nomadic group with aliens' passports or other identity papers might raise the issue of degrading treatment in breach of Articles 3 and 14.<sup>97</sup> It is also possible to argue that a level of psychological burden and distress, which is sufficiently grave to cross the threshold of degrading treatment, might be recognised in relation to intrusive and humiliating treatment of homosexuals.<sup>98</sup> Further, arguments grounded on degrading treatment assist post-operational transsexuals suffering distressful and confusing state of mind (gender dysphoria). Their predicament may be compounded by a sense of powerlessness and humiliation created by the refusal of the State to acknowledge their newly acquired sex on the birth certificate, so as to enable the full and effective guarantee of their right to realise individual autonomy and self-fulfilment in society.

The dynamism of the case-law has expanded the field of application of Article 3, possibly covering the protection against medical treatment of an experimental nature carried out without the fully informed consent of the patient.<sup>99</sup> Article 3 may be applied to neglect by a State of environmental issues,<sup>100</sup> and to degrading socio-economic conditions.<sup>101</sup> Further, the expanding scope of State responsibility arising from Article 3 may have implications for gender issues, including domestic violence against women,<sup>102</sup> sexual harassment at the workplace with official complicity, and abortion issues.<sup>103</sup>

<sup>97</sup> *48 Kalderas Gipsies vs Germany and the Netherlands*, Nos 7823/77-7824/77 (joined), Decision of 6 July 1977, 11 DR 221, at 231.

<sup>98</sup> While the Court has not yet agreed that the level of distress and humiliation experienced by homosexuals reached the minimum level of severity, it has not excluded such possibility: *Smith & Grady vs United Kingdom*, Judgment of 27 September 1999, paras. 122-123; and *Beck, Copp and Bazeley vs United Kingdom*, Judgment of 22 October 2002, paras. 54-55.

<sup>99</sup> *X vs Denmark*, No 9974/82, Decision of 2 March 1983, 32 DR 282, at 283.

<sup>100</sup> In this regard, see *López Ostra vs Spain*, which involved health problems and nuisance arising from a waste-treatment plant. While finding that the Spanish authorities had omitted to take necessary measures to ensure the right protected under Article 8, both the Commission and the Court took the view that the conditions in which the applicant had been obliged to live did not attain such a level of severity as to disclose degrading treatment contrary to Article 3: Judgment of 9 December 1994, A 303-C, para. 59; and Commission's Report of 31 August 1993, *ibidem*, para. 61.

<sup>101</sup> The Commission implied this possibility in *Francine van Volsem vs Belgium*, No 14641/89, Decision of 9 May 1990: 2 *Revue Universelle des Droits de l'Homme*, 1990, at pp. 384-385. See also Cassese, A., 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?', 2 *EJIL* p. 141, 1991.

<sup>102</sup> See Grdinic, E., 'Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence', *Hastings Int'l & Comp. L. Rev.*, No. 23, 2000, p. 217.

<sup>103</sup> *H vs Norway*, No 17004/90, Decision of 19 May 1992, 73 DR 155. In view of the absence of any material substantiating the allegation, the Commission, however, rejected the complaint that the termination of pregnancy would inflict pain on a 14-week-old foetus in a manner contrary to Article 3. Another part of his complaint that the refusal to receive the remains of the foetus amounted to degrading treatment was also rejected, *ibidem*, at pp. 168-169.

### 1.5.2. Discretionary Treatment of Convicted Criminals

Member States are endowed with discretionary power to draft and implement penal policies,<sup>104</sup> including the parole, sentencing, and conditions of treatment of convicted criminals.<sup>105</sup> It needs to be explored at what point the exercise of such a discretionary power oversteps the boundary of gravity required by degrading treatment or punishment. As in other areas, there is no room for warranting degrading treatment on the basis of extraneous public policy, including even national security grounds, which remain a determinative factor only in evaluating the adequacy and proportionality of punishment to the crimes committed.<sup>106</sup>

Obstacles to identifying consistent guiding principles on the assessment of subjective elements required for degrading treatment can be found in an analysis of the case-law. To expose a convicted criminal in public by taking him through a town with handcuffs and convict's dress has been considered 'undesirable', but not so serious as to amount to degrading treatment.<sup>107</sup> Nor has the recall of a person of unsound mind with a criminal record to a mental hospital after almost three years of probation been found sufficiently severe to bring Article 3 into play.<sup>108</sup> Further, in the absence of sufficiently proven, violent clashes, the policy of integrating loyalist and republican prisoners in Northern Ireland has not, in itself, been deemed as overstepping the threshold of degrading treatment.<sup>109</sup> A court order for a psychiatric examination of a lawyer in connection with criminal proceedings might throw doubt on his professional reputation, but the negative impact on his career has not been considered serious enough to meet the minimum level of gravity required for degrading treatment.<sup>110</sup> In contrast, the refusal to provide a detainee with the opportunity to change his trousers smeared with faeces during an interrogation has been held to disclose degrading treatment.<sup>111</sup>

<sup>104</sup> In *Hogben vs United Kingdom*, No. 11653/85, Decision of 3 March 1986, 46 DR 231, para. 13.

<sup>105</sup> Addo and Grief, *loc.cit.* (note 2), at p. 189.

<sup>106</sup> *Treholt vs Norway*, No. 14610/89, Decision of 9 July 1991, 71 DR 168 (sixteen-month solitary confinement during detention on remand).

<sup>107</sup> *X vs Austria*, No. 2291/64, Decision of 1 June 1967, 24 CD 20 at 31.

<sup>108</sup> *X vs United Kingdom*, No. 6998/75, Decision of 14 May 1977, 20 Ybk 295.

<sup>109</sup> *McQuiston and Others vs United Kingdom*, No. 11208/84, Decision of 4 March 1986, 46 DR 182. Compare this with *Pantea vs Romania*, Judgment of 3 June 2003, paras. 185-187 (failure to separate violent inmates from a victim of their assault).

<sup>110</sup> *X vs Germany*, No. 8334/78, Decision of 7 May 1981, 24 DR 103, at 105, para. 1.

<sup>111</sup> *Hurtado vs Switzerland*, Commission's Report of 8 July 1993, A. 280-A (friendly settlement before the Court). The Commission also found 'inhuman treatment' in relation to the absence of immediate medical treatment for the applicant, who was injured when a stun grenade was used in his arrest: *ibidem*, para. 79.

### 1.5.3. Detention and Custody

A litany of allegations of torture or inhuman treatment has arisen from assaults committed by police or prison officers against detainees in custody or in remand.<sup>112</sup> What is equally crucial in strengthening the effective guarantee of Article 3 is the application of this provision to general or special conditions of detention, especially in reliance on the two lower categories of maltreatment, namely, degrading or inhuman treatment. The flexible nature of the benchmark of degradingness, as established in the case-law, and the possibility of stringent review<sup>113</sup> provide inducements for national authorities to be vigilant in laying down and implementing the terms and conditions of detention, including disciplinary sanctions, which must not outweigh the level of humiliation, suffering or hardship inherent in detention.<sup>114</sup>

National authorities must comply with such ‘soft-law’ documents as the United Nations Minimum Standard Rules for the Treatment of Prisoners,<sup>115</sup> the United Nations Code of Conduct for Law Enforcement Officials,<sup>116</sup> the Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’),<sup>117</sup> and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>118</sup> Further, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>119</sup> emphasises the

<sup>112</sup> See, for instance, *Dikme vs Turkey*, Judgment of 11 July 2002, paras. 95-96 (torture); *Büyükdag vs Turkey*, Judgment of 21 December 2000, paras. 55-56 (inhuman and degrading treatment); and *Hulki Güneş vs Turkey*, Judgment of 19 June 2003, para. 74 (inhuman and degrading treatment).

<sup>113</sup> The rigour with which the minimum level of degrading treatment needs to be assessed can be illustrated by the principle that even in circumstances of revolt and non-cooperation on the part of applicants, a Member State is not absolved from its obligations under Article 3: *Ensslin, Baader and Raspe vs Germany*, Nos 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978, 14 DR 64, at 111; *McFeeley et al. vs United Kingdom*, No 8317/78, Decision of 15 May 1980, 20 DR 44 at 81; *X vs United Kingdom*, No 8231/78, Decision of 6 March 1982, 28 DR 5, at 32; *R., S., A. and C. vs Portugal*, Nos 9911/82 and 9945/82 (joined), Decision of 15 March 1984, 36 DR 200, at 208; and *Dhoest vs Belgium*, No 10448/83, Commission’s Report of 14 May 1987, 55 DR 5, at 21.

<sup>114</sup> See, *inter alia*, *Valasinas vs Lithuania*, Judgment of 24 July 2001, para. 121; and *Öcalan vs Turkey*, Judgment of 12 March 2003, para. 231.

<sup>115</sup> ECOSOC Resolution 663C (XXIV) (1957) and ECOSOC Resolution 2076 (LXII) (1977), which adopted an additional article, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm).

<sup>116</sup> General Assembly Resolution 34/169 (1979), available at [http://www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm).

<sup>117</sup> GA Resolution 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN Doc. A/40/53 (1985).

<sup>118</sup> GA Resolution 43/173, A/RES/43/173 (1988).

<sup>119</sup> See Cassese, A., ‘A New Approach to Human Rights: The European Convention for the Prevention of Torture’, 83 AJIL, 1989, p. 128; Evans, M., and Morgan, R., ‘The European Convention for the Prevention of Torture: Operational Practice’, 41 ICLQ, 1992, p. 590; ‘The European Torture Committee: Membership Issues’, 5 EJIL, 1994, p. 249; and Murdoch, J., ‘The Work of the Council of Europe’s Torture Committee’, 5 EJIL, 1994, p. 220.

prevention of torture or other mistreatment, obliging the Member States to allow visits by the Committee established by this Convention to ‘any place within its jurisdiction where persons are deprived of their liberty by a public authority’.<sup>120</sup> The successful experience in averting torture and other forms of mal-treatment under this Convention has prompted the United Nations to adopt the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, emulating the mechanism of ‘preventive supervision’.<sup>121</sup> In the context of the ICCPR, issues relating to conditions of detention have been examined under Article 10, which provides the right of an individual person deprived of his/her liberty to be treated with humanity and with respect for dignity. Article 10, as a *lex specialis*, complements Article 7, and the Human Rights Committee must decide whether to find only a violation of Article 10<sup>122</sup> or to ascertain an additional and separate breach of Article 7 based on degrading treatment.<sup>123</sup>

The case-law generally suggests rigorous review except where security requirements weigh heavily. From the outset, the Commission has declared a number of cases admissible,<sup>124</sup> including a complaint by terrorist suspects in Northern Ireland detained in custody,<sup>125</sup> and a complaint from an adolescent who, from the age of 11 to 13, lived under threat of an expulsion order involving his detention for a short period.<sup>126</sup> The combined effects of detaining death row prisoners in restricted cells, which have no access to natural light, and of denying them outdoor exercise are likely to be censured as degrading.<sup>127</sup> Further, the level of humiliation inherent in strip-

<sup>120</sup> Article 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.

<sup>121</sup> GA Res. A/RES/57/199, adopted on 18 December 2002 by a vote of 127 in favour, 4 against (Nigeria, USA, Palau, the Marshall Islands), and 42 abstentions. See Quéniwet, N., *New Hopes on the International Level for the Prevention of Torture and Other Forms of Ill-Treatment BOFAXE*, No. 232 E, 19 January 2003; <http://www.ifhv.de/>.

<sup>122</sup> See, for instance, *Christopher Brown vs Jamaica*, No. 775/1997, Human Rights Committee, 23 March 1999, para. 6.5 (circumstances of pre-trial detention); and *Eversley Thompson vs Saint Vincent and the Grenadines*, No. 806/1998, Human Rights Committee 18 October 2000, para. 8.4. The case-law of the Human Rights Committee is available at <http://www.sim.law.uu.nl/SIM/>, documentation site of the Netherlands Institute of Human Rights (SIM).

<sup>123</sup> See, for instance, *Christopher Brown vs Jamaica*, No. 775/1997, 23 March 1999, para. 6.13 (conditions of detention at a specific prison).

<sup>124</sup> Apart from the cases described, see *Kornmann vs Germany*, No 2686/65, Decision of 13 December 1966, 9 Ybk 494.

<sup>125</sup> *Donnelly and Others vs United Kingdom*, Nos. 5577/72-5583/72 (joined), Decision of 5 April 1973, 16 Ybk 212.

<sup>126</sup> *Bulus vs Sweden*, No 9330/81, Decision of 19 January 1984, 35 DR 57; Friendly settlement, Commission’s Report of 8 December 1984, 39 DR 75.

<sup>127</sup> See, inter alia, *Aliev vs Ukraine*, Judgment of 29 April 2003, para. 148; *Dankevich vs Ukraine*, Judgment of 29 April 2003, para. 141; *Khokhlich vs Ukraine*, Judgment of 29 April 2003, para. 178; *Kuznetsov vs Ukraine*, Judgment of 29 April 2003, para. 125 (the situation of the applicant in this case was compounded by his solitary confinement); *Nazarenko vs Ukraine*, Judgment of 29 April 2003, para. 141; and *Poltoratskiy vs Ukraine*, Judgment of 29 April 2003, para. 145.

searches, which in itself may not exceed the bounds of what is considered as necessary concomitants of detention for security purposes, can acquire the proportion of degradingness due to attendant factors,<sup>128</sup> including the presence of a woman.<sup>129</sup> The national authorities are allowed to remove detainees from association with other prisoners for security, disciplinary or protective reasons.<sup>130</sup> The prospect of serving a prolonged period in prison does not in itself form a violation of Article 3 unless there are aggravating conditions.<sup>131</sup> However, expelling an individual person to a third State where s/he faces a 'real risk' of being subjected to 'death row phenomenon' for a lengthy period, with a consequent sense of anxiety and anguish, is incompatible with Article 3, and a guarantee that such punishment will not be meted out must be obtained from that non-Contracting State.<sup>132</sup>

There is a general positive obligation to regularly review conditions of detention to meet the requirements of the health and well-being of a detainee or a prisoner.<sup>133</sup> If a detainee requires either special medical treatment in view of his/her health problem, as in the case of an HIV sufferer,<sup>134</sup> a mentally ill person<sup>135</sup> and a drug addict,<sup>136</sup> or special

<sup>128</sup> See *Iwanczuk vs Poland*, Judgment of 15 November 2001, paras. 58-59 ('degrading treatment' in relation to strip-searches accompanied by verbal abuse by prison guards); and *Lorsé and Others vs the Netherlands*, Judgment of 4 February 2003, paras. 70-74 ('inhuman or degrading treatment' as regards the combination of routine strip-searches applied for more than 6 years and stringent security regime). Compare these with *McFeeley and Others vs UK*, No. 8317/78, Commission's Decision of 15 May 1980, 20 DR 44, paras. 60-61 ('close body' searches, including anal inspections).

<sup>129</sup> See *Valasinas vs Lithuania*, Judgment of 24 July 2001, para. 117.

<sup>130</sup> *No 5310/71, Ireland vs United Kingdom*, Commission's Report of 25 January 1976, at 379. Compare *Pantea vs Romania*, Judgment of 3 June 2003, paras. 185-187 (the detention in the same cell of a prisoner, a victim of physical assault, together with the inmates who perpetrated it).

<sup>131</sup> *Treholt vs Norway*, No. 14610/89, Decision of 9 July 1991, 71 DR 168, at 191.

<sup>132</sup> *Soering vs United Kingdom*, Judgment of 7 July 1989, A 161. Appraisal of whether the circumstances surrounding the implementation of capital punishment would reach the minimum level of severity concentrated on four conditions: first, the manner in which a death penalty is executed; second, the personal circumstances of the applicant, including age, sex and health; third, the disproportionate nature of the expected punishment in relation to the gravity of the crime committed; and fourth, the conditions of detention awaiting execution: *ibidem*, para. 104. Contrast *E.M. Kirkwood vs United Kingdom*, No 10479/83, Decision of 12 March 1984, 37 DR 158, at 184-190.

<sup>133</sup> *Harris et al., op.cit.* (note) 2, at 71. See *McFeeley vs United Kingdom*, No. 8317/78, 20 DR 44; and *B vs Germany*, No. 13047/87, 55 DR 271.

<sup>134</sup> *Ayala vs Portugal*, No 23663/94, Decision of 23 May 1995 (declared admissible with respect to complaints, based on Articles 3 and 8, of detention conditions and lack of medical assistance); Commission's Report of 21 October 1996 (friendly settlement).

<sup>135</sup> *Kudla vs Poland*, Judgment of 26 October 2000, para. 94.

<sup>136</sup> *McGlinchey and Others vs UK*, Judgment of 29 April 2003, paras. 57-58 (failure of the prison authority to take effective measures for a heroin addict suffering from serious weight loss and dehydration).

arrangements because of his/her disability,<sup>137</sup> a State is obliged under Article 3 to ensure that the conditions of detention are suited to his/her poor state of health, and that s/he receives adequate medical, palliative and psychological treatment in detention. The alternative is to grant provisional release and hospitalisation to enable proper medical care. Failure to do either may give rise to degrading or even inhuman treatment.<sup>138</sup> On this matter, the Commission's earlier decision must be criticised for its apparent reluctance to scrutinise the adequacy of medical treatment in detention, which was in that case questioned even by the relevant medical authorities.<sup>139</sup>

As is exemplified by the controversial treatment of the Al-Qaeda and the Taliban soldiers at the special detention centre in Guantanamo Bay,<sup>140</sup> one of the most daunting challenges faced by contemporary democracies is how to reconcile the demand for special security measures against dangerous detainees, such as terrorists and violence-prone organised criminals, with international human rights standards based on the right to human dignity and on freedom from maltreatment. A close look at the approaches of the Strasbourg organs suggests that their evaluation of the severity of such security measures relative to the threshold of degrading treatment hinges on three elements:<sup>141</sup>

- (i) the conditions under which such measures are applied against a detained person, including their duration and stringency;
- (ii) the continued relevance of the objective of the measures pursued; and
- (iii) the effects of the measures on the personality of a detained person and on his/her physical and mental health.

<sup>137</sup> *Price vs United Kingdom*, Judgment of 10 July 2001, paras. 21-30 (detention of a four-limb-deficient thalidomide victim suffering from defective kidneys).

<sup>138</sup> *McGlinchey and Others vs UK*, Judgment of 29 April 2003, paras. 57-58.

<sup>139</sup> *Chartier vs Italy*, No. 9044/80, Commission's Report of 8 December 1982, 33 DR 41 (first declared admissible in *X vs Italy*, No. 9044/80, Decision of 17 December 1981, 27 DR 200; Committee of Ministers' Resolution DH (83) 12, 23 September 1983). See also the complaint brought by a detainee suffering from diabetes and cardio-vascular disorders: *De Varga-Hirsch vs France*, No. 9559/81, Decision of 9 May 1983, 33 DR 158, at 213-214.

<sup>140</sup> For discussions on this issue, see , 'Agora: Military Commission', (2002) 96 AJIL pp. 320-358; Paust, and Jordan J., 'Antiterrorism Military Commission: the Ad Hoc DoD Rules of Procedure', 23 *Michigan Journal of International Law*, 2002, p. 677.

<sup>141</sup> *Kröcher and Möller vs Switzerland*, No. 8463/78, Commission's Report of 16 December 1982, 34 DR 24, at 53, para. 62. See also *Ensslin, Baader and Raspe vs Germany*, Nos 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978, 14 DR 64, at 109; *McFeeley et al. vs United Kingdom*, No 8317/78, Decision of 15 May 1980, 20 DR 44, at 82, para. 49; *X vs Denmark*, No. 8395/78, Decision of 16 December 1981, 27 DR 50, at 53; *R vs Denmark*, No. 10263/83, Decision of 11 March 1985, 41 DR 149, at 153; *Hauschildt vs Denmark*, No 10486/83, Decision of 9 October 1986, 49 DR 86, at 97; *Dhoest vs Belgium*, No. 10448/83, Commission's Report of 14 May 1987, 55 DR 5, at 21; and *Treholt vs Norway*, No. 14610/89, Decision of 9 July 1991, 71 DR 168, at 191 and 193.

Moreover, it has been well-established in the case-law<sup>142</sup> that assessment of the minimum level of degrading treatment needs to take into consideration the cumulative effect of conditions.<sup>143</sup> It is discernible that the Court has increasingly recognised this mode of assessment.<sup>144</sup>

Earlier decisions of the Commission drew on the notion of a reasonable balance that was to be struck between the demand of security controls and the respect for individual rights of detainees,<sup>145</sup> albeit with a conspicuous tendency to prioritise national security grounds in the context at least of law enforcement.<sup>146</sup> Though solitary confinement of a detainee may exceptionally be justified on national security grounds,<sup>147</sup> the prolonged nature of such confinement should be deemed as overstepping the bounds of lawful treatment, especially where s/he is detained on remand.<sup>148</sup> Detention incommunicado in a small cell without ventilation or natural light will, as found by the Inter-American Court of Human Rights,<sup>149</sup> denote not only

<sup>142</sup> *McFeeley et al. vs United Kingdom, No 8317/78*, Decision of 15 May 1980, 20 DR 44, at 83, para. 52. See also *Herczegfalvy vs Austria, A 244*, Commission's Report of 1 March 1991, para. 254; and the dissenting opinion of Mr. Opsahl in *B vs United Kingdom, No 6870/75* (Commission's Report of 7 October 1981, 32 DR 5, at 43, para. 4).

<sup>143</sup> See, *inter alia*, *Dougoz vs Greece*, Judgment of 6 March 2001, para. 46; and *Kalashnikovs vs Russia*, Judgment of 15 July 2002, para. 95.

<sup>144</sup> See, for example, *Lorsé and Others vs the Netherlands*, Judgment of 4 February 2003, para. 61; *Van der Ven vs the Netherlands*, Judgment of 4 February 2003, paras. 52-63 ('inhuman or degrading treatment' in relation to the combined effect of routine strip-searching for a long period and of other tight security measures in prison); *Dankevich vs Ukraine*, Judgment of 29 April 2003, para. 124; and *Kuznetsov vs Ukraine*, Judgment of 29 April 2003, para. 113.

<sup>145</sup> Apart from the cases described, see also *X vs Germany, No. 6038/73*, Decision of 11 July 1973, 44 CD 115; *Ensslin, Baader and Raspe vs Germany, Nos 7572/76, 7586/76 and 7587/76*, Decision of 8 July 1978, 14 DR 64; and *Dhoest vs Belgium, No. 10448/83*, Commission's Report of 14 May 1987, 55 DR 5, at 21.

<sup>146</sup> *Guzzardi vs Italy*, Judgment of 6 November 1980, A 39, para. 107 (compulsory residence of a Mafia suspect in a restricted area of an isolated prison island, with unpleasant living conditions).

<sup>147</sup> See *X vs Germany, No 6038/73*, Decision of 11 July 1973, 44 CD 115; *Ensslin, Baader and Raspe vs Germany, Nos 7572/76, 7586/76 and 7587/76*, Decision of 8 July 1978, 14 DR 64; *McFeeley et al. vs United Kingdom, No 8317/78*, Decision of 15 May 1980, 20 DR 44; *X vs Denmark, No 8395/78*, Decision of 16 December 1981, 27 DR 50; *Kröcher and Möller vs Switzerland, No 8463/78*, Commission's Report of 16 December 1982, 34 DR 24, Committee of Ministers' Resolution DH (83) 15; and *Hauschildt vs Denmark, No. 10486/83*, Decision of 9 October 1986, 49 DR 86 (the solitary confinement of a person convicted of fraud and embezzlement on a large scale).

<sup>148</sup> *R vs Denmark, No. 10263/83*, Decision of 11 March 1985, 41 DR 149, at 153; and *Herczegfalvy vs Austria, A 244*, Commission's Report of 1 March 1991, para. 251.

<sup>149</sup> In the *Cantoral Benavides Case*, the Inter-American Court of Human Rights, citing its judgment in the *Loayza-Tamayo Case*, ruled that '[h]olding a person *incommunicado*, public exhibition in defamatory clothing before the media, isolation in a small cell, without ventilation or natural light (...) restriction of visiting rights (...) constitute forms of cruel, inhuman and degrading treatment' in breach of Article 5(2) of the American Convention on Human Rights: Inter-American Court of Human Rights, Judgment of 18 August 2000, 8 IHRR 1049, para. 89. Note, however, that in the *Loayza-Tamayo Case*, the reasoning of the Inter-American Court seemed to suggest that not all alleged acts or conditions reached the level of degrading treatment: *Loayza-Tamayo Case*, Judgment of 17 September 1997, 6 IHRR 683, para. 58.



degrading but also inhuman treatment. The Human Rights Committee, while not specifying the type of maltreatment, has also agreed that solitary confinement, even where a detainee is not kept incommunicado, may breach Article 7 of the ICCPR.<sup>150</sup> Complete sensory isolation, coupled with total social isolation, can destroy the personality of a detained person and reveal not only degrading but also inhuman treatment, excluding any justification based on countervailing public interests.<sup>151</sup> Nonetheless, under the ECHR jurisprudence no complaint of conditions of solitary confinement or segregation *in itself* has yet been found to violate Article 3.<sup>152</sup> The fact that an applicant was of a especially dangerous character charged with aggravated offences has militated against a claim based on the prohibition of maltreatment.<sup>153</sup>

Illustrative of the broad scope of national discretion on solitary confinement was the Commission's approach in the *Kröcher and Möller Case*,<sup>154</sup> where two terrorist suspects complained that the conditions of their prolonged detention, especially sensory, acoustic and social isolation, amounted to degrading or even inhuman treatment. Their accommodation was set in non-adjacent cells on a floor not occupied by other prisoners and with no opening to the outside world. They were under constant artificial lighting and permanent surveillance by closed-circuit television. Access to newspaper and radio as well as the opportunity for physical exercise were denied. The Commission weighed a balance between the effect of tight security measures on the applicants' personality and health, and the objective of achieving a high level of security against dangerous terrorist

<sup>150</sup> Human Rights Committee, General Comment No. 7 (Article 7), A37/40 (1982), Annex V (pp. 94-95); CCPR/C/Rev.1, (pp. 6-7), para. 2.

<sup>151</sup> For Commission's authority, see *Ensslin, Baader and Raspe vs Germany*, Nos 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978, 14 DR 64, at 109; *McFeeley et al. vs United Kingdom*, No 8317/78, Decision of 15 May 1980, 20 DR 44, p. 82, para. 49; *R vs Denmark*, No. 10263/83, Decision of 11 March 1985, 41 DR 149, p. 153; and *Treholt vs Norway*, No. 14610/89, Decision of 9 July 1991, 71 DR 168, at 190.

The Court has reaffirmed this principle in more recent cases: *Van der Ven vs the Netherlands*, Judgment of 4 February 2003, para. 51. See also *Messina vs Italy* (admissibility decision), Decision of 8 June 1999.

<sup>152</sup> Apart from the cases discussed, see *Valasinas vs Lithuania*, Judgment of 24 July 2001, paras. 112-113. For Commission's decisions, see *X vs Germany*, No 6038/73, Decision of 11 July 1973, 44 CD 115; *Ensslin, Baader and Raspe vs Germany*, Nos 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978, 14 DR 64; *Reed vs United Kingdom*, No 7630/76, Decision of 6 December 1979, 19 DR 113 (declared admissible; Commission's Report of 12 December 1981, friendly settlement); *X vs United Kingdom*, No. 8158/78, Decision of 10 July 1980, 21 DR 95; *X vs United Kingdom*, No. 9813/82, 5 EHRR 513 (1983); *X vs United Kingdom*, No. 8231/78, Decision of 6 March 1982, 28 DR 5; *M vs United Kingdom*, No. 9907/82, Decision of 12 December 1983, 35 DR 130; *X vs United Kingdom*, No. 10117/82, (1984) 7 EHRR 140; and *D vs Belgium*, No 10448/83, Decision of 12 July 1984, 38 DR 164.

<sup>153</sup> See, for instance, *M vs United Kingdom*, No 9907/82, Decision of 12 December 1983, 35 DR 130 (detention in a cell with a special steel mesh front partition).

<sup>154</sup> *Kröcher and Möller vs Switzerland*, No 8463/78, Commission's Report of 16 December 1982, 34 DR 24.

suspects.<sup>155</sup> The Swiss authorities' gradual relaxation of security arrangements and the applicants' failure to avail themselves of some opportunities to make outside contacts were cited as warranting the conclusion that their detention conditions did not cause such physical or moral suffering as to punish the applicants, destroy their personality or break their resistance.<sup>156</sup> The Commission's opinion suggests that stringent security measures could be justified where there was a grave danger of detainees escaping or injuring themselves. Nevertheless, as four dissenting Commissioners stressed, the examination should have focused on the tight security measures adopted in the first month, which seemed to have overstepped the level of degrading or even inhuman treatment.<sup>157</sup>

It has been established since the *Chahal* decision<sup>158</sup> that in view of the absolute nature of the right guaranteed under Article 3, the assessment of the minimum threshold of gravity cannot be swayed by arguments based on relative or proportionate merits, or on countervailing public interests, including difficulties encountered in anti-terrorism struggles.<sup>159</sup> Further, in a more recent case, the Court condemned overcrowded, unsanitary and unhygienic conditions of detention in a Member State, disallowing justification based on common unsatisfactory conditions in a respondent State.<sup>160</sup> Such transformation of judicial policy marks a striking contrast to the Commission's earlier decisions, which remained largely deferential to the appreciation of the security needs of national authorities. It remains to be seen whether there is similar dynamism in relation to excessively tight security measures.

#### 1.5.4. Medical Treatment in the Context of Detention

A number of cases concerning the medical treatment of prisoners or patients, in particular mental health patients, have arisen under Article 3 on the basis that such treatment amounted to degrading or inhuman treatment. The well-established principle that the Member States owe a 'positive obligation' to protect the physical well-being of persons deprived of their liberty means that failure to provide adequate medical treatment and

<sup>155</sup> *Ibidem*, at p. 52, para. 57.

<sup>156</sup> *Ibidem*, at p. 57.

<sup>157</sup> The joint dissenting opinion of MM. Tenekides, Melchior, Sampaio and Weitzel, who considered that though various measures were gradually relaxed after the first month of detention, the conditions of that period was 'inhuman treatment'; *ibidem*, at pp. 57-58.

<sup>158</sup> *Chahal vs United Kingdom*, Judgment of 15 November 1996, paras. 79-81.

<sup>159</sup> This dictum has been repeatedly reaffirmed by the Inter-American Court of Human Rights. See, for instance, *Cantoral Benavides Case*, Inter-American Court of Human Rights, Judgment of 18 August 2000, 8 IHRR 1049, para. 96.

<sup>160</sup> *Kalashnikov vs Russia*, Judgment of 15 July 2002.

psychiatric care may give rise to a breach of Article 3,<sup>161</sup> or in case of death of a detainee or a patient, of Article 2.<sup>162</sup> Nonetheless, the decision-making policy of the Strasbourg organs has revealed some timidity in second-guessing the perceived primary determinations of a purely medical-scientific nature.<sup>163</sup> The medical authorities are accorded broad latitudes of discretion in evaluating the fitness of a convicted person for detention,<sup>164</sup> the therapeutic necessity and the appropriate medical treatment for a detained person.<sup>165</sup>

A violation of Article 3 may be found if treatment of an experimental character is not accompanied by the free and informed consent of a patient,<sup>166</sup> a well-established principle as recognised in the second sentence of Article 7 ICCPR. A more nuanced approach is adopted as regards compulsory medical treatment, which is not viewed as *ipso facto* unlawful but calling for 'increased vigilance' of 'the position of inferiority and powerlessness' in which patients, including those in private hospitals, find themselves.<sup>167</sup> The obstructive attitude of a patient does not relieve a State of its obligation to comply with the requirements of Article 3.<sup>168</sup> Compulsory medical treatment has been deemed to be compatible with Article 3, provided that it is medically necessary and in conformity with accepted medical standards.<sup>169</sup> This suggests the *a contrario* argument that if medical necessity is proved to be non-existent or slim, compulsion to subject a patient to medical acts can be contested in the light of Article 3. However, such a challenge would face considerable, if not insurmountable, difficulty with evidence. In the *Herczegfalvy Case*,<sup>170</sup> where a violent and mentally-ill

<sup>161</sup> *Herczegfalvy vs Austria*, A 244, Commission's Report of 1 March 1991, No. 10533/83, para. 242; and *Hurtado vs Switzerland*, A 280, Commission's Report of 8 July 1993, para. 79. See also *Aerts vs Belgium*, Judgment of 30 July 1998; *Kotälla vs the Netherlands*, No. 7994/77, Decision of 6 May 1978, 14 DR 238; *B vs the United Kingdom*, No. 6870/75, Commission's Report of 7 October 1981, 32 DR 5; *Chartier vs Italy*, No. 9044/80, Decision of 17 December 1981, Commission's Report of 8 December 1982, 33 DR 41; and *Ayala vs Portugal*, No. 23663/94, Decision of 23 May 1995 (declared admissible); Commission's Report of 21 October 1996 (friendly settlement).

<sup>162</sup> See *Calvelli and Ciglio vs Italy*, Judgment of 17 January 2002.

<sup>163</sup> Apart from the *Herczegfalvy Case*, see also *M vs United Kingdom*, No. 9907/82, Decision of 12 December 1983, 35 DR 130, at 136; and *Dhoest vs Belgium*, No. 10448/83, (administration of tranquillisers), Commission's Report of 14 May 1987, 55 DR 5, at 22

<sup>164</sup> *B vs Germany*, No. 13047/87, Decision of 10 March 1988, 55 DR 271.

<sup>165</sup> *Herczegfalvy vs Austria*, Judgment of 24 September 1992, A 244, para. 82.

<sup>166</sup> *X vs Denmark*, No. 9974/82, Decision of 2 March 1983, 32 DR 282, at 283-284 (a failed sterilisation operation with a new model of pincers).

<sup>167</sup> *Herczegfalvy vs Austria*, Judgment of 24 September 1992, A 244, para. 82.

<sup>168</sup> *Herczegfalvy vs Austria*, A 244, Commission's Report of 1 March 1991, para. 242. See also No. 8281/78, *X vs United Kingdom*, Decision of 6 March 1982, 28 DR 5.

<sup>169</sup> *Herczegfalvy vs Austria*, A 244, Commission's Report of 1 March 1991, para. 242. See also *X vs Germany*, No. 8334/78, Decision of 7 May 1981, 24 DR 103; *X vs Germany*, No 8518/79, Decision of 14 March 1980, 20 DR 193; and *X vs Denmark*, No 9974/82, Decision of 2 March 1983, 32 DR 282.

<sup>170</sup> *Herczegfalvy vs Austria*, A 244, Commission's Report of 1 March 1991, at 30-55.

patient's major complaint was levelled at forced medical treatment at a psychiatric hospital, the Strasbourg organs provided a mixed and muted response to the submission based on Article 3. The Commission, on one hand, recognised that the medical authorities' 'margin of appreciation' as regards the necessity and methods of artificial feeding was not exceeded.<sup>171</sup> On the other, compulsory medical treatment involving continued artificial feeding through a tube even after improvement in the applicant's health, coupled with artificial feeding and isolation, was considered degrading and inhuman treatment.<sup>172</sup> In contrast, the Court did not find any breach of Article 3 on the ground that there was no 'sufficient' or 'convincing' evidence to disprove medical necessity. This mode of reasoning evinces that an applicant must bear an onerous standard of proof.<sup>173</sup> The Court's decision in the *Herczegfalvy* Case was a missed opportunity to define both the operational boundaries of the guarantee and the nature of State responsibility under Article 3 in relation to medical negligence.<sup>174</sup>

### 1.5.5. Extradition, Asylum Seekers and Immigration Controls

There have been a number of cases under Article 3 involving immigration controls and asylum seekers. While earlier cases of the Commission conceded the limit of international supervision set by the notion of subsidiarity,<sup>175</sup> the Court, since the *Soering* judgment,<sup>176</sup> has consistently strengthened the protection of asylum seekers or others facing reasonable prospect of ill-treatment in a third country, broadening the ambit of State responsibility on the basis of the 'extra-territorial' effect of Article 3. Risk of ill-treatment in a third country need not emanate from the conduct of that country's officials.<sup>177</sup> Further, the liability of a sending State remains even

<sup>171</sup> *Ibidem*, para. 249.

<sup>172</sup> *Ibidem*, para. 254.

<sup>173</sup> *Herczegfalvy vs Austria*, Judgment of 24 September 1992, A 244, paras. 82-83. Note that in relation to allegations of ill-treatment in general, the Court has consistently applied the standard of proof 'beyond reasonable doubt', which can be adduced from 'the coexistence of sufficiently strong, clear and concordant interference or of similar unrebutted presumptions of fact': *Aliiev vs Ukraine*, Judgment of 29 April 2003, para. 154. See also *Ireland vs UK*, Judgment of 18 January 1978, A 25, para. 161 *in fine*.

<sup>174</sup> On these matters, the Member States must also take into account the *Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment*, as annexed to UN General Assembly Resolution 37/194: GA Resolution 37/194, A/RES/37/194 (1982).

<sup>175</sup> See, for instance, *Singh Uppal et al. vs United Kingdom*, No. 8244/78, Decision of 2 May 1979, 17 DR 149, at 157.

<sup>176</sup> *Soering vs United Kingdom*, Judgment of 7 July 1989, A. 161.

<sup>177</sup> *Cemal Kemal Altun vs Germany*, No 10308/83, Decision of 3 May 1983, 36 DR 209, at 232, para. 5; *X vs Germany*, No. 7216/75, Decision of 20 May 1976, 5 DR 137; and *X vs United Kingdom*, No 8581/79, Decision of 6 March 1980 (unpublished). See also *X vs Germany*, No. 10040/82 (unpublished), where the Commission took the view that 'it is not necessary for the application of Article 3 that the danger emanates from the Government of the State, which

where the third State assures the suppression of sources of maltreatment. The judicial probe has focused on whether in reality ill-treatment persisted regardless of the efforts of the risk country.<sup>178</sup>

There are, however, some elements of judicial policy that can overshadow these progressive tendencies. The fact that an applicant's position is no worse than that of the generality of other members of a persecuted group in his/her home country has been interpreted as a factor undermining a claim of risk.<sup>179</sup> Moreover, the Strasbourg organs have rarely specified the form of maltreatment anticipated in a risk country.<sup>180</sup> They were in most cases satisfied that a minimum level of ill-treatment would be attainable.<sup>181</sup> Where the Court has decided to identify a specific form of proscribed ill-treatment, this has involved speculative torture or inhuman treatment. It is highly unlikely that the Court would provide a remedy under Article 3 for an applicant whose claim relates to aspects of anticipatory *degrading* treatment only, even if the appraisal of such ill-treatment based on a sense of debasement and humiliation would plainly satisfy the minimum level of severity in non-expulsion contexts.<sup>182</sup> These features of the case-law may result in effectively compromising the otherwise 'absolute' nature of the guarantee under Article 3, with the requisite level of severity in the expulsion and asylum cases elevated to a more onerous level than in non-expulsion contexts.<sup>183</sup> In the latter context, the Court's decision in the *Kalashnikov* Case signalled a victim-friendly policy, stressing that the fact that the poor conditions of detention were attributable to economic constraints, and were no worse than those for most detainees, should not have an

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requires extradition': P. van Dijk, and G.H.J. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2<sup>nd</sup> ed.), Deventer, Kluwer, 1990, at p. 236, footnote 123 (not cited in: *idem*, *Theory and Practice of the European Convention on Human Rights*, (3<sup>rd</sup> ed.), The Hague, Kluwer, 1998).

<sup>178</sup> *Altun vs Germany*, No. 10308/83, 36 DR 209, paras. 12-13.

<sup>179</sup> *Vilvarajah and Others vs United Kingdom*, Judgment of 30 October 1991, A 215, para. 112.

<sup>180</sup> See cases where the approach of the Court can be contrasted with the Commission's silence on a specific type of anticipated ill-treatment: *Ahmed vs Austria*, Judgment of 17 December 1996, para. 47 (risk of 'torture, inhuman and degrading treatment'); *HLR vs France*, Judgment of 29 April 1997 (risk of 'inhuman and degrading treatment'); and *Vilvarajah and Others vs United Kingdom*, Judgment of 30 October 1991, A 215 (reference to 'no real risk of inhuman and degrading treatment'). See also *Hilal vs United Kingdom*, Judgment of 6 March 2001, para. 68 (reference to the risk of 'torture or inhuman and degrading treatment').

<sup>181</sup> See, for instance, *Soering vs United Kingdom*, Judgment of 7 July 1989, A. 161; and *Chahal vs United Kingdom*, Judgment of 15 November 1996 (both the Court and Commission failed to specify ill-treatment). Even in cases of *actual* ill-treatment, the Court has at times failed to specify the form of ill-treatment. See, for instance, *A. vs United Kingdom*, Judgment of 23 September 1998, paras. 21-2. However, in that case the Commission expressly recognised degrading treatment or punishment: Commission's Report of 18 September 1997, para. 55. Compare *Campbell and Cosans vs United Kingdom*, Judgment of 25 February 1982, A. 48, para. 29.

<sup>182</sup> See Arai-Takahashi, *loc.cit.* (note 48), at pp. 15-17.

<sup>183</sup> *Vilvarajah and Others vs United Kingdom*, Judgment of 30 October 1991, A 215, para. 111; and *D. and Others vs Sweden*, No 20547/92, Decision of 15 February 1993, 74 DR 252, at 262.

‘exculpatory’ effect on the assessment of the lowest threshold required for *degrading* treatment.<sup>184</sup> While the political implications of this decision on wholesale reform of the Russian penitentiary system may be significant, it remains to be ascertained whether and if so, to what extent, the Court will infuse this progressive mode of interpretation into their appraisal of the threshold questions under Article 3.

### 1.5.6. Corporal Punishment

The Member States owe duties to ensure that neither corporal punishment nor excessive chastisement is tolerated as a disciplinary measure, not only against persons in State custody, such as those arrested or imprisoned, but also against pupils at educational institutions and patients in medical facilities. Akin to the scope of application of Article 7 of the ICCPR, as broadly interpreted by the Human Rights Committee,<sup>185</sup> the protection of Article 3 extends, on the strength of positive obligations on a State, to cover sources of risk emanating from non-State actors. These include corporal punishment at home, and mistreatment at private institutions such as nurseries, schools and mental hospitals. Corporal punishment at a private school<sup>186</sup> can be recognised as incurring State responsibility under Article 3 in view of State aids and general overseeing of disciplinary matters.<sup>187</sup> The

<sup>184</sup> *Kalashnikov vs Russia*, Judgment of 15 July 2002, paras. 93-94 and 102. See also *Aliiev vs Ukraine*, Judgment of 29 April 2003, para. 151; *Dankevich vs Ukraine*, Judgment of 29 April 2003, para. 144; *Khokhlich vs Ukraine*, Judgment of 29 April 2003, para. 181; *Kuznetsov vs Ukraine*, Judgment of 29 April 2003, para. 128; *Nazarenko vs Ukraine*, Judgment of 29 April 2003, para. 144; and *Poltoratskiy vs Ukraine*, Judgment of 29 April 2003, para. 148. Compare these cases with *Yekaterina Pavlovna Lantsova on behalf of her son, Vladimir Albertovich Lantsov (deceased) vs Russia*, Human Rights Committee, No. 763/1997, 26 March 2002, para. 9.2. (the right to life under Article 6, ICCPR).

<sup>185</sup> Human Rights Committee, General Comment No. 7 (Article 7), A37/40 (1982), Annex V (pp. 94-95); CCPR/C/Rev.1, (pp. 6-7), para. 2.

<sup>186</sup> Apart from cases examined below, see also *Three corporal punishment cases vs United Kingdom*, Nos. 9114/80, 9303/81 and 10592/83, (1987) 30 Ybk 84 (the *Yearbook* mistakenly refers to No. 9403/81 instead of 9303/81), Commission’s Reports of 16 July 1987. See also *B and D vs United Kingdom*, No. 9303/81, Decision of 13 October 1986, 49 DR 44 (declared admissible only as regards the complaint of a violation of Article 2 of the First Protocol, with the complaint raised under Article 3 rejected under ex Article 27(3) based on the ‘six months rule’); and *Family A vs United Kingdom*, No. 10592/83, 52 DR 150 (friendly settlement; declared admissible on 22 January 1986).

<sup>187</sup> The justifications are three-fold:

- (i) The State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1. Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process;
- (ii) Independent schools co-exist with a system of public education so that 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; and
- (iii) The State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.

*Costello-Roberts vs United Kingdom*, Judgment of 25 March 1993, A 247-C, para. 27.

approach adopted by the Strasbourg organs is not to classify all forms of moderate corporal punishment in schools as ‘institutionalised violence’ of the kind that discloses degrading punishment in the sense of the *Tyrer* decision,<sup>188</sup> but to examine each claim based on particular circumstances of an individual case.<sup>189</sup> Even a mere *threat* to inflict corporal punishment may be perceived as degrading, provided that there are sufficient elements of humiliation and debasement.<sup>190</sup>

Only in a fraction of cases the Strasbourg organs have found the severity of corporal punishment to be sufficient to reveal degradation. Corporal punishment that causes a permanent or lasting effect on a victim’s health is likely to be classified as torture, and chastisement that leaves heavy bruising and swelling on the body of a victim for a lengthy period can be described as at least inhuman. Yet in none of the corporal punishment cases have the Strasbourg organs considered the degree of seriousness to exceed the level of degrading treatment or punishment.<sup>191</sup> This cautious stance must be contrasted to the approach of the Human Rights Committee, which has consistently found corporal punishment to amount to ‘cruel, inhuman and degrading treatment or punishment’ contravening Article 7 of the ICCPR.<sup>192</sup> As in other contexts, the Strasbourg organs have yet to establish criteria that help pinpoint the minimum level of *physical* suffering characterised as degrading. The only suggestion made by the Court is that severe and long-lasting effects are not indispensable for a violation of Article 3.<sup>193</sup> In *Y vs United Kingdom* where the applicant, then 15 years old, was chastised through caning on his bottom, leaving heavy bruising and swelling on both buttocks, the Commission opined that the chastisement caused physical injury and humiliation of such a kind as to be described as degrading.<sup>194</sup> In contrast, in the *Costello-Roberts* Case, where a headmaster at an independent school inflicted on a seven-year-old boy three ‘slipperings’ against his buttocks through his shorts with a rubber-soled gym shoe, the Court, by a narrow margin (five votes to four), concluded that the minimum

<sup>188</sup> In *Tyrer vs United Kingdom*, judicial corporal punishment in the form of whacks inflicted on a juvenile offender was regarded as degrading punishment: Judgment of 25 April 1978, A 26.

<sup>189</sup> *Y vs United Kingdom*, A 247A, Commission’s Report of 8 October 1991, para. 42.

<sup>190</sup> Such a possibility can be inferred from the Court’s statement in *Campbell and Cosans vs United Kingdom* that ‘it is not established that pupils at a school where such punishment is used are, solely by reason of the risk of being subjected thereto, humiliated or debased in the eyes of others to the requisite degree or at all’: Judgment of 25 February 1982, A 48, para. 29.

<sup>191</sup> See *A vs United Kingdom* (Judgment of 23 September 1998), where the Court was silent on a specific type of maltreatment.

<sup>192</sup> See, for instance, *Malcolm Higginson vs Jamaica*, No. 792/1998, Human Rights Committee, 28 March 2002, para. 4.6 (whipping with a tamarind switch).

<sup>193</sup> *Costello-Roberts vs United Kingdom*, Judgment of 25 March 1993, A 247-C, paras. 31-32.

<sup>194</sup> *Y. vs United Kingdom*, Commission’s Report of 8 October 1991, para. 45. The Commission dispensed with the need for examination under Article 8, since in its view, the issue of Article 8 as the *lex generalis* was absorbed into that of Article 3 as the *lex specialis* (friendly settlement before the Court: Judgment of 29 October 1992, A 247-A).

level of degradingness was not attained.<sup>195</sup> Despite the less serious physical affront sustained by the applicant in the *Costello-Roberts* Case, the age factor would have militated in his favour if the approach of both the Court and the Commission in this case were to be reconciled with the Commission's approach in the case of *Y vs United Kingdom*. The boundary setting apart acceptable physical chastisement from degrading corporal punishment depends not only on objective factors such as age, sex, religious or cultural background or health but also on subjective factors. As found in the *Warwick* Case, a relatively light caning on a girl's hand might well be viewed as degrading if the sense of humiliation is compounded by the presence of male head teachers.<sup>196</sup>

Until the Court's seminal decision in *A vs United Kingdom*,<sup>197</sup> it was doubtful whether the Strasbourg organs intended to apply Article 3 to cases of domestic corporal punishment.<sup>198</sup> Under the second sentence of Article 2 of the First Protocol, the Contracting States are obliged to respect parents' philosophical and religious convictions in relation to the implementation of education, including the way discipline is taught to children by their parents. Under Article 8, a Member State is also obliged to respect the right to family life, which encompasses matters of discipline and education. However, in *Y vs United Kingdom*, the Commission suggested that the evaluation of the minimum threshold of degradingness be made irrespective of authors of corporal punishment,<sup>199</sup> describing corporal punishment causing severe physical injury and humiliation as 'unacceptable whoever were to inflict the punishment, be it parent or teacher'.<sup>200</sup> This reasoning tallies with the dynamic policy of expanding the scope of State responsibility for safeguarding the physical and mental integrity of vulnerable categories

<sup>195</sup> *Costello-Roberts vs United Kingdom*, Judgment of 25 March 1993, A 247-C, para. 32. The Court did not find a violation of Article 8 either; *ibidem*, para. 36. Cf. *Costello-Roberts vs United Kingdom*, Commission's Report of 8 October 1991, A 247-C (no violation of Article 3 but an infringement of Article 8).

<sup>196</sup> *Maxine and Karen Warwick vs United Kingdom*, No 9471/81, Commission's Report of 18 July 1986, 60 DR 5 (declared admissible in the decision of 13 March 1984, 36 DR 49). The Commission also found a breach of Article 2 of the First Protocol with respect to the complaint raised by the first applicant, a mother of the second applicant, that there was no guarantee that her other child would not be subjected to corporal punishment. However, the Committee of Ministers could not decide whether there was a breach of Article 3, but it recommended the United Kingdom Government to pay the applicants' costs. See also *X vs United Kingdom*, No. 7907/77, Commission's Report of 17 December 1981, 24 Ybk 402.

<sup>197</sup> *A vs United Kingdom*, Judgment of 23 September 1998.

<sup>198</sup> See *Seven Individuals vs Sweden*, where the existence of legislation prohibiting all corporal punishment, but which contained no sanction, was not considered as an interference with the applicants' family life under Article 8. Neither was the fact that corporal punishment of a child by parents might expose them to criminal prosecution for assaults, by the same standards as assault of a person outside the family, held to constitute an interference with the right embodied in Article 8: No. 8811/79, Decision of 13 May 1982, 29 DR 104.

<sup>199</sup> *Y vs United Kingdom*, A 247-A, Commission's Report of 8 October 1991, para. 44 (friendly settlement before the Court: Judgment of 29 October 1992, A247-A).

<sup>200</sup> *Idem*.



of individuals in a private context, such as children, hospital patients and the mentally-ill. Perhaps inadvertently, the Commission has also allowed the traditional boundaries of the sources of risk, which set apart the conduct of State organs from acts of private individuals, to be obscured. In that sense, the Commission's approach in *Y vs United Kingdom* portended its subsequent breakthrough in *A vs United Kingdom* decision,<sup>201</sup> where the Court's intention was to channel into the hitherto uncertain area the unmistakable message that a Member State should undertake positive obligations to furnish safeguards against affront to physical integrity in a horizontal context.

### 1.5.7. Transsexuals

The absolute nature of the prohibition on degrading treatment under Article 3 has also been tapped into the struggle of transsexuals to obtain from a State legal recognition of the change of their birth certificate or registration to suit their post-operative sex. In *No. 6699/74*, the Commission declared admissible complaints of violations of Articles 3 and 8 of the Convention.<sup>202</sup> In the *Van Oosterwijk* Case, though a breach of Article 3 was alleged, the Commission did not examine this question, partly because it had already found violations of Articles 8 and 12, and partly because the level of psychological burden in this case was not considered to reach that contemplated by Article 3.<sup>203</sup> In subsequent cases, complaints from transsexuals concentrated on Articles 8 and 12.<sup>204</sup> However, in *B vs France*, the applicant's allegation that the refusal to recognise her new sexual identity and the sense of embarrassment caused by the discrepancy between her appearance and official documents amounted to degrading and inhuman treatment was not rejected by the Commission, albeit that the facts of the circumstances were not perceived as sufficient to disclose either of the proscribed types of treatment.<sup>205</sup> The Court, after finding a breach of Article 8, did not go on to examine the issue of Article 3 on the ground that the applicant did not repeat this complaint any longer. The Court saw no merit in examining the question *proprio motu*.<sup>206</sup> Since the failure in *B vs*

<sup>201</sup> *A vs United Kingdom*, Judgment of 23 September 1998.

<sup>202</sup> *X vs Germany*, No. 6699/74, Decision of 15 December 1977, 11 DR 16 (friendly settlement). See also No. 9420/81, 38 *Transsexuals vs Italy*, Decision of 5 October 1982, unpublished (referred to in the *Rees* Case, A 106, Commission's Report of 12 December 1984, para. 41).

<sup>203</sup> *Van Oosterwijk vs Belgium*, No 7654/72, Decision of 15 December 1977, (1978) 21 Ybk 476; Report of 1 March 1979, B 36, at 28-29. In view of non-exhaustion of local remedies, the Court did not reach the point of examining the merits: Judgment of 6 November 1980, A 40.

<sup>204</sup> See *Rees vs United Kingdom*, Judgment of 17 October 1986, A 106, at 1-29; *Cossey vs United Kingdom*, Judgment of 27 September 1990, A 184, at 1-54; and *B. vs France*, Judgment of 25 March 1992, A 232-C, at 28-91.

<sup>205</sup> *B. vs France*, A 232-C, Commission's Report of 6 September 1990, para. 86. Nevertheless, the Commission found a violation of Article 8.

<sup>206</sup> *B. vs France*, Judgment of 25 March 1992, A 232-C, para. 64.

*France* to obtain from the Court an endorsement of the view that the psychological burden of transsexuals could amount to degrading treatment, the tactics pursued by the transsexuals have not involved claims based on Article 3, and their primary focus has been on Articles 8 and 12.<sup>207</sup>

## 2. CONCLUSION

Distinguishing three-tiered forms of maltreatment is a widely accepted approach in appraising affront to physical and mental integrity under international human rights treaties. With respect to Article 7 of the ICCPR, the Human Rights Committee, while dismissing the need to draw sharp distinctions between forbidden forms of treatment or punishment,<sup>208</sup> seems to have taken for granted the tripartite hierarchy: first, torture; second, cruel or inhuman treatment or punishment; and third, degrading treatment or punishment. According to the Human Rights Committee, this differentiation rests on the ‘kind, purpose and severity of the particular punishment’.<sup>209</sup> A similar tendency to introduce a three-layer stratum of maltreatment can be recognised in the approach pursued by the Inter-American Court of Human Rights. According to this, the right to physical and psychological integrity of persons guaranteed in Article 5 of the American Convention on Human Rights (ACHR) embraces a scale ranging from torture to other types of humiliation,<sup>210</sup> differentiation of which hinges on ‘varying degrees of physical and psychological effects caused by endogenous and exogenous factors’.<sup>211</sup> Further, the gradation of severity required for separate categories of ill-treatment is seen in the approach followed in the UN Convention Against Torture, subject to qualification. Under that Convention, only torture, as distinct from ‘other acts of cruel, inhuman or degrading treatment or punishment’,<sup>212</sup> is endowed with an especially privileged status susceptible neither to derogation in time of war or other public exigencies, nor to justification grounded on superior orders,

<sup>207</sup> See *X, Y and Z vs United Kingdom*, Judgment of 22 April 1997; *Christine Goodwin vs United Kingdom*, Judgment of 11 July 2002; and *I vs United Kingdom*, Judgment of 11 July 2002.

<sup>208</sup> Human Rights Committee, General Comment No. 7 (Article 7), A/37/40 (1982), Annex V (pp. 94-95); CCPR/C/Rev.1, (pp. 6-7), para. 2.

<sup>209</sup> *Idem*; and Human Rights Committee, General Comment No. 20 (Article 7), A/47/40 (1992), Annex VI (pp. 193-195), para. 4.

<sup>210</sup> On some occasions, however, the Inter-American Court of Human Rights seems to adopt the bifurcated approach as regards the severity of ill-treatment, with types of torture, cruel and inhuman treatment encapsulated in the same category. In the *Cantoral Benavides* Case, the Inter-American Court noted that it ‘must now determine whether the facts (...) constitute torture, cruel, inhuman and degrading treatment, or both, in violation of Article 5(2) of the American Convention’: Inter-American Court of Human Rights, Judgment of 18 August 2002, emphasis added.

<sup>211</sup> *Loayza Tamayo* Case, Inter-American Court of Human Rights, Judgment of 17 September 1997, 6 IHRR 683, para. 57.

<sup>212</sup> Article 16 of the UN Convention Against Torture.

at least insofar as the express language is concerned.<sup>213</sup> As Byrnes points out,<sup>214</sup> this bifurcated distinction gives rise to different legal consequences for the extent of the substantive obligations undertaken by States Parties<sup>215</sup> and on the advantages in supervisory procedures.<sup>216</sup> However, the approach adopted by the drafters of the UN Convention Against Torture lags behind the more entrenched nature of protection afforded in the ICCPR. The Human Rights Committee has enunciated that Article 7 of the ICCPR must be immune from any exceptions or extenuating circumstances, including even those based on a superior order,<sup>217</sup> the stance likely to be repeated in the decision-making policy of the Strasbourg Court. This brief examination reveals a comparable structure but a different twist on the concepts of maltreatment in international human rights treaties. While comparison of experience offers a valuable resource for a monitoring body to explore the nature of such concepts, its task of determining them, in the absence of their acceptable standard definition, will ultimately depend on the drafters' intention, the purpose of the relevant treaty set in a historical and cultural context, as well as on the practice of Member States.<sup>218</sup>

The support for a hierarchical system of maltreatment is also borne out in international criminal law. On one hand, the Statute of the International Criminal Court includes torture, but not inhuman or degrading treatment, among acts that amount to crimes against humanity.<sup>219</sup> On the other hand, while classifying both torture and inhuman treatment as grave breaches under the rubric of war crimes,<sup>220</sup> the Rome Statute describes the act of 'committing outrages upon personal dignity, in particular humiliating and degrading treatment' as a genre of '[o]ther serious violations of war and customs applicable in international armed conflict'.<sup>221</sup> This fine-drawn classification into three cohorts of core crimes testifies to the validity of the argument that stratifying types of maltreatment signifies the differentiation

<sup>213</sup> Article 2 of the UN Convention Against Torture.

<sup>214</sup> Byrnes, A., *loc.cit.* (note 16), at p. 514.

<sup>215</sup> See Articles 3–9 and 14.

<sup>216</sup> Investigative procedures established under Article 20 are available only where there are indications of torture being systematically practiced. Further, it might be possible for a State to argue, on the basis of Article 16, that in the case of maltreatment other than torture, there would be no obligation of compensation under Article 14.

<sup>217</sup> Human Rights Committee, General Comment No. 20, A/47/40 (1992), Annex VI (pp. 193–195), para. 3.

<sup>218</sup> Byrnes, *loc.cit.* (note 16), at p. 513.

<sup>219</sup> Article 7(1)(f) of the Rome Statute of the ICC.

<sup>220</sup> Article 8(2)(a)(ii) of the Rome Statute of the ICC.

<sup>221</sup> Article 8(2)(b)(xxi) of the Rome Statute of the ICC. However, as regards cases of internal strife, the Rome Statute, reiterating common Article 3 of the 1949 Geneva Conventions, includes both 'cruel treatment and torture', and acts 'committing outrages upon personal dignity, in particular humiliating and degrading treatment', describing these two types of acts as constituting only 'serious violations' of the common Article 3 regime (Article 8(2)(c)(i) & (ii) of the Rome Statute of the ICC).

of gravity. The Rome Statute, reflective of the practice of the UN *ad hoc* criminal tribunals,<sup>222</sup> treats crimes against humanity as more serious crimes than war crimes, as can be demonstrated by its recognition that both self-defence in the protection of property<sup>223</sup> and superior orders furnish the grounds for excluding responsibility for war crimes only,<sup>224</sup> and that a transitional opt-out clause is available only to war crimes.<sup>225</sup>

In view of the primacy accorded to subjective elements of humiliation and debasement, it is difficult and almost impracticable to establish an *objectively* verifiable standard of maltreatment acquiring the condemnatory character of degradingness. A search for uniform and consistent guidelines may prove to be futile in the diverging fields where complaints under Article 3 have arisen. Under this absolute-right clause, any dynamism evidenced in the broadening of State responsibility with horizontal effects and extra-territorial implications seems to be at variance with the Court's unpredictability and relative guardedness in other fields. This may stifle efforts to settle irregularities in discretionary treatment of convicted criminals or medical negligence.

Nevertheless, at a more macroscopic level, the foregoing examination suggests an encouraging sign that the Strasbourg organs have funnelled considerable vigour and creativity into their 'law-making' policy, expatiating on the most succinct provision in the ECHR. Degrading treatment or

<sup>222</sup> See Frulli, M., 'Are Crimes Against Humanity More Serious Than War Crimes?', (2001) 12 EJIL 329, at 344. Contrast, however, *Prosecutor vs Kambanda* (ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 14), in which crimes against humanity were recognised as more serious than violations of Article 3 common to the four Geneva Conventions 1949, with *Prosecutor vs Tadic* (26 IT-94-I, Judgment in Sentencing Appeals, 26 January 2000, paras. 65-69), where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia refused to draw such distinction of seriousness.

<sup>223</sup> Article 31(1)(c) of the Rome Statute allows the ground for precluding criminal responsibility where '[t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected ...'

<sup>224</sup> Article 33(1) of the Rome Statute provides for superior orders as a ground for excluding criminal responsibility if: '(a) [t]he person was under a legal obligation to obey orders of the Government or the superior in question; (b) [t]he person did not know that the order was unlawful; and (c) [t]he order was not *manifestly unlawful*'. The second paragraph adds that '[f]or the purposes of this article, orders to commit genocide or crimes against humanity are *manifestly unlawful*' (emphasis added). This provision is, however, not considered harmonious with customary international law, which excludes superior orders from the category of defence but treats them as a mitigating factor: Frulli, *loc.cit.* (note 222), at p. 340. See also Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 EJIL, 1999, p. 152, at p. 156; and Gaeta, P., 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 EJIL, 1999, pp. 172-191.

<sup>225</sup> War crimes provided in Article 8 of the Rome Statute are subject to the transitional clause of Article 124, which can exempt a State from the subject-matter jurisdiction of the ICC for seven years after the entry into force of the Statute.

punishment, set as the 'lowest' form of an absolute right on the graded scale of ill-treatment under Article 3 of the ECHR, offers a string of practical advantages to the decision-making policy of the Strasbourg organs. First, in view of its low intensity requirement, degrading treatment or punishment allows the Court to address multiple issues in diverse fields, some of which may never be condemned as worthy of a stigma associated with the inkling of torture. Second, since the ascertainment of a minimum threshold of severity is a malleable process susceptible to evolving perceptions of common European human rights standards, the benchmark of degrading treatment can be adapted to capture a greater number of claims, including even those that were previously declared inadmissible *ratione materiae* in the initial screening phase. A postmodernist discourse can furnish useful explanation to such dynamism. The quintessence of what is regarded as a 'human rights society' lies in the ability of human rights to transcend the social context of their appearance and to redefine their boundaries to seek what dignity entails, suspending any reference to the 'vagaries of time'.<sup>226</sup> Third, an extensive coverage of issues under the rubric of degrading treatment can be undertaken without compromising the non-derogable nature of Article 3. The recognition of a graded scale of maltreatment does not result in any variability, relativity or erosion of legal effect, and Article 3 continues to embody a peremptory and superior rule in the hierarchy of international law, imbued with special normative force. Just as with torture or inhuman treatment, conditions or treatment deemed as degrading should not be tolerated however convincing countervailing public policy grounds may be. These general traits discernible in the case-law suggest that the Strasbourg organs have capitalised on the graduating scale of degrading treatment so as to diversify the protective scope of Article 3, in a continued search for progressive European public order. They have supplied to individual victims a horizon of possible arguments, which can unfold along lines conducive to the shaping and restructuring of the emerging European constitutional system.

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<sup>226</sup> Douzinas, *loc.cit.* (note 33), at p. 131 and pp. 133-134.