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5 ARTICLE 3 PROHIBITION OF TORTURE

From its early case-law the Court has elaborated the differences between the various forms of conduct prohibited by Article 3. Obviously, torture encompasses the most horrendous forms of maltreatment. The full-time Court sought to widen the scope of this classification (*Selmouni*), however it is still reserved for relatively rare cases of gross abuse (*Gurgurov*). Inhuman treatment has been found in a variety of contexts ranging from officials' physical assaults on detainees (*Tomasi*) to deportations where applicants face a real risk of treatment violating Article 3 in their home State (*D and others v Turkey*). In assessing whether prison conditions (and other detention facilities) meet the minimum requirements of Article 3, the Court has increasingly taken cognizance of the standards and reports produced by the expert European Committee for the Prevention of Torture (*Ilascu and others*), thereby promoting a consistent and harmonious European approach. Strasbourg judgments led to the abolition of corporal punishment in the criminal justice system (*Tyrer*) and were highly significant in the ending of corporal punishment in schools (*Campbell and Cosans*).

The Court has also developed positive obligations under Article 3 including the requirements that States conduct effective investigations into allegations of serious maltreatment by officials (*Assenov*) and give protection to vulnerable persons threatened with Article 3 maltreatment by other private individuals (*Z and others*).

Recent judgments have reinforced the unqualified prohibition of conduct falling within Article 3 irrespective of the threats posed by the victims, whether they be a suspected international terrorist (*Saadi*) or a child killer (*Gafgen*).

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The Court's general approach

Ireland v UK A.25 (1978)
European Court of Human Rights

Soon after the creation of the Irish Free State in 1921, six counties in the north opted to remain within the UK. These counties became Northern Ireland and until 1972 it had a separate Parliament (which was constitutionally subordinate to the Westminster Parliament) and Government. In the words of the Court:

> Northern Ireland is not a homogeneous society. It consists of two communities divided by deep and long-standing antagonisms. One community is variously termed Protestant, Unionist or Loyalist, the other is generally labelled as Catholic, Republican or Nationalist. About two-thirds of the population of one and a half million belong to the Protestant community, the remaining third to the

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Catholic community. The majority group is descended from Protestant settlers who emigrated in large numbers from Britain to Northern Ireland during the seventeenth century. The now traditional antagonism between the two groups is based both on religion and on social, economic and political difference. In particular, the Protestant community has consistently opposed the idea of a united Ireland independent of the United Kingdom, whereas the Catholic community has traditionally supported it. [Para 15.]

From 1963 a campaign for 'civil rights' (demanding the ending of discrimination against Catholics in the allocation of public sector housing, local authority appointments, and the manipulation of electoral boundaries) began to gather momentum in Northern Ireland. Marches in support of the campaign started in 1968 and some ended in rioting. In November 1968 the Northern Ireland Government announced a reform programme to deal with the minority community's grievances. However, the protest marches continued with escalating public disorder in the province. In the spring of 1969 explosive devices were detonated (probably by Loyalist terrorists) at public utility facilities in Northern Ireland and British troops were sent to the province. At about the same time the IRA (the Irish Republican Army, 'a clandestine organisation with quasi-military dispositions') secretly reactivated its members. During 1970 the IRA began a terrorist campaign of bombing buildings and attacking members of the security forces in Northern Ireland. Simultaneously Loyalist terrorists were killing Catholics and bombing their premises. The terrorist violence escalated in 1971 with the IRA being responsible for the majority of incidents. In August 1971 the Government of Northern Ireland, after discussions with the UK Government, brought into operation extra-judicial measures of detention and internment to try and reduce the level of terrorist violence. The authorities introduced these measures because they believed that: (a) the ordinary criminal justice system was unable to deal with IRA terrorism, (b) widespread intimidation of the population made it impossible to secure convictions against IRA terrorists, and (c) the border with the Republic of Ireland made it easy for terrorists to escape from one jurisdiction to the other. In the weeks preceding the introduction of internment, the security forces prepared lists of persons who were suspected of being involved with or having knowledge about IRA terrorism.

Starting at 4 am on Monday 9 August 1971, the army, with police officers occasionally acting as guides, mounted an operation ('Demetrius') to arrest the 452 persons whose names appeared on the final list. In the event some 350 persons were arrested in accordance with the Special Powers Regulations. The arrested persons were taken to one of the three regional holding centres (Malligan Weekend Training Centre in County Londonderry, Ballykinder Weekend Training Centre in County Down, and Girdwood Park Territorial Army Centre in Belfast) that had been set up to receive the prisoners during 48 hours. All those arrested were subjected to interrogation by police officers of the Royal Ulster Constabulary (RUC). One hundred and four persons were released within 48 hours. Those who were to be detained were sent on to the prison ship *Maidstone* or to Crumlin Road prison, both in Belfast. Prior to being lodged in detention, 12 individuals were moved to one or more unidentified centres for 'interrogation in depth' extending over several days (para 39).

Subsequently other persons held and interrogated under the extra-judicial measures were processed at Palace Barracks (Holywood, County Down), Gough (County Armagh), and Girdwood Park and Ballykelly (County Londonderry). Internment resulted in serious rioting and increased terrorist activity. In March 1972, due to the deteriorating security situation, direct rule was established over Northern Ireland by the UK Government (the Northern Ireland Parliament was prorogued and the executive powers of the Northern Ireland Government transferred to the Secretary of State for Northern Ireland). One of the

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first actions taken under direct rule was to release over 250 detainees. Loyalist terrorism, however, began to increase, especially in the form of sectarian assassinations. In 1973 the first Loyalists were interned. Political reforms were unsuccessfully attempted in Northern Ireland and in 1975 the last extra-judicial detainees were released. By March 1975, according to the UK Government, 1,100 people had been killed, 11,500 injured, and £140 million worth of property destroyed by terrorism and public disorder in Northern Ireland.

In December 1971 the Irish Government lodged a complaint with the Commission against the UK, alleging a number of breaches of the Convention in respect of, *inter alia*, the treatment of persons detained under the extra-judicial powers in Northern Ireland. The applicant Government submitted written evidence in respect of 228 cases concerning incidents between 1971 and 1974. The Commission examined in detail the evidence relating to 16 'illustrative' cases selected by the Irish Government. Also 41 further cases were considered by the Commission. The applicant Government was particularly concerned about the use of 'interrogation in depth' techniques, for several days, on 14 persons in 1971 at unidentified interrogation centres. The 'five techniques' consisted of the following sensory deprivation methods which were used in combination:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';
(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud, hissing noise;
(d) deprivation of sleep pending their interrogations: depriving the detainees of sleep;
(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations (para 96).

The applicant Government also made a number of allegations of violent assaults by members of the security forces against detainees. In its report (February 1976) the Commission found, *inter alia*, that the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and of torture in breach of Article 3 (unanimously).

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AS TO THE LAW

. . .

I. ON ARTICLE 3 (ART 3)

150. Article 3 (art 3) provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

A. PRELIMINARY QUESTIONS

151. In their memorial of 26 October 1976 and at the hearings in February 1977, the United Kingdom Government raised two preliminary questions on the alleged violations of Article 3 (art 3). The first concerns the violations which they no longer contest, the second certain of the violations whose existence they dispute.

1. Preliminary question on the non-contested violations of Article 3 (art 3)

152. The United Kingdom Government contest neither the breaches of Article 3 (art 3) as found by the Commission . . . nor—a point moreover that is beyond doubt—the Court's jurisdiction to

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examine such breaches. However, relying *inter alia* on the case-law of the International Court of Justice (*Northern Cameroons* case, judgment of 2 December 1963, and Nuclear Tests cases, judgments of 20 December 1974), they argue that the European Court has power to decline to exercise its jurisdiction where the objective of an application has been accomplished or where adjudication on the merits would be devoid of purpose. Such, they claim, is the situation here. They maintain that the findings in question not only are not contested but also have been widely publicised and that they do not give rise to problems of interpretation or application of the Convention sufficiently important to require a decision by the Court. Furthermore, for them the subject-matter of those findings now belongs to past history in view of the abandonment of the five techniques (1972), the solemn and unqualified undertaking not to reintroduce these techniques (8 February 1977) and the other measures taken by the United Kingdom to remedy, impose punishment for, and prevent the recurrence of, the various violations found by the Commission.

This argument is disputed by the applicant Government. Neither is it accepted in a general way by the delegates of the Commission; they stated, however, that they would express no conclusion as to whether or not the above-mentioned undertaking had deprived the claim concerning the five techniques of its object.

153. The Court takes formal note of the undertaking given before it, at the hearing on 8 February 1977, by the United Kingdom Attorney-General on behalf of the respondent Government. The terms of this undertaking were as follows:

> 'The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 (art 3) of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation.'

The Court also notes that the United Kingdom has taken various measures designed to prevent the recurrence of the events complained of and to afford reparation for their consequences. For example, it has issued to the police and the army instructions and directives on the arrest, interrogation and treatment of persons in custody, reinforced the procedures for investigating complaints, appointed commissions of enquiry and paid or offered compensation in many cases . . .

154. Nevertheless, the Court considers that the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3 (art 3). The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19) (art 19).

The conclusion thus arrived at by the Court is, moreover, confirmed by paragraph 3 of Rule 47 of the Rules of Court. If the Court may proceed with the consideration of a case and give a ruling thereon even in the event of a 'notice of discontinuance, friendly settlement, arrangement' or 'other fact of a kind to provide a solution of the matter', it is entitled a fortiori to adopt such a course of action when the conditions for the application of this Rule are not present.

155. Accordingly, that part of the present case which concerns the said allegations cannot be said to have become without object; the Court considers that it should rule thereon, notwithstanding the initiatives taken by the respondent State. . . .

B. QUESTIONS OF PROOF

160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3 (art 3), the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the

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material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*.

161. The Commission based its own conclusions mainly on the evidence of the one hundred witnesses heard in, and on the medical reports relating to, the sixteen 'illustrative' cases it had asked the applicant Government to select. The Commission also relied, but to a lesser extent, on the documents and written comments submitted in connection with the '41 cases' and it referred to the numerous 'remaining cases' (see paragraph 93 above). As in the '*Greek case*' (Yearbook of the Convention, 1969, The *Greek* case, p 196, para 30), the standard of proof the Commission adopted when evaluating the material it obtained was proof 'beyond reasonable doubt'.

The Irish Government see this as an excessively rigid standard for the purposes of the present proceedings. They maintain that the system of enforcement would prove ineffectual if, where there was a *prima facie* case of violation of Article 3 (art 3), the risk of a finding of such a violation was not borne by a State which fails in its obligation to assist the Commission in establishing the truth (Article 28, sub-paragraph (a) *in fine*, of the Convention) (art 28-a). In their submission, this is how the attitude taken by the United Kingdom should be described.

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

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C. QUESTIONS CONCERNING THE MERITS

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

163. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art 3) makes no provision for exceptions and, under Article 15 para 2 (art 15–2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.

164. In the instant case, the only relevant concepts are 'torture' and 'inhuman or degrading treatment', to the exclusion of 'inhuman or degrading punishment'.

1. The unidentified interrogation centre or centres

(a) The 'five techniques'

165. . . . In the Commission's estimation, those facts constituted a practice not only of inhuman and degrading treatment but also of torture. The applicant Government ask for confirmation of this opinion which is not contested before the Court by the respondent Government.

166. The police used the five techniques on fourteen persons in 1971 . . . Although never authorised in writing in any official document, the five techniques were taught orally by the English Intelligence Centre to members of the RUC at a seminar held in April 1971. There was accordingly a practice.

167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to

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the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission.

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

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

The Court considers in fact that, while there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article 1 *in fine* of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares:

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

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

168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3 (art 3).

(b) Ill-Treatment alleged to have accompanied the use of the five techniques

. . .

2. Palace Barracks

173. The Commission came to the view that inhuman treatment had occurred at Palace Barracks in September, October and November 1971 in seven of the nine 'illustrative' cases it examined . . . It considered that these cases, combined with other indications, showed that there had been in these Barracks, in the autumn of 1971, a practice in connection with the interrogation of prisoners by members of the RUC which was inhuman treatment.

The British Government do not contest these conclusions; the Irish Government ask the Court to confirm them but also to supplement them in various respects.

(c) Autumn 1971

174. Insofar as the Commission has found that a practice of inhuman treatment was followed in the autumn of 1971 . . . The evidence before the Court reveals that, at the time in question, quite a large number of those held in custody at Palace Barracks were subjected to violence by members of the RUC. This violence, which was repeated violence occurring in the same place and taking similar forms, did not amount merely to isolated incidents; it definitely constituted a practice. It also led to intense suffering and to physical injury which on occasion was substantial; it thus fell into the category of inhuman treatment.

According to the applicant Government, the violence in question should also be classified, in some cases, as torture.

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On the basis of the data before it, the Court does not share this view. Admittedly, the acts complained of often occurred during interrogation and, to this extent, were aimed at extracting confessions, the naming of others and/or information, but the severity of the suffering that they were capable of causing did not attain the particular level inherent in the notion of torture as understood by the Court (see paragraph 167 above). . . .

3. Other Places

178. According to the applicant Government, a practice or practices in breach of Article 3 (art 3) existed in Northern Ireland from 1971 to 1974, for example at Girdwood Park and at Ballykinler; this allegation is denied by the respondent Government.

The Commission was of the opinion that T 16 and T 7 had been victims of treatment that was both inhuman and degrading and T 11 of treatment that was inhuman: T 16 on 13 August 1971 at Girdwood Park, T 7 on 28 October 1971 in a street in Belfast and T 11 on 20 December 1971 at Albert Street Barracks, also in Belfast. However, the Commission considered that no practice in breach of Article 3 (art 3) had been established in relation to these cases, including the general conditions at Girdwood Park . . . and, further, that the conditions of detention at Ballykinler did not disclose a violation of that Article (art 3) (ibid).

(a) Ballykinler

. . .

180. The RUC, with the assistance of the army, used Ballykinler as a holding and interrogation centre for a few days early in August 1971. Some dozens of people arrested in the course of Operation Demetrius were held there in extreme discomfort and were made to perform irksome and painful exercises . . .

There was thus a practice rather than isolated incidents. The Court found confirmation of this in the judgment of 18 February 1972 in the Moore case.

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181. The Court has to determine whether this practice violated Article 3 (art 3). Clearly, it would not be possible to speak of torture or inhuman treatment, but the question does arise whether there was not degrading treatment. The Armagh County Court granted Mr Moore £300 by way of damages, the maximum amount it had jurisdiction to award. This fact shows that the matters of which Mr Moore complained were, if nothing else, contrary to the domestic law then in force in the United Kingdom. Furthermore, the way in which prisoners at Ballykinler were treated was characterised in the judgment of 18 February 1972 as not only illegal but also harsh. However, the judgment does not describe the treatment in detail; it concentrates mainly on reciting the evidence tendered by the witnesses and indicates that the judge rejected that given on behalf of the defence. The Compton Committee for its part considered that, although the exercises which detainees had been made to do involved some degree of compulsion and must have caused hardship, they were the result of lack of judgment rather than an intention to hurt or degrade.

To sum up, the RUC and the army followed at Ballykinler a practice which was discreditable and reprehensible but the Court does not consider that they infringed Article 3 (art 3).

(b) Miscellaneous places

182. There remain the various other places referred to by the Irish Government . . . The information before the Court concerning these places—for example the large number of cases in which compensation was paid by the British authorities and the many criminal or disciplinary sanctions imposed on members of the security forces . . . suggests that there must have been individual violations of Article 3 (art 3) in Northern Ireland over and above the breaches already noted by the Court. However, the Commission did not regard this information . . . as being sufficient to disclose a practice or practices in breach of Article 3 (art 3).

The Court shares this view. Admittedly, the evidence before the Court bears out the Commission's opinion . . . However, these were incidents insufficiently numerous and inter-connected to amount

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to a practice . . . the preventive measures taken by the United Kingdom . . . at first sight render hardly plausible, especially as regards the period after the introduction of direct rule (30 March 1972), if not the suggestion of individual violations of Article 3 (art 3)—on which the Court does not have to give a specific ruling . . . at least the suggestion of the continuation or commencement of a practice or practices in breach of that Article (art 3). Furthermore, anyone claiming to be the victim of a breach of Article 3 (art 3) in Northern Ireland is entitled to exercise the domestic remedies open to him (Article 26 the Convention) (art 26) and subsequently, if need be, to apply to the Commission whose competence to receive 'individual' petitions has been recognised by the United Kingdom (Article 25) (art 25); this in fact often happened. Finally, the findings made in connection with the five techniques and Palace Barracks, henceforth embodied in a binding judgment of the Court, provide a far from negligible guarantee against a return to the serious errors of former times.

In these circumstances, the interests protected by the Convention do not compel the Court to undertake lengthy researches that would delay the Court's decision. . . .

185. In conclusion, the Court does not find, as regards the places concerned, any practice in breach of Article 3 (art 3).

4. The Irish request for a consequential order

186. In a letter dated 5 January 1977, the applicant Government requested the Court to order that the respondent Government

— refrain from reintroducing the five techniques, as a method of interrogation or otherwise;
— proceed as appropriate, under the criminal law of the United Kingdom and the relevant disciplinary code, against those members of the security forces who have committed acts in breach of Article 3 (art 3) referred to in the Commission's findings and conclusions, and against those who condoned or tolerated them.

At the hearings, the applicant Government withdrew the first request following the solemn undertaking given on behalf of the United Kingdom Government on 8 February 1977 . . . on the other hand, the second request was maintained.

187. The Court does not have to consider in these proceedings whether its functions extend, in certain circumstances, to addressing consequential orders to Contracting States. In the present case, the Court finds that the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law. . . .

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V. ON ARTICLE 50 (ART 50)

. . .

245. The President, acting on behalf of the Court, instructed the Registrar to ask the Agent of the Irish Government to indicate 'as soon as possible whether it would be correct to assume, particularly in the light' of certain passages in the Commission's decision on the admissibility of the application and in the verbatim report of the public hearings held in February 1977, 'that [his] Government [were not inviting] the Court, should it find a violation of the Convention, to afford just satisfaction within the meaning of Article 50 (art 50)'. This the Registrar did by letter of 8 August 1977. On 14 October 1977, the Agent of the applicant Government replied as follows:

> '. . . the applicant Government, while not wishing to interfere with the *de bene esse* jurisdiction of the Court, have not as an object the obtaining of compensation for any individual person and do not invite the Court to afford just satisfaction under Article 50 (art 50), of the nature of monetary compensation, to any individual victim of a breach of the Convention . . . .'

246. The Court accordingly considers that it is not necessary to apply Article 50 (art 50) in the present case.

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FOR THESE REASONS, THE COURT

I. ON ARTICLE 3 (ART 3)

1. holds unanimously that, although certain violations of Article 3 (art 3) were not contested, a ruling should nevertheless be given thereon;

2. holds unanimously that it has jurisdiction to take cognisance of the cases of alleged violation of Article 3 (art 3) to the extent that the applicant Government put them forward as establishing the existence of a practice;

3. holds by sixteen votes to one that the use of the five techniques in August and October 1971 constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3 (art 3);

4. holds by thirteen votes to four that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3 (art 3);

5. holds by sixteen votes to one that no other practice of ill-treatment is established for the unidentified interrogation centres;

6. holds unanimously that there existed at Palace Barracks in the autumn of 1971 a practice of inhuman treatment, which practice was in breach of Article 3 (art 3);

7. holds by fourteen votes to three that the last-mentioned practice was not one of torture within the meaning of Article 3 (art 3);

8. holds unanimously that it is not established that the practice in question continued beyond the autumn of 1971;

9. holds by fifteen votes to two that no practice in breach of Article 3 (art 3) is established as regards other places;

10. holds unanimously that it cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 (art 3) found by the Court and against those who condoned or tolerated such breaches; . . .

IV. ON ARTICLE 50 (ART 50)

18. holds unanimously that it is not necessary to apply Article 50 (art 50) in the present case.
. . .

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NOTES

1 The plenary Court was composed of President Balladore Pallieri and Judges: Wiarda, Zekia, Cremona, O'Donoghue, Pedersen, Thor Vilhjalmsson, Ryssdal, Ganshof Van Der Meersch, Fitzmaurice, Bindschedler-Robert, Evrigenis, Teitgen, Lagergren, Liesch, Gölcüklü, and Matscher.

2 Judge Zekia issued a separate opinion in which he set out his conception of torture.

Admittedly the word 'torture' included in Article 3 of the Convention is not capable of an exact and comprehensive definition. It is undoubtedly an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed,

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the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.

It seems to me permissible, in ascertaining whether torture or inhuman treatment has been committed or not, to apply not only the objective test but also the subjective test.

As an example I can refer to the case of an elderly sick man who is exposed to a harsh treatment—after being given several blows and beaten to the floor, he is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied on a wrestler or even a young athlete, I would hesitate a lot to describe it as inhuman treatment and I might regard it as mere rough handling.

3 Judge O'Donoghue, the judge of Irish nationality, dissented on a number of grounds.

For my part I agree with the unanimous finding of the Commission that the use of the five techniques constituted 'torture' in breach of the Convention. . . . One is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed. Indeed in the present-day world there can be little doubt that torture may be inflicted in the mental sphere.

4 Judge Sir Gerald Fitzmaurice, the judge of British nationality, was the dissenter who did not consider that the five techniques constituted a practice of inhuman and degrading treatment. Generally, he took a more restrictive view of the scope of Article 3 than the Court.

It would be reasonable to suppose that, at the date when the Convention was framed, during the aftermath of war and atrocity, it would have been the severer forms of ill-treatment that the Parties would have had in mind.

Subjection to the five techniques was certainly harsh treatment, ill-treatment, maltreatment, and other descriptions could be found; but the 'inhuman' involves a totally different order or category of concept to which, in my opinion, the five techniques, even used in combination, do not properly belong . . . if standing someone against a wall in a strained position over a considerable period, or keeping him with a hood over his head for a certain time, amounts to 'inhuman' treatment, what language should be used to describe kicking a man in the groin, or placing him in a blacked-out cell in the company of a bevy of starving rats? . . .

In the present context it can be assumed that [degrading treatment] is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt . . .

. . . not only must a certain intensity of suffering be caused before the process can be called torture, but also that torture involves a wholly different order of suffering from what falls short of it. It amounts not to a mere difference of degree but to a difference of kind. If the five techniques are to be regarded as involving torture, how does one characterize eg having one's finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over an electric grid? . . .

5 Judge Evrigenis took a diametrically opposite approach to Judge Fitzmaurice:

The Court's interpretation in this case seems also to be directed to a conception of torture based on methods of inflicting suffering which have already been overtaken by the ingenuity of modern techniques of oppression. Torture no longer presupposes violence, a notion to which the judgment

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refers expressly and generically. Torture can be practised—and indeed is practised—by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By means of new forms of suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will. I should very much regret it if the definition of torture which emerges from the judgment could not cover these various forms of technologically sophisticated torture. Such an interpretation would overlook the current situation and the historical prospects in which the European Convention on Human Rights should be implemented.

6 For Judge Matscher:

the distinguishing feature of the notion of torture is the systematic, calculated (hence deliberate) and prolonged application of treatment causing physical or psychological suffering of a certain intensity, the aim of which may be to extort confessions, to obtain information or simply to break a person's will in order to compel him to do something he would not otherwise do, or again, to make a person suffer for other reasons (sadism, aggravation of a punishment, etc.).

7 While the above judicial opinions indicate the difficulties inherent in determining if a particular form of maltreatment falls within any of the specific categories prescribed by Article 3 (for further guidance on how these categories have been applied by the Court see the cases extracted and discussed below), the Court's judgment in ***Ireland*** emphasizes some of the basic certainties of the Article. Hence a victim's conduct does not permit a State to subject him or her to treatment prohibited by Article 3 (even if the victim is a terrorist or a major criminal). Furthermore, the Article is not subject to exceptions and cannot be derogated from under Article 15 (even where there is a public emergency threatening the life of the nation).

8 The Court's elaboration of the idea of 'a practice' which is incompatible with the Convention and its importance in the determination of the admissibility of a complaint has been examined at p 35.

9 The Commission has expressed the view that legal persons cannot claim to be the victims of a violation of Article 3. In ***Verein Kontakt-Information-Therapie and Hagen v Austria***, 57 DR 81 (1988), the first applicant was a private association which ran rehabilitation centres for young drug abusers. The domestic courts ordered two therapists (including the second applicant), employed by the association, to give evidence in criminal proceedings for alleged drug abuse against a former patient. The therapists, with the support of the first applicant, refused to disclose confidential information about the former patient. The courts fined the therapists 5,000 AS each and obliged the association to collect the fine by attachment of their earnings. The applicants complained, *inter alia*, of a breach of Article 3. The Commission declared the application inadmissible noting that the rights protected by Article 3 '. . . are by their very nature not susceptible of being exercised by a legal person such as a private association' (p 162). Also the treatment of the second applicant involving 'the obligation to give the required evidence did not attain the level of severity which is required by this provision' (p 163). Conceptually it is nonsensical to characterize the treatment of a legal entity as 'torture' or 'inhuman'.

10 The Court has interpreted Article 3 so as to impose a duty on member States to undertake an effective official investigation where a person makes an arguable claim that he or she has been subject to serious maltreatment by public officials. This procedural obligation

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mirrors the similar duty created by Article 2, in cases where a person has been killed in circumstances governed by that provision (see p 130). In ***Assenov and others v Bulgaria***, 1998-VIII, the first applicant was a Bulgarian of Roma origin. In 1992, when he was 14 years old, he was caught gambling in a market square by an off-duty police officer. The officer arrested the applicant and took him to a nearby bus station, where the officer called for additional police help. The applicant's parents were working at the bus station and they sought his release. To show that he would punish the applicant, his father hit the applicant with a strip of plywood. Subsequently, the applicant claimed that he was, *inter alia*, beaten with truncheons by three police officers. The Commission did not find a breach of Article 3 (16 votes to 1) as it was not able to establish who had caused the bruises on the applicant. The Court, unanimously, held that:

> 102. . . . where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, the *McCann and Others v the United Kingdom* judgment of 27 September 1995, Series A No 324, p 49 . . .). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance . . . would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.
>
> 103. The Court notes that following [the applicant's mother's] complaint, the State authorities did carry out some investigation into the applicant's allegations. It is not, however, persuaded that this investigation was sufficiently thorough and effective to meet the above requirements of Article 3. In this respect it finds it particularly unsatisfactory that the . . . investigator was prepared to conclude that Mr Assenov's injuries had been caused by his father . . . despite the lack of any evidence that the latter had beaten his son with the force which would have been required to cause the bruising described in the medical certificate. Although this incident had taken place in public view at the bus station, and although, according to the statements of the police officers concerned, it was seen by approximately fifteen to twenty Roma and twenty bus drivers, no attempt appears to have been made to ascertain the truth through contacting and questioning these witnesses in the immediate aftermath of the incident, when memories would have been fresh. Instead, at that time a statement was taken from only one independent witness, who was unable to recall the events in question . . .
>
> 104. The initial investigation carried out by the regional military prosecution office (RMPO) and that of the general military prosecution office (GMPO) were even more cursory. The Court finds it particularly striking that the GMPO could conclude, without any evidence that Mr Assenov had not been compliant, and without any explanation as to the nature of the alleged disobedience, that 'even if the blows were administered on the body of the juvenile, they occurred as a result of disobedience to police orders' . . . To make such an assumption runs contrary to the principle under Article 3 that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct is in principle an infringement of his rights . . .
>
> . . .
>
> 106. Against this background, in view of the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers, the Court finds that there has been a violation of Article 3 of the Convention.

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The articulation of this implicit duty of investigation is valuable for two reasons. First, it seeks to ensure that victims of unlawful maltreatment by public officials will be able to demand an effective domestic inquiry, potentially leading to the punishment of the culpable officials. Secondly, the Convention duty to conduct such an inquiry may act as a deterrent, to prevent ill-treatment, as officials may fear discovery and punishment when an inquiry is held.

A united Chamber also found a breach of this effective investigation obligation in conjunction with Article 14 where the authorities had failed to examine possible racist motivation behind acts of police brutality: ***Bekos and Koutropoulos v Greece***, judgment of 13 December 2005.

A broadening of the scope of the effective investigation obligation under this Article to encompass complaints about serious (criminal) ill-treatment by private persons has been endorsed by a unanimous Chamber in ***MC v Bulgaria***, judgment of 4 December 2003. The applicant was born in 1980 and she alleged that on 31 July and 1 August 1995, when she was 14 years and 10 months old (the age of consent in Bulgaria is 14), she had been raped by two men. She had been waiting to enter a local disco bar on the evening of 31 July 1995 when three men (P aged 21, A aged 20, and VA of unknown age) arrived in a car. The applicant knew P and A. They invited her to go to another disco bar in a town some distance away and she agreed. On the return journey they went to a reservoir as A wished to swim (the applicant subsequently stated that she had objected to the detour). She remained in the car whilst the men went for a swim. P returned to the car and started kissing her. She claimed that she had refused his advances and asked him to leave her alone. She contended that he then held her hands against her back. She did not have the strength physically to resist or scream. P then had sexual intercourse with her. P later claimed that the applicant had consented to sex. She alleged that afterwards she had been very disturbed and cried. In the early morning of 1 August the group went to a nearby town where relatives of VA had a house. The applicant went into the house with A and VA. She asserted that A had pushed her down on a bed she was sitting on and forced her to have sexual intercourse with him (she claimed that she did not have the strength to resist). The applicant's mother found her in the house and took her directly to the local hospital. The medical examiner confirmed that the applicant had recently lost her virginity. One day later P visited the applicant's home and (according to the applicant and her mother) had asked for forgiveness and promised that he would marry the applicant when she became of age. The applicant's mother considered this a suitable arrangement. Subsequently, the applicant went out with P the following evening. On 10 August the applicant's father returned home. The family then decided to file a complaint with the authorities.

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During 11 August 1995 the applicant made a written statement to the police. Later that day the police arrested P and A. The men claimed that she had consented to sex and were subsequently released by the police. On 14 November 1995 the District Prosecutor opened criminal proceedings concerning the alleged rapes and referred the case to an investigator. No action was taken by the authorities for one year and then, in November 1996, the investigator questioned the parties and one month later produced a report recommending the termination of proceedings against P and A (as there was no evidence that they had used threats or violence towards the applicant). The District Prosecutor, in January 1997, ordered a further investigation (as the initial one had not been objective and thorough). The investigator sought the advice of a psychiatrist and a psychologist regarding the behaviour of the applicant at the time of the alleged rapes. They considered that she was psychologically sound but of a credulous nature. She did not appear to have been in a state of shock during the events as she had a clear recollection of them. Her subsequent socializing with P could be explained by the family's wish to present a socially acceptable image of the events. In

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February 1997 the investigator produced a second report which again proposed terminating the proceedings (he considered that the experts' opinions did not undermine his earlier finding that there was no evidence of force or threats having been used against the applicant). The District Prosecutor terminated the proceedings in March 1997 as he concluded that the use of force or threats by P and A had not been established beyond reasonable doubt and no resistance by the applicant or attempts to seek help from others had been established. Appeals to the Regional and Chief Public Prosecutor, by the applicant, were rejected.

The applicant contended that, *inter alia*, the authorities had not effectively investigated the events of 31 July and 1 August 1995. The Court held that:

> 151. In a number of cases Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov v Bulgaria* . . .). Such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by State agents . . .

The Court went on to find that the Bulgarian authorities had insufficiently investigated the surrounding circumstances of the applicant's allegations and placed undue emphasis on the absence of 'direct' proof of rape (i.e. the lack of evidence that the applicant had 'resisted' the men). Consequently, a violation of the respondent State's positive obligations under Article 3 (and Article 8) were found to have occurred. This extension of ***Assenov*** is a further enhancement of the procedural protection given to individuals under Article 3. The perpetrators of serious ill-treatment should be sought via effective investigations whether they be State agents or private individuals.

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11 Although the vast majority of cases relying upon Article 3 involve allegations against the actions of State officials, the Court has interpreted this provision to require States to take positive steps, such as the enactment of appropriate criminal offences, to protect persons from being subject to Article 3 maltreatment by other private persons. In ***A v UK***, 1998-VI, the applicant was a young person born in 1984. In 1993 the applicant's stepfather was charged with assault occasioning actual bodily harm in respect of his beating of the applicant. The stepfather admitted that on several occasions he had caned (i.e. hit on the bottom and back of the legs with a garden cane) the applicant, because the latter was a difficult boy who did not respond to parental or school discipline. To secure a conviction it was necessary for the prosecution to prove that the stepfather's punishment was not reasonable. The jury, by a majority verdict, found the stepfather not guilty. The applicant complained to the Commission alleging, *inter alia*, that the UK Government had failed to protect him from ill-treatment by his stepfather in breach of Article 3. The Commission was unanimous in upholding that claim. The Court was also unanimous in its judgment that the beating of the applicant was sufficiently serious to fall within the scope of Article 3 (note, the Court did not specify what element of Article 3 had been infringed, e.g. whether it was degrading or inhuman treatment or punishment).

> 22. It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather. The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, the *HLR v France* judgment of 29 April 1997, Reports 1997-III, p 758, § 40). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal

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integrity (see, *mutatis mutandis*, the *X and Y v Netherlands* judgment of 26 March 1985, Series A No 91, pp 11–13, §§ 21–7; the *Stubbings v UK* judgment of 22 October 1996, Reports 1996-IV, p 1505, §§ 62–4; and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

23. The Court recalls that under English law it is a defence to a charge of assault on a child that the treatment in question amounted to 'reasonable chastisement' . . . The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment.

24. In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government have accepted that this law currently fails to provide adequate protection to children and should be amended. In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.

The Court went on to award the applicant £10,000 compensation for non-pecuniary damage. Would it be stretching the reasoning in the above judgment too far to require States to protect individuals from Article 3 maltreatment inflicted by legal persons, for example what of dangerous or humiliating working conditions (the Court used the phrase 'ill-treatment administered by private individuals')?

The Children Act 2004, section 58, removed the defence of reasonable punishment in respect of battery of a child amounting to the offences of wounding and causing grievous bodily harm, assault occasioning actual bodily harm, and cruelty to a person under the age of 16. Also, battery causing actual bodily harm to a child cannot be justified in any civil proceedings as constituting reasonable punishment. These limitations, which apply to England and Wales, the Scottish Parliament having previously introduced similar legislation, came into effect in January 2005. They were designed to allow parents to administer mild physical punishment to their children provided that bruising and cuts were not inflicted. Leading child protection charities, including the NSPCC, criticized the amendments because, *inter alia*, they believed that it was as wrong to hit a child as to hit an adult. Proponents of physical chastisement criticized the legislation as being impossible to police.

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12 A unanimous Grand Chamber applied the reasoning in ***A v UK*** to a local authority's failure to take prompt action to safeguard children from serious neglect by their parents in ***Z and Others v UK***, judgment of 10 May 2001. The four applicants were siblings, born between 1982 and 1988. From 1987 their local social services department were aware of concerns about the children's welfare (reports from their neighbours and teachers indicated that the children were not being properly fed and cared for by their parents). In 1989 a social work assistant was assigned to help the parents care for the applicants (social services had concluded that the parents should be aided to look after the applicants rather than the latter being taken away from them into public care). In 1992 the applicants were taken into public care when their mother informed the social services that she could not cope and would 'batter' them. Subsequently, the applicants complained that the social services had failed to protect them from being subject to inhuman and degrading treatment by their parents. The Grand Chamber held that:

73. . . . The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals

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within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *A v the United Kingdom* judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, § 22). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (*mutatis mutandis*, the *Osman v the United Kingdom* judgment of 28 October 1998, Reports 1998-VIII, § 116).

74. There is no dispute in the present case that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment . . . This treatment was brought to the local authority's attention, at the earliest in October 1987. It was under a statutory duty to protect the children and had a range of powers available to them, including removal from their home. The children were however only taken into emergency care, at the insistence of the mother, in 30 April 1992. Over the intervening period of four and a half years, they had been subject in their home to what the child consultant psychiatrist who examined them referred to as horrific experiences. . . . The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence . . . The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case however leaves no doubt as to the failure of the system to protect these child applicants from serious, long-term neglect and abuse.

75. Accordingly, there has been a violation of Article 3 of the Convention.

Each of the applicants was awarded £32,000 non-pecuniary damages in respect of pain and suffering experienced through the local authority's failure to protect them from abuse. In addition they were awarded individual sums, ranging from £4,000 to £100,00 pecuniary damages to compensate them for their loss of employment opportunities and future medical costs attributable to their suffering.

The above judgment expanded the protective measures obligation upon States to encompass the speedy physical intervention of State officials to protect children known to be at risk of serious risk of harm from their parents/carers.

13 The Court has refused to accept that States are under a positive obligation to permit/aid the assisted suicide of a competent adult in the final stages of a terminal illness. In ***Pretty v UK***, judgment of 29 April 2002 (and see p 118 for the Article 2 aspects of her case), the applicant submitted that the domestic authorities were under an Article 3 duty to so protect her from death caused by motor neurone disease.

55. The Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death. It is true that she is unable to commit suicide herself due to physical incapacity and that the state of law is such that her husband faces the risk of prosecution if he renders her assistance. Nonetheless, the positive obligation on the part of the State which is invoked in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.

56. The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent Government either to give an undertaking not to prosecute the applicant's husband if he assists her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide. There has, accordingly, been no violation of this provision.

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This interpretation of Article 3 was a logical consequence of the Court's earlier ruling that there was no right to die recognized under Article 2 of the Convention.

Torture

Aksoy v Turkey 1996-VI

European Court of Human Rights

The applicant was a Turkish national who had been born in 1963 and lived in south-east Turkey. In 1994 he was shot dead, but his father continued his application before the Strasbourg authorities. The applicant alleged that on the night of 24 November 1992 approximately 20 police officers came to his home, accompanied by a detainee who claimed that the applicant was a member of the PKK (Workers' Party of Kurdistan). The applicant was arrested and taken to Mardin Anti-terrorist Headquarters. He was interrogated about the man who identified him (the applicant claimed not to know the man) and threatened with torture. On the second day of his detention the applicant claimed that he was stripped naked, his hands were tied behind his back, and he was strung up by his arms in the form of torture known as 'Palestinian hanging'. While he was hanging, the police connected electrodes to his genitals and threw water over him while they electrocuted him. He was blindfolded during this torture, which lasted for about half an hour. During the next two days he was regularly beaten by the police officers. The applicant claimed that the hanging resulted in him losing the movement of his arms and hands. He asked to see a doctor, but his request was denied. He was released from detention on 10 December 1992 and no charges were brought against him. On the 15 December 1992 he was admitted to the Dicle University Hospital where he was diagnosed as suffering from bilateral radial paralysis (paralysis of both arms caused by nerve damage in the upper arms). He discharged himself on the 31 December 1992, taking his medical file with him. The applicant complained to the Commission alleging, *inter alia*, that he had suffered maltreatment in breach of Article 3 during his detention. Delegates of the Commission held evidentiary hearings in Turkey. The Commission found, *inter alia*, that there was no evidence that the applicant was suffering from any disability prior to his arrest. The medical evidence showed that he was suffering from radial paralysis in both arms (an uncommon condition, but consistent with having been subject to 'Palestinian hanging') soon after his release. The Turkish Government had supplied no alternative explanation for the applicant's injuries. There was insufficient evidence for the Commission to reach any conclusions regarding the applicant's contentions that he had been electrocuted and beaten. By 15 votes to 1 the Commission expressed the opinion that there had been a breach of Article 3.

. . . THE MERITS . . .

60. The applicant complained of having been ill-treated in different ways. He claimed to have been kept blindfolded during interrogation, which caused disorientation; to have been suspended from his arms, which were tied together behind his back ('Palestinian hanging'); to have been given electric shocks, which were exacerbated by throwing water over him; and to have been subjected to beatings, slapping and verbal abuse. He referred to medical evidence from Dicle University Medical

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Faculty which showed that he was suffering from a bilateral brachial plexus injury at the time of his admission to hospital . . . This injury was consistent with Palestinian hanging.

He submitted that the treatment complained of was sufficiently severe as to amount to torture; it was inflicted with the purpose of inducing him to admit that he knew the man who had identified him.

In addition, he contended that the conditions in which he was detained . . . and the constant fear of torture which he suffered while in custody amounted to inhuman treatment.

61. The Court, having decided to accept the Commission's findings of fact . . . considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention (art 3) (see the *Tomasi v France* judgment of 27 August 1992, Series A No 241-A, pp 40–1, paras 108–11 and the *Ribitsch v Austria* judgment of 4 December 1995, Series A No 336, p 26, para 34).

62. Article 3 (art 3), as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art 15) even in the event of a public emergency threatening the life of the nation (see the *Ireland v the United Kingdom* judgment of 18 January 1978, Series A No 25, p 65, para 163, the *Soering v United Kingdom* judgment of 7 July 1989, Series A No 161, p 34, para 88, and the *Chahal v United Kingdom* judgment of 15 November 1996, Reports 1996-V, p 1855, para 79).

63. In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 (art 3) between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v United Kingdom* judgment previously cited, p 66, para 167).

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64. The Court recalls that the Commission found, *inter alia*, that the applicant was subjected to 'Palestinian hanging', in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms . . .

In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time . . . The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.

In view of the gravity of this conclusion, it is not necessary for the Court to examine the applicant's complaints of other forms of ill-treatment.

In conclusion, there has been a violation of Article 3 of the Convention (art 3).

. . .

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (ART 50)

110. Under Article 50 of the Convention (art 50),

> 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from

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the . . . Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

111. In his memorial the applicant claimed compensation for pecuniary damage caused by his detention and torture, consisting of medical expenses of 16,635,000 Turkish liras and loss of earnings amounting to £40 (sterling).

In addition he sought non-pecuniary damages of £25,000 . . .

He also requested payment of his legal fees and expenses which totalled £20,710.

112. The Government offered no comment either in its memorial or during the hearing before the Court as regards these claims.

A. DAMAGE

113. In view of the extremely serious violations of the Convention suffered by Mr Zeki Aksoy and the anxiety and distress that these undoubtedly caused to his father, who has continued with the application after his son's death . . . the Court has decided to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damage. In total this amounts to 4,283,450,000 (four thousand two hundred and eighty-three million, four hundred and fifty thousand) Turkish liras (based on the rate of exchange applicable on the date of adoption of the present judgment).

B. COSTS AND EXPENSES

114. The Court considers that the applicant's claim for costs and expenses is reasonable and awards it in full, less the amounts received by way of legal aid from the Council of Europe which have not already been taken into account in the claim.

FOR THESE REASONS, THE COURT

. . .

2. Holds by eight votes to one that there has been a violation of Article 3 of the Convention (art 3); . . .

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NOTES

1 The Court was composed of President Ryssdal and Judges: Thor Vilhjalmsson, Gölcüklü, Pettiti, De Meyer, Morenilla, Baka, Makarczyk, and Lohmus.

Judge Gölcüklü, the Judge of Turkish nationality, dissented because he did not believe that the applicant had exhausted domestic remedies. Therefore he was dispensed from considering the merits of the case.

This was the first case where the Court found maltreatment by State officials amounted to torture. Even where the applicant suffered such horrendous treatment the level of compensation payable under Article 50 was not that large in absolute terms. However, the relative value of the just satisfaction award was greater when compared with the applicant's wage level (he claimed only £40 for several weeks' loss of earnings). The effect upon the international reputation of a member State found responsible for acts of torture by the Court is, of course, very significant.

2 The Commission had found a practice of torture inflicted on political detainees by the Athens Security Police in the earlier ***Greek Case***, 12 Yearbook of the European Convention on Human Rights (1969). From 1965 until 1967 there was political instability and some public disorder in Greece. During 1967 senior military officers staged a *coup d'etat* and

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subsequently a number of persons were detained. Widespread allegations of serious ill-treatment of detainees by security officials were made. Denmark, Norway, and Sweden lodged an inter-State application against Greece in respect of the latter's treatment of political detainees. A few days later the Netherlands also made a similar application. The Commission joined the cases and a Sub-Commission went to Greece to conduct on-the-spot inquiries and hear witnesses. The Commission's report found that:

> *Falanga* or *bastinado* has been a method of torture known for centuries. It is the beating of the feet with a wooden or metal stick or bar which, if skilfully done, breaks no bones, makes no skin lesions, and leaves no permanent and recognisable marks, but causes intense pain and swelling of the feet. The use of *falanga* has been described in a variety of situations: on a bench or chair or on a car-seat; with or without shoes on. Sometimes water has been thrown over the feet and sometimes the victim has been made to run around between beatings. Victims have also been gagged. . . .
>
> While *falanga* and severe beatings of all parts of the body are the commonest forms of torture or ill-treatment that appear in the evidence before the Sub-Commission, other forms have been described: for example, the application of electric shock, squeezing of the head in a vice, pulling out of hair from the head or pubic region, or kicking of the male genital organs, dripping water on the head, and intense noises to prevent sleep. . . .
>
> there has since April 1967 been a practice of torture and ill-treatment by the Athens Security Police, Bouboulinas Street, of persons arrested for political reasons, and that:
>
> (a) this torture and ill-treatment has most often consisted in the application of '*falanga*' or severe beatings of all parts of the body;
>
> (b) its purpose has been the extraction of information including confessions concerning the political activities and associations of the victims and other persons considered to be subversive . . . [Pp 499, 500 and 504.]

The Commission's report was transmitted to the Committee of Ministers on 18 November 1969. On 12 December 1969 the Government of Greece denounced the Convention (under former Article 65 the denunciation would take effect after six months: i.e. 13 June 1970) and refused to participate in further proceedings relating to the report. Therefore, the Committee issued Resolution DH70(1):

> . . . Agreeing with the opinion of the Commission, Decides:
>
> (a) that the Government of Greece has violated Articles 3 . . .
>
> 19. Considering that these circumstances and communications clearly established that the Greek Government is not prepared to comply with its continuing obligations under the Convention and thus with the system of collective protection of human rights established thereby, and that accordingly the Committee of Ministers is called upon to deal with the case in conditions which are not precisely those envisaged in the Convention;
>
> 20. Concludes that in the present case there is no basis for further action under paragraph 2 of Article 32 (art 32–2) of the Convention;
>
> 21. Concludes that it must take a decision, in accordance with paragraph 3 of Article 32 (arts 32–3) of the Convention, about the publication of the report of the Commission;
>
> 22. Decides to make public forthwith the report drawn up by the Commission on the above-mentioned Applications;
>
> 23. Urges the Government of Greece to restore, without delay, human rights and fundamental freedoms in Greece, in accordance with the Convention . . .

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24. Also urges the Government of Greece, in particular, to abolish immediately torture and other ill-treatment of prisoners and to release immediately persons detained under administrative order;

25. And accordingly resolves to follow developments in Greece in this respect.

In 1974 constitutional government was restored in Greece and the Government sought readmission to the Council of Europe. The ***Greek Case*** reveals both the strengths and weaknesses of the Convention system for protecting human rights. The undemocratic military government withdrew from the Council of Europe rather than face censure under the Convention for its practice of torturing political opponents. Yet diplomatic pressures encouraged the restoration of democracy in Greece and readmission to the Council of Europe (together with a renewed accession to the Convention) within a few years.

3 A Grand Chamber of the Court found an act of rape committed by a State official on a detainee to be torture in ***Aydin v Turkey***, 1997-VI. The applicant, who was 17 at the time of her detention, had never travelled outside her village before her arrest by the security forces. On the 29 June 1993 she alleged that village guards and a gendarme arrived at her village and arrested her, her father, and her sister-in-law. They were questioned about visits to her family home by members of the PKK (as in ***Aksoy***). The three of them were then blindfolded and taken to the gendarmerie headquarters in Derik. The applicant was taken alone into a room, stripped, put in a car tyre and spun round, beaten, sprayed with cold water, and raped by a man in military clothing. The applicant and her relatives were released from custody on 2 July 1993. She complained to the Commission alleging, *inter alia*, a breach of Article 3. Delegates of the Commission visited Turkey to hear witnesses and the Commission found the applicant's allegations to be established beyond reasonable doubt. By 26 votes to 1 the Commission expressed the opinion that there had been a violation of Article 3. A majority of the Court (14 votes to 7) determined that:

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83. While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

84. The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.

85. The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region . . . and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.

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86. Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.

87. In conclusion, there has been a violation of Article 3 of the Convention. . . .

The Court went on to award the applicant £25,000 just satisfaction for non-pecuniary damage, 'having regard to the seriousness of the violation of the Convention suffered by the applicant while in custody and the enduring psychological harm which she may be considered to have suffered on account of being raped . . .' (para 131). The dissenters did not consider that the applicant's allegations had been established with sufficient proof. As a matter of law the Court's decision clearly defines the rape of detainees as a particularly serious breach of Article 3.

4 A Grand Chamber of the full-time Court, unanimously, adopted a new approach to assessing whether particular maltreatment should be classified as torture in ***Selmouni v France***, 1999-V. The implication of the Court's statement that in the future 'greater firmness in assessing breaches' (para 101, below) is required, suggests that the Court will be more willing to categorize serious acts of maltreatment as torture. In that case the applicant was a Netherlands and Moroccan national (born in 1942) who had been arrested by the police in France, after he was implicated in drug-trafficking by a fellow suspect. The applicant was held in police custody from 8.30 pm on 25 November 1991 until 7 pm on 28 November 1991. During his detention he was questioned by a number of officers from the Seine-Saint-Denis Criminal Investigation Department. The applicant claimed that during his detention the investigating officers subjected him to a number of forms of serious maltreatment including: repeated assaults (with fists, kicks, and a baseball bat), pulling of his hair, forcing the applicant to kneel down in front of a woman while being verbally abused by an officer, having an officer urinate over him, being threatened with a blowlamp, and having a truncheon inserted into his anus. Later the applicant was convicted of drugs offences and sentenced to 13 years' imprisonment and fined 24 million Francs. The applicant complained to the authorities about the abuse that he had suffered while being questioned and medical reports were obtained. These confirmed that he had many bruises and wounds over his body. However, by the time the applicant alleged that he had been sexually abused by the officers it was too late for medical investigations to establish the truth of his claim. Eventually several police officers were convicted of assaulting and wounding the applicant (the senior officer in charge was sentenced to 18 months' imprisonment—of which 15 months were suspended, another officer was given a 15-month suspended sentence and another a 12-month suspended sentence). The applicant complained to the Commission alleging, *inter alia*, a breach of Article 3. The Commission was unanimous in finding that the deliberate maltreatment of the applicant was of such a serious and cruel nature as to be classified as torture. The Court held that:

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96. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v United Kingdom* judgment . . .).

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97. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, also makes such a distinction, as can be seen from Articles 1 and 16:

> Article 1:
>
> '1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> . . .
>
> Article 16, paragraph 1:
>
> '1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.'

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98. The Court finds that all the injuries recorded in the various medical certificates . . . and the applicant's statements regarding the ill-treatment to which he had been subjected while in police custody . . . establish the existence of physical and—undoubtedly (notwithstanding the regrettable failure to order a psychological report on Mr Selmouni after the events complained of)—mental pain and suffering. The course of the events also shows that pain and suffering were inflicted on the applicant intentionally for the purpose of, *inter alia*, making him confess to the offence which he was suspected of having committed. Lastly, the medical certificates annexed to the case file show clearly that the numerous acts of violence were directly inflicted by police officers in the performance of their duties.

99. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading (see the *Ireland v UK* judgment, p 66, § 167, and the *Tomasi v France* judgment p 42, § 115). In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the *Ribitsch v Austria* judgment of 4 December 1995, Series A No 336, p 26, § 38) . . .

100. In other words, it remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention. The Court considers that this 'severity' is, like the 'minimum severity' required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

101. The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture (see the *Aksoy v Turkey* judgment 2279, § 64, and the *Aydin v Turkey* judgment, pp 1892–3, §§ 83–4 and 86). However, having regard to the fact that the

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Convention is a 'living instrument which must be interpreted in the light of present-day conditions' (see, among other authorities, the following judgments: *Tyrer v UK*, 25 April 1978, Series A No 26, p 15, § 31; *Soering v UK*, p 40, § 102; and *Loizidou v Turkey*, 23 March 1995, Series A No 310, p 26, § 71), the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report of 7 December 1991 . . . that the marks of the violence Mr Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said 'Look, you're going to hear somebody sing'; that one police officer then showed him his penis, saying 'Look, suck this', before urinating over him; and that he was threatened with a blowlamp and then a syringe . . . Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which—without this in any way justifying them—heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning . . .

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

3. Conclusion

There has therefore been a violation of Article 3 . . .

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Having regard to the 'extreme seriousness of the violations of the Convention of which Mr Selmouni was a victim' (para 123), the Court awarded him 500,000 Francs just satisfaction in respect of personal and non-pecuniary injury.

This was the first case in which the Court (both in its part-time and current form) found a European Union member State to have committed acts of torture. The judgment indicates the evidential necessity for victims of maltreatment by officials to obtain expeditious and comprehensive medical reports of their physical and mental conditions. If such reports are not obtained the Court is constrained in its ability to determine the occurrence and effects of the maltreatment.

5 A Grand Chamber cited ***Selmouni*** when it unanimously found that the physical assaults on a young man by gendarmes, which resulted in him suffering considerable permanent brain damage, combined with a 36-hour delay in taking him to a hospital amounted to torture in ***Ilhan v Turkey***, judgment of 27 June 2000.

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6 Another Grand Chamber, by 16 votes to 1, found Russia liable for, *inter alia*, the torture of the first applicant by the separatist regime of the 'Moldavian Republic of Transdniestria' (MRT) in ***Ilascu and Others v Moldova and Russia*** (p 67).

434. The applicant was sentenced to death on 9 December 1993 and detained until his release on 5 May 2001.

The Court reiterates that the Convention is not binding on Contracting States save in respect of events that have occurred since its entry into force, the relevant dates being 12 September 1997 for Moldova and 5 May 1998 for the Russian Federation. However, in order to assess the effect on the applicant of his conditions of detention, which remained more or less identical throughout the time he spent in prison, the Court may also take into consideration the whole of the period in question, including that part of it which preceded the Convention's entry into force with regard to each of the respondent States.

435. During the very long period he spent on death row the applicant lived in the constant shadow of death, in fear of execution. Unable to exercise any remedy, he lived for many years, including the time after the Convention's entry into force, in conditions of detention apt to remind him of the prospect of his sentence being enforced.

In particular, the Court notes that after sending a letter to the Moldovan Parliament in March 1999 Mr Ilaşcu was savagely beaten by the warders at Tiraspol Prison, who threatened to kill him. After that incident he was denied food for two days and light for three.

As to the mock executions which took place before the Convention's entry into force, there is no doubt that the effect of such barbaric acts was to increase the anxiety felt by the applicant throughout his detention about the prospect of his execution.

436. The anguish and suffering he felt were aggravated by the fact that the sentence had no legal basis or legitimacy for Convention purposes. The 'Supreme Court of the MRT' which passed sentence on Mr Ilaşcu was set up by an entity which is illegal under international law and has not been recognised by the international community. That 'court' belongs to a system which can hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention. That is evidenced by the patently arbitrary nature of the circumstances in which the applicants were tried and convicted, as they described them in an account which has not been disputed by the other parties and as described and analysed by the institutions of the OSCE.

437. The judgment of the Supreme Court of Moldova setting aside the applicant's conviction confirmed the unlawful and arbitrary nature of the judgment of 9 December 1993.

438. As regards the applicant's conditions of detention while on death row, the Court notes that Mr Ilaşcu was detained for eight years, from 1993 until his release in May 2001, in very strict isolation: he had no contact with other prisoners, no news from the outside—since he was not permitted to send or receive mail—and no right to contact his lawyer or receive regular visits from his family. His cell was unheated, even in severe winter conditions, and had no natural light source or ventilation. The evidence shows that Mr Ilaşcu was also deprived of food as a punishment and that in any event, given the restrictions on receiving parcels, even the food he received from outside was often unfit for consumption. The applicant could take showers only very rarely, often having to wait several months between one and the next. On this subject the Court refers to the conclusions in the report produced by the CPT following its visit to Transdniestria in 2000, in which it described isolation for so many years as indefensible.

The applicant's conditions of detention had deleterious effects on his health, which deteriorated in the course of the many years he spent in prison. Thus, he did not receive proper care, having

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been deprived of regular medical examinations and treatment and dietetically appropriate meals. In addition, owing to the restrictions on receiving parcels, he could not be sent medicines and food to improve his health.

439. The Court notes with concern the existence of rules granting a discretionary power in relation to correspondence and prison visits, exercisable by both prison warders and other authorities, and emphasises that such rules are arbitrary and incompatible with the appropriate and effective safeguards against abuses which any prison system in a democratic society must put in place. Moreover, in the present case, such rules made the applicant's conditions of detention even harsher.

440. The Court concludes that the death sentence imposed on the applicant coupled with the conditions he was living in and the treatment he suffered during his detention after ratification, account being taken of the state he was in after spending several years in those conditions before ratification, were particularly serious and cruel and must accordingly be considered acts of torture within the meaning of Article 3 of the Convention.

There has therefore been a failure to observe the requirements of Article 3.

441. As Mr Ilaşcu was detained at the time when the Convention came into force with regard to the Russian Federation, on 5 May 1998, the latter is responsible, for the reasons set out above . . . on account of his conditions of detention, the treatment inflicted on him and the suffering caused to him in prison.

Mr Ilaşcu was released in May 2001 and it is only from that date on that Moldova's responsibility is engaged on account of the acts complained of for failure to discharge its positive obligations . . . Consequently, there has been no violation of Article 3 of the Convention by Moldova with regard to Mr Ilaşcu.

442. In conclusion, the violation of Article 3 of the Convention with regard to Mr Ilaşcu is imputable only to the Russian Federation.

The above findings are a truly appalling catalogue of abuse.

7 A unanimous Chamber found that the forced-feeding of a mentally competent remand prisoner, who was engaging in a hunger strike (to protest about the length and conditions of his detention), constituted torture in ***Nevmerzhitsky v Ukraine***, judgment of 5 April 2005.

94. The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v Austria*, judgment of 24 September 1992, Series A No 244, p 26, § 83). Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention. The Court will examine these elements in turn.

95. At the outset, the Court notes that the applicant did not claim that he should have been left without any food or medicine regardless of the possible lethal consequences. However, he claimed that there had been no medical necessity to force-feed him, as there had been no medical examinations, relevant tests or other documents that sufficiently proved that necessity. He claimed that the decision to subject him to force-feeding had been based on the analysis of the acetone level in his urine. He further maintained that the force-feeding had been aimed at his humiliation and punishment, as its purpose had been to make him stop the hunger strike and, in the event of his refusal, to subject him to severe physical suffering.

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> 96. The Court observes the statement of the Government with regard to the satisfactory state of health of the applicant in detention . . . In view of the failure of the Government to provide 'the written report of the medical commission establishing a life-threatening decrease in the state of health of the applicant' and 'the decision of the head of the [detention] institution' that were obligatory under the decree of 4 March 1992 . . . the Court concludes that the Government have not demonstrated that there was a 'medical necessity' established by the domestic authorities to force-feed the applicant. It can only therefore be assumed that the force-feeding was arbitrary. Procedural safeguards were not respected in the face of the applicant's conscious refusal to take food, when dispensing forced treatment against his will. Accordingly, it cannot be said that the authorities acted in the applicant's best interests in subjecting him to force-feeding.
>
> 97. As to the manner in which the applicant was fed, the Court assumes, in view of the submissions of the parties, that the authorities complied with the manner of force-feeding prescribed by decree. However, in themselves the restraints applied—handcuffs, a mouth-widener, a special rubber tube inserted into the food channel—in the event of resistance, with the use of force, could amount to torture within the meaning of Article 3 of the Convention, if there is no medical necessity . . .
>
> 98. In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture.
>
> 99. In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention.

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Consequently, States must be able to demonstrate that there is a medical necessity to force-feed a detainee in order to preserve his/her life. The respondent State had not provided evidence of the existence of such dire circumstances at the time the decision was made to force-feed the applicant. Furthermore, the relevant domestic procedure, specified in a Decree of the Ministry of Internal Affairs, governing the resort to force-feeding of detainees had not been complied with. For an examination, by the original Court, of the lawfulness under the Convention of the forced-feeding of a mentally ill detainee see ***Herczegfalvy v Austria*** A.244, see p 186.

8 The placing of a gas mask over the head of a detainee followed by the periodic cutting off of the air supply combined with electric shocks to his ears and the placing of a 32kg weight on his back were held to amount to torture by a united Chamber in ***Gurgurov v Moldova***, judgment of 16 June 2009.

Inhuman treatment

Physical violence

As we have already seen in ***Ireland v UK*** (p 145), the subjection of detainees to physical violence by State officials can amount to inhuman treatment within Article 3. For example, the kicking and punching of detainees by members of the security forces at Palace Barracks was determined to be inhuman treatment by the Court, because the maltreatment led to intense suffering and physical injury (para 174).

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Tomasi v France A.241-A (1992)

European Court of Human Rights

In February 1982 the Corsican National Liberation Front (a movement seeking independence from France) claimed responsibility for an armed attack upon a Foreign Legion rest centre in which one soldier was killed and another seriously injured. The applicant, a shopkeeper resident in the same region of Corsica, was an active member of a Corsican political organization. The police suspected the applicant of having taken part in the attack on the rest centre and on 23 March 1983 they arrested him. He was taken to Bastia police station and held for questioning until 25 March. During this period of detention the applicant claimed that the police, *inter alia*, knocked his head against a wall, hit him in the stomach, slapped and kicked him, and left him naked in front of a window for several hours. Medical reports confirmed that he had bruises on different parts of his body. Subsequently he was remanded in custody, by an investigating judge, and in October 1988 he was acquitted of the charge of murder. The applicant complained to the Commission alleging, *inter alia*, that he had suffered inhuman and degrading treatment by the police. The Commission, by 12 votes to 2, found a breach of Article 3.

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B. MERITS OF THE COMPLAINT

107. In the circumstances of this case Mr Tomasi's complaint raises two issues, which are separate although closely linked: firstly that of the causal connection between the treatment which the applicant allegedly suffered during his police custody and the injuries noted subsequently by the investigating judge and the doctors; and, secondly and if necessary, the gravity of the treatment inflicted.

1. The causal connection between the treatment complained of and the injuries noted

108. According to the applicant, the observation made on 25 March 1983 by the Bastia investigating judge and the reports drawn up by various doctors at the end of his police custody . . . confirmed his statements, even though it was, he said, to be regretted that the prison authorities had failed to communicate the X-rays effected on 2 April 1983 at Bastia Hospital . . . His body had borne marks which had only one origin, the ill-treatment inflicted on him for a period of forty odd hours by some of the police-officers responsible for his interrogation: he had been slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on.

109. The Government acknowledged that they could give no explanation as to the cause of the injuries, but they maintained that they had not resulted from the treatment complained of by Mr Tomasi. The medical certificates showed, in their opinion, that the slight bruises and abrasions noted were totally inconsistent with the acts of violence described by the applicant; the certificate of the Chief Medical Officer of Bastia Prison of 4 July 1989 had been drawn up a long time after the event and was in complete contradiction with the earlier certificates. The chronology of the interrogation sessions, which had not been contested by the applicant, in no way corresponded to the allegations. Finally, the five other persons in police custody at the time had neither noticed nor heard anything, and although one of them referred to Mr Tomasi's losing a tooth, this fact was not mentioned by a doctor until six years later. In short, a clear doubt subsisted, which excluded any presumption of the existence of a causal connection.

110. Like the Commission, the Court bases its view on several considerations.

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In the first place, no one has claimed that the marks noted on the applicant's body could have dated from a period prior to his being taken into custody or could have originated in an act carried out by the applicant against himself or again as a result of an escape attempt.

In addition, at his first appearance before the investigating judge, he drew attention to the marks which he bore on his chest and his ear; the judge took note of this and immediately designated an expert...

Furthermore, four different doctors—one of whom was an official of the prison authorities—examined the accused in the days following the end of his police custody. Their certificates contain precise and concurring medical observations and indicate dates for the occurrence of the injuries which correspond to the period spent in custody on police premises...

111. This conclusion makes it unnecessary for the Court to inquire into the other acts which it is claimed the officials in question carried out.

2. The gravity of the treatment complained of

112. Relying on the *Ireland v UK* judgment of 18 January 1978 (Series A No 25), the applicant maintained that the blows which he had received constituted inhuman and degrading treatment. They had not only caused him intense physical and mental suffering; they had also aroused in him feelings of fear, anguish and inferiority capable of humiliating him and breaking his physical or moral resistance....

113. The Commission stressed the vulnerability of a person held in police custody and expressed its surprise at the times chosen to interrogate the applicant. Although the injuries observed might appear to be relatively slight, they nevertheless constituted outward signs of the use of physical force on an individual deprived of his liberty and therefore in a state of inferiority. The treatment had therefore been both inhuman and degrading.

114. According to the Government, on the other hand, the 'minimum level of severity' required by the Court's case-law (see the *Ireland v the UK* judgment cited above and the *Tyrer v the UK* judgment of 25 April 1978, Series A No 26) had not been attained. It was necessary to take into account not only that the injuries were slight, but also the other facts of the case: Mr Tomasi's youth and good state of health, the moderate length of the interrogations (fourteen hours, three of which were during the night), 'particular circumstances' obtaining in Corsica at the time and the fact that he had been suspected of participating in a terrorist attack which had resulted in the death of one man and grave injuries to another. In the Government's view, the Commission's interpretation of Article 3 (art 3) in this case was based on a misunderstanding of the aim of that provision.

115. The Court cannot accept this argument... It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.

3. Conclusion

116. There has accordingly been a violation of Article 3 (art 3)....

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been a violation of... Article 3...

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NOTES

1 The Court was composed of President Ryssdal and Judges: Bernhardt, Gölcüklü, Matscher, Pettiti, Russo, Spielmann, De Meyer, and Morenilla.

The Court awarded the applicant 700,000 Francs just satisfaction in respect of pecuniary and non-pecuniary damage (he had already received 300,000 Francs compensation from the French authorities).

The judgment indicates that the infliction of significant physical violence on a detainee by State officials, even where no serious long-term injuries are caused, will be classified as inhuman treatment. Indeed, Judge De Meyer went further in his concurring opinion where he expressed the view that:

> Any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct (for instance in the case of an escape attempt or an act carried out against himself.) violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 of the Convention.

2 In the later case of ***Ribitsch v Austria*** A.336 (1995), the Court stated that although: '...in principle it is not its task to substitute its own assessment of the facts for that of the domestic courts...it is not bound by the domestic courts' findings any more than it is by those of the Commission.... Its vigilance must be heightened when dealing with rights such as those set forth in Article 3 of the Convention, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct' (para 32). A majority of the Court, 6 votes to 3, went on to uphold the applicant's claim of inhuman and degrading treatment even though the relevant police officers had been acquitted by the Austrian courts. The applicant had been arrested and his home searched, 0.5g of hashish was found by members of the Security Branch of the Vienna Federal Police Authority who suspected that he had supplied heroin to persons who had died of overdoses. Ribitsch was held in custody at the headquarters of the Security Branch from 12.30 pm on 31 May 1988 until 9.30 am on 2 June 1988. According to Ribitsch while he was being questioned by the police several officers assaulted him (by punching him in the head, kidneys, and on the arm; kicking him; pulling his hair and banging his head on the floor). After his release from police custody the applicant sought medical treatment. A hospital report confirmed that he had several bruises on his right arm. The media gave coverage to Ribitsch's allegations of police maltreatment and in response the police began an inquiry into the officers' conduct. In 1989 the District Criminal Court found one officer guilty of assault occasioning bodily harm (he was given a suspended sentence of two months' imprisonment) and acquitted two other officers. The convicted officer appealed claiming that Ribitsch had sustained his injuries by falling against a car door while being transported during his detention. The Regional Criminal Court allowed the appeal, noting that Ribitsch had been fined for drug offences and was unemployed. The Constitutional Court found that the arrest of Ribitsch, the search of his home, and his detention had been unlawful. However, Ribitsch's allegations of maltreatment by the police had not been proved beyond doubt. The applicant complained to the Commission asserting that he had been subject to inhuman and degrading treatment by the police. By 10 votes to 6 the Commission reported that there had been a breach of Article 3. The Court determined that:

> 34. It is not disputed that Mr Ribitsch's injuries were sustained during his detention in police custody, which was in any case unlawful, while he was entirely under the control of police officers.

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Police Officer Markl's acquittal in the criminal proceedings by a court bound by the principle of presumption of innocence does not absolve Austria from its responsibility under the Convention. The Government were accordingly under an obligation to provide a plausible explanation of how the applicant's injuries were caused. But the Government did no more than refer to the outcome of the domestic criminal proceedings, where the high standard of proof necessary to secure a criminal conviction was not found to have been satisfied. It is also clear that, in that context, significant weight was given to the explanation that the injuries were caused by a fall against a car door. Like the Commission, the Court finds this explanation unconvincing . . .

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

35. . . . a number of witnesses had confirmed that the applicant had sustained physical injuries and was suffering from considerable psychological trauma . . .

38. The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention . . .

39. In the instant case the injuries suffered by Mr Ribitsch show that he underwent ill-treatment which amounted to both inhuman and degrading treatment.

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Ribitsch was awarded 100,000 ATS just satisfaction in respect of non-pecuniary damage. Significantly, the judgment of the Court (of which Judge De Meyer was a member), at paragraph 38, incorporated Judge De Meyer's principle (enunciated in his concurring opinion in ***Tomasi***, see Note 1) that the use of any physical force on a detainee, not strictly necessary to respond to actions of the detainee (such as attacking other detainees) is a breach of Article 3. This jurisprudential evolution of Article 3 is a very important Convention safeguard for detainees who are potentially in a highly vulnerable position vis-à-vis the public officials overseeing their detention and questioning.

3 The ***Ribitsch*** obligation upon States to provide a plausible explanation for injuries sustained by an individual during a period of detention was extended to injuries arising during a person's arrest in ***Rehbock v Slovenia***, judgment of 28 November 2000. The applicant was a former German body-building champion whom the Slovenia authorities suspected of being a drug dealer. Therefore, the authorities planned to arrest him in Slovenia during a drug smuggling journey. Given the physical strength of the applicant, 13 police officers were deployed to arrest him. He was arrested by six officers, dressed in black and wearing masks, armed with a shotgun and pistols. After his arrest it was discovered that the applicant had suffered a double fracture to his jaw and facial cuts (subsequently he was sentenced to one year's imprisonment for unauthorized production and dealing in narcotics and of smuggling). A large majority, 6 votes to 1, determined:

76. . . . that the Government have not furnished convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the arrest operation. Accordingly, the force used was excessive and unjustified in the circumstances.

77. Such use of force had as a consequence injuries which undoubtedly caused serious suffering to the applicant of a nature amounting to inhuman treatment.

78. There has therefore been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected during his arrest.

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4 A majority (10 votes to 7) of the Grand Chamber in ***Jalloh v Germany***, judgment of 11 July 2006, held that the forced administration of emetics to a suspected drug dealer, in order physically to induce him to regurgitate a packet of cocaine that he had swallowed, amounted to inhuman and degrading treatment.

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

The policy of the public prosecutor in Wuppertal to order the use of emetics to secure evidence against suspected drug offenders was not in accordance with the general practice in member States (only Germany, Luxembourg, Norway, and Macedonia forcibly administered emetics against the wishes of a suspect).

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(I) Mental suffering

1 In the Court's judgment in ***Ireland v UK*** (p 145), the deliberate infliction of 'intense physical and mental suffering' leading to 'acute psychiatric disturbances during interrogation' of detainees, by the use of the five techniques, was characterised as inhuman treatment (para 167).

2 The 'severe mental distress and anguish' experienced, over a number of years, by a close relative of a 'disappeared' person was also classified as inhuman treatment by the Commission in ***Kurt v Turkey***, 1998-III. The Commission found that in November 1993 gendarmes and village guards conducted an anti-terrorist operation against the PKK in the applicant's village. The last time the applicant, or any other member of her family or the village, saw the applicant's son (Uzeyir Kurt) was on the morning of 25 November 1993, when he was surrounded by members of the security forces. Despite the applicant's subsequent numerous inquiries of various officials, all of them denied any knowledge of the whereabouts or condition of Uzeyir. In May 1994 the applicant complained, on behalf of her son and herself, to the Commission alleging a number of breaches of the Convention. The latter body, by 19 votes to 5, expressed the opinion, *inter alia*, that the applicant had been subject to inhuman and degrading treatment through the 'uncertainty, doubt and apprehension' caused to her by the disappearance of her son for which the Turkish authorities were responsible. The Court, by 6 votes to 3, agreed that there had been a breach of Article 3. But the Court did not specify which particular element of that Article had been infringed.

> 133. The Court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 . . . It recalls in this respect that the applicant approached the public prosecutor in the days following her son's disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety . . . However, the public prosecutor gave no serious consideration to her complaint . . . As a result, she has been left with the anguish of knowing

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that her son has been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.

134. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.

Turkey was ordered to pay the applicant £10,000 compensation.

Regrettably, in the later case of ***Cakici v Turkey***, judgment of 8 July 1999, a large majority (14 votes to 3) of a Grand Chamber took a restrictive view of the judgment in ***Kurt*** by emphasizing that there must be 'special factors' present before a family member of a disappeared person can claim to be a victim of a breach of Article 3. The applicant, a resident of south-east Turkey complained to the Commission (on behalf of his brother Ahmet and himself) regarding the disappearance of Ahmet. The Turkish security authorities suspected Ahmet of being involved in PKK terrorist activities and on 8 November 1993 gendarmes arrested him. Other detainees reported that they had seen Ahmet in a bad condition after he had been tortured. The authorities denied that they had detained Ahmet. Subsequently, the Turkish Government claimed that Ahmet had been killed during a clash between the security forces and the PKK in February 1995. The Commission expressed the opinion that, *inter alia*, there had been a breach of Article 2 in respect of Ahmet (unanimously) and a breach of Article 3 in respect of the applicant (27 votes to 3). The Court held that:

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98. . . . in the Kurt case . . . which concerned the disappearance of the applicant's son during an unacknowledged detention, it found that the applicant had suffered a breach of Article 3 having regard to the particular circumstances of the case. It referred particularly to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress. The Kurt case does not however establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3. Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie—in that context, a certain weight will attach to the parent-child bond—the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.

99. In the present case, the applicant was the brother of the disappeared person. Unlike the applicant in the Kurt case, he was not present when the security forces took his brother, as he lived with his own family in another town. It appears also that, while the applicant was involved in making various petitions and enquiries to the authorities, he did not bear the brunt of this task, his father Tevfik Çakici taking the initiative in presenting the petition of 22 December 1993 to the Diyarbakir State Security Court. Nor have any aggravating features arising from the response of the authorities been brought to the attention of the Court in this case. Consequently, the Court perceives no special features existing in this case which would justify finding an additional violation of Article 3 of the Convention in relation to the applicant himself. Accordingly, there has been no breach of Article 3 as concerns the applicant in this case.

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Judge Thomassen, joined by Judges Jungwiert and Fischbach, did not express an opinion on the merits of the majority's criterion of the existence of special factors. However, the dissenters considered that this criterion was satisfied in respect of the applicant because, 'a brother can also suffer deeply in face of the uncertainty of the fate of a sibling'.

In ***Cicek v Turkey***, judgment of 27 February 2001, a unanimous Chamber found a breach of Article 3 in regard to the authorities' persistent refusals to explain to a mother the whereabouts/fate of her adult sons who had 'disappeared' after being taken into custody by gendarmes.

173. It recalls in this respect that the applicant and her daughter made several applications to the public prosecutor and the gendarme commander following her sons' disappearance in the definite belief that they had been kept in custody in the Lice Regional Boarding School [where the gendarmes were based]. However, the public prosecutor and the gendarmerie commander gave no serious consideration to her complaint. The Court observes that the applicant has had no news of her sons for almost six years. She has been living with the fear that her sons are dead and has made attempts before the public prosecutor and requested the authorities to be at least given their bodies. The uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish.

174. Having regard to the circumstances described above as well as to the fact that the complainant is the mother of victims of grave human rights violations and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.

A similar breach was found in the case of a father who had made many attempts to discover the whereabouts/fate of his 'disappeared' sons in ***Ipek v Turkey***, judgment of 17 February 2004 (see also p 108 for the Article 2 aspects of this case).

182. In the present case, the Court notes that the applicant is the father of the disappeared Ipek brothers. The applicant witnessed the impugned events and his sons being taken away by soldiers almost nine years ago and he has never heard from them since. It further appears from the documents submitted by him that the applicant bore the weight of having to make numerous futile enquiries in order to find out what had happened to his two sons. Despite his tireless endeavours to discover the fate of his sons, the applicant has never received any plausible explanation or information from the authorities as to what became of his sons following their apprehension by the soldiers. Conversely, the authorities' reaction to the applicant's grave concerns was limited to denials that the İpek brothers had ever been detained by the security forces. It is to be noted that the applicant was not even informed of the outcome of the investigations pursued in respect of his complaints. Furthermore, the Court considers that the applicant's anguish about the fate of his sons must have been exacerbated by the destruction of his family home.

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

The Court concludes therefore that there has been a violation of Article 3 of the Convention in respect of the applicant.

Hence, the greater the length of time (normally amounting to many years) parents have persisted in their attempts to discover the whereabouts/fate of their 'disappeared' children, combined with lack of cooperation from the authorities, the greater the likelihood that the Court will conclude that the parents have suffered a violation of Article 3.

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In ***Tanis and Others v Turkey***, judgment of 2 August 2005, a unanimous Chamber found that the wives/partner of two politicians who 'disappeared' after being summoned to a gendarmerie station had suffered inhuman/degrading treatment due to the distress and anxiety caused to them by the authorities' failure over four years to provide a plausible explanation for the fate of their relatives or undertake an effective investigation into the disappearances (the disappearances were found to involve breaches of both substantive and procedural aspects of Article 2).

3 In ***V v UK***, 1999-IX, the applicant (born in 1982) had played truant from school with another 10-year-old boy (the applicant in the related case of ***T v UK*** (1999) 30 EHRR 121) one day during February 1993. While truanting T and V abducted a 2-year-old boy from a shopping centre, took him on a journey of a couple of miles, battered him to death, and then left his body to be run over by a train. The applicants were arrested and charged with murder. Their trial took place in public before Preston Crown Court over three weeks in November 1993.

In the two months preceding the trial, each applicant was taken by social workers to visit the courtroom and was introduced to trial procedures and personnel by way of a 'child witness pack' containing books and games. The trial was preceded and accompanied by massive national and international publicity. Throughout the criminal proceedings, the arrival of the defendants was greeted by a hostile crowd. On occasion, attempts were made to attack the vehicles bringing them to court. In the courtroom, the press benches and public gallery were full. The trial was conducted with the formality of an adult criminal trial. The judge and counsel wore wigs and gowns. The procedure was, however, modified to a certain extent in view of the defendants' age. They were seated next to social workers in a specially raised dock. Their parents and lawyers were seated nearby. The hearing times were shortened to reflect the school day (10.30 am to 3.30 pm, with an hour's lunch break), and a ten-minute interval was taken every hour. During adjournments the defendants were allowed to spend time with their parents and social workers in a play area. The judge made it clear that he would adjourn whenever the social workers or defence lawyers told him that one of the defendants was showing signs of tiredness or stress. This occurred on one occasion.

At the opening of the trial on 1 November 1993 the judge made an order under section 39 of the Children and Young Persons Act 1933, that there should be no publication of the names, addresses, or other identifying details of the applicant or T or publication of their photographs. On the same day, the applicant's counsel made an application for a stay of the proceedings, on the grounds that the trial would be unfair due to the nature and extent of the media coverage. After hearing argument, the judge found that it was not established that the defendants would suffer serious prejudice to the extent that no fair trial could be held. He referred to the warning that he had given to the jury to put out of their minds anything which they might have heard or seen about the case outside the courtroom.

The jury convicted the applicants of murder and the judge sentenced them, as required by law, to detention during Her Majesty's Pleasure. Subsequently, the judge recommended that the applicants serve eight years' detention in order to satisfy the requirements of retribution and deterrence (the 'tariff' period). The Lord Chief Justice recommended a tariff of ten years. The Home Secretary received considerable correspondence from members of the public, including a petition signed by nearly 300,000 people and 21,000 coupons from the *Sun* newspaper calling for the applicants to be detained for the rest of their lives. The Home Secretary allowed the applicants' lawyers to make representations to him and then (July 1994) informed the applicant that his tariff period should be 15 years. The applicant sought to challenge that decision in judicial review proceedings and the House of Lords (by a

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majority) ruled that the Home Secretary had acted unlawfully by giving weight to the public protests about the applicant's tariff. At the time of the court's judgment the Home Secretary had not set a new tariff for the applicant (in part because he was still awaiting representations from T). The applicant complained to the Commission alleging, *inter alia*, that his trial before an adult court in public and his sentence amounted to inhuman and degrading treatment in breach of Article 3. The Commission, by 17 votes to 2, found no breach of that provision. A majority of the Court (12 votes to 5 and 10 votes to 7) also found no violations of Article 3 in respect of the applicant's trial or sentence.

63. The applicant alleged that the cumulative effect of the age of criminal responsibility, the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial, the jury of twelve adult strangers, the physical lay-out of the courtroom, the overwhelming presence of the media and public, the attacks by the public on the prison van which brought him to court and the disclosure of his identity, together with a number of other factors linked to his sentence . . . gave rise to a breach of Article 3 . . . .

72. The Court has considered first whether the attribution to the applicant of criminal responsibility in respect of acts committed when he was ten years old could, in itself, give rise to a violation of Article 3. In doing so, it has regard to the principle, well established in its case-law that, since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing among the member States of the Council of Europe (see the *Soering* judgment . . . p 40, § 102; and also the *Dudgeon v UK* judgment of 22 October 1981, Series A No 45, and the *X, Y and Z v UK* judgment of 22 April 1997, Reports 1997-II).

73. In this connection, the Court observes that, at the present time, there is not yet a commonly accepted minimum age for the imposition of criminal responsibility in Europe. While most of the Contracting States have adopted an age-limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Liechtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments . . . Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40(3)(a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be.

74. The Court does not consider that there is at this stage any clear common standard among the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.

75. The second part of the applicant's complaint under Article 3 concerning the trial relates to the fact that the criminal proceedings took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published.

76. The Court notes in this connection that one of the minimum guarantees provided by Article 40(2)(b) of the UN Convention to children accused of crimes is that they should have their privacy fully respected at all stages of the proceedings. Similarly, Rule 8 of the Beijing Rules states that 'the juvenile's privacy shall be respected at all stages' and that 'in principle, no information that may lead to the identification of a juvenile offender shall be published'. Finally, the Committee of Ministers

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of the Council of Europe recommended in 1987 that member States should review their law and practice with a view to avoiding committing minors to adult courts where juvenile courts exist and to recognising the right of juveniles to respect for their private lives . . .

77. The Court considers that the foregoing demonstrates an international tendency in favour of the protection of the privacy of juvenile defendants, and it notes in particular that the UN Convention is binding in international law on the United Kingdom in common with all the other member States of the Council of Europe . . . Moreover, Article 6 § 1 of the Convention states that 'the press and public may be excluded from all or part of the trial . . . where the interests of juveniles . . . so require'. However, while the existence of such a trend is one factor to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable under the other Articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3 . . .

78. The Court recognises that the criminal proceedings against the applicant were not motivated by any intention on the part of the State authorities to humiliate him or cause him suffering. Indeed, special measures were taken to modify the Crown Court procedure in order to attenuate the rigours of an adult trial in view of the defendants' young age . . .

79. Even if there is evidence that proceedings such as those applied to the applicant could be expected to have a harmful effect on an eleven-year-old child . . . the Court considers that any proceedings or inquiry to determine the circumstances of the acts committed by T. and the applicant, whether such inquiry had been carried out in public or in private, attended by the formality of the Crown Court or informally in the Youth Court, would have provoked in the applicant feelings of guilt, distress, anguish and fear. The psychiatric evidence shows that before the trial commenced he was suffering from the post-traumatic effects of the offence; that he cried inconsolably and found it difficult and distressing when asked to talk about what he and T. had done to the two-year-old, and that he suffered fears of punishment and terrible retribution . . . While the public nature of the proceedings may have exacerbated to a certain extent these feelings in the applicant, the Court is not convinced that the particular features of the trial process as applied to him caused, to a significant degree, suffering going beyond that which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following the commission by him of the offence in question . . .

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80. In conclusion, therefore, the Court does not consider that the applicant's trial gave rise to a violation of Article 3 of the Convention. . . .

93. The applicant argued that, in view of his age at the time of the offence, the sentence of detention during Her Majesty's pleasure was severely disproportionate and in breach of Article 3 of the Convention . . .

98. The Court recalls that States have a duty under the Convention to take measures for the protection of the public from violent crime (see, for example, the *A v UK* judgment of 23 September 1998, Reports 1998-VI, p 2699, § 22, and the *Osman v UK* judgment of 28 October 1998, Reports 1998-VIII, p 3159, § 115). It does not consider that the punitive element inherent in the tariff approach itself gives rise to a breach of Article 3, or that the Convention prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release where necessary for the protection of the public (see the *Hussain* judgment . . . p 269, § 53).

99. The applicant has not yet reached the stage in his sentence where he is able to have the continued lawfulness of his detention reviewed with regard to the question of dangerousness, and although he has not yet been notified of any new tariff, it can be assumed that he is currently detained for the

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purposes of retribution and deterrence. Until a new tariff has been set, it is not possible to draw any conclusions regarding the length of punitive detention to be served by the applicant. At the time of adoption of the present judgment he has been detained for six years since his conviction in November 1993. The Court does not consider that, in all the circumstances of the case including the applicant's age and his conditions of detention, a period of punitive detention of this length can be said to amount to inhuman or degrading treatment.

100. Finally, the Court observes that it cannot be excluded, particularly in relation to a child as young as the applicant at the time of his conviction, that an unjustifiable and persistent failure to fix a tariff, leaving the detainee in uncertainty over many years as to his future, might also give rise to an issue under Article 3. In the present case, however, in view of the relatively short period of time during which no tariff has been in force and the need to seek the views, *inter alia*, of both the applicant and T. . . . no such issue arises.

101. It follows that there has been no violation of Article 3 in respect of the applicant's sentence.

The above judgment indicates that the effects of a trial and a subsequent sentence of imprisonment on a person's mental well-being will have to be devastating before the Court is likely to find suffering of an intensity that violates Article 3 (note, the Court found the applicant's trial and the setting of his tariff to be in breach of Articles 6 and 5).

In February 2000 a new Practice Note (Crown Court: trial of children and young persons) was issued [2000] 2 All ER 284. The Direction emphasized that all possible steps should be taken to assist the young defendant to understand and participate in his/her trial. The proceedings should not expose the defendant to avoidable intimidation, humiliation, or distress. Special arrangements should be made for the trials of juveniles in the Crown Court including: counsel not wearing robes and wigs, police presence in the courtroom should not normally be recognizable, and restricting the number of reporters present in the courtroom (if appropriate the proceedings could be relayed to another room to which the media would have access). In March 2000 the Home Secretary (Mr Jack Straw) referred the cases of Robert Thompson and Jon Venables to the Lord Chief Justice for the latter to determine the tariff to be served before their cases would be considered by the Parole Board.

In October 2000 Lord Woolf ruled that the parole process could begin for both Thompson and Venables. During June 2001 the Parole Board authorized their release on life licences as they were no longer deemed to pose a danger to society. However, because of their notoriety and threats made against them they were given new secret identities on their release.

Jon Venables was recalled to prison, by the Justice Secretary (Mr Straw in another ministerial role), in February 2010 on suspicion of having child abuse images on his computer. Subsequently, in July 2010, he admitted child pornography offences and was sentenced to two years' imprisonment. Because of 'compelling evidence' of threats to the safety of Venables, the trial judge ruled that Venables' new identity must be kept secret.

The Committee of Ministers issued lengthy Guidelines on Child Friendly Justice on 17 November 2010. They provided, *inter alia*, that 'children' were persons under the age of 18 and:

23. The minimum age of criminal responsibility should not be too low and should be determined by law.

63. As far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law. This could include the establishment of specialised units within the police, the judiciary, the court system and the prosecutor's office.

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Hence, no European consensus had emerged as to the precise minimum age of criminal responsibility.

4 The tragic background to ***Gafgen v Germany***, judgment of 1 June 2010, resembled the factual scenario in a jurisprudence seminar where the issue for debate was whether the police should be able to torture a suspect in order to gain information to try and save a victim's life. Gafgen, a law student, had befriended a wealthy family and then murdered the family's 11-year-old son and hid his body. Gafgen demanded a one million euros ransom for the return of the son. The police arrested Gafgen after he collected the ransom. Later that evening Gafgen told the police that other kidnappers were holding the boy. The next morning the Deputy Chief of Frankfurt police ordered another officer to threaten (and if necessary inflict) considerable physical pain on Gafgen if he did not disclose where the boy was being held. The officer told Gafgen that a specially trained person would come and cause him great pain if he did not provide the required information regarding the boy. A few minutes later Gafgen disclosed the location of the boy's body. Subsequently, Gafgen was convicted of murder and kidnapping and given a life sentence. The Deputy Chief of Police was convicted of inciting a subordinate to commit coercion and given a suspended fine (later he was appointed Chief of the Police Headquarters for Technology). The junior officer was convicted of coercion and also given a suspended fine. Gafgen complained that he had been subject to torture. The Grand Chamber held that:

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107. In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law, the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

108. . . . a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.

Hence the Court's answer to the jurisprudential conundrum is unequivocal—not only is torture prohibited to elicit such information but so are all other types of maltreatment falling within Article 3. For a criticism of this ruling see S. Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gafgen Case' (2011) 11(1) *Human Rights Law Review* 67.

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(ii) Destruction of homes

The Court, by 8 votes to 1, has held that the burning of people's homes, by members of the security forces of a member State, can be so serious in its effects as to amount to inhuman treatment. In ***Selcuk and Asker v Turkey***, 1998-II, the Court determined that:

> 77. . . . Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village . . . all their lives . . . Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards.
>
> 78. Bearing in mind in particular the manner in which the applicants' homes were destroyed . . . and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.
>
> 79. The Court recalls that the Commission made no finding as regards the underlying motive for the destruction of the applicants' property. However, even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment.
>
> 80. In conclusion, the Court finds that the particular circumstances of this case disclose a violation of Article 3.

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In the light of the applicants' property losses the Court awarded Mrs Selcuk £17,760 and Mr Asker £22,408 compensation for pecuniary damage. In addition Turkey was ordered to pay each applicant £10,000 in respect of non-pecuniary damage to compensate for their suffering. Where the circumstances and effects of the deliberate destruction of homes is not quite so traumatic the Court will find such conduct to be a breach of Article 8 (right to respect for a person's home), see p 557.

(iii) Conditions of detention

1 A unanimous Chamber found the severe regime of imprisonment in which a convicted multiple child murderer had been held for over three years amounted to inhuman and degrading treatment in ***Iorgov v Bulgaria***, judgment of 11 March 2004. The applicant who had been sentenced to death, but after the introduction of a *de facto* moratorium on executions, was imprisoned alone in a cell for 23 hours per day. Food was served in his cell and he was not allowed to eat with other prisoners. Apart from two visits per month, his only contact with other persons was with prison staff and conversations with other prisoners during a daily one-hour walk.

> 84. The Court notes that although the damaging effects of the impoverished regime to which the applicant was subject were known, that regime was maintained for many years . . . Furthermore, it is significant that the Government have not invoked any particular security reasons requiring the applicant's isolation and have not mentioned why it was not possible to revise the regime of prisoners in the applicant's situation so as to provide them with adequate possibilities for human contact and sensible occupation . . .

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86. In sum, the Court considers that the stringent custodial regime to which the applicant was subjected after 1995 and the material conditions in which he was detained must have caused him suffering exceeding the unavoidable level inherent in detention. The Court thus concludes that the minimum threshold of severity under Article 3 of the Convention has been reached and that the applicant has been subjected to inhuman and degrading treatment.

2 A Chamber was very divided on the issue whether the detention of the notorious terrorist Ilich Ramirez, popularly known as 'Carlos the Jackal', in solitary confinement for over eight years amounted to inhuman treatment. In ***Ramirez Sanchez v France***, judgment of 27 January 2005, the applicant complained about his detention in a 7 sq m cell; he was allowed two hours of walking in a prison exercise yard per day and access to newspapers and television. He was not allowed to associate with other prisoners but was visited by a doctor twice a week, a cleric once a month, and his lawyer (who had become his partner) visited him 640 times during five years. The applicant was in good physical and mental health. The authorities sought to justify the stringent conditions of detention because of the exceptional level of danger he posed (he was deemed to be the most dangerous terrorist in the world at the time of his capture in the mid-1990s; in 1997 he had been sentenced to life imprisonment for the murder of three French police officers in 1975—part of his terrorists group's campaign of violence which included the seizure of OPEC ministers and the hijacking of an Air France aeroplane). The Chamber, by 4 votes to 3, found that given his personality and the extreme level of danger he posed the conditions of his detention did not amount to inhuman treatment. On a referral under Article 43 the Grand Chamber (judgment of 4 July 2006) by a large majority (12 votes to 5) found that, having regard to the applicant's character and the danger he posed, his solitary confinement did not amount to a breach of Article 3. However, the Grand Chamber emphasized that solitary confinement should not be imposed on a prisoner indefinitely. Since the beginning of 2006 he had been detained under normal prison conditions and the Grand Chamber expressed the view that that should continue.

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3 The routine subjection of a prisoner to strip-searches, combined with a very strict security regime (e.g. limited physical contact allowed with visiting close family members), was found to constitute inhuman or degrading treatment by a united Chamber in ***Van Der Ven v Netherlands***, judgment of 4 February 2003. The applicant was detained on remand, in an ordinary prison, during September 1995 accused of having committed murder, rape, and narcotics offences. The next month he was transferred to an 'Extra-Security Institution' (EBI) after the authorities concluded that he was planning to escape from custody. The EBI was part of a large prison complex. As the applicant had threatened to commit suicide if transferred to the EBI he was placed under a high security regime in the institution. His cell was searched at least on a weekly basis and each time that occurred he was subject to a strip-search (involving an external inspection of his body orifices—including an anal inspection—by an officer of the same gender in a closed room). The applicant was subject to this regime for over three and a half years. The European Committee for the Prevention of Torture had reported that in its view the systematic strip-searching of detainees in the EBI did not appear to be justified in accordance with legitimate security requirements.

61. In the present case, the Court is struck by the fact that the applicant was submitted to the weekly strip-search in addition to all the other strict security measures within the EBI. In view of the fact that the domestic authorities, through the reports drawn up by the Psychological Department of their Penitentiary Selection Centre, were well aware that the applicant was experiencing serious difficulties coping with the regime, and bearing in mind that at no time

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during the applicant's stay in the EBI did it appear that anything untoward was found in the course of a strip-search, the Court is of the view that the systematic strip-searching of the applicant required more justification than has been put forward by the Government in the present case.

62. The Court considers that in the situation where the applicant was already subjected to a great number of control measures, and in the absence of convincing security needs, the practice of weekly strip-searches that was applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. The applicant himself confirmed that this was indeed the case in a meeting with a psychiatrist, during which he also stated that he would forsake, for instance, going to the hairdresser's so as not to have to undergo a strip-search . . .

63. Accordingly, the Court concludes that the combination of routine strip-searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment in violation of Article 3 of the Convention. There has thus been a breach of this provision.

The above judgment does not prevent States from subjecting detainees to strip-searches but recourse to them must be justifiable on legitimate security grounds in the case of each person undergoing such a search (see also ***Iwanczuk v Poland***, p 215). More generally, once again, in ***Van Der Ven*** it was the prison regime, rather than the physical conditions of incarceration, that led the Court to find a breach of Article 3.

4 The forced-feeding, physical restraint, and forced administration of sedatives to a mentally ill person who was compulsorily detained in a psychiatric hospital and a special prison were found not to have breached Article 3 in ***Herczegfalvy v Austria*** A.242-B (1992). The applicant had been proven to have assaulted fellow prisoners and prison wardens together with threatening judges, but the Court found that he was 'dangerous and not criminally responsible for his acts' due to a mental illness (paranoia querulans). Therefore, he was detained in a special prison and later a psychiatric hospital.

After several weeks of the applicant being on a hunger strike the director of the hospital ordered that he be force fed. The applicant was also given sedatives, against his will, on a number of occasions. For two days he was also attached to a security bed by means of straps and a net. The applicant claimed that this treatment was inhuman. The Commission, unanimously, agreed that it was in breach of Article 3. However, the Court, also unanimously, took a different view.

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79. Mr Herczegfalvy also complained of his medical treatment. In that he had been forcibly administered food and neuroleptics [tranquillizers], isolated and attached with handcuffs to a security bed . . . he had been subjected to brutal treatment incompatible with Article 3 . . .

80. The Commission considered that the manner in which the treatment was administered had not complied with the requirements of Article 3 (art 3): the various measures complained of had been violent and excessively prolonged, and taken together had amounted to inhuman and degrading treatment, and even contributed to the worsening of the patient's condition.

81. In the Government's opinion, on the other hand, the measures were essentially the consequence of the applicant's behaviour, as he had refused medical treatment which was urgent in view of the deterioration in his physical and mental health.

Thus when Mr Herczegfalvy returned to the hospital on 10 September 1979 it proved to be necessary to feed him artificially, in view of his extremely weak state caused by his refusal to take any food . . . Later on, it was partly at his own request that he was fed through a tube, while continuing—at least ostensibly—with his hunger strike.

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Similarly, it was only his resistance to all treatment, his extreme aggressiveness and the threats and acts of violence on his part against the hospital staff which explained why the staff had used coercive measures including the intramuscular injection of sedatives and the use of handcuffs and the security bed. These measures had been agreed to by Mr Herczegfalvy's curator, their sole aim had always been therapeutic, and they had been terminated as soon as the state of the patient permitted this.

Finally, the Government claimed that the isolation complained of had in fact consisted of being placed in an individual cell, in accordance with Mr Herczegfalvy's wishes. He had had contact with doctors and nurses, and had been able to receive visits and even walk in the garden.

82. The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 (art 3), whose requirements permit of no derogation.

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

83. In this case it is above all the length of time during which the handcuffs and security bed were used . . . which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, certain of the applicant's allegations are not supported by the evidence. This is the case in particular with those relating to . . . the extent of the isolation.

84. No violation of Article 3 (art 3) has thus been shown.

Hence the Court will permit the compulsory medical treatment of mentally ill patients who cannot make rational decisions about their own treatment. But, States will have to be able to show that any particular course of treatment was medically necessary. The Court's 'vigilance' in ensuring that the Convention rights of these patients have been respected is a vital European safeguard to prevent States abusing their extensive domestic powers over a potentially vulnerable group.

5 The failure of the authorities to provide a detained person, who had been injured during his arrest, with prompt medical treatment was considered to be inhuman treatment by the Commission, unanimously, in ***Hurtado v Switzerland*** A.280A (1994). The applicant, a suspected member of a drug smuggling gang, had been arrested by a police special task force who used a stun grenade in order to overpower him. Two days after his arrest and detention the applicant asked to see a doctor. However, he was not examined by a doctor for another six days at which time X-rays revealed that the applicant had a fracture of the ninth left rib.

The Commission considers that in a situation of such gravity, resulting from the use of force by the police, Article 3 of the Convention requires the State authorities to adopt measures to safeguard the physical well-being of a person placed in the charge of the police, judicial or prison authorities. Under Article 3 of the Convention the State has a specific positive obligation to protect the physical well-being of persons deprived of their liberty. The lack of adequate medical treatment in such a situation must be classified as inhuman treatment. [Para 79.]

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Later the applicant and the respondent State agreed a friendly settlement in which the latter paid the former an ex gratia sum of 14,000 SF (while not admitting that there had been a breach of the Convention).

6 The Court applied ***Hurtado*** when determining that the lack of appropriate specialist medical care, together with the imposition of a disciplinary period of solitary confinement, for a prisoner with a long history of serious mental illness who committed suicide amounted to inhuman and degrading treatment in ***Keenan v UK***, judgment of 3 April 2001. The applicant's son, Mark, had a history of mental illness, including symptoms of paranoia, violence, and deliberate self-harm. In April 1993 he was convicted of assaulting his former girlfriend and sentenced to four months' imprisonment. He was admitted to Exeter Prison and sent to the prison health centre. The prison's senior doctor consulted the psychiatrist who had been treating Mark. Several attempts were made to transfer Mark to the ordinary cells but he resisted (by barricading himself in the ward on one occasion). At the end of April the prison's visiting psychiatrist recommended a change in Mark's medication. The next day Mark's condition deteriorated and a prison doctor, with no psychiatric training, ordered a return to his original medication. Later that day Mark assaulted two prison hospital officers (one was seriously injured). The next day another prison doctor, who had six months' psychiatric training, certified Mark as being fit for disciplinary proceedings in respect of the assaults and for placement in the segregation unit within the prison's punishment block. A deputy governor ordered Mark's placement in the segregation unit, where he was locked up for 23 hours each day. He was visited each day by a doctor, the prison chaplain, and the prison governor. Mark asked to see a prisoner trained by the Samaritans (to counsel inmates who may be suicidal) and threatened to harm himself. He was put on a 15-minute watch by prison staff. Prison doctors recorded that he was a hazard to staff. No further entries were made in Mark's medical record from 3 May 1993. However, the segregation unit's occurrence book had several entries regarding his behaviour, stating that he was being aggressive to staff and acting strangely. On 14 May he was subject to a disciplinary adjudication, after being certified as medically fit for the hearing by one of the prison doctors, and found guilty of assaulting the officers. The deputy governor sentenced him to 28 additional days in prison and seven days in the segregation unit. During the next day Mark was visited by a friend and he appeared to be in good spirits. However, that evening Mark was found hanged in his cell (the relevant prison officer had been absent in the toilet for a few minutes prior to the discovery of Mark's suicide). The applicant contended that, *inter alia*, there had been wholly insufficient psychiatric care given to her son whilst in prison and that violated his rights under Article 3. The Court, by 5 votes to 2, held that:

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110. It is relevant in the context of the present application to recall also that the authorities are under an obligation to protect the health of persons deprived of liberty (*Hurtado v Switzerland*, Comm. Report 8 July 1993, Series A No 280, p 16, § 79). The lack of appropriate medical treatment may amount to treatment contrary to Article 3 (see *Ilhan v Turkey* [GC] No 22277/93, ECHR 2000-VII, § 87). In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment (see e.g. the *Herczegfalvy v Austria* judgment of 24 September 1992, Series A no. 244, § 82; the *Aerts v Belgium* judgment of 30 July 1998, Reports 1998-V, p 1966, § 66).

113. In this case, the Court is struck by the lack of medical notes concerning Mark Keenan, who was an identifiable suicide risk and undergoing the additional stresses that could be foreseen from

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segregation and, later, disciplinary punishment. From 5 May to 15 May 1993, when he died, there were no entries in his medical notes. Given that there were a number of prison doctors who were involved in caring for Mark Keenan, this shows an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process. The Court does not find the explanation of Dr Keith—that an absence of notes indicates that there was nothing to record—a satisfactory answer in the light of the occurrence book entries for the same period.

114. Further, while the prison senior medical officer consulted Mark Keenan's doctor on admission and the visiting psychiatrist, who also knew Mark Keenan, had been called to see Mark Keenan on 29 April 1993, the Court notes that there was no subsequent reference to a psychiatrist. Even though Dr Rowe had warned on 29 April 1993 that Mark Keenan should be kept from association until his paranoid feelings had died down, the question of returning to normal location was raised with him the next day. When his condition proceeded to deteriorate, a prison doctor, unqualified in psychiatry, reverted to Mark Keenan's previous medication without reference to the psychiatrist who had originally recommended a change. The assault on the two prison officers followed. Though Mark Keenan asked the prison doctor to point out to the governor at the adjudication that the assault occurred after a change in medication, there was no reference to a psychiatrist for advice either as to his future treatment or his fitness for adjudication and punishment.

115. The lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment—seven days' segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days before his expected date of release—which may well have threatened his physical and moral resistance, is not compatible with the standard of treatment required in respect of a mentally ill person. It must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention.

Accordingly, the Court finds a violation of this provision.

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This judgment is important for indicating the Court's increasing concern that States must provide adequate medical care for mentally ill prisoners, especially those who may commit suicide.

7 The failure accurately to monitor and adequately to treat a new inmate experiencing serious withdrawal symptoms from heroin addiction were found to constitute inhuman and degrading treatment in ***McGlinchey and Others v UK***, judgment of 29 April 2003. The applicants were the mother and children of Judith McGlinchey, born in 1968, who had a long history of drug addiction. On 7 December 1998 she was sentenced to four months' imprisonment for theft. On her arrival, at New Hall Prison Wakefield, she weighed 50 kg and complained of withdrawal symptoms (she was vomiting frequently). The next day the prison doctor examined her and prescribed medication to reduce the symptoms of withdrawal. On 9 December her weight was recorded as 43 kg and she was given an anti-nausea drug. The following day she telephoned her mother to complain about the lack of treatment she was receiving. On 11 December she was found to be 'opiate positive'. For the next two days her pulse and blood pressure readings were within normal limits. However, on 14 December she collapsed and was taken to hospital. Subsequently she suffered a cardiac arrest and died on 3 January 1999. The autopsy found brain damage and multiple organ failure and recorded her weight as being 41 kg. An inquest jury was unanimous in reaching an open verdict in respect of her death. The applicants complained that the authorities subjected Judith to inhuman

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and degrading treatment by, *inter alia*, permitting her to dehydrate and leaving her to clean up her vomit. The Chamber, by 6 votes to 1, concluded that:

> 57. The evidence indicates to the Court that by the morning of 14 December 1998 Judith McGlinchey, a heroin addict whose nutritional state and general health were not good on admission to prison, had suffered serious weight loss and was dehydrated. This was the result of a week of largely uncontrolled vomiting symptoms and an inability to eat or hold down fluids. This situation, in addition to causing Judith McGlinchey distress and suffering, posed very serious risks to her health, as shown by her subsequent collapse. Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons, the Court finds that in the present case there was a failure to meet the standards imposed by Article 3 of the Convention. It notes in this context the failure of the prison authorities to provide accurate means of establishing Judith McGlinchey's weight loss, which was a factor that should have alerted the prison to the seriousness of her condition, but was largely discounted due to the discrepancy of the scales. There was a gap in the monitoring of her condition by a doctor over the weekend when there was a further significant drop in weight and a failure of the prison to take more effective steps to treat Judith McGlinchey's condition, such as her admission to hospital to ensure the intake of medication and fluids intravenously, or to obtain more expert assistance in controlling the vomiting.
>
> 58. The Court concludes that the prison authorities' treatment of Judith McGlinchey contravened the prohibition against inhuman or degrading treatment contained in Article 3 of the Convention.

In this case, as in ***Keenan***, the victim sadly died.

8 The full-time Court found no breach of Article 3 in respect of the forced medical treatment of a convicted murder being held on 'death row' (his sentence was commuted to life imprisonment four years later) in ***Naumenko v Ukraine***, judgment of 10 February 2004. During his detention on death row he was diagnosed as being psychopathic, he attempted suicide several times and was aggressive. A psychiatrist prescribed neuroleptic and psychoactive drugs. The applicant complained, *inter alia*, that he was being subject to radiation from a 'psychoactive drugs generator'. A delegation from the Court took evidence from the applicant and witnesses at the prison where he was being held. In its judgment the Court repeated that domestic authorities were under a duty to protect the health of prisoners and therapeutic treatment, no matter how disagreeable, could not be regarded as breaching Article 3 if it was shown to be necessary on medical grounds. Although the Court was critical of the lack of detail in the medical records kept on the applicant by the prison authorities, the judges were unanimous in finding no credible evidence that the authorities had acted wrongly in making the applicant take the above medication. Also, there was no evidence that he had been subject to treatment from a 'psychoactive drugs generator'. This judgment adopted a similar approach to the compulsory treatment of a mentally ill detainee as that applied by the original Court in ***Herczegfalvy*** (see Note 4).

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9 In ***Iorgov v Bulgaria*** (see Note 1) the applicant also alleged that surgery on a swollen gland had been unduly delayed because of hostility to him by the prison medical staff and administration. The Court stated that:

> 85. As regards the quality of the health care provided to the applicant, the Court notes that his health was regularly monitored and in most cases the necessary treatment was provided. However, the evidence about the treatment of the applicant's swollen salivary gland, although not conclusive, suggests that there had been an unwarranted delay in providing adequate medical assistance. It must be stressed in this respect that the applicant's alleged rude behaviour towards medical staff

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and, indeed, any violation of prison rules and discipline by a detainee, can in no circumstances warrant a refusal to provide medical assistance.

Clearly, denial or delay in the provision of necessary medical care must not be used as a form of (official or unofficial) punishment of detainees.

10 A united Grand Chamber determined that the high security conditions in which the former leader of a terrorist/political organization (described as a 'warlord' by President Wildhaber in his joint partly dissenting opinion) was serving his life sentence did not constitute inhuman or degrading treatment in ***Ocalan v Turkey***, see p 135.

192. In the present case, it is true that the applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, as the leader of a large, armed separatist movement, is considered in Turkey to be the most dangerous terrorist in the country. Reactions to his arrest and differences of opinion that have come to light within his own movement show that his life is genuinely at risk. It is also a reasonable presumption that his supporters will seek to help him escape from prison. In those circumstances, it is understandable that the Turkish authorities should have found it necessary to take extraordinary security measures to detain the applicant.

193. The applicant's prison cell is indisputably furnished to a standard that is beyond reproach. From the photographs in its possession and the findings of the delegates of the CPT [European Committee for the Prevention of Torture], who inspected the applicant's prison during their visit to Turkey from 2 to 14 September 2001, the Court notes that the cell which the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also air-conditioned, has washing and toilet facilities and a window overlooking an inner courtyard. The applicant appears to be under medical supervision that is both strict and regular. The Court considers that these conditions do not give rise to any issue under Article 3 of the Convention.

194. Further, the Court considers that the applicant cannot be regarded as being kept in sensory isolation or cellular confinement. It is true that, as the sole inmate, his only contact is with prison staff. He has books, newspapers and a radio at his disposal. He does not have access to television programmes or a telephone. He does, however, communicate with the outside world by letter. He sees a doctor every day and his lawyers and members of his family once a week (his lawyers were allowed to see him twice a week during the trial). The difficulties in gaining access to İmralı Prison in adverse weather conditions appear to have been resolved, as the prison authorities were provided with a suitable craft at the end of 2004.

195. The Court notes the CPT's recommendations that the applicant's relative social isolation should not be allowed to continue for too long and that its effects should be attenuated by giving him access to a television and to telephone communications with his lawyers and close relatives. However, like the Chamber, the Grand Chamber is also mindful of the Government's concerns that the applicant may seek to take advantage of communications with the outside world to renew contact with members of the armed separatist movement of which he was the leader. These concerns cannot be said to be unfounded. An added consideration is the Government's fear that it would be difficult to protect the applicant's life in an ordinary prison.

196. While concurring with the CPT's recommendations that the long-term effects of the applicant's relative social isolation should be attenuated by giving him access to the same facilities as other high security prisoners in Turkey, such as television and telephone contact with his family, the Grand Chamber agrees with the Chamber that the general conditions in which he is being detained at İmralı Prison have not thus far reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. Consequently, there has been no violation of that provision on that account.

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11 The chaining of the legs of unconscious prisoners (undertaking a hunger strike) to their beds in a hospital was held to constitute inhuman treatment by a unanimous Chamber in ***Avci and Others v Turkey***, judgment of 27 June 2006. The Court found that given their weak medical condition the risk of the prisoners absconding was non-existent (they were also guarded by gendarmes) and therefore the restraint was disproportionate.

12 The imprisonment of a 15-year-old youth in an adult prison together with a failure to provide adequate medical care for his serious psychological problems (manifested through several attempted suicides) was held to amount to inhuman and degrading treatment by a unanimous Chamber in ***Guvec v Turkey***, judgment of 20 January 2009.

(iv) Extradition or Deportation

Soering v United Kingdom A.161 (1989)
European Court of Human Rights

The applicant, Jens Soering, is a German national born in 1966. In March 1985 the parents of his girlfriend were brutally killed in their home in Virginia, USA. The applicant and his girlfriend disappeared together from Virginia in October 1985 and were subsequently arrested in England, during April 1986, in connection with cheque fraud. The applicant was interviewed, in England, by a Virginia police officer and admitted that he had killed his girlfriend's parents because they were opposed to his relationship with her. In June 1986 a Virginia grand jury indicted Soering on capital murder charges in respect of the killings. Two months later the Government of the United States of America requested the applicant's extradition (and that of the girlfriend) under the terms of the 1972 Extradition Treaty between the USA and the UK. The UK Government began extradition proceedings against the applicant in September 1986 and shortly afterwards the British Embassy in Washington made the following request of the US authorities:

> Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of . . . the Extradition Treaty, that, in the event of Mr Soering being surrendered and being convicted of the crimes for which he has been indicted . . . , the death penalty, if imposed, will not be carried out. Should it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.

In December 1986 a German prosecutor interviewed the applicant and in February 1987 a court in Bonn issued a warrant for Soering's arrest in respect of the alleged murders. This was followed by the German Government requesting his extradition to Germany under the terms of the 1872 Extradition Treaty between Germany and the UK. The UK Government replied that as the US authorities had already submitted a request for Soering's extradition those proceedings should be allowed to continue. The prosecuting attorney in Virginia swore an affidavit that:

> I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.

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However, he intended to seek the death penalty. After a hearing the Chief Magistrate at Bow Street Magistrates' Court committed the applicant to await the Home Secretary's order for his return to the USA. Soering was unsuccessful in challenging that decision in judicial review proceedings. While awaiting extradition, in July 1987, Soering applied to the Commission alleging that if he was to be extradited to the USA there was a serious likelihood that he would be sentenced to death and that consequently he would be subject to inhuman and degrading treatment and punishment contrary to Article 3 (particularly through exposure to the 'death row phenomenon'). The Commission requested the UK not to extradite Soering until the application had been determined. Subsequently, the Commission (by 6 votes to 5) expressed the opinion that there had been no breach of Article 3. The Commission, UK and German Governments referred the case to the Court.

A. APPLICABILITY OF ARTICLE 3 (ART 3) IN CASES OF EXTRADITION

81. The alleged breach derives from the applicant's exposure to the so-called 'death row phenomenon'. This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

82. In its report (at paragraph 94) the Commission reaffirmed 'its case-law that a person's deportation or extradition may give rise to an issue under Article 3 (art 3) of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article (art 3)'.

The Government of the Federal Republic of Germany supported the approach of the Commission, pointing to a similar approach in the case-law of the German courts.

The applicant likewise submitted that Article 3 (art 3) not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States. For the applicant, at least as far as Article 3 (art 3) is concerned, an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.

83. The United Kingdom Government, on the other hand, contended that Article 3 (art 3) should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in their submission, extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State's jurisdiction. To begin with, they maintained, it would be straining the language of Article 3 (art 3) intolerably to hold that by surrendering a fugitive criminal the extraditing State has 'subjected' him to any treatment or punishment that he will receive following conviction and sentence in the receiving State. Further arguments advanced against the approach of the Commission were that it interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of foreign States not Parties to the Convention or to the proceedings before the Convention institutions; it entails grave difficulties of evaluation and proof in requiring the examination of alien systems of law and of conditions in foreign States; the practice of national courts and the international community cannot reasonably be invoked to support it; it causes a serious risk of harm in the Contracting State which is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished.

In the alternative, the United Kingdom Government submitted that the application of Article 3 (art 3) in extradition cases should be limited to those occasions in which the treatment or punishment

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abroad is certain, imminent and serious. In their view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur.

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5 § 1 (f) (art 5-1-f), which permits 'the lawful . . . detention of a person against whom action is being taken with a view to . . . extradition', no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, *mutatis mutandis*, the *Abdulaziz, Cabales and Balkandali* judgment of 25 May 1985, Series A No 94, pp 31–2, §§ 59–60—in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 (art 3) can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. Article 1 (art 1) of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I', sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art 3) in particular.

In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government—for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3)—the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the *Ireland v UK* judgment of 18 January 1978, Series A No 25, p 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the *Artico* judgment of 13 May 1980, Series A No 37, p 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A No 23, p 27, § 53).

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88. Article 3 (art 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art 3).

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89. What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case (see paragraph 100 below). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art 3) (see paragraph 87 above).

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of

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conditions in the requesting country against the standards of Article 3 (art 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

B. APPLICATION OF ARTICLE 3 (ART 3) IN THE PARTICULAR CIRCUMSTANCES OF THE PRESENT CASE

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States authorities . . . this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr Soering's return to the United States are such as to attract the application of Article 3 (art 3). This inquiry must concentrate firstly on whether Mr Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the 'death row phenomenon', lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the Court examine whether exposure to the 'death row phenomenon' in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3 (art 3).

1. Whether the applicant runs a real risk of a death sentence and hence of exposure to the 'death row phenomenon'

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 (art 3) into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill . . . the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence . . . is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law . . .

Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty . . . The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings.

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out . . .

At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr Soering were extradited to the United States there was 'some risk', which was 'more than merely negligible', that the death penalty would be imposed.

94. As the applicant himself pointed out, he has made to American and British police officers and to two psychiatrists admissions of his participation in the killings of the Haysom parents, although he appeared to retract those admissions somewhat when questioned by the German prosecutor . . . It is not for the European Court to usurp the function of the Virginia courts by ruling that a defence of insanity would or would not be available on the psychiatric evidence as it

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stands. The United Kingdom Government are justified in their assertion that no assumption can be made that Mr Soering would certainly or even probably be convicted of capital murder as charged . . . Nevertheless, as the Attorney General conceded on their behalf at the public hearing, there is 'a significant risk' that the applicant would be so convicted.

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness (see paragraph 43 above). In this connection, the horrible and brutal circumstances of the killings . . . would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the 'vileness' of the crime . . .

Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and a defendant's age . . .

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. The Commonwealth's Attorney for Bedford County, Mr Updike, who is responsible for conducting the prosecution against the applicant, has certified that 'should Jens Soering be convicted of the offence of capital murder as charged . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out' . . . The Court notes, like Lord Justice Lloyd in the Divisional Court . . . that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of 'assurances satisfactory to the requested Party that the death penalty will not be carried out' . . . However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty . . . This being so, Mr Updike's undertaking may well have been the best 'assurance' that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms 'means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out . . . It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances' . . . Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice . . . and not withstanding the diplomatic context of the extradition between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the

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death penalty because the evidence, in his determination, supports such action . . . If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'.

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 (art 3) into play.

2. Whether in the circumstances the risk of exposure to the 'death row phenomenon' would make extradition a breach of Article 3 (art 3)

(a) General considerations

100. As is established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the . . . *Ireland v UK* judgment, Series A No 25, p 65, § 162; and the *Tyrer* judgment of 25 April 1978, Series A No 26, pp 14–15, §§ 29 and 30).

Treatment has been held by the Court to be both 'inhuman' because it was premeditated, was applied for hours at a stretch and 'caused, if not actual bodily injury, at least intense physical and mental suffering', and also 'degrading' because it was 'such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance' (see the above-mentioned *Ireland v UK* judgment, p 66, § 167). In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment (see the *Tyrer* judgment, loc. cit.). In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.

101. Capital punishment is permitted under certain conditions by Article 2 § 1 (art 2-1) of the Convention, which reads:

> 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

In view of this wording, the applicant did not suggest that the death penalty per se violated Article 3 (art 3). He, like the two Government Parties, agreed with the Commission that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under either Article 2 (art 2) or Article 3 (art 3). On the other hand, Amnesty International in their written comments . . . argued that the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3 (art 3).

102. Certainly, 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art 3), 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field' (see the above-mentioned *Tyrer* judgment, Series A No 26, pp 15–16, § 31). *De facto* the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried

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out. This 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice', to use the words of Amnesty International, is reflected in Protocol No 6 (P6) to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No 6 (P6) was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty *per se* within the prohibition of ill-treatment under Article 3 (art 3) must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 (art 3) should therefore be construed in harmony with the provisions of Article 2 (art 2) (see, *mutatis mutandis*, the *Klass* judgment of 6 September 1978, Series A No 28, p 31, § 68). On this basis Article 3 (art 3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art 2-1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art 3). However, Protocol No 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (see paragraph 87 above), Article 3 (art 3) cannot be interpreted as generally prohibiting the death penalty.

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104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art 3). Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) The particular circumstances

105. The applicant submitted that the circumstances to which he would be exposed as a consequence of the implementation of the Secretary of State's decision to return him to the United States, namely the 'death row phenomenon', cumulatively constituted such serious treatment that his extradition would be contrary to Article 3 (art 3). He cited in particular the delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma; the fact, so he said, that the judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state at the time of the offence; the extreme conditions of his future detention on 'death row' in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality; and the constant spectre of the execution itself including the ritual of execution. He also relied on the possibility of extradition or deportation, which he would not oppose, to the Federal Republic of Germany as accentuating the disproportionality of the Secretary of State's decision.

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The Government of the Federal Republic of Germany took the view that, taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be 'inhuman' within the meaning of Article 3 (art 3).

On the other hand, the conclusion expressed by the Commission was that the degree of severity contemplated by Article 3 (art 3) would not be attained.

The United Kingdom Government shared this opinion. In particular, they disputed many of the applicant's factual allegations as to the conditions on death row in Mecklenburg and his expected fate there.

I. Length of detention prior to execution

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years . . . This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months . . . The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for *certiorari* review, the prisoner at each stage being able to seek a stay of execution . . . The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

II. Conditions on death row

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the Court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row . . .

. . . In this connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. While it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Mecklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

III. The applicant's age and mental state

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he 'was suffering from [such] an abnormality of mind . . . as substantially impaired his mental responsibility for his acts' . . .

Unlike Article 2 (art 2) of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 (art 2) of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States Parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 (art 3) of measures connected with a death sentence.

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It is in line with the Court's case-law (as summarised above at paragraph 100) to treat disturbed mental health as having the same effect for the application of Article 3 (art 3).

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction if it is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage . . . Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings . . . These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion . . . They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3 (art 3), of the 'death row phenomenon' for a given individual once condemned to death.

Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 (art 3).

IV. Possibility of extradition to the Federal Republic of Germany

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany . . . where the death penalty has been abolished under the Constitution . . . is not material for the present purposes. Any other approach, the United Kingdom Government submitted, would lead to a 'dual standard' affording the protection of the Convention to extraditable persons fortunate enough to have such an alternative destination available but refusing it to others not so fortunate.

This argument is not without weight. Furthermore, the Court cannot overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 (art 3) in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case (see paragraphs 89 and 104 above).

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(c) Conclusion

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services . . . However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art 3). A further consideration of relevance is that in the particular instance the legitimate

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purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3 (art 3).

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling . . .

FOR THESE REASONS, THE COURT UNANIMOUSLY

I. Holds that, in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3; . . .

NOTES

1 The plenary Court was composed of President Ryssdal and Judges: Cremona, Thor Vilhjalmsson, Gölcüklü, Matscher, Pettiti, Walsh, Evans, Macdonald, Russo, Bernhardt, Spielmann, De Meyer, Carrillo Salcedo, Valticos, Martens, Palm, and Foighel.

Soering was eventually extradited to the USA after the UK received an assurance that he would not be prosecuted on capital charges.

The British Parliament abolished the death penalty for the remaining civilian offences of treason and piracy (Crime and Disorder Act 1998) and for military offences, in times of peace and war (Human Rights Act 1998) during 1998. Subsequently, the UK ratified Protocol 6 (abolition of the death penalty in peacetime) on 20 May 1999 and Protocol 13 (abolition of the death penalty in all circumstances) on 10 October 2003.

2 The ***Soering*** principle has been extended by the Court to cover member States' decisions to deport or expel aliens in ***Cruz Varas v Sweden*** A.201 (1991). The applicants were a husband, wife, and their son all of whom held Chilean citizenship. The husband arrived in Sweden in January 1987 and applied for political asylum. At first he claimed that he had been a member of various left-wing political groups in Chile in the 1960s and 1970s, but that he left Chile for financial reasons. The Swedish National Immigration Board and the Government rejected his request for asylum. Some months later he informed the Swedish authorities that he had been tortured by members of the Chilean security forces in 1986. The Swedish Government decided to continue with his expulsion and he was expelled from Sweden (to Chile) in October 1989. He complained to the Commission alleging, *inter alia*, a breach of Article 3. A majority of that body, 8 votes to 5, found no breach of Article 3. The Court held:

69. In its *Soering* judgment of 7 July 1989 the Court held that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country (Series A No 161, p 35, § 91).

Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3 (art 3), there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken

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action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (ibid, p 36, § 91).

70. Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.

75. In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 (art 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu (see the *Ireland v UK* judgment of 18 January 1978, Series A No 25, p 64, § 160).

76. Since the nature of the Contracting States' responsibility under Article 3 (art 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears.

A majority of the Court, 18 votes to 1, went on to find that the principle's requirements had not been satisfied in this case because, *inter alia*, of doubts regarding the credibility of the applicant's claims regarding his alleged maltreatment in Chile, the re-emergence of democracy in Chile, and the thorough examination of the applicant's case by the Swedish immigration authorities. Therefore, no breach of Article 3 had occurred.

3 The Court has held that mere membership of a minority group, which is caught up in a foreign civil conflict, is not of itself enough to satisfy the ***Soering*** principle. The evidence must show that there were substantial grounds for believing that the particular applicant was at real risk of being subject to prohibited treatment if he/she was to be deported back to the State where the conflict was occurring. In ***Vilvarajah v UK*** A.215 (1991), the applicants were Sri Lankan citizens of Tamil ethnic origin. Tamils make up about 20 per cent of the population of Sri Lanka and there has been ethnic conflict between the majority Sinhalese and the minority Tamils for several decades. The applicants were refused political asylum in the UK and returned to Sri Lanka where several of them claimed to have been seriously mistreated by security officials (one applicant alleged that he was beaten with belts and kicked for about half an hour by police officers). Subsequently, the British authorities allowed them to return to stay in the UK. The Commission, on the casting vote of the President, expressed the opinion that there had been no breach of Article 3 in respect of the UK's original decisions to deport the applicants. A majority of the Court, 8 votes to 1, upheld that finding.

111. The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants . . . A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3.

During 2007 the security situation in Sri Lanka deteriorated and more Tamils sought asylum in the UK. The Court granted interim measures in over 340 cases preventing the UK from returning the applicants prior to a determination of their Strasbourg complaints. In a

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lead case ***NA v UK***, judgment of 17 July 2008, a unanimous Chamber held that assessing the Article 3 risk of maltreatment if a particular applicant was to be returned to Sri Lanka had to be undertaken on an individual basis. The Court endorsed the UK's use of a list of 'risk factors' including: a record as a suspected/actual member of the Liberation Tigers of Tamil Eelam (Tamil Tigers), having relatives in the Tigers, and having made an asylum claim.

In May 2009 the Sri Lankan Government proclaimed military victory over the Tamil Tigers.

4 The Court ruled in ***Chahal v UK***, 1996-V, that the conduct of the individual was not a relevant factor in the application of the ***Soering*** principle. Mr Chahal is an Indian citizen who illegally entered the UK in 1971. Three years later he was given indefinite leave to remain under the terms of an amnesty for illegal entrants. Subsequently he married another Indian citizen and she came to live with him in the UK. They had two children born in the UK (who have British citizenship). In the early 1980s Mr Chahal visited the Punjab province and was baptised into Sikhism. At this time there was considerable violence taking place between Sikh separatists, who wanted an independent State, and Indian security forces; since 1984 over 20,000 people have been killed in this conflict. When he returned to the UK Mr Chahal became a leading figure in the Sikh community and he organized protests against the Indian Government. He was arrested several times, on suspicion of conspiring to kill the Indian Prime Minister and moderate Sikhs in the UK, but he was released without charge. In 1990 the Home Secretary decided that Mr Chahal ought to be deported as his presence in the UK was contrary to the public good for reasons of national security and the international fight against terrorism. The Secretary ordered the detention of Chahal who sought, unsuccessfully, to challenge that decision before an advisory panel and in judicial review proceedings. Chahal complained to the Commission and it requested the UK to stay the deportation of the applicant. Later the Commission expressed the unanimous opinion that, *inter alia*, there would be a breach of Article 3 if the applicant were to be deported to India because of the applicant's notoriety and the level of violence against Sikh separatists and their supporters in that country. Before the Court, the British Government argued that the guarantees under Article 3 were not absolute where the applicant posed a threat to the national security of the member State. However, this limitation was not accepted by the Court:

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79. Article 3 (art 3) enshrines one of the most fundamental values of democratic society (see . . . *Soering* judgment, p 34, para 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art 15) even in the event of a public emergency threatening the life of the nation (see the *Ireland v UK* judgment of 18 January 1978, Series A No 25, p 65, para 163, and also the *Tomasi v France* judgment of 27 August 1992, Series A No 241-A, p 42, para 115).

80. The prohibition provided by Article 3 (art 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the . . . *Vilvarajah* judgment, p 34, para 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration . . .

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81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art 3) is engaged.

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

C. APPLICATION OF ARTICLE 3 (ART 3) IN THE CIRCUMSTANCES OF THE CASE

1. The point of time for the assessment of the risk

83. Although there were differing views on the situation in India and in Punjab . . . it was agreed that the violence and instability in that region reached a peak in 1992 and had been abating ever since. For this reason, the date taken by the Court for its assessment of the risk to Mr Chahal if expelled to India is of importance.

84. The applicant argued that the Court should consider the position in June 1992, at the time when the decision to deport him was made final . . . The purpose of the stay on removal requested by the Commission . . . was to prevent irremediable damage and not to afford the High Contracting Party with an opportunity to improve its case. Moreover, it was not appropriate that the Strasbourg organs should be involved in a continual fact-finding operation.

85. The Government, with whom the Commission agreed, submitted that because the responsibility of the State under Article 3 of the Convention (art 3) in expulsion cases lies in the act of exposing an individual to a real risk of ill-treatment, the material date for the assessment of risk was the time of the proposed deportation. Since Mr Chahal had not yet been expelled, the relevant time was that of the proceedings before the Court.

86. . . . as far as the applicant's complaint under Article 3 (art 3) is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article (art 3). Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive . . .

A majority of the Court, 12 votes to 7, went on to determine that the evidence showed that the contemporary involvement of the Indian security forces in killings and serious human rights violations associated with the problems in the Punjab meant that there was a real risk of Mr Chahal being subject to treatment contrary to Article 3 if he were to be deported to India. Therefore, the UK would violate Article 3 if it were to implement the Home Secretary's deportation order.

In addition to reinforcing the absolute nature of the guarantees contained in Article 3, the above judgment also provides valuable guidance regarding the time at which the risk to the applicant should be assessed. Where the applicant has been extradited/deported the date of that action will be appropriate, but where the applicant has not yet been expelled the Court will consider the risk at the time of the determination of the case at Strasbourg.

With the continued growth of international terrorism some member States became increasingly unhappy with the restrictions ***Chahal*** placed on their ability to deport/extradite foreign nationals from their territories. In ***Saadi v Italy***, judgment of 28 February 2008,

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the British Government intervened as a third party to argue (with the support of the Italian Government) that ***Chahal*** had caused governments many difficulties in practice and that the Court should adopt a new test that took account of the threat posed by the foreign national to the host member State. The unanimous Grand Chamber responded that whilst:

> 137. . . . It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.
>
> 138. . . . It must therefore reaffirm the principle stated in the *Chahal* judgment that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned however undesirable or dangerous, cannot be taken into account . . .

Consequently, as the applicant had established a real risk that he would suffer severe maltreatment by the authorities if he was deported to Tunisia, the Grand Chamber determined a breach of Article 3 would occur if his deportation was to be implemented.

Saadi demonstrated the Court's unwillingness to reduce the level of protection granted by Article 3, for further analysis of the judgment, see D. Moeckli, '*Saadi v Italy*: The Rules of the Game Have Not Changed' (2008) 8(3) *Human Rights Law Review* 534.

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5 The nature and sources of the prohibited forms of treatment which fall within the ***Soering*** principle were defined very broadly by the unanimous Court in ***D v UK***, 1997-III. The applicant was a citizen of St Kitts who was in the terminal stages of AIDS (Acquired Immunodeficiency Syndrome). He had sought to enter the UK in 1993, but was found to be in possession of a large quantity of cocaine. He was formally refused entry to the UK and arrested. Subsequently, he pleaded guilty to being knowingly involved in the fraudulent evasion of the prohibition on the importation of controlled drugs into the UK. He was sentenced to six years' imprisonment. While in prison it was discovered that the applicant was HIV (Human Immunodeficiency Virus) positive, the infection appeared to have occurred at some time prior to his arrival in the UK. He was given medical treatment and allowed a period of compassionate leave in 1995. Prior to his release from prison in January 1996 (on licence because of his good behaviour) the immigration authorities gave directions for his deportation to St Kitts. The applicant's lawyers sought leave for him to remain in the UK on compassionate grounds as they argued that he would not be able to receive the same specialist medical care in St Kitts that he was currently receiving in the UK, thereby shortening his life expectancy. The Chief Immigration Officer refused the request and judicial review proceedings were also unsuccessful. The applicant complained to the Commission and it requested the UK not to deport him while his case was being examined. The Commission, by 11 votes to 7, expressed the opinion that there would be a breach of Article 3 if the applicant were to be deported. Before the Court, the applicant's lawyers argued that his removal to St Kitts would condemn him to an even earlier death in conditions of squalor and destitution (as he had no close relatives or friends to care for him and expensive drug therapies were not available to patients with HIV/AIDS in St Kitts).

B. THE COURT'S ASSESSMENT

> 46. The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was

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committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge.

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

48. The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. Regardless of whether or not he ever entered the United Kingdom in the technical sense . . . is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art 1) since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art 3) irrespective of the gravity of the offence which he committed.

49. It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection . . . Aside from these situations and given the fundamental importance of Article 3 (art 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art 3). To limit the application of Article 3 (art 3) in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.

50. Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 (art 3) in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health . . .

51. The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern . . . The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers.

52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts . . . While he may have a cousin in St Kitts . . . no evidence has

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been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients . . .

53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (art 3).

The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment . . .

54. Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.

However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3 (art 3) . . .

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Clearly the Court was motivated by the extreme plight of the applicant's situation in concluding that deportation to his country of birth would amount to inhuman treatment. Given the increase in HIV/AIDS in many countries it is, sadly, not surprising that other non-nationals infected with HIV (or suffering from alternative serious medical conditions) subsequently contended that their deportation from a variety of member States to their home States would violate Article 3. However a Grand Chamber confirmed that ***D v UK*** applied only in the most exceptional circumstances: ***N v UK***, judgment of 27 May 2008. The applicant in the latter case was a Ugandan national who entered the UK in 1998. She was immediately admitted to hospital where she was diagnosed as HIV positive. Over the following nine years she received extensive medical treatment from the National Health Service, whilst she unsuccessfully sought asylum. That medical treatment greatly improved her health and the use of antiretroviral drugs stabilized her HIV. Before the Court she contended that her deportation would breach Article 3 as her home town hospital was unable to cope with AIDS and she was too weak to work or pay for medication. The Grand Chamber noted that since ***D v UK*** the Court had never upheld a health-related deportation challenge under Article 3.

42. In summary, the Court observes that since *D. v the United Kingdom* it has consistently applied the following principles.

Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case the very exceptional circumstances were that

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the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

A large majority, 14 votes to 3, concluded that as the applicant was not critically ill her situation could be distinguished from that of ***D***, therefore the UK would not be in breach of Article 3 if the applicant was to be deported to Uganda. Consequently, only a foreign national who is facing deportation during the final stages of a terminal illness and who will not receive any suitable care in his/her home State is likely to succeed with an Article 3 complaint.

6 One day after giving judgment in the case of ***D v UK***, the Court further broadened the scope of the ***Soering*** principle by stating that the source of the risk of an applicant being subject to treatment contrary to Article 3 could arise from the actions of private persons, such as organized criminals. In ***HLR v France***, 1997–III, the applicant was a Colombian national who was arrested at a French airport in possession of 580g of cocaine. While being questioned by the police the applicant provided officers with information on other persons involved in the smuggling of drugs. This information facilitated the conviction of another person for drug smuggling in Germany. The applicant was convicted of drug offences and sentenced to five years' imprisonment and permanent exclusion from French territory. After the applicant had served his sentence the French authorities began the process of deporting him. He complained to the Commission alleging that if he were to be returned to Colombia he would face a real risk of serious injury or death at the hands of the drug traffickers on whom he had informed. The Commission, by 19 votes to 10, expressed the opinion that if France were to deport the applicant in these circumstances it would amount to a breach of Article 3. The Court held that:

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

41. Like the Commission, the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3 (art 3).

42. The documents from various sources produced in support of the applicant's memorial provide insight into the tense atmosphere in Colombia, but do not contain any indication of the existence of a situation comparable to his own. Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in H.L.R.'s case that the alleged risk is real. His aunt's letters cannot by themselves suffice to show that the threat is real. Moreover, there are no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported.

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> Amnesty International's reports for 1995 and 1996 do not provide any information on the type of situation in which the applicant finds himself. They describe acts of the security forces and guerrilla movements. Only in the 1995 report is there any reference, in a context which is not relevant to the present case, to criminal acts attributable to drug trafficking organisations.
>
> 43. The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection.
>
> 44. In the light of these considerations, the Court finds that no substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (art 3). It follows that there would be no violation of Article 3 (art 3) if the order for the applicant's deportation were to be executed.

Six judges dissented as they believed that the risk to the applicant was sufficient to satisfy the ***Soering*** test.

The deportation of aliens may also raise Convention issues under Article 8 (right to respect for family life), see p 531.

7 In ***D and Others v Turkey***, judgment of 22 June 2006, a unanimous Chamber held that the deportation of a married woman (together with her husband and child) to her home State of Iran where she had been sentenced to 100 lashes for fornication (she had married her husband in a Sunni ceremony without the consent of her father, a Shia) would constitute inhuman treatment. The Chamber expressed the view that where a legal system permitted such physical violence, even if it was imposed by a symbolic punishment using a special lash with 100 tails, the sentence was 'inhuman'.

For earlier case-law involving corporal punishment see the section below on Degrading punishment.

8 The operation of the European Union's system of allocating responsibility for determining asylum applications was the background to the Grand Chamber's consideration of Article 3 in ***MSS v Belgium and Greece***, judgment of 21 January 2011. Under the EU's 'Dublin Regulation' (Council No 343/2003) where an asylum seeker irregularly entered the territory of a member State of the EU, from a third State, that EU State had responsibility for determining the asylum seeker's claim (even if he/she travelled on to another EU member State). The applicant was an Afghan national who entered Greece from Turkey. He was detained, for a week, and then ordered to leave Greece (he did not claim asylum in Greece). Two months later he claimed asylum in Belgium. The Belgian authorities notified the Greek authorities that, under the Dublin Regulation, it was for the latter to determine the applicant's claim. Whilst the applicant's appeals against being deported to Greece were pending, the United Nations High Commissioner for Refugees wrote to the Belgian Government recommending the suspension of such transfers to Greece because of deficiencies in Greek procedures for determining asylum claims and the poor living conditions of asylum seekers in that country. Nevertheless, after the rejection of the applicant's appeals he was transferred to Greece. After three days' detention the applicant was released by the Greek authorities and he claimed that he then had to live in a public park for many months with no accommodation or material support given to him by the Greek authorities (local people and the church gave him some assistance). By large majorities (16 votes to 1 and 15 votes to 2) the Grand Chamber concluded that Belgium had violated Article 3 by deporting

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the applicant to Greece when the Belgian authorities knew or ought to have known that there was a real risk that his asylum claim would not be properly determined and he would be exposed to degrading living conditions. A key factor underlying the Grand Chamber's conclusions was the UNCHR's letter. The judgment was significant for confirming that State parties to the ECHR who were also members of the EU could not automatically apply the Dublin Regulation mechanism to deal with claims for asylum, they also had to ensure that any transfer of an asylum seeker to another EU member State respected the asylum seeker's rights under Article 3. In his concurring opinion Judge Rozakis, the judge of Greek nationality, observed:

> . . . almost 88% of the immigrants (and among them asylum seekers) entering the EU today cross the Greek borders to land in our continent. In these circumstances it is clear that the EU immigration policy . . . does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities.

Inhuman punishment

Chember v Russia judgment of 3 July 2008
European Court of Human Rights

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The applicant had been called up for military service, after passing medical tests, in the Ministry of Internal Affairs forces. He claimed that he injured his spine carrying an axle for a lorry during his service. A couple of weeks later he was transferred to another unit and he complained to a medical officer and a Lieutenant D about constant pains in his knees. During the next month a Sergeant, with Lieutenant D present, ordered the applicant (and fellow servicemen) to do 350 knee bends as punishment for failing to clean their barracks sufficiently. After many knee bends the applicant collapsed and he was taken to the medical unit. After several weeks of treatment in a medical university, the applicant was discharged from military service due to spinal injury acquired during that service. The applicant contended that he had been subject to inhuman treatment and punishment.

> 50. . . . the State has a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, his health and well-being are adequately secured by, among other things, providing him with the medical assistance he requires (see, *mutatis mutandis*, *Kılınç and Others v Turkey*, no. 40145/98, § 41, 7 June 2005, and *Álvarez Ramón v Spain* (dec.), no. 51192/99, 3 July 2001). The State has a primary duty to put in place rules geared to the level of risk to life or limb that may result not only from the nature of military activities and operations, but also from the human element that comes into play when a State decides to call up ordinary citizens to perform military service. Such rules must require the adoption of practical measures aimed at the effective protection of conscripts against the dangers inherent in military life and appropriate procedures for identifying shortcomings and errors liable to be committed in that regard by those in charge at different levels . . .

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52. Even though challenging physical exercise may be part and parcel of military discipline, the Court reiterates that, to remain compatible with Article 3 of the Convention, it should not go beyond the level above which it would put in danger the health and well-being of conscripts or undermine their human dignity. In the present case the applicant—who was known to have painful knees—was ordered to do 350 knee bends which appears to be a particularly demanding workout. However, the Court sees no need to determine *in abstracto* whether that particular order was compatible with the requirements of Article 3, for it will have regard to the following elements of the case which it considers crucial for its assessment of compliance with Article 3.

53. The applicant was ordered to do knee bends as punishment for insufficiently thorough cleaning of the barracks. The order emanated from his acting commander Junior Sergeant Ch. It was tacitly endorsed by the higher commander Lieutenant D. who was present at the scene but did not contradict the order. It follows that the treatment complained about was applied on the applicant deliberately.

54. It is obvious from the statements collected in the framework of the domestic inquiry that both Lieutenant D. and Junior Sergeant Ch. were well aware of the applicant's knee-related health problems from the moment of his arrival at the military base. . . . Notwithstanding their awareness of the applicant's specific health problems, the commanders forced the applicant to do precisely the kind of exercise that put great strain on his knees and spine. In these circumstances, the Court cannot but find that the treatment was both deliberate and calculated to cause the applicant physical suffering. The severity of the punishment cannot obviously be accounted for by any requirements of military service or discipline or said to have contributed to the specific mission of the armed force . . .

55. As regards the consequences of the punishment at issue, the Court notes that the applicant collapsed on the spot and lost control of his legs. Despite the emergency treatment he received first in a military and then in a civilian hospital, the injury resulted in long-term damage to his health. The applicant was discharged from the military service and assigned the second category of disability.

56. Assessing the above elements as a whole, the Court finds that in the present case the applicant was subjected to forced physical exercise to the point of physical collapse. This punishment was applied deliberately by his commanders, in full knowledge of the applicant's specific health problems and without there being any military necessity which might have called for that course of action. The Court is of the opinion that in these circumstances that punishment caused the applicant intense physical suffering and went beyond the threshold of a minimum level of severity.

57. Having regard to the above considerations, the Court finds that the applicant was subjected to inhuman punishment in breach of Article 3 of the Convention. There has therefore been a violation of that provision under its substantive limb.

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NOTES

1 The unanimous Chamber was composed of President Rozakis and Judges: Vajic, Klover, Steiner, Hajiyev, Malinverni, and Nicolaou.

2 The key findings in the above judgment were that the onerous physical exercises required to be undertaken by the applicant were deliberately imposed as a form of punishment by his superiors, who knew of his health problems, and the consequent serious disability that was inflicted on him. That was a far too brutal measure of military discipline.

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Degrading treatment

Yankov v Bulgaria judgment of 11 December 2003
European Court of Human Rights

The applicant, a Bulgarian national born in 1943, had a doctorate in economics and was the executive director of an agricultural investment fund and a financial company. In March 1996 he had been arrested and detained in respect of alleged criminal dereliction of his professional duties. He was subsequently held in custody pending his trial. Whilst in prison, on 10 March 1998, prior to a meeting with his lawyers the applicant was searched. The officers found and confiscated a manuscript from the applicant. The manuscript was read and it contained an account of the applicant's prosecution and imprisonment by the authorities. Parts of the manuscript were highly critical of officials: for example 'The search [in the apartment] was conducted by police officer [B]. His inexperience was betrayed by his behaviour, he was a provincial parvenu…The [prison] wardens, most of whom are simple villagers and are better paid than teachers, doctors and engineers, "work" 24 hours and then have a 72-hour rest…' On the same day the prison governor ordered that the applicant be placed in an isolation cell for seven days as punishment for having made offensive remarks about public officials. The applicant contended that the manuscript was the draft of a book he had been writing and he had merely intended to read parts of the manuscript to his lawyers, while the prison officer who seized the manuscript claimed that the applicant had planned to transmit it to his lawyer. Prior to being placed in the isolation cell, the applicant's head was shaved (no other prisoners had witnessed the shaving). Two days after being released from the isolation cell the applicant was brought before a public hearing of the District Court and the fact that his head had been shaved was noticeable. Subsequently the applicant lodged a complaint with the Strasbourg authorities alleging, *inter alia*, that the shaving of his head amounted to a breach of Article 3.

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105. In considering whether treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, *Peers v Greece*, No 28524/95, § 74, ECHR 2001-III; and *Kalashnikov v Russia*, No 47095/99, § 101, ECHR 2002-VI).

106. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v the United Kingdom*, judgment of 18 January 1978, Series A No 25, p. 65, § 162).

107. The Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (*Kudła v Poland* [GC], No 30210/96, §§ 93–4, ECHR 2000-XI).

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2. Application of those principles in the present case

108. The Court notes that the applicant's hair was shaved off before his placement in an isolation cell.

109. The Court has not had occasion to rule on whether or not the forced shaving off of a prisoner's hair may constitute degrading treatment contrary to Article 3 of the Convention.

. . .

112. A particular characteristic of the treatment complained of, the forced shaving off of a prisoner's hair, is that it consists in a forced change of the person's appearance by the removal of his hair. The person undergoing that treatment is very likely to experience a feeling of inferiority as his physical appearance is changed against his will.

113. Furthermore, for at least a certain period of time a prisoner whose hair has been shaved off carries a mark of the treatment he has undergone. The mark is immediately visible to others, including prison staff, co-detainees and visitors or the public, if the prisoner is released or brought into a public place soon thereafter. The person concerned is very likely to feel hurt in his dignity by the fact that he carries a visible physical mark.

114. The Court thus considers that the forced shaving off of detainees' hair is in principle an act which may have the effect of diminishing their human dignity or may arouse in them feelings of inferiority capable of humiliating and debasing them. Whether or not the minimum threshold of severity is reached and, consequently, whether or not the treatment complained of constitutes degrading treatment contrary to Article 3 of the Convention will depend on the particular facts of the case, including the victim's personal circumstances, the context in which the impugned act was carried out and its aim.

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115. The Court rejects as being unsubstantiated the Government's allegation that the applicant's hair was shaved off as a hygienic measure. It has not been alleged that a problem of infestation existed in the particular detention facility. It is also unclear why the hygienic requirements for entry into the isolation cell would differ from those concerning other cells in the same detention facility.

116. The Government have not offered any other explanation. Therefore, even assuming that there was a practice of shaving off of the hair of prisoners punished by confinement in an isolation cell . . . the act complained of had no legal basis and valid justification.

117. The Court thus considers that even if it was not intended to humiliate, the removal of the applicant's hair without specific justification contained in itself an arbitrary punitive element and was therefore likely to appear in his eyes to be aimed at debasing and/or subduing him.

118. Furthermore, in the particular case the applicant must have had reasons to believe that the aim had been to humiliate him, given the fact that his hair was shaved off by the prison administration in the context of a punishment imposed on him for writing critical and offensive remarks about prison warders, among others.

119. Additional factors to be taken into consideration in the present case are the applicant's age—55 at the relevant time—and the fact that he appeared at a public hearing nine days after his hair had been shaved off.

120. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the shaving off of the applicant's hair in the context of his punishment by confinement in an isolation cell for writing critical and offensive remarks about prison warders and State organs constituted an unjustified treatment of sufficient severity to be characterised as degrading within the meaning of Article 3 of the Convention.

121. It follows that there has been a violation of Article 3 of the Convention on account of the forced removal of the applicant's hair.

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FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 3 of the Convention;

NOTES

1 The Court was composed of President Rozakis and Judges: Tulkens, Vajic, Levits, Botoucharova, Kovler, and Zagrebelsky.

2 ***Yankov*** reveals that degrading treatment can occur via intentionally humiliating acts or by subjecting a person to degrading conditions. For a consideration of the Article 10 aspects of the judgment, see p 653.

3 An example of State officials intentionally subjecting a person to degrading treatment occurred in ***Iwanczuk v Poland***, judgment of 15 November 2001. The applicant was a remand prisoner awaiting trial on charges of misappropriation. At 9.30 pm on 19 September 1993 he asked the Wroclaw prison authorities to allow him to visit the voting facilities in the prison, so that he might cast his vote in the parliamentary elections. A prison officer took him to the guards' room and four guards told him that he would have to undress and undergo a body search in order to be allowed to vote. The applicant removed all his clothes, except his underwear, and the guards verbally abused him (in part by making humiliating comments about his body). The guards ordered that he strip naked. The applicant refused. He also refused to undergo a body search. Consequently the guards denied him the opportunity to vote and took him back to his cell. Iwanczuk subsequently lodged a complaint with the Strasbourg authorities alleging, *inter alia*, that the guards' behaviour constituted degrading treatment in breach of Article 3. The Court determined that the guards' order that the applicant undergo a body search as a precondition to being allowed to enter the voting area in the prison was not necessary. Relevant factors included his peaceful behaviour during his entire period of detention, the nature of the charges against him (not involving allegations of violence), and the absence of previous convictions against the applicant. The Court held that:

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59. . . . whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder in prisons, they must be conducted in an appropriate manner. In the present case, the prison's guards verbally abused and derided the applicant. Their behaviour was intended to cause in the applicant feelings of humiliation and inferiority. This, in the Court's view, showed a lack of respect for the applicant's human dignity.

Therefore, by 6 votes to 1, the Court determined that the applicant had been subjected to degrading treatment. Here the guards' behaviour was unjustified/unprofessional and suggests that they were seeking to humiliate him as a response to his request to vote during the late evening. For the Court's consideration of a high security regime involving regular strip-searches see ***Van Der Ven v Netherlands*** (p 185).

4 The Court has found that poor physical conditions of detention in a number of States constituted degrading treatment even though there was no intention to humiliate detainees. Examples include: ***Dougoz v Greece***, judgment of 6 March 2001, where a convicted foreign drug offender was held for ten months in Drapetsona detention centre and for eight months in Alexandras Avenue police headquarters (both locations were severely overcrowded and there were no beds, mattresses or blankets). The Court, unanimously, determined that:

46. . . . conditions of detention may sometimes amount to inhuman or degrading treatment. In the Greek case (Yearbook of the European Convention on Human Rights No 12, 1969), the Commission

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reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contacts with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT [the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] report of 29 November 1994 regarding the Police Headquarters in Alexandras Avenue. In its report the CPT stressed that the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as in Drapetsona, and the applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water.

47. Furthermore, the Court does not lose sight of the fact that in 1997 the CPT visited both the Alexandras Police Headquarters and the Drapetsona detention centre and felt it necessary to renew its visit to both places in 1999. The applicant was detained in the interim from July 1997 to December 1998.

48. In the light of the above, the Court considers that the conditions of detention of the applicant in the Alexandras Police Headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.

Shortly afterwards the segregation unit of Koridallos prison was found to breach this element of Article 3 in ***Peers v Greece***, judgment of 19 April 2001. The applicant was a British drug addict who had been convicted of drug offences. He was detained in the segregation unit for two months while he underwent drug withdrawal. During that time he had to share a single person cell with another prisoner and they had to use an open toilet (with no screen from the sleeping area) in their cell. A united Court concluded that:

74. . . . in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (*V. v the United Kingdom* [GC], No 24888/94, § 71, ECHR-IX).

75. Indeed, in the present case, the fact remains that the competent authorities have taken no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. The Court takes particularly into account that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. The Court is not convinced by the Government's allegation that these conditions have not affected the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in the segregation unit of the Delta wing of the Koridallos prison amounted to degrading treatment within the meaning of Article 3 of the Convention.

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The terrible conditions of detention for asylum seekers in Greece, including detainees having to drink water from toilets, led the Court to find a detainee had suffered degrading treatment in ***MSS v Belgium and Greece***, see p 210.

A few days' detention of a severely disabled person was found to breach this provision in ***Price v UK***, judgment of 10 July 2001. The applicant was a four-limb deficient victim of thalidomide. In 1995 she refused to answer questions regarding her financial position during civil proceedings. The judge found her in contempt of court and ordered that she be committed to prison for seven days. She was held in the cells of Lincoln police station that night, as it was too late to send her to a prison. Price had to sleep in her wheelchair (she claimed that she could not sleep on the wooden bed as it would have been too painful for her hips) and was cold (extra blankets were provided and a doctor attended her). The next day she was moved to the health centre of New Hall Women's Prison, in Wakefield. Her cell had a wider wheelchair door access, hand pulls on the toilet, and a hydraulic hospital bed. Constant nursing care was provided. Male officers were required to help the nurse lift Price on and off the toilet. She was released after four days (due to the rules on remission of sentences). Price alleged that her treatment during detention breached Article 3. The Court, unanimously, found that:

> 30. There is no evidence in this case of any positive intention to humiliate or debase the applicant. However, the Court considers that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3.

The judgment in ***Price*** indicates that States must ensure that the conditions of detention are appropriate for disabled detainees (the Court was critical of the domestic judge for not checking to confirm that there would be suitable facilities for the care of Price before he ordered her incarceration).

The dire conditions of detention in Russia were first examined by the Court in ***Kalashnikov v Russia***, judgment of 15 July 2002. The applicant, a businessman charged with fraud, had been held on remand in a detention centre in Magadan for over four years. His cell was so overcrowded that the inmates had to share each bed amongst three detainees (on an eight-hour shift system), the light was constantly on in the cell, and between 11 and 24 inmates had to share the toilet in the corner of the cell. Furthermore, the cell was infested with pests and some of the inmates had serious contagious diseases (e.g. tuberculosis). Consequently, the Court, unanimously, ruled that:

> 102. . . . the applicant's conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment.

Very significantly during the Strasbourg proceedings the respondent government had acknowledged that the conditions of the applicant's detention were no worse than those of most detainees in Russia and that, because of economic difficulties, such conditions were below those acceptable to the Council of Europe.

In the subsequent case of ***Poltoratskiy v Ukraine***, judgment of 29 April 2003, the Court held that a State's economic problems cannot be used to justify bad conditions of detention which infringe Article 3. The applicant was convicted, in December 1995, of the murder of four persons. He was sentenced to death. In February 1996 he was moved to one of the cells

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in Ivano-Frankivsk prison where convicted prisoners awaiting execution were detained. A moratorium on executions was announced by the President of Ukraine in March 1997 and in December 1999 the Constitutional Court of Ukraine ruled that the death penalty was contrary to the Constitution. In June 2000 the applicant's sentence was commuted to life imprisonment. He alleged a number of breaches of his Convention rights before the Strasbourg authorities.

145. The Court views with particular concern the fact that, until at earliest May 1998, the applicant, in common with other prisoners detained in the prison under a death sentence, was locked up for 24 hours a day in cells which offered only a very restricted living space, that the windows of the cells were covered with the consequence that there was no access to natural light, that there was no provision for any outdoor exercise and that there was little or no opportunity for activities to occupy himself or for human contact. In common with the observations of the CPT concerning the subjection of death row prisoners in Ukraine to similar conditions, the Court considers that the detention of the applicant in unacceptable conditions of this kind amounted to degrading treatment in breach of Article 3 of the Convention. In the case of the present applicant, the situation was aggravated by the fact that in the period between 24 February and 24 March 1998, he was detained in a cell where there was no water tap or washbasin but only a small pipe on the wall near the toilet, and where the water supply could only be turned on from the corridor, where the walls were covered with faeces and where the bucket for flushing the toilet had been taken away. The applicant' situation was further aggravated by the fact that he was throughout the period in question subject to a death sentence, although . . . a moratorium had been in effect since 11 March 1997.

146. The Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 of the Convention (see *V. v the United Kingdom* [GC], No 24888/94, § 71, ECHR 1999-IX; and *Kalashnikov*, cited above, § 101). It considers that the conditions of detention, which the applicant had to endure in particular until May 1998, must have caused him considerable mental suffering, diminishing his human dignity.

147. The Court acknowledges that following May 1998 substantial and progressive improvements had taken place, both in the general conditions of the applicant's detention and in the regime applied within the prison. In particular, the coverings over the windows of the cells were removed, daily outdoor walks were introduced and the rights of prisoners to receive visits and to correspond were enhanced. Nevertheless, the Court observes that, by the date of introduction of these improvements, the applicant had already been detained in these deleterious conditions for a period of nearly 30 months, including a period of 8 months after the Convention had come into force in respect of Ukraine.

148. The Court has also borne in mind, when considering the material conditions in which the applicant was detained and the activities offered to him, that Ukraine encountered serious socio-economic problems in the course of its systemic transition and that prior to the summer of 1998 the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations. However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention which it has found in paragraph 145 to be unacceptable in the present case.

149. There has, accordingly, been a violation of Article 3 of the Convention in this respect.

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If the Court had allowed a plea of State economic hardship to justify very poor prison conditions it would have undermined the potential protection of Article 3 for many detainees across Europe and reduced the external incentive upon States to improve their conditions of detention.

Prison overcrowding resulting in a non-smoking prisoner being imprisoned in cells with smoking inmates for several years, during which time he developed chronic health problems, was found to have breached Article 3 in ***Elefteriadis v Romania***, judgment of 25 January 2011.

We can note that in many of the above prison condition cases the judgments have reflected a symbiotic relationship between the Court's role in applying and interpreting the Convention rights of detainees and the work of it sister organization the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Published reports by the latter on its inspections of particular places of detention are of great help to the Court in reaching findings of fact in respect of applicants who allege breaches of their Convention rights concerning their treatment in those institutions. Also adverse comments by the CPT regarding conditions in an institution may encourage the Court to find a breach of Article 3 where an inmate, who has suffered from those conditions, lodges a complaint under the Convention.

5 The conditions in which a prisoner was repeatedly transported from a remand facility to the courthouse were held to violate Article 3 by a unanimous Chamber in ***Khudoyorov v Russia***, judgment of 8 November 2005. On 205 occasions the applicant was transported to and from the Regional Court, a journey that took an hour in a prison van where he occupied a compartment of about 1 sq m. The applicant had to share that compartment with another prisoner, there was only one seat, and the occupants had to take turns sitting on the other's lap. During the days that he was taken to the Regional Court the applicant was given no food or outdoor exercise. The Chamber had regard to the CPT's published views that transportation compartments for individual prisoners up to 0.8 sq m were unsuitable (irrespective of the duration of the journey). Therefore, given the size of the compartment used to transport the applicant and another prisoner, the lack of adequate seating, and the absence of food and exercise the Chamber concluded that Article 3 had been breached. The Court did not specify which element of the Article had been violated. Again, we see the significance of the CPT's expertise being used by the Court in the application of Article 3.

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6 The delayed release of a very ill elderly prisoner was found to constitute degrading treatment by a Chamber (6 votes to 1) in ***Farbtuhs v Latvia***, judgment of 2 December 2004. The applicant had been sentenced to five years' imprisonment in 2000, when he was aged 84, in respect of acts of genocide and crimes against humanity he committed when an official of the Soviet Union after the latter's annexation of Latvia in 1940. Prior to beginning his imprisonment he was examined by medical experts who reported that he was paraplegic and suffered from a number of other serious ailments. Because of his ill-health he was detained in the prison infirmary. In February 2001 the medical experts recommended that, given his ill-health and age, he should be released on licence. Three days later the prison governor applied for the applicant's release to the District Court. His request was refused. In March 2002 the Regional Court authorized the applicant's release in the light of evidence that he had developed two further illnesses, including diabetes, whilst in prison. The applicant was then released. The Chamber expressed grave concern that the applicant's release from prison had been delayed for over one year despite expert medical advice that his declining health merited immediate release. Furthermore, the Chamber was critical of the limited professional medical care given to Farbtuhs whilst he was being detained. Outside working hours he had

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to rely on fellow prisoners, sometimes acting on a voluntary basis, to care for him. This judgment indicates that States ought not to continue the detention of persons where independent medical opinion clearly supports their immediate release on health grounds.

7 Latvia's failure to provide adequate food to a remand prisoner on the days when he was taken to court for hearings constituted degrading treatment according to the unanimous Chamber in ***Moisejevs v Latvia***, judgment of 15 June 2006. The applicant was taken to court for hearings on 72 days and on those occasions he was not given a normal lunch, but only a slice of bread, an onion, and a piece of fish or a meatball. The Chamber considered that this was insufficient nutrition to meet his needs (especially having regard to the stresses he faced during trial hearings). Furthermore, on the hearing days when he was returned to prison in the evening he frequently was not given a meal, but just a bread roll.

8 In ***Hurtado v Switzerland*** A.280A (1994), p 187, the effects of the stun grenade and the police officers' use of physical force to arrest the applicant were to cause him to defecate in his trousers. He was not allowed to change into clean clothing for over 24 hours, during which time he was questioned by the police and brought before an investigating judge. The Commission, by 15 votes to 1, found this treatment to be degrading contrary to Article 3.

> 67. The Commission reiterates that treatment is considered 'degrading' when it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (Court's judgments in *Ireland v UK* p 66 para 167 and *Soering v UK* p 39 para 100).
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> 68. The Commission considers that the conduct of the authorities, who neglected to take the most elementary hygiene measures by failing to make available to the applicant clean clothes to replace those soiled as a result of their action, was humiliating and debasing for the applicant and therefore degrading within the meaning of Article 3 of the Convention.

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9 The routine handcuffing of a life-sentence prisoner every time he was taken out of his cell (during a 13-year period) was found to amount to degrading treatment by a unanimous Chamber in ***Kashavelov v Bulgaria***, judgment of 20 January 2011. There was no evidence that the applicant had attempted to harm others or escape from custody.

10 A unanimous Chamber found the confining of a non-violent defendant in a metal cage during his criminal trial, for alleged economic crimes, amounted to degrading treatment in ***Khodorkovskiy v Russia***, judgment of 31 May 2011. Prior to his arrest the applicant had been one of the richest businessmen in Russia, he had also supported opposition political groups and expressed concerns about anti-democratic trends in the country. The Chamber determined that the Government had not identified any specific security risk that justified such confinement.

> 126. In sum, the security arrangements in the courtroom, given their cumulative effect, were, in the circumstances, excessive and could have been reasonably perceived by the applicant and the public as humiliating. There was, therefore, a violation of Article 3 of the Convention in that the treatment was degrading within the meaning of this provision.

The Chamber also found several breaches of Article 5, but he had failed to substantiate his claim that his prosecution (and conviction) had been politically motivated.

11 The Commission found racial discrimination in British immigration restrictions amounted to degrading treatment in ***East African Asians v UK*** (1973) 3 EHRR 76. By the 1960s there were several hundred thousand citizens of the UK and colonies, many of whom

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were of Asian ethnic origin, resident in East Africa. As British colonies in that region gained their independence their new national governments began various 'Africanization' policies; the effects of these programmes were to deprive many of the Asians of their livelihoods (e.g. by withdrawing their trading licences) and render them destitute. Consequently, significant numbers of the Asians sought to enter and settle in the UK. In 1968 Parliament enacted the Commonwealth Immigrants Act 1968 which had the effect of prohibiting the East African Asians from entering or settling in the UK. Twenty-five such persons, who had been refused entry into the UK, complained to the Commission alleging, *inter alia*, a breach of Article 3. In its report the Commission concluded that:

> 207. . . . the legislation applied in the present case discriminated against the applicants on the grounds of their colour or race. It has also confirmed the view, which it expressed at the admissibility stage, that discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention. The Commission recalls in this connection that, as generally recognised, a special importance should be attached to discrimination based on race; that publicity [sic] to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.
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> 208. The Commission considers that the racial discrimination, to which the applicants have been publicly subjected by the application of the above immigration legislation, constitutes an interference with their human dignity which, in the special circumstances described above, amounted to 'degrading treatment' in the sense of Article 3 of the Convention.
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> 209. It therefore concludes, by six votes against three votes [in addition two other members of the Commission, who were not present when the vote was taken, expressed their agreement with the majority], that Article 3 has been violated in the present case.

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The special circumstances identified by the Commission included the fact that the applicants were not aliens in British law, yet the 1968 Act denied them entry to the UK, and the difficult situation the applicants faced in East Africa because of the local 'Africanization' programmes. Subsequently the British Government allowed the applicants to enter the UK and introduced a special voucher scheme that allowed entry for other persons in the same predicament. In 1977 the Committee of Ministers was unable to reach a two-thirds majority decision on the application and, therefore, resolved that no further action was called for (Res DH(77)2). In 1994, at the request of the British Government, the Committee of Ministers finally resolved formally to publish the above report of the Commission (Res DH(94)30). The failure of the Committee of Ministers to reach a conclusive determination of the case illustrates the problematic role played by that institution under the former Strasbourg supervisory system.

12 The Court did not find racial or sexual discrimination which breached Article 3 in ***Abdulaziz, Cabales and Balkandali v UK*** A.94 (1985), and see p 530. The applicants, who were aliens, were lawfully resident in the UK and under existing immigration rules they were unable to gain entry to the UK for their foreign husbands. The Court, unanimously, held that: '. . . the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase . . .' (para 91). Hence, the Court will examine the justifications and effects of any alleged discriminatory action when assessing if it is serious enough to constitute degrading treatment.

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13 A unanimous Chamber of the full-time Court determined that racially discriminatory comments by domestic courts and public officials against members of the minority Roma community contributed towards the latter suffering degrading treatment in ***Moldovan and Others v Romania (No 2)***, judgment of 12 July 2005. The seven Roma applicants had their homes and personal property destroyed by a mob, including police officers, who also murdered three Roma involved in a fight with non-Roma villagers which had led to the death of a villager. For many years after the destruction of their homes the applicants were forced to live in hen-houses, pigsties, and cellars. During the criminal proceedings against the villagers the court stated that, *inter alia*, the Roma living in the village '…rejected the moral values accepted by the rest of the population…Most of the Roma have no occupation and earn their living by doing odd jobs, stealing and engaging in all kinds of illicit activity.' The applicants complained to Strasbourg. The Chamber held that:

> 111. In addition, the remarks concerning the applicants' honesty and way of life made by some authorities dealing with the applicants' grievances…appear to be, in the absence of any substantiation on behalf of those authorities, purely discriminatory. In this connection the Court reiterates that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention (see *East African Asians v the United Kingdom*, Commission Report, 14 December 1973, DR 78, p 5, at p 62).
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> Such remarks should therefore be taken into account as an aggravating factor in the examination of the applicants' complaint under Article 3 of the Convention.
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> …
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> 113. In the light of the above, the Court finds that the applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to 'degrading treatment' within the meaning of Article 3 of the Convention.
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> 114. Accordingly, there has also been a violation of Article 3 of the Convention.

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14 The types of discrimination which can potentially violate Article 3 were extended to encompass sexual orientation in ***Smith and Grady v UK*** (1999) 29 EHRR 493, extracted and discussed at p 492. The Court, unanimously, held that:

> 121.…Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 (see *mutatis mutandis*, the *Addulaziz, Cabales and Balkandali v UK* A.94 p 42, paras 90–1).
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> 122. However, while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

15 The deliberate delaying of a pregnant woman undergoing amniocentesis, in order to confirm whether her foetus was suffering from a serious genetic abnormality, by doctors opposed to abortion, was found to have breached Article 3 in ***RR v Poland***, judgment of 26 May 2011. The applicant was 18 weeks pregnant when an ultrasound scan disclosed the potential abnormality. However, it took the applicant six weeks to find a doctor willing to undertake the genetic testing and produce the results. By then it was too late for her to have

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a lawful abortion and her child was subsequently born with Turner syndrome. By 6 votes to 1 the Chamber held that:

> 160. The Court is further of the view that the applicant's suffering, both before the results of the tests became known and after that date, could be said to have been aggravated by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them.
>
> It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case. The Court can only agree with the Polish Supreme Court's view that the applicant had been humiliated . . .
>
> 161. The Court is of the view that the applicant's suffering reached the minimum threshold of severity under Article 3 of the Convention.

For the lack of care another pregnant woman had received from Polish doctors opposed to abortion see ***Tysiac***, p 501.

Degrading punishment

Tyrer v UK A.26 (1978)
European Court of Human Rights

The applicant was born on the Isle of Man (a dependency of the British Crown with its own government, legislature, and courts) in 1956. In early March 1972 he pleaded guilty to a charge of unlawful assault occasioning actual bodily harm to a fellow pupil at school (who had earlier reported the applicant for bringing beer into the school). The juvenile court sentenced him to three strokes of the birch (local regulations specified that the birch rod should have a maximum length of 40 inches with a spray circumference not exceeding 6 inches). The applicant appealed against the sentence to the High Court of Justice of the Isle of Man. On the morning of 28 April 1972 the court ordered Tyrer to be examined by a doctor to determine if he was fit to receive the punishment. The doctor reported that he was fit. In the afternoon the court dismissed Tyrer's appeal. After waiting in a police station for some time for a doctor to arrive, Tyrer was birched later that day. The doctor and Tyrer's father were present. Tyrer was made to take down his trousers and underpants and bend over a table; he was held by two policemen while a third officer administered the birching. After the first stroke pieces of the birch rod were broken by the force of the impact on Tyrer. The applicant's father thereupon 'went for' one of the policemen and had to be restrained. The birching did not cut the applicant's skin, but he was sore for about one and a half weeks after the punishment. Judicial corporal punishment of adults and juveniles was abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968. The applicant complained to the Commission in 1972 arguing, *inter alia*, that his punishment violated Article 3. In January 1976 the applicant sought to withdraw his application. However, the Commission refused his request because, 'the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved.' Thereafter the applicant took no further part in the proceedings. In its December 1976 report the Commission, by 14 votes to 1, found the punishment to be degrading and in breach of Article 3.

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II. ON ARTICLE 3 (ART 3)

29. The Court shares the Commission's view that Mr Tyrer's punishment did not amount to 'torture' within the meaning of Article 3 (art 3). The Court does not consider that the facts of this particular case reveal that the applicant underwent suffering of the level inherent in this notion as it was interpreted and applied by the Court in its judgment of 18 January 1978 (*Ireland v UK*, Series A No 25, pp 66–67 and 68, paras 167 and 174).

That judgment also contains various indications concerning the notions of 'inhuman treatment' and 'degrading treatment' but it deliberately left aside the notions of 'inhuman punishment' and 'degrading punishment' which alone are relevant in the present case (ibid, p 65, para 164). Those indications accordingly cannot, as such, serve here. Nevertheless, it remains true that the suffering occasioned must attain a particular level before a punishment can be classified as 'inhuman' within the meaning of Article 3 (art 3). Here again, the Court does not consider on the facts of the case that that level was attained and it therefore concurs with the Commission that the penalty imposed on Mr Tyrer was not 'inhuman punishment' within the meaning of Article 3 (art 3). Accordingly, the only question for decision is whether he was subjected to a 'degrading punishment' contrary to that Article (art 3).

30. The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 (art 3) is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system.

However, as the Court pointed out in its judgment of 18 January 1978 in the case of *Ireland v UK* (Series A No 25, p 65, para 163), the prohibition contained in Article 3 (art 3) of the Convention is absolute: no provision is made for exceptions and, under Article 15 (2) (art 15-2) there can be no derogation from Article 3 (art 3). It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is 'degrading' within the meaning of Article 3 (art 3). Some further criterion must be read into the text. Indeed, Article 3 (art 3), by expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment in general.

In the Court's view, in order for a punishment to be 'degrading' and in breach of Article 3 (art 3), the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.

31. The Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island. However, even assuming that local public opinion can have an incidence on the interpretation of the concept of 'degrading punishment' appearing in Article 3 (art 3), the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves. As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3 (art 3), whatever their deterrent effect may be.

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in

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the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney-General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.

32. As regards the manner and method of execution of the birching inflicted on Mr Tyrer, the Attorney-General for the Isle of Man drew particular attention to the fact that the punishment was carried out in private and without publication of the name of the offender.

Publicity may be a relevant factor in assessing whether a punishment is 'degrading' within the meaning of Article 3 (art 3), but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.

The Court notes that the relevant Isle of Man legislation, as well as giving the offender a right of appeal against sentence, provides for certain safeguards. Thus, there is a prior medical examination; the number of strokes and dimensions of the birch are regulated in detail; a doctor is present and may order the punishment to be stopped; in the case of a child or young person, the parent may attend if he so desires; the birching is carried out by a police constable in the presence of a more senior colleague.

33. Nevertheless, the Court must consider whether the other circumstances of the applicant's punishment were such as to make it 'degrading' within the meaning of Article 3 (art 3).

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State . . . Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 (art 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

Admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him.

34. In the present case, the Court does not consider it relevant that the sentence of judicial corporal punishment was imposed on the applicant for an offence of violence. Neither does it consider it relevant that, for Mr Tyrer, birching was an alternative to a period of detention: the fact that one penalty may be preferable to, or have less adverse effects or be less serious than, another penalty does not of itself mean that the first penalty is not 'degrading' within the meaning of Article 3 (art 3).

35. Accordingly, viewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of 'degrading punishment' as explained at paragraph 30 above. The indignity of having the punishment administered over the bare posterior aggravated to some extent the degrading character of the applicant's punishment but it was not the only or determining factor.

The Court therefore concludes that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 (art 3) of the Convention.

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FOR THESE REASONS, THE COURT

...

2. holds by six votes to one that the judicial corporal punishment inflicted on Mr Tyrer amounted to degrading punishment within the meaning of Article 3; ...

NOTES

1 The Court was composed of President Balladore Pallieri and Judges: Cremona, Pedersen, Vilhjalmsson, Teitgen, and Matscher.

Judge Fitzmaurice dissented as he did not consider that judicial corporal punishment was degrading when applied to juveniles. Furthermore:

9. The 'other' circumstances (Judgment, paragraph 33 et seq.)—I have noted the following:

(i) In paragraph 33, much stress is placed on the fact that the 'violence' was 'institutionalised', ie 'permitted by law' and 'carried out by the police authorities'. For my part, I cannot see the relevance of this criterion, ie that the punishment was degrading because 'institutionalised', or more degrading on that account that if it had not been.

To be 'institutionalised' is, in an ordered society, inseparable from any punishment for crime, since non-institutionalised punishment, except such as the law tolerates, must be illegal. Therefore I do not follow (and it is not explained) why institutionalised violence must necessarily be degrading, if non-institutionalised is not, or be more degrading than the latter. Indeed, it is not at all clear what form of non-institutionalised violence the Court had in mind which, by comparison, would not be regarded as degrading to the recipient. Possibly it was desired to imply (though this is not stated) that, for instance, a beating administered by a parent to a child would not degrade the latter,—whereas a 'judicial' one would. I do not believe in these subtleties. In my view neither punishment (so long as administered in private) can be considered as inherently degrading where a juvenile is concerned, unless other factors over and above the beating as such are involved. The State is, in a certain sense, in loco parentis in such a situation.

(ii) Next (third section of paragraph 33), the alleged effect of the institutionalisation is said to be 'compounded' by 'the whole aura of official procedure attending the punishment'—(but how could the procedure not be official if there was institutionalisation?—the one is, or entails, the other)—and also compounded 'by the fact that those inflicting [the punishment] were total strangers to the offender'. As to this last objection, leaving aside the question whether, in the restricted community of Castletown, Isle of Man, the police officers concerned were 'total strangers' to the boy, I for my part fail to see how it can be any more degrading to be beaten by strangers than non-strangers. Many would, I believe, think it less so.

...

11. ... Modern opinion has come to regard corporal punishment as an undesirable form of punishment; and this, whatever the age of the offender. But the fact that a certain form of punishment is an undesirable form of punishment does not automatically turn it into a degrading one. A punishment may well have an undesirable character without being in the least degrading—or at any rate not more so than punishment in general is. And hitherto, whatever may have been felt about corporal punishment from such standpoints as whether it really deters, whether it may not have a brutalising effect, whether it harms the psyche of those who carry it out, etc., it has not been generally regarded as degrading when applied to juveniles and young offenders, in the same way as it is considered so to be in the case of adults. In that respect, the two things have never been regarded as being quite of the same order or as being on the same plane. This last is the real point—for to put it in terms of the criterion adopted by the Court, and assuming that corporal punishment does involve some degree of degradation, it has never been seen as doing so for a juvenile to anything

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approaching the same manner or extent as for an adult. Put in terms of the Convention and of the Court's criterion, therefore, such punishment does not, in the case of a juvenile, attain the level of degradation needed to constitute it a breach of Article 3 (art 3), unless of course seriously aggravating circumstances are present over and above the simple fact of the corporal character of the punishment. This is why I could have understood it if the Court had regarded the infliction of the blows on the bare posterior as bringing matters up to the required level of degradation. I would not necessarily have agreed with that view, but it would have been tenable. However, the Court held that this was not a determining element: the punishment was in any event degrading. This means, in effect, that any judicial corporal punishment meted out to a juvenile is degrading and a breach of Article 3 (art 3). It is this view (in my opinion far too dogmatic and sweeping) that I cannot agree with. That such punishments may be undesirable and ought perhaps to be abolished is, as I have said, quite another matter: they are not ipso facto degrading on that account in the case of juvenile offenders.

12. I have to admit that my own view may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones—prefects or monitors—sometimes by masters) was regarded as the normal sanction for serious misbehaviour, and even sometimes for what was much less serious. Generally speaking, and subject to circumstances, it was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart, or be denied leave of absence on a holiday occasion. Moreover, these beatings were carried out without any of the safeguards attendant on Mr Tyrer's: no parents, nurses or doctors were ever present. They also not infrequently took place under conditions of far greater intrinsic humiliation than in his case. Yet I cannot remember that any boy felt degraded or debased. Such an idea would have been thought rather ridiculous. The system was the same for all until they attained a certain seniority. If a boy minded, and resolved not to repeat the offence that had resulted in a beating, this was simply because it had hurt, not because he felt degraded by it or was so regarded by his fellows: indeed, such is the natural perversity of the young of the human species that these occasions were often seen as matters of pride and congratulation,—not unlike the way in which members of the student corps in the old German universities regarded their duelling scars as honourable—(though of course that was, in other respects, quite a different case).

13. In conclusion, I must insist that I am not seeking to maintain that the state of affairs I have just described was necessarily a good one, though it had, and has, many supporters. I am not advocating corporal punishment. I am simply saying that it is not degrading for juvenile offenders—or (to such extent as it is), does not, in their case, involve the level of degradation required to constitute it a breach of Article 3 (art 3) of the European Human Rights Convention, when inflicted under proper restrictions and safeguards in consequence of a regularly pronounced judicial sentence, traditionally sanctioned for certain offences by the law of the community to which the offender belongs, and by its public opinion. No juvenile is or need feel 'degraded' under those conditions....

The dissent is notable for the candour with which Sir Gerald Fitzmaurice acknowledged the effects of his public school upbringing upon his personal conception of degrading punishment. For a contrasting (and later) account of the consequences of corporal punishment in a British non-state school see ***Costello-Roberts***, Note 3.

In 1993 the Parliament of the Isle of Man (Tynwald) enacted legislation abolishing judicial corporal punishment.

The judgment of the Court in ***Tyrer*** also has an enduring importance, extending beyond the definition of Article 3, through the judiciary's articulation of the 'living instrument' doctrine regarding the interpretation and application of the rights guaranteed by the Convention. This evolutionary approach enables the Court to take account of changes in

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social and economic relationships, cultural values, and governmental structures since the time of the Convention's drafting in the immediate post-Second World War era.

In an analysis of the doctrine I have observed that it has been used by the Court to:

> . . . creatively update the interpretation of a number of Convention Articles in varied situations. These judgment have, *inter alia*, prohibited judicial corporal punishment (*Tyrer v UK*), limited the role of a government minister in determining the release of a prisoner (*Stafford v UK*), contributed to reducing the 'democratic deficit' in the European Union (*Matthews v UK*), recognised a right not to be compelled to belong to a trade union/employers' association (*Sigurjonsson v Iceland*) and required the legal recognition of the new identity of post-operative transsexuals (*Christine Goodwin v UK*). In utilising this doctrine the Court has had regard to a wide range of factors when determining what contemporary conditions necessitate. The common approach of member States has been relied upon (e.g. in *Tyrer* and *Pretty v UK*), whilst similar developments in a number of non-member States were noted in *Christine Goodwin*. The rulings of other international bodies were cited in support of the Court's interpretation of Article 11 in *Sigurjonsson*. ['The Creativity of the European Court of Human Rights' (2005) 5(1) *Human Rights Law Review* 57 at 69.]

2 Corporal punishment in state-funded schools was challenged by two Scottish mothers in ***Campbell and Cosans v UK*** A.48 (1982). Mrs Campbell's son, who was aged 6 at the time of the application to the Commission, attended a Roman Catholic primary school in the Strathclyde Region Education Authority area. The school used corporal punishment, in the form of striking the palm of the pupil's hand with a leather strap called a tawse, for disciplinary purposes. Mrs Campbell's son never received such punishment while he attended that school, but the Authority refused her request that it guarantee that he would not be so punished. Mrs Cosans' son, Jeffrey who was born in 1961, attended a High School in the Fife Region Education Authority area. In September 1976 Jeffrey was ordered to report to the Assistant Headmaster to receive corporal punishment (the tawse) for having tried to take a prohibited route, through a cemetery, on his way home from school. On his father's advice, Jeffrey reported to the Assistant Headmaster, but refused to accept the punishment. Jeffrey was immediately suspended from the school and he never returned as his parents continued to object to him receiving corporal punishment (in May 1977 he ceased to be of compulsory school age). Both mothers complained to the Commission that the use of corporal punishment in the schools attended by their sons violated, *inter alia*, Article 3. By 13 votes to 1, the Commission found no breach of that Article. The Court was unanimous in also finding no violation of that provision on the facts of the applicants' cases.

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> 25. Neither Gordon Campbell nor Jeffrey Cosans was, in fact, strapped with the tawse. Accordingly, the Court does not in the present case have to consider under Article 3 (art 3) an actual application of corporal punishment.
>
> 26. However, the Court is of the opinion that, provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 (art 3) may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'.
>
> 27. Although the system of corporal punishment can cause a certain degree of apprehension in those who may be subject to it, the Court nevertheless shares the Commission's view that the situation in which the applicants' sons found themselves did not amount to 'torture' or 'inhuman treatment', within the meaning of Article 3 (art 3): there is no evidence that they underwent suffering of the level inherent in these notions as they were interpreted and applied in the Court's *Ireland v UK* judgment of 18 January 1978 (Series A No 25, pp 66–7 and 68, paras 167 and 174).

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28. The Court's judgment of 25 April 1978 in the *Tyrer* case does indicate certain criteria concerning the notion of 'degrading punishment' (Series A No 26, p 15, par 30). In the present case, no 'punishment' has actually been inflicted. Nevertheless, it follows from that judgment that 'treatment' itself will not be 'degrading' unless the person concerned has undergone—either in the eyes of others or in his own eyes (ibid, p 16, para 32)—humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the case (see the above-mentioned *Ireland v UK* judgment, p 65, para 162, p 66, para 167, and pp 69–70, paras 179–181).

29. Corporal chastisement is traditional in Scottish schools and, indeed, appears to be favoured by a large majority of parents . . . Of itself, this is not conclusive of the issue before the Court for the threat of a particular measure is not excluded from the category of 'degrading', within the meaning of Article 3 (art 3), simply because the measure has been in use for a long time or even meets with general approval (see, *mutatis mutandis*, the above-mentioned *Tyrer* judgment, p 15, para 31).

However, particularly in view of the above-mentioned circumstances obtaining in Scotland, 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.

30. As to whether the applicants' sons were humiliated or debased in their own eyes, the Court observes first that a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and 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. In any event, in the case of these two children, the Court, like the Commission, notes that it has not been shown by means of medical certificates or otherwise that they suffered any adverse psychological or other effects . . .

Jeffrey Cosans may well have experienced feelings of apprehension or disquiet when he came close to an infliction of the tawse . . . but such feelings are not sufficient to amount to degrading treatment, within the meaning of Article 3 (art 3).

The same applies, a fortiori, to Gordon Campbell since he was never directly threatened with corporal punishment . . . It is true that counsel for his mother alleged at the hearings that group tension and a sense of alienation in the pupil are induced by the very existence of this practice but, even if this be so, these effects fall into a different category from humiliation or debasement.

31. To sum up, no violation of Article 3 (art 3) is established . . .

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Hence the fact that neither of the applicants' sons had actually received corporal punishment was the decisive element in the Court's determination that the minimum threshold of Article 3 had not been infringed in these circumstances. However, the applicants succeeded in their claims that the school authorities had failed to respect the parents' 'religious and philosophical convictions' during the education of their children; thereby breaching Article 2 of Protocol 1.

Subsequently, a number of other complaints were made to the Commission by parents, and their children, concerning the existence and use of corporal punishment in state funded schools. These cases, where admissible, were subject to friendly settlements. A major component in the friendly settlements was the enactment of the Education (No 2) Act 1986, which ended corporal punishment in state-funded schools (by abolishing teachers' reasonable punishment defence to criminal charges or civil actions brought in respect of corporal punishment in such schools). See, for example, ***Durairaj, Townend and Brant v UK*** (1987), European Commission of Human Rights, *Stock-taking on the ECHR: Supplement 1987*, p 26.

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3 Corporal punishment in non-state-funded schools, where the parents paid for the education of their children, was considered by the Court in ***Costello-Roberts v UK*** A.247-C (1993). In September 1985 Mrs Costello-Roberts sent her son, Jeremy, aged 7, to an independent boarding preparatory school (the school received no financial support from the government). The school's prospectus stated that a high standard of discipline was maintained, but it did not mention the use of corporal punishment. In fact the school operated a demerit marks system whereby pupils were given demerit marks each time they broke a school rule. When five demerit marks had been accumulated the pupil was subject to corporal punishment. By early October 1985 Jeremy had acquired five demerit marks, for talking in the corridor and being late for bed. The headmaster discussed the matter with colleagues and decided to punish Jeremy. Three days later the headmaster 'whacked' Jeremy three times on the bottom through his shorts with a rubber-soled gym shoe. No other person was present when the punishment was administered. Afterwards, Jeremy wrote to his mother several times complaining about the 'slippering'. In early November Mrs Costello-Roberts wrote to the school's governors expressing her 'grave concern' about the use of such a 'barbaric practice'. She also informed the headmaster that she did not want her son to be subject to any further corporal punishment. He replied that as she wished Jeremy to be exempt from the 'framework of discipline and punishment that is acceptable to all other parents at the school' it would be best if Jeremy were to be removed from the school at the end of term. Mrs Costello-Roberts also complained to the police regarding Jeremy's punishment, but they said that action could not be taken as there was no evidence of bruising on his buttocks. Jeremy was removed from the school in November 1985 by his mother. Mrs Costello-Roberts and Jeremy complained to the Commission alleging, *inter alia*, that the headmaster's punishment violated Article 3. The Commission declared Mrs Costello-Roberts' application inadmissible and that Jeremy had not suffered a breach of Article 3 (by 9 votes to 4). The Court held that the government was responsible under the Convention for the actions of the school because, *inter alia*, States are obliged (by Article 2 of Protocol 1) to secure to children their right to education and they cannot absolve themselves from responsibility by devolving authority to private persons/bodies. However, a majority, of five judges, determined that there had been no breach of Article 3.

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31. The circumstances of the applicant's punishment may be distinguished from those of Mr Tyrer's which was found to be degrading within the meaning of Article 3 (art 3). Mr Costello-Roberts was a young boy punished in accordance with the disciplinary rules in force within the school in which he was a boarder. This amounted to being slippered three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private . . . Mr Tyrer, on the other hand, was a young man sentenced in the local juvenile court to three strokes of the birch on the bare posterior. His punishment was administered some three weeks later in a police station where he was held by two policemen while a third administered the punishment, pieces of the birch breaking at the first stroke.

32. Beyond the consequences to be expected from measures taken on a purely disciplinary plane, the applicant has adduced no evidence of any severe or long-lasting effects as a result of the treatment complained of. A punishment which does not occasion such effects may fall within the ambit of Article 3 (art 3) (see the *Tyrer* judgment, Series A No 26, pp 16–17, para 33), provided that in the particular circumstances of the case it may be said to have reached the minimum threshold of severity required. While the Court has certain misgivings about the automatic nature of the punishment and the three-day wait before its imposition, it considers that minimum level of severity not to have been attained in this case.

Accordingly, no violation of Article 3 (art 3) has been established.

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Is the Court's distinction between the context and nature of the punishments in the above case and ***Tyrer*** convincing? Four judges dissented.

> However, in the present case, the ritualised character of the corporal punishment is striking. After a three-day gap, the headmaster of the school 'whacked' a lonely and insecure 7-year-old boy. A spanking on the spur of the moment might have been permissible, but in our view, the official and formalised nature of the punishment meted out, without adequate consent of the mother, was degrading to the applicant and violated Article 3 (art 3).

The School Standards and Framework Act 1998 abolished corporal punishment in all schools.

4 Yutaka Arai-Takahashi has commented that:

> Degrading treatment or 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 . . . . Third, an extensive coverage of issues under the rubric of degrading treatment can be undertaken without compromising the non-derogable nature of Article 3. ['Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR' (2003) 21(3) *Netherlands Quarterly of Human Rights* 385 at 420–1.]

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