

Article 3 of the European Convention on Human Rights

Uğur Erdal &
Hasan Bakırcı

A PRACTITIONER'S
HANDBOOK

With a Preface by Sir Nigel Rodley



OMCT Handbook Series Vol. I

Series Editor: Boris Wijkström

The World Organisation Against Torture (OMCT) coordinates the activities of the SOS-Torture Network, which is the world's largest coalition of non-governmental organisations fighting against torture and ill-treatment, arbitrary detention, extrajudicial executions, forced disappearances, and other serious human rights violations. OMCT's growing global network currently includes 282 local, national, and regional organisations in 92 countries spanning all regions of the world. An important aspect of OMCT's mandate is to respond to the advocacy and capacity-building needs of its network members, including the need to develop effective international litigation strategies to assist victims of torture and ill-treatment in obtaining legal remedies where none are available domestically, and to support them in their struggle to end impunity in states where torture and ill-treatment remain endemic or tolerated practices. In furtherance of these objectives, OMCT has published a *Handbook Series* of four volumes, each one providing a guide to the practice, procedure, and jurisprudence of the regional and international mechanisms that are competent to examine individual complaints concerning the violation of the absolute prohibition of torture and ill-treatment. This *Practitioner's Handbook* on Article 3 of the European Convention on Human Rights is the first of the series.

ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS A PRACTITIONER'S HANDBOOK

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Note to Readers

This *Practitioner's Handbook* constitutes a capacity-building tool which is meant to support NGOs, advocates, lawyers, and indeed, the victims of torture themselves, in developing effective litigation strategies before the European Court of Human Rights in respect of violations of Article 3 of the European Convention on Human Rights. As such, OMCT has striven for comprehensive coverage of the relevant areas of substance and procedure but also for clarity and accessibility. OMCT is continuously looking for ways to improve its materials and enhance their impact. Please help us do this by submitting your comments on this book, preferably in English or French, at: handbook@omct.org

Readers are also invited to visit our website (www.omct.org) featuring a page devoted to the *Handbook* which contains further reference materials including electronic versions of all of the *Handbook's* appendices.

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Finally, my thanks to Veronica de Nogales Leprevost for contributing the cover illustration for the *OMCT Handbook Series*.

Boris Wijkström
Series Editor
July 2006

DISCLAIMER

The views expressed in this book are solely those of the authors and do not represent those of the European Court of Human Rights or any other institution.

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PREFACE

I welcome the publication of what is certain to be a most useful contribution to better practice before the European Court of Human Rights in cases alleging violations of the Article 3 prohibition of torture and inhuman or degrading treatment or punishment under the European Convention on Human Rights. It is written by persons with extensive inside experience of the Court's work.

At first sight, one might wonder why another 'how to' book on the Court is necessary. In fact, the Court has developed such an extensive case law on both substance and procedure, potential applicants or their lawyers will be well served by this article-specific work. This is particularly apposite in the context of Article 3 violations: torture and other prohibited ill-treatment generally occur far from the public eye, in secret, dark places where the victim has no control over the circumstances and where the ensuing physical and psychological trauma make access to justice more difficult even after the torture stops. Moreover, it is a commonplace observation that public officials who commit torture are careful to cover up their tracks and usually have ample means at their disposal to do so. As a consequence, litigating a case under Article 3 presents special evidential and other challenges for the victim. In this connection, the comprehensive treatment the *Handbook* accords to the 'establishment of facts' and other procedural and evidential challenges peculiar to Article 3 complaints will be especially helpful. In fact, a review of the current state of the literature reveals that while increasing attention is being focused on the development of the Court's Article 3 jurisprudence, and indeed the jurisprudence on torture of international tribunals generally, there is little which treats these developments specifically from the perspective of an applicant wishing to seek justice before the Strasbourg Court.

The definitional aspects are an especially important element of substance. In the past, the Court has inexplicably insisted on maintaining an approach which sees 'torture' as involving even more pain or suffering than is inherent in the notion of inhuman treatment, apparently because of the 'special stigma' associated with torture. Today, however, it is becoming increasingly common for the Court, in finding violations of Article 3, not to specify which aspect of the Article was violated. The extensive discussion in this *Handbook* of Article 3 severity threshold issues usefully draws out the practical implications of this trend.

The scope of subject-matter is also noteworthy, ranging as it does from brutal interrogation methods through inhumane conditions of detention to arbitrary methods of expulsion. The treatment of interim measures is of great significance in Article 3 cases, particularly those involving attempts to avoid

extradition or deportation to a country where their mental or physical integrity could be at risk.

Practitioners should be immeasurably assisted by the appendices that provide an accessible guide to best practice before the Court in Article 3 cases.

*Professor Sir Nigel Rodley KBE
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July 2006*

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INTRODUCTION

The purpose of this *Handbook* is to provide practical advice to persons wishing to bring a case to the European Court of Human Rights under Article 3 of the European Convention on Human Rights. Article 3 of the Convention prohibits the use of *torture or inhuman or degrading treatment or punishment* by Contracting Parties. This prohibition is absolute, allowing for no derogation or exceptions under any circumstances. The European Court has held that the Article 3 prohibition enshrines “one of the fundamental values of the democratic societies making up the Council of Europe.”¹

The *Handbook* is intended for advocates and practitioners of varying levels of experience including those who have little or no prior experience of litigating cases in Strasbourg. Indeed, applicants themselves should be able to use it to lodge an application with the Court. Naturally, the risks of oversimplification had to be avoided particularly in relation to some of the more complex areas of substance and procedure. It is hoped that the more experienced readers will find the *Handbook* useful as a reference tool, especially on such issues as the evidential rules and the establishment of facts, which, in the opinion of OMCT, have not traditionally received the attention they deserve and which have not previously been the subject of article-specific treatment.

Although the focus of this *Handbook* is Article 3, the analyses it contains should in theory enable a prospective applicant to formulate an application under any Article of the Convention. Nevertheless, due to its article-specific nature, all the substantive and procedural areas covered here are discussed in the context of the Court’s Article 3 jurisprudence. In this connection, ample use has been made of the Court’s judgments concerning ill-treatment to illustrate the operation of procedural rules and the application of substantive law to factual scenarios. Additionally, special emphasis has been placed on giving practical and strategic litigation advice in relation to matters which may pose particular challenges to Article 3 litigants. In doing so, the authors have drawn on their own experience in the Registry of the European Court.

The *Handbook* was written at a time when significant changes to the structure and procedure of the Court were underway. They include: the expected entry into force of Protocol No. 14 which will amend certain provisions of the Convention with the aim of improving the Court’s efficiency; the amended Rules of Court which entered into force on 1 December 2005; the increasing tendency of the Court to examine admissibility and merits in a joint procedure, and finally, the creation of a fifth Section on 1 April 2006. This book

1 *Soering v. UK*, no. 14038/88, 7 July 1989, § 88.

takes into account the changes already in place as well as those that will follow when Protocol No. 14 enters into force.

For practical reasons, a simple method of reference was employed when referring to the decisions and reports of the European Commission of Human Rights and decisions and judgments of the Court. Thus, the reference “*A. v. the United Kingdom*, no. 25599/94, 23 September 1998” includes [the applicant’s name] v. [the respondent State], the application number, and the date of the judgment. The initials “GC” in square brackets in some case references indicate that the decision or judgment was adopted by the Grand Chamber of the Court.

Throughout this book, the European Court of Human Rights is referred to as “the Court” or “the Strasbourg Court”; the Convention for the Protection of Human Rights and Fundamental Freedoms as “the European Convention on Human Rights” or “the Convention”; and the word “ill-treatment”, unless otherwise specified, is employed as a collective term for all forms treatment prohibited by Article 3, i.e. torture, inhuman treatment and degrading treatment. Whenever inhuman or degrading *punishment* is meant, it is referred to as such. Finally, the person lodging the application and corresponding with the Court is referred to simply as “the applicant” even though in practice that person may be the applicant’s lawyer.

A number of documents have been appended to the *Handbook* including reference materials such as the European Convention, Protocol No. 14, Practice Directions, and so forth. The appendices also include a model Article 3 application to which applicants may refer in formulating their own applications, and a detailed analysis of the Court’s Article 3 jurisprudence.² In recognition of the important role that non-judicial preventive mechanisms play in the struggle to eradicate torture and ill-treatment, the appendices include an article describing the mandate and working methods of the relevant European institutions including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).³ Due to space constraints, a number of these appendices were placed in the CD-ROM which accompanies this book. The appendices are generally intended to be consulted in conjunction with the sections to which they relate, as explained below.

Section 1 of the *Handbook* presents an overview of the Council of Europe, the Court, the Convention, and provides a general description of the Court’s

2 See Appendix No. 10, “Analysis of the Court’s Article 3 Jurisprudence,” prepared by the Deutsches Institut für Menschenrechte in collaboration with OMCT.

3 See Appendix No. 11, “European Mechanisms for the Prevention of Torture and Ill-treatment”, by Dr. Reinhard Marx, Deutsches Institut für Menschenrechte.

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proceedings. The latter is intended to give the reader a bird's-eye view of these proceedings and may be particularly useful to persons who have no prior experience with the Court. Readers are referred *inter alia* to Appendix No. 5, "Submitting a Complaint to the European Court of Human Rights: Eleven Common Misconceptions", and *Textbox ii*, "Case-Processing Flowchart".

Section 2 deals with the admissibility and standing requirements of the Convention. The issue of substantiation is analysed in detail since the large percentage of applications declared inadmissible as "manifestly ill-founded" on this ground suggests that applicants are not according sufficient attention to it.

Section 3 examines the issue of interim measures and the procedures for expediting cases. The Court is currently receiving a large number of requests for interim measures under Rule 39 from persons who are subject to expulsion. This is partly a consequence of the stricter immigration and anti-terrorist measures adopted recently by many Council of Europe Member States. The Practice Directions in Appendix No. 3 and the sample request for an interim measure under Rule 39 in Appendix No. 15 may be consulted when reading this section.

Sections 4 through 6 set out the Court's procedure from the lodging of the application up to and including the admissibility stage. At the time of writing, Article 29 § 3 of the Convention stipulates that in principle admissibility decisions are taken separately from merits decisions. However, this is more the exception than the rule. At the present time, and in anticipation of the entry into force of Protocol No. 14,⁴ proceedings on admissibility and merits are conducted jointly in the vast majority of cases. The Court's recent practice of joint examination has accordingly been taken into account in this *Handbook*. Relevant appendices are *inter alia*, Appendices Nos. 1, 3-6, 10, 12 - 14, 17, and 19. Relevant *Textboxes* include *Textboxes iii-x*.

Section 7 deals with the issue of just satisfaction under Article 41 of the Convention. The reader may consult the applicants' claims for just satisfaction in the case of *Akkum and Others v. Turkey* in Appendix No. 12.

Section 8 tackles the issue of friendly settlement and strike outs under Articles 37 and 38 of the Convention. Readers may consult *Textbox xi* for a concrete example of friendly settlement declarations (*Sakı v. Turkey*, no. 29359/95, 30 October 2001).

4 See Article 9 of Protocol No. 14.

In Section 9, the form and content of judgments, referrals to the Grand Chamber, and the execution of judgments are examined.

Section 10 provides an analysis of the obligations inherent in Article 3 of the Convention. Annex 1 of the Istanbul Protocol, i.e. the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, includes the principles applicable to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. This may be consulted in Appendix No. 7 when formulating complaints concerning the effectiveness of investigations. Appendix No. 10 contains an analysis and discussion of the Court's Article 3 jurisprudence.

Section 11 deals with the establishment of facts and other evidential issues, such as the admissibility of evidence and the burden and standard of proof that are applied in the Court's proceedings. Annex 2 of the Istanbul Protocol, mentioned above, may be found in Appendix No. 8 of the present *Handbook*. This Annex should be consulted in conjunction with Section 11 for a review of advanced medical techniques used in the diagnoses of the effects of ill-treatment.