

THE ABSOLUTE NATURE OF THE PROHIBITION AND THE INHERENT OBLIGATIONS OF ARTICLE 3

10.1 Summary

10.2 Discussion

10.2.1 The Negative Obligation

10.2.2 The Positive Obligation

a) The Obligation to Investigate Allegations of Ill-treatment

i. Concluding Remarks

b) The Obligation to Protect Against Ill-treatment by Private Individuals

i. Concluding Remarks

10.1 Summary

Article 3 of the Convention simply states that

“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

At first sight, Article 3 appears to impose only a negative obligation on Contracting Parties, i.e. an obligation only to refrain from inflicting ill-treatment on individuals within their jurisdiction. However, such a restrictive approach to Article 3 would not provide individuals with adequate protection against ill-treatment for two primary reasons. Firstly, if the right guaranteed by Article 3 did not also impose an obligation on the Contracting Party to conduct effective investigations into allegations of ill-treatment which are capable of leading to the prosecution and punishment of the perpetrators, the obligations of Article 3 would in practice not deter agents of the State from abusing the rights of those within their control. Secondly, if the obligation of Article 3 were only negative, it would in theory allow a Contracting Party to sit by as a passive spectator to ill-treatment by *private actors* without engaging its responsibilities under the Convention.

According to the Court's case-law, it is now well established that in addition to the negative obligation, Article 3 also imposes two separate positive obligations (sometimes referred to as procedural obligations). Thus, under Article 3, Contracting Parties have a positive obligation to conduct effective investigations into allegations of ill-treatment (regardless of whether the perpetrator is alleged to be an official of the State or a private party) capable of leading to the identification and punishment of those responsible for the ill-treatment.⁵⁴¹ There arises a separate positive obligation to take effective measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment by officials or by private parties.⁵⁴² This second positive obligation requires that effective criminal law provisions be in force in order to afford maximum protection from ill-treatment. It also requires that the relevant officials of the Contracting Parties take pre-emptive steps to protect vulnerable individuals from ill-treatment.⁵⁴³ Indeed, similar positive obligations are inherent in various Articles of the Convention to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective.⁵⁴⁴

541 See *Assenov v. Bulgaria*, cited above, § 102.

542 See *A. v. the United Kingdom*, no. 25599/94, 23 September 1998, § 22.

543 See *Z. v. the United Kingdom*, no. 29392/95, 10 May 2001, §§ 73-74.

544 See *İlhan v. Turkey*, cited above, § 91.

10.2 Discussion

Article 3, together with Article 2 (right to life), is regarded by the Court as:

“one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe. In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention”.⁵⁴⁵

Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment in absolute terms and irrespective of the circumstances or the victim’s conduct.⁵⁴⁶ The Court has recognised this to be the case even when Contracting Parties are confronted with difficult challenges such as the fight against terrorism and organised crime.⁵⁴⁷ Indeed, the Court has recognized that the prohibition of torture constitutes a *jus cogens* norm, that is, a peremptory norm of international law. In *Al-Adsani v. UK*, the Court stated the following:

“Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party’s criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens* [reference is made to *Furundzija* and *Pinochet* (No. 3)] ...

... the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law ...”⁵⁴⁸

Because of the absolute nature of the prohibition, the Court’s vigilance is heightened when dealing with Article 3 complaints. Unlike some of the qualified Articles of the Convention, such as Articles 8-11, Article 3 makes no provision for exceptions. It follows, therefore, that although the Court may allow a Contracting Party’s national authorities a certain margin of

545 See, *inter alia*, *Pretty v. the United Kingdom*, cited above, § 49.

546 See, *inter alia*, *Lorsé v. the Netherlands*, cited above, § 58.

547 See, *inter alia*, *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, 13 November 2003, § 632; *Chahal v. the United Kingdom*, cited above, § 79.

548 *Al-Adsani v. the United Kingdom*, no. 35763/97, 21 November 2001.

OMCT

appreciation when dealing with issues concerning the rights guaranteed in Articles 8-11 (in particular when striking a fair balance between the competing interests of the individual and of the community as a whole), it will not accord Contracting Parties the same latitude in their examination of allegations of ill-treatment. For example, any attempt by the national authorities to balance the dangers of terrorism or organised crime against an individual's rights under Article 3 will fall foul of the standard of the protection guaranteed in that Article.⁵⁴⁹

The absolute nature of the prohibition of torture and other forms of ill-treatment is examined in detail in the *amicus* briefs submitted by third party interveners in the case of *Ramzy v. The Netherlands*, at Appendix No. 9, and in the *Written Submission to the UK House of Lords by Third Party Interveners in the case of A and Others v. Secretary of State for the Home Department and A and Others (FC) and another v. Secretary of State for the Home Department*, at Appendix No. 16.

10.2.1 The Negative Obligation

Despite the absolute nature of the prohibition of ill-treatment, there are situations which permit Contracting Parties to use force against individuals in the exercise of legitimate State functions, as in the context of making arrests. In these situations however, the Court has clarified that:

“in respect of a person deprived of 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”⁵⁵⁰

The phrase “strictly necessary by the victim's own conduct” must be construed in a restrictive manner. For example, law enforcement officers sometimes must use force when effecting an arrest if the arrestee resists the arrest by violent or forceful means. In such a situation, an injury caused to the arrested person may fall outside the protection afforded by Article 3 provided that the use of force by the authorities was strictly necessary under the circumstances. In *Klaas v. Germany*, for instance, force used by police officers in the course of the arrest of the applicant who tried to run away resulted in a

549 The absolute nature of the prohibition has also been emphasised by the European Committee for the Prevention of Torture (CPT): “Like the prohibition of slavery, the prohibition of torture and inhuman or degrading treatment is one of those few human rights which admit of no derogations. Talk of ‘striking the right balance’ is misguided when such human rights are at stake. Of course, resolute action is required to counter terrorism; but that action cannot be allowed to degenerate into exposing people to torture or inhuman or degrading treatment. Democratic societies must remain true to the values that distinguish them from others”.

550 *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, § 38.

number of injuries. The Court found, as the domestic German courts had, that the injuries were caused during the applicant's struggle and that the force used by the police officers was not excessive.⁵⁵¹

Perhaps one of the most extreme examples of the legitimate use of force is found in the case of *Douglas-Williams v. the United Kingdom*. In this case, the applicant's brother threatened the arresting police officers with a knife. The officers then hit him with their truncheons and pinned him face down on the ground, restrained his hands behind his back, handcuffed him, and transferred him in this position to the police station in a police car. He died of positional asphyxia within one hour and ten minutes of his arrest. The Court did not find a violation in this case because it concluded that the use of restraint techniques was justified by the applicant's own violence.⁵⁵² By contrast, in the case of *Rehbock v. Slovenia*, where the use of force against an unarmed person who did not resist caused a double fracture of the jaw, the Court found that such use of force was excessive and therefore amounted to inhuman treatment within the meaning of Article 3.⁵⁵³

As the Court held in its judgment in *Pretty v. the United Kingdom*, mentioned above,

“[a]n examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities... It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction”.⁵⁵⁴

If the Court finds that a Contracting Party has failed in its negative obligation, it will find a violation of Article 3 in its substantive aspect.⁵⁵⁵

Cases in which the Court has found a substantive violation of Article 3 may be categorized under three headings: 1) ill-treatment intentionally inflicted by law enforcement officers, such as police and other security forces; 2) ill-treatment resulting from a lawful or unlawful act carried out by State agents; and finally, 3) ill-treatment emanating from State agents' omissions.⁵⁵⁶

551 *Klaas v. Germany*, no. 15473/89, 22 September 1993, §§ 30-31.

552 *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002.

553 *Rehbock v. Slovenia*, no. 29462/95, 20 May 1998, §§ 68-78.

554 *Pretty v. the United Kingdom*, cited above, § 50.

555 See, for example, *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, 13 November 2003, § 2 of the operative part of the judgment.

556 See also Appendix No. 10 for the section in which the Court's judgments in Article 3 cases are examined in different contexts.

OMCT

Notable examples of the first category include, *inter alia*, ill-treatment by police officers at the time of arrest and immediately afterwards;⁵⁵⁷ ill-treatment during interrogation in police custody;⁵⁵⁸ physical and mental violence in police custody;⁵⁵⁹ rape in a gendarmerie station;⁵⁶⁰ the force-feeding of an applicant on hunger strike;⁵⁶¹ and interrogation techniques employed by law enforcement officers.⁵⁶²

The second group of cases concerns actions of State agents which constitute ill-treatment indirectly. It must be noted that such actions need not be carried out with an intention to subject a person to ill-treatment; in fact, in most cases they are not. This group of cases can be divided into two sub-groups: ill-treatment stemming from lawful actions of State agents and ill-treatment stemming from unlawful actions of State agents. Cases in which lawful actions of State agents have led to violations of Article 3 include expulsions or extraditions of applicants to countries where they would be subjected to ill-treatment;⁵⁶³ prison conditions⁵⁶⁴ and corporal punishment.⁵⁶⁵ Unlawful actions that subject applicants to indirect ill-treatment have included the intentional destruction of applicants' homes and possessions by soldiers in the course of military operations in southeast Turkey,⁵⁶⁶ and the disappearances of the applicants' close relatives after having been taken into unacknowledged detention.⁵⁶⁷

The third group of cases concerns situations where national authorities have failed to assist persons in need of medical assistance. It appears from the Court's case-law that Contracting Parties owe a duty to provide medical care

557 *Egmez v. Cyprus*, cited above, §§ 74-79.

558 *Salman v. Turkey* cited above, §§ 103 and 115.

559 *Selmouni v. France*, cited above, § 105.

560 *Aydm v. Turkey*, cited above, §§ 86-87.

561 *Nevmerzhitsky v. Ukraine*, cited above, §§ 98-99.

562 *Ireland v. the United Kingdom*, cited above, § 96. The five interrogation techniques which the Court found to be degrading and inhuman included wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.

563 See *Soering v. the United Kingdom*, cited above, which concerned the applicant's intended extradition to the United States where there was the possibility that he would be placed on death row; see also *Said v. the Netherlands*, cited above, § 55, in which the Netherlands authorities intended to expel the applicant to Eritrea.

564 See Section 2.6.3 (b) above.

565 *Tyrer v. the United Kingdom*, cited above, § 35.

566 See, *inter alia*, *Ayder and Others v. Turkey*, cited above, § 110, in which the Court found that "the destruction of the applicants' homes and possessions, as well as the anguish and distress suffered by members of their family, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3".

567 See, *Kurt v. Turkey*, no. 24276/94, 25 May 1998, § 134; see also, more recently, *Akdeniz v. Turkey*, cited above, § 124, in which the Court found that "the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and of her inability to find out what has happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3".

to detainees and also to persons whose health problems are caused by Government actions. In its judgment in *McGlinchey and Others v. the United Kingdom*, the Court found a violation of Article 3 on account of the prison authorities' failure to provide adequate medical assistance to a detainee suffering from heroin withdrawal as well as asthma.⁵⁶⁸ Similarly, in the case of *Keenan v. the United Kingdom* concerning the suicide in prison of the applicant's son who was an identifiable suicide risk, the Court, in finding a violation, stated:

“[t]he 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”⁵⁶⁹

In its judgment in the case of *İlhan v. Turkey*, the Court's finding of a violation of Article 3 was influenced by the authorities' failure to provide the applicant's brother, who had been badly beaten up by soldiers and who suffered brain damage and long-term impairment of function as a result of the beating, with medical care until 36 hours after the incident.⁵⁷⁰

Finally, it must be noted that the scope of the duty of care owed by Contracting Parties under the substantive aspect of Article 3 was extended in the case of *Moldovan and Others v. Romania*. In this case, the Court found that police officers had been involved in the destruction of houses and belongings of the applicants, who were Romanian citizens of Roma origin. The destruction took place before Romania ratified the Convention, and for that reason the Court could not examine it. However, the Court pointed out that:

“following this incident, having been hounded from their village and homes, the applicants had to live, and some of them still live, in crowded and improper conditions – cellars, hen-houses, stables, etc. – and frequently changed address, moving in with friends or family in extremely overcrowded conditions”.⁵⁷¹

Noting “the direct repercussions of the acts of State agents on the applicants' rights”, the Court found that the Government had a responsibility as regards the applicants' subsequent living conditions. The Court concluded that the destitute conditions in which the applicants had to live following the destruction of their houses and belongings, coupled with “the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities” constituted interference with

568 *McGlinchey and Others v. the United Kingdom*, cited above.

569 *Keenan v. the United Kingdom*, no. 27229/95, 3 April 2001, § 116.

570 *İlhan v. Turkey* [GC], cited above, §§ 86-88.

571 *Moldovan and Others v. Romania*, cited above, § 103.

OMCT

their human dignity which, in the special circumstances of the case, amounted to “degrading treatment” within the meaning of Article 3.⁵⁷²

10.2.2 The Positive Obligation

According to the Court’s established case-law, Contracting Parties have, in addition to the negative obligation examined above, a positive obligation under Article 3 to carry out effective investigations into allegations of ill-treatment and to take measures designed to ensure that individuals within their jurisdictions are not subjected to ill-treatment, including ill-treatment administered by private individuals. As explained below, the Court examines the obligation to carry out an effective investigation either from the standpoint of the positive obligation inherent in Article 3 or from the standpoint of the right to an effective remedy under Article 13. In some cases it has even examined the obligation under both Articles 3 and 13.⁵⁷³ Before the Court resolves this somewhat inconsistent practice, applicants are strongly advised to invoke both Articles in their applications to the Court.

The issue of positive obligation is examined below under two sub-headings: a) The Obligation to Investigate and b) The Obligation to Protect Against Ill-Treatment by Private Individuals.

a) The Obligation to Investigate Allegations of Ill-treatment

In its judgment in the case of *McCann and Others v. the United Kingdom* concerning the killing of the applicants’ relatives by members of the British special forces in Gibraltar, the Court held:

“[A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under [Article 2 of the Convention], 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 some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State”.⁵⁷⁴

⁵⁷² *Ibid.*, § 113.

⁵⁷³ See, *inter alia*, *Menesheva v. Russia*, no. 59261/00, 9 March 2006, §§ 61-74.

⁵⁷⁴ *McCann and Others v. the United Kingdom*, no. 18984/91, 27 September 1995, § 161.

This approach was adopted by the Court in its judgment in the case of *Assenov v. Bulgaria* and was applied, *mutatis mutandis*, to investigations into allegations of ill-treatment. In *Assenov*, the Court stated the following:

“...where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance... would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity”.⁵⁷⁵

The obligation to carry out an effective investigation into allegations of ill-treatment was later “described as a ‘procedural obligation’ which devolves on Contracting Parties under Article 3”.⁵⁷⁶ Violations of Article 3 of the Convention based on failures to comply with the positive obligation are referred to as “procedural violations” of Article 3.⁵⁷⁷

It must be noted that the Contracting Parties’ obligation to carry out effective investigations into allegations of ill-treatment existed prior to the adoption of the judgment in the case of *Assenov* and was examined from the standpoint of the obligation to provide adequate remedies under Article 13 of the Convention. The Court stated in its judgment in the case of *Aksoy v. Turkey* that:

“[t]he nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”.⁵⁷⁸

⁵⁷⁵ *Assenov v. Bulgaria*, cited above, § 102.

⁵⁷⁶ *Sevtap Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000, § 35. See also Jacobs & White, pp. 66-68 for a review of the evaluation of the positive obligation.

⁵⁷⁷ See, *inter alia*, *Elçi and Others v. Turkey*, cited above, § 2 of the operative part of the judgment.

⁵⁷⁸ *Aksoy v. Turkey*, cited above, § 98.

OMCT

In its judgment in the case of *İlhan v. Turkey* the Court preferred to examine the applicant's allegations concerning the effectiveness of the investigation into his allegations of ill-treatment under Article 13 because it found, *inter alia*, that:

“[p]rocedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective. The obligation to provide an effective investigation into the death caused by, *inter alios*, the security forces of the State was for this reason implied under Article 2 which guarantees the right to life (see the *McCann and Others* judgment cited above, pp. 47-49, §§ 157-64). This provision does, however, include the requirement that the right to life be “protected by law”. It may also concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials... Article 3, however, is phrased in substantive terms. Furthermore, although the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials...”⁵⁷⁹

However, since the adoption of the judgment in *İlhan*, the Court has continued to examine the obligation to carry out investigations both from the standpoint of Article 13 and from the standpoint of Article 3.⁵⁸⁰ Recent judgments adopted by the Court highlight the Court's somewhat inconsistent practice in this area. For example, in *Bekos and Koutropoulos v. Greece* the Court, having found a procedural violation of Article 3 on account of the lack of an effective investigation, did not deem it necessary to examine separately the same allegation under Article 13.⁵⁸¹ On the other hand, in *Murat Demir v. Turkey*, the Court considered it more appropriate to examine the allegation of the lack of an effective investigation solely from the standpoint of Article 13.⁵⁸² Finally, in a number of cases, including the recent case of *Corsacov v. Moldova*, the Court examined the allegations of a lack of an effective investigation under both Articles 3 and 13 and found a violation of both Articles.⁵⁸³

579 *İlhan v. Turkey* [GC], cited above, §§ 91-92.

580 See, *inter alia*, *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, §§ 127-128 and *Elçi and Others v. Turkey*, cited above, § 649; see also the separate opinions of judge Sir Nicolas Bratza in both judgments.

581 *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, §§ 53-57.

582 *Murat Demir v. Turkey*, no. 879/02, 2 March 2006, §§ 43-45.

583 See *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, §§ 68-82.

Applicants should note that it is not necessary for the Court to find a substantive violation of Article 3 before it can examine whether the respondent Contracting Party has complied with its procedural obligations under the article. In fact, sometimes the Court is unable to find a substantive violation *precisely because* the respondent Government has violated its procedural obligations by not conducting an effective investigation. In particular, where the authorities fail to take basic investigative steps (for example by performing medical examinations, autopsies, taking statements from key witnesses, etc.) the substantive violation might be very difficult or impossible for the applicant to prove. This was the case in *Khashiev and Akayeva v. Russia*, which concerned the ill-treatment and killing of Chechen civilians by Russian forces in the vicinity of Grozny in January 2000. The Court found a procedural and substantive violation of Article 2 (right to life). However, because the Russian authorities had failed to conduct autopsies or prepare other forensic reports, it was not possible for the Court to conclude that the victims were tortured before they were killed, and it therefore could not find a substantive violation of Article 3. However, in finding a procedural violation of Article 3, it stated the following:

“[t]he procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, *deriving at least in part, from the failure of the authorities to react effectively to such complaints* at the relevant time ...”.⁵⁸⁴

The kind of investigation that will satisfy a Contracting Party’s obligation under the procedural limb of Article 3 may vary according to the circumstances of the case and nature of the allegations. However, minimum standards identified by the Court in its case-law must be observed. The following paragraphs from the judgment in the case of *Bati and Others v. Turkey*, in which the Court reviewed its case-law on the subject, illustrate the required standards.⁵⁸⁵ An investigation into allegations of ill-treatment lacking the following steps will fall foul of the requirement and result in a procedural violation of Article 3 or a violation of Article 13:

“133. ... whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used (see, among other authorities, *Özbey v. Turkey* (dec.), no. 31883/96, 8

584 *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 178 (emphasis supplied).

585 It must be noted that in *Bati and Others v. Turkey* the Court examined the allegation of a lack of an effective investigation from the standpoint of Article 13 of the Convention only.

OMCT

March 2001; see also the Istanbul Protocol, paragraph 100 above⁵⁸⁶). The authorities must take into account the particularly vulnerable situation of victims of torture and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint (see *Aksoy*, cited above, pp. 2286-87, §§ 97-98).

134. The investigation must be ‘effective’ in practice as well as in law, and not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy*, cited above, p. 2286, § 95, and *Aydm*, cited above, pp. 1895-96, § 103). It should be capable of leading to the identification and punishment of those responsible (see *Aksoy*, cited above, p. 2287, § 98). Otherwise, the general legal prohibition of torture and inhuman or degrading treatment or punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

Admittedly, this is a qualified, not an absolute, obligation. The Court takes note of the fact that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence (see *Aksoy*, cited above, p. 2286, § 97). The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard.

135. For an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events (see, *mutatis mutandis*, *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in

586 The Istanbul Protocol referred to by the Court in this judgment is the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was submitted to the United Nations High Commissioner for Human Rights on 9 August 1999. The “Istanbul Principles” subsequently received the support of the United Nations through resolutions of the United Nations Commission on Human Rights and the General Assembly. It is the first set of guidelines to have been produced for the investigation of torture. The Protocol contains full practical instructions for assessing persons who claim to have been the victims of torture or ill-treatment, for investigating suspected cases of torture and for reporting the investigation’s findings to the relevant authorities. The principles applicable to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment are to be found in Annex 1 of the Manual, reprinted in Appendix No. 7 of the present *Handbook*. See also Conor Foley, *Combating Torture Handbook: A Manual for Judges and Prosecutors*, published by the Human Rights Centre of the University of Essex, United Kingdom, 2003. An online version of the *Handbook* may be consulted at http://www2.essex.ac.uk/human_rights_centre/publications/index.shtml.

practice (see, *mutatis mutandis*, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84, and *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, 4 May 2001).

136. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, among other authorities, *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001, and *Özgür Kılıç v. Turkey* (dec.), no. 42591/98, 24 September 2002). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, it may generally be regarded as essential for the authorities to launch an investigation promptly in order to maintain public confidence in their adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 72, ECHR 2002-II).

137. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure (see *Aksoy*, cited above, p. 2287, § 98, and *Büyükdağ*, cited above, § 67).⁵⁸⁷

In its judgment in the case of *Abdulsamet Yaman v. Turkey* the Court added the following:

“...where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted (see Conclusions and Recommendations of the United Nations Committee against Torture: Turkey, 27 May 2003, CAT/C/CR/30/5).”⁵⁸⁸

Finally, it should be noted that the obligation to investigate “is not an obligation of result, but of means”.⁵⁸⁹ Naturally, the Court does not require that every criminal investigation result in a conviction. In *Mikheyev v. Russia* the Court stated the following:

“Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the

⁵⁸⁷ *Bati and Others v. Turkey*, cited above. See also Leach pp. 191-198 for a review of the Court’s case-law on the requirement of effective investigations into killings under Article 2 of the Convention, which are also applicable, *mutatis mutandis*, in the context of Article 3 of the Convention.

⁵⁸⁸ *Abdulsamet Yaman v. Turkey*, cited above, § 55.

⁵⁸⁹ *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71.

OMCT

facts of the case and, if the facts prove to be true, to the identification and punishment of those responsible (see, *mutatis mutandis*, *Mahmut Kaya v. Turkey*, no. 22535/93, § 124, DCHR 2000-III)".⁵⁹⁰

i. Concluding Remarks

It must be stressed once more that the positive obligation examined above is not limited solely to cases of ill-treatment by State agents;⁵⁹¹ investigating authorities of the Contracting Parties are under an obligation to investigate allegations of ill-treatment regardless of the identity of the alleged perpetrator.

The types and methods of domestic criminal investigations and criminal trials in the Contracting Parties vary considerably, and neither the Convention nor the Court's case-law require uniformity in these respects. However, the Court's paramount consideration is that whatever methods are employed, criminal investigations should be capable of establishing the accuracy of allegations of ill-treatment and lead to the identification and punishment of those responsible. The requirements of an effective investigation set out in the above mentioned judgments have been identified by the Court on a case-by-case basis, and the list is by no means exhaustive. When distilling these requirements the Court has sometimes identified defects in the national legislation of the Contracting Parties while observing in some other instances that the shortcomings were due to negligence – or reluctance – of the authorities to investigate the allegations. Defects identified in a national criminal justice system obviously need to be remedied by the national law-making bodies to ensure compliance with the Convention system. Furthermore, the Contracting Parties need to ensure that their investigating authorities conduct their business properly and in accordance with applicable law and procedure. Mention must once more be made of the close relationship between effective remedies and the requirement of exhaustion of domestic remedies. As pointed out earlier, there is no obligation to exhaust a remedy that is ineffective.⁵⁹² Furthermore, if an applicant succeeds in demonstrating that a particular remedy is ineffective, this will not only absolve the applicant from the requirement of exhausting that remedy but may also lead the Court to find a procedural violation of Article 3 or a violation of Article 13.

When arguing that the national authorities have failed to investigate their allegations of ill-treatment, applicants should refer to the criteria described in

⁵⁹⁰ *Mikheyev v. Russia*, no. 77617/01, 26 January 2006, § 107.

⁵⁹¹ See, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17 January 2002.

⁵⁹² See Section 2.4.2 above.

the Court's case-law, using these criteria as a "check list" and should refer to the relevant judgments in which they figure.

Finally, because of the Court's present practice of examining allegations of ineffective investigations both under Articles 3 and 13, and until the Court resolves the issue, applicants should consider invoking both Article 3 and Article 13 in relation to complaints concerning the effectiveness of investigations.

b) The Obligation to Protect Against Ill-treatment by Private Individuals

According to the Court's case-law, Article 3 protects individuals not only from ill-treatment emanating directly from State agents but also, in certain circumstances, from ill-treatment at the hands of private individuals. This is a positive obligation, sometimes referred to as the third-party effect, or *drittwirkung*, of the Convention under Article 3 which is conferred upon the Contracting Parties by the Court's case-law. Under this obligation, States are not only required to enact legislation criminalising ill-treatment but also to enforce their legislation in a way that affords real and effective protection for individuals.

This obligation was described in the judgment in the case of *A. v. the United Kingdom* where the Court held that the obligation on the 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".⁵⁹³

Such protection requires the existence of effective domestic law provisions criminalising ill-treatment by private individuals and adequate application of those provisions by the judiciary.

The *A. v. the United Kingdom* case concerned an applicant who at the age of nine was regularly beaten by his stepfather. The Court found that this treatment rose to the level of severity prohibited by Article 3. The stepfather did not deny having beaten A. and was charged with and tried for assault occasioning actual bodily harm. However, he was found not guilty of assault occasioning actual bodily harm as he successfully invoked the defence of "reasonable chastisement" provided for parents and other persons *in loco parentis* in domestic law. The Court in Strasbourg, in agreement with the

593 *A. v. the United Kingdom*, cited above, § 22.

OMCT

respondent Government, found that the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.⁵⁹⁴

When the victim is a vulnerable individual, the scope of the obligation to protect individuals from harm at the hands of private individuals is broader. In such circumstances the Contracting Parties will be under an obligation to take reasonable steps to prevent harm if their authorities knew or had reason to know of that maltreatment.⁵⁹⁵

For example in *Z. v. the United Kingdom* the Court stated that the measures referred to in its judgment in the case of *A. v. the United Kingdom* “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”.

In the *Z. v. the United Kingdom* case, the failure of social services to protect the applicants – four siblings – from serious abuse at the hands of their parents for a period of four and a half years, notwithstanding their awareness of the abuse, left “no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse” in violation of Article 3 of the Convention.⁵⁹⁶

The scope of the positive obligation to provide effective protection was further extended by the Court in its decision in the case of *M.C. v. Bulgaria*, where the Court considered that States also “have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution”.⁵⁹⁷ In this case, the investigating authorities discontinued the investigation into the applicant’s allegations that she had been raped by two men on a date. The absence of direct proof of rape, such as traces of violence and resistance or calls for help, formed the basis for the authorities’ decision to discontinue the investigation. The Court held:

“the investigation of the applicant’s case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”⁵⁹⁸

⁵⁹⁴ *Ibid.*, §§ 18 and 24.

⁵⁹⁵ See also Alastair R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, 2004, pp. 43-65.

⁵⁹⁶ *Z. v. the United Kingdom*, cited above, §§ 73-74.

⁵⁹⁷ *M.C. v. Bulgaria*, cited above, § 153.

⁵⁹⁸ *Ibid.*, § 185.

The Court went on to find a violation of Article 3.

i. Concluding Remarks

It follows from the jurisprudence discussed above that the positive obligation to take steps to protect individuals from harm at the hands of other private individuals exists primarily when the victim is a “vulnerable” individual, such as a child. On the other hand, the positive obligation to enact domestic law provisions criminalising ill-treatment by private individuals and adequate application of those provisions by the judiciary exists regardless of the identity of the victim. In this connection, parallels may be drawn between the positive obligations under Article 3 and those that exist under Article 2. According to the Court’s established case-law concerning the right to life, the first sentence of Article 2 § 1 requires the Contracting Parties not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction.⁵⁹⁹ As with the obligation inherent in Article 3, Article 2 also imposes an obligation to put in place effective criminal law provisions to deter the commission of offences against the person. Furthermore, the State’s obligation in this respect includes “in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.⁶⁰⁰

However, not every claimed risk to life entails for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. It must be established to the Court’s satisfaction that the authorities knew or should have known of the existence of a real and immediate risk to the life of the individual(s) from the criminal acts of a third party and that they failed to take measures within the scope of their powers which reasonably might have prevented the harm.⁶⁰¹ It follows, therefore, that the obligation to take pre-emptive steps to protect an individual from being killed depends on the identity or the circumstances of the victim. In an Article 3 case, on the other hand, the applicant will be expected to show that he or she belongs to a category of persons who are vulnerable for reasons of, for example, age, mental or physical health and that the authorities therefore were under an obligation to exercise a heightened standard of vigilance to protect them from harm.

599 See, *inter alia*, *L.C.B. v. the United Kingdom*, no. 23413/94, 9 June 1998, § 36.

600 See *Osman v. the United Kingdom*, no. 23452/94, 28 October 1998, § 115.

601 *Ibid.*, § 116.

PART V

ESTABLISHMENT OF FACTS

