

## Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

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### I. General

Article 3 of the European Convention on Human Rights states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' and is one of its most important provisions. This is borne out by the fact that – along with Articles 2, 4(1) and 4(7) – it is a rule from which no derogation is allowed, not even in times of war or other public emergencies threatening the existence of a Contracting State (see Article 15(2)). By the same token, it is also one of the most difficult norms of the Convention to interpret and apply, for two main reasons. First, it prohibits, in very strong terms, torture and, in the same breath, two other classes of misbehaviour: inhuman treatment or punishment and degrading treatment or punishment. Second, it provides no clue as to the meaning and purport of the proscribed actions. Admittedly, other provisions of the Convention also fall short of a clear explanation of the precise meaning of what it is they are prohibiting. Those provisions can, however, be interpreted fairly easily, either because of the clarity of the expressions used (for example, 'respect to private and family life' in Article 8 or 'right to marry and found a family' in Article 12), or because of the technical nature of the expressions used, these being supported by a whole tradition of legal practice and legal thinking (for example, 'right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' in Article 6, 'right to freedom of expression' in Article 10 or 'right to freedom of peaceful assembly and to freedom of association with others' in Article 11).

By contrast, it is particularly difficult to pinpoint the exact scope and meaning of the bans enshrined in Article 3 regarding the notion of 'inhuman' and 'degrading' treatment or punishment. For although one can contend that, as far as torture is concerned, a whole body of municipal legislation, case-law and legal scholarship on which contracting States and the European Commission and Court could draw was already in existence by 1950 (the year the Convention was adopted), no comparable definition or interpretation of the concepts of 'inhuman'

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and 'degrading' treatment or punishment can be found even in municipal bodies of law.

It is therefore very clearly and immediately apparent how arduous a task the Commission and Court faced when called upon to construe and apply Article 3. Thus it was that these two bodies came ultimately to be endowed with wide powers of interpretation, bordering on 'judicial legislation': it stands to reason that the looser the purport of legal rules, the greater is the power of supervisory bodies to authoritatively lay down what those legal rules aim to provide.

In the following sections I shall first of all establish whether any useful indications can be drawn from the preparatory works; I shall then examine how the two bodies have interpreted Article 3 in their case-law; and finally, I shall endeavour to suggest possible avenues for further developments in the application of Article 3.

## II. Preparatory Works

Even a cursory glance at the preparatory works (*travaux préparatoires*) enables one to see that very little can be deduced from them.

The provision first proposed by the Consultative Assembly in its draft text of a Convention explicitly referred to Article 5 of the Universal Declaration of Human Rights, whereby 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment': Article 2(1) of the draft provided that the Member States undertook to ensure the security of persons, 'in accordance with Articles 3, 5 and 8 of the United Nations Declaration.' In the first session of the Consultative Assembly, in 1949, the British representative, Mr Cocks, moved that the following text should be added to Article 1, to become Article 2(1):

The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organizations, are inconsistent with civilized society, are offences against heaven and humanity and must be prohibited.

It declares that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, either for extracting evidence, to save life or even for the safety of the State.

The Assembly believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain.<sup>1</sup>

Mr Cocks also proposed that the following text should be added at the end of Article 2(1):

In particular no person shall be subjected to any form of mutilation or sterilization or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering.<sup>2</sup>

<sup>1</sup> See *Travaux Préparatoires* 2, pp. 2-4 and 36.

<sup>2</sup> *Ibid.*, p. 4.

It is clear that these two amendments were cast in lofty and eloquent language, better suited for a political or moral declaration than for a legal text. One should not, however, pass over the important novelties of Mr Cocks's proposals in silence. First, they stated that torture is to be regarded as a crime against humanity. Second, they proclaimed that torture is never justified, not even when it is practised for the safety of the State. Third, they encompassed any kind of torture, even that carried out by 'members of private organizations.' Fourth, they extended the prohibition to beating, to 'imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering,' as well as to mutilation, sterilization and the administration of drugs without the knowledge and consent of the persons concerned.

In the eloquent presentation of his drafts, Mr Cocks emphasized that his proposals were intended as a barrier against a return to barbarism such as that experienced by Europe on account of Nazi atrocities: in his view, the Consultative Assembly must 'condemn in the most forthright and absolute fashion this retrogression into barbarism.'<sup>3</sup> However, misgivings about the advisability of adopting Mr Cocks's first proposal were expressed by the British (Mr Maxwell-Fyfe) and the French (Messrs Philip, Lapie and Teitgen). Mr Teitgen, besides supporting the critical comments made by the previous speakers, compounded the objections in forceful terms by stating, in substance, that Mr Cocks's proposals were dangerous, for what was not stated explicitly there would be taken as allowed; hence, at the end of the day those proposals would eventually weaken the text as it stood, instead of strengthening it.<sup>4</sup> Clearly, Mr Teitgen, and the majority of the Assembly, did not object to the banning of the classes of torture suggested by Mr Cocks, but only feared that spelling out particular instances of torture would undermine the general scope of the ban; in short, they wisely favoured the old maxim *omnis definitio periculosa est*. As a result of these criticisms, Mr Cocks withdrew his amendments.<sup>5</sup>

<sup>3</sup> See *ibid.*, pp. 36-40. The words cited in the text are on p. 40.

<sup>4</sup> 'If we add a commentary on these statements [the wording of Article 5 of the Universal Declaration, referred to in Article 2(1)], whose terms have been carefully weighed, we shall limit their scope to the comments which we make. For example, I shall shortly tell our very dear colleague that if, in our Resolution, he enumerates a certain number of means of torture which he wishes to have prohibited, he risks giving a wholly different interpretation from that which he hopes to make, namely that the other processes of torture are not forbidden. And this is certainly the opposite of what he intends. I really think that the best way of stating the fundamental principle which he expressed a short while ago, and behind which every man of heart and conscience will immediately and entirely take his stand, is simply to state that all torture is prohibited. When this is stated in a legal document and in a diplomatic Conference, everything has been said. It is dangerous to want to say more, since the effect of the Convention is thereby limited' (*ibid.*, pp. 44-46). For the statements of the preceding speakers, see *ibid.*, pp. 40-44.

<sup>5</sup> See *ibid.*, p. 46. A compromise was agreed upon, whereby Mr Cocks's ideas were to constitute the substance of a motion, to be voted upon as a text separate from the text of the Convention. However, when subsequently Mr Cocks submitted the text of a draft resolution (*ibid.*, p. 238), this text too drew much criticism (*ibid.*, pp. 240-44), so much so that it was agreed to ask a Committee to re-examine the text and submit a new report to

Subsequently, it was decided that the text of Article 5 of the Universal Declaration should be taken up as an autonomous provision.<sup>6</sup> Later on, for reasons which are not recorded, the word 'cruel' was deleted, and the provision became the present Article 3.<sup>7</sup>

What can we infer from the preparatory works? The main lesson to be learned is that Article 3 was conceived of as a *very sweeping ban*, so broad as to embrace all the forms of torture or inhuman treatment also included by Mr Cocks in his proposals (to the extent, of course, that this was compatible with other provisions of the Convention: take, for example, the ban on torture by private groups, which in the light of Article 1 of the Convention can clearly apply only to those instances of torture which involve some sort of liability of a Contracting State).<sup>8</sup>

### III. The Case-Law of the Strasbourg Bodies

#### A. General

A careful investigation of the huge case-law of the Commission and the Court shows – as might well have been expected – that after some initial hesitation, and even disagreements between them, the two bodies have gradually expanded their interpretation of Article 3 so as to make the purport of the provision as broad as possible. They have pursued this goal in two ways: first, they have gradually enlarged the *areas* to which Article 3 should apply; second, they have specified the criteria for establishing whether or not Article 3 is breached, and by the same token have in real terms broadened the *contents* of the proscriptions laid down in that provision.

#### B. Areas to which Article 3 has been applied

Initially the Commission and the Court applied Article 3 with regard to the conditions of detention of persons deprived of their liberty (usually in prisons, police custody or mental institutions). From the 1960s, they also examined the question whether extradition, expulsion or deportation to a country where an individual is likely to be subjected to torture or to inhuman or degrading treat-

the following session of the Assembly (*ibid.*, p. 244). It would seem that a new draft was never proposed, and the matter was laid to rest.

6 The British member of the Committee of Experts charged with preparing a draft proposed in the second meeting of this Committee that at the end of Article 2 the following articles should be added: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and 'No one shall be subjected to any form of physical mutilation or medical or scientific experimentation against his will' (*ibid.*, vol. 3, pp. 204–6). Subsequently, it was ostensibly agreed to drop the second proposed provision and to retain only the first (see *ibid.*, pp. 222 and 236; no official record exists of a discussion on the deletion of the second provision).

7 See *ibid.*, vol. 3, pp. 282, 314 and 320; vol. 4, pp. 24, 32, 52, 58, 184 and 218.

8 Cf. the judgment of the Court.

ment was contrary to Article 3. In addition, the Commission examined whether racial discrimination can be said to amount – in some instances at any rate – to inhuman or degrading treatment. Subsequently, the Commission and the Court dealt with alleged cases of inhuman or degrading treatment in educational institutions. Finally, the Commission has considered a few cases where it was alleged that very poor economic or social conditions actually amounted to inhuman treatment by the authorities responsible for such conditions.

#### C. Definitions and case-law of the Commission and the Court

##### 1. Inhuman treatment or punishment

Almost immediately the two Strasbourg bodies began to feel the need to formulate a definition of the various concepts mentioned in Article 3. Although in some instances they then disagreed on the concrete application of such definitions, they have not made any fundamental departures from them. It may therefore prove useful to summarize these briefly here.

The Commission or the Court first of all stated that the category of inhuman treatment (or punishment) is more general than that of torture: torture constitutes but one instance – a particularly serious and aggravated one – of inhuman treatment or punishment. While these two classes can in a way be grouped together, degrading treatment or punishment constitutes a category by itself, as will be shown.

What is meant by inhuman treatment? On several occasions the Commission has stated that 'the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, physical or mental, which in the particular situation is unjustifiable.'<sup>9</sup> Thus, at least three elements are required for there to be a breach of Article 3: the *intent to ill-treat*, a *severe suffering* (physical or psychological), and the *lack of any justification* for such suffering.<sup>10</sup>

9 Op. Com., 5 November 1969, *Greek case*, *Yearbook* 12, p. 186, paragraph 2; Op. Com., 7 December 1978, *Guzzardi case*, p. 31, paragraph 80; Dec. Adm. Com., Application no. 8706/79, 5 October 1981 (unpublished); Dec. Adm. Com., Application no. 11701/85, 7 March 1988, DH(88)2, Appendix IV, p. 17.

10 To them one should probably add a fourth one: the *imputability* of the misbehaviour to one of the Contracting States. This element, which is general in nature in that it applies to any misconduct proscribed by the Convention, should never be neglected. In actual fact, in a few cases the Commission has had an opportunity to pass on it. In the *Greek case* the Commission was obliged to deal with the preliminary question of the imputability of the practice of torture alleged by the applicant Governments to the Greek State. It first dwelt on the notion of 'an administrative practice of torture and ill-treatment' (this examination was rendered necessary because, in the view of the Commission, whenever one is confronted with such a practice, the local remedies, the exhaustion of which is imposed by the Convention, 'will of necessity be sidestepped or rendered inadequate'). In dealing with the 'administrative practice of torture or ill-treatment', the Commission stated that 'acts prohibited by Article 3 of the Convention will engage the responsibility of a Contracting State only if they are committed by persons exercising public authority' (*Yearbook* 12, p. 195) and went on to state that these acts can be imputed to a State also when there is 'official tolerance' by the State

As the existence of these elements in specific instances is a delicate matter calling for an accurate evaluation of all the contributing factors, the Court has hastened to state that each case must be assessed on its own merits. In the *Ireland v. The United Kingdom* case, the Court stated that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of 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.'<sup>11</sup>

Let us now see how the Commission and the Court have applied this notion in specific instances. Given the multitude of cases available, for the sake of brevity only a few have been selected.

a. Cases where the Commission or the Court found a breach of Article 3

In this category mention should first be made of the famous case of *Denmark, Norway, Sweden and The Netherlands v. Greece*. The Commission found in 1969 that, in addition to numerous cases of torture, inhuman treatment or punishment had also been inflicted by the Greek authorities in some instances. It held in particular that in the Athens Security Police premises in Bouboulinas Street, the conditions of detention in the basement – where persons arrested for political reasons were held – were contrary to Article 3;<sup>12</sup> that the bad conditions of

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authorities of ill-treatment ('by official practice is meant that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts, take no action to punish them or prevent their repetition; or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied' (ibid., p. 196). The Commission subsequently dwelt on the concepts of State responsibility and 'official tolerance' in relation to alleged cases of torture, in the *Ireland v. UK* case, *Yearbook* 19, p. 758 ff.

Furthermore, in the *Cyprus v. Turkey* case the Commission, when dealing among other things with instances of alleged rape of female inhabitants of Cyprus by Turkish soldiers or officers, stated the following: 'The evidence shows that rapes were committed by Turkish soldiers and at least in two cases even by Turkish officers, and this not only in some isolated cases of indiscipline. It has not been shown that the Turkish authorities took adequate measures to prevent this happening or that they generally took any disciplinary measures following such incidents. The Commission therefore considers that the non-prevention of the said acts is imputable to Turkey under the Convention.' Rep. Com., 10 July 1976, Application no. 6780/74 and Application no. 6950/75, paragraph 373.

11 Judgment of 18 January 1978, Series A no. 25, p. 65, paragraph 162. See also Dec. Adm. Com., Application no. 11701/85 (*E. v. Norway*), 7 March 1988, DH(88)2, Appendix IV, p. 17.

12 The Commission stressed in particular the lack of hygiene; the lack of natural light; overcrowding; the lack of access to elementary sanitary facilities; the fact that when detained in 'strict solitary confinement,' detainees were deprived of any food; the fact that repeatedly during the first days of their detention inmates were forced to sleep in their clothes, without blankets, on the bare cement floor; the insufficient medical care; the lack of contact with the outside world; the lack of recreation and exercise, particularly for those held in solitary confinement cells. See *Yearbook* 12, pp. 468–80, for the report of the Sub-Commission and p. 505 for the conclusion of the plenary Commission.

detention of political prisoners in Averoff Prison were also unjustifiable and amounted to a breach of Article 3;<sup>13</sup> and that in addition the harsh manner of the separation of detainees from their families and the gross overcrowding in the camps on Leros Island were inhuman.<sup>14</sup>

The well-known case of *Ireland v. United Kingdom* should also be mentioned. The applicant alleged, and the Commission held, that the use by British police in Northern Ireland, in 1971, of five 'techniques' as an aid to the interrogation of fourteen persons amounted to torture. These 'techniques' consisted basically of hooding the detainees, subjecting them to a continuous loud, hissing noise, depriving them of sleep, subjecting them to a reduced diet, and making them stand for periods of some hours against a wall in a painful posture. The Court held instead that the five techniques constituted inhuman treatment. It stated that they 'were applied in combination, with premeditation and for hours at a stretch. They caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Art. 3.'<sup>15</sup>

Another interesting case is *Cyprus v. Turkey*. The Commission had among other things to deal with allegations of rape and physical ill-treatment inflicted by Turkish soldiers on the inhabitants of Cyprus in 1974. It concluded that the incidents of large-scale rape amounted to inhuman treatment; similarly the fact that in a considerable number of cases prisoners had been severely beaten or otherwise ill-treated by Turkish soldiers, and that these acts of ill-treatment had caused considerable injuries and in at least one case the death of the victim, also amounted to inhuman treatment. The same definition was given to the 'withholding of an adequate supply of food and drinking water and of adequate medical treatment in a number of cases.'<sup>16</sup>

b. Cases where the Commission and the Court indicated, in abstract terms, a possible breach

In other cases the Commission and the Court, while holding that in the specific instance under consideration there had been no breach of Article 3, left the door open, as it were, to other possible violations, in that they indicated other instances where it could be concluded that a breach had occurred. In the case of *Campbell and Cosans* the Commission and the Court held that the use of corporal punishment as a disciplinary measure in school did not amount to a breach of Article 3.

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13 The Commission stressed in particular the complete absence of heating in winter, the lack of hot water, the poor lavatory facilities, the unsatisfactory dental treatment and the tight restriction on letters and visits to prisoners (see *ibid.*, pp. 482–89 and p. 505).

14 See *ibid.*, pp. 489–97 and p. 505.

15 Judgment of 18 January 1978, Series A no. 25, p. 66 (*Yearbook* 21, p. 602).

16 Rep. Com., 10 July 1976, paragraphs 373–414.

However, the Court pointed out that 'provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Art. 3 may in itself conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least inhuman treatment.'<sup>17</sup> Furthermore, in a number of cases relating to harsh conditions of detention in prison, the Commission, while dismissing the application, has stated that 'complete sensory isolation [of a detainee] coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason.'<sup>18</sup> In addition, the Commission has often stated that failure to provide adequate medical treatment may be contrary to Article 3.<sup>19</sup> Finally, in numerous cases the Commission and the Court have pointed out that a person's deportation, expulsion or extradition may give rise to an issue under Article 3 'where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article.'<sup>20</sup>

c. Cases where no breach of Article 3 was found

Let us now turn to the most significant cases where the Commission or the Court held that allegations of inhuman treatment or punishment were ill-founded. These cases refer primarily to the following areas: the conditions of prison detention, in particular, solitary confinement; compulsory medical treatment of detainees; life imprisonment as such; the handcuffing of prisoners in public; the claim of persons released from prison, following a criminal conviction, to economic and social measures designed to ensure a minimum subsistence payment or employment; the cutting off of electricity to a family living in a social welfare centre. I shall focus briefly on the most revealing cases.

An important case concerning *conditions of detention* is *B. v. UK*, decided by the Commission in 1981. The applicant had been detained for more than three and a half years in Broadmoor Hospital, a 'special hospital' where detainees

17 Judgment of 25 February 1982, Series A no. 48, p. 12, paragraph 25.

18 Rep. Com., Application no. 5310/71, *Ireland v. United Kingdom*, p. 379; Dec. Adm., Application nos 7572/76, 7586/76 and 7587/76, *Enslin, Daader, Raspe v. FRG*, DR 14, p. 109; Dec. Adm., Application no. 8317/78, *McFeeley and others v. UK*, DR 20, p. 82.

19 See, e.g., Dec. Com. 6 May 1978, Application no. 7994/77, *Kotilla v. The Netherlands*, DR 14, p. 238; Com. Rep. 7 October 1981, Application no. 6870/75, *B. v. UK*, DR 32, p. 5; Com. Rep. 8 December 1982, Application no. 9044/80, *Chartier v. Italy*, DR 33, p. 41; Com. Rep. 1 March 1991, Application no. 10533, *Herczegfaluy v. Austria*, p. 48, paragraph 242.

20 See Dec. 3 May 1983, Application no. 10308/83, *Altun v. FRG*, DR 41, pp. 209-35; Dec. 13 December 1984, Application no. 10078/82, *M. v. France*, DR 41, p. 103; Dec. 12 March 1984, Application no. 10479/83, *Kirkwood v. UK*, DR 37, pp. 158-91; Rep. 19 January 1989, Application no. 14038/88, *Soering v. UK*, pp. 16-27, paragraphs 94-154. As for the Court, see the judgment of 20 March 1991 in the *Cruz Varas* case, Series A no. 201, paragraphs 69-70, as well as the judgment of 30 October 1991 in the *Vikarajah and others* case (no. 45/1990/236/902-6, paragraphs 102-16). For the *Soering* case, see section V(A) below.

requiring treatment under conditions of special security on account of their dangerous, violent or criminal propensities are held. The applicant claimed that he was held there in 'extremely squalid conditions.' He alleged, in particular, that (i) Broadmoor was grossly overcrowded and lacking in sanitary facilities (he referred in particular to the filthy condition of toilets and lack of washing facilities); (ii) he had to live constantly with murderers, rapists, arsonists, sexual perverts and other lunatics and that there was a constant atmosphere of violence (in particular, he alleged that in the dormitories the beds were only six to twelve inches apart, that observation lights were kept on all night, that seriously disturbed patients occasionally went on the rampage at night, shouting and screaming, and that the atmosphere in the dormitories was foul and airless since the majority of the windows were screwed shut); (iii) he had received no medical treatment whatever since being in Broadmoor; (iv) he was not kept sufficiently occupied, found the daily routine boring, received no preparation for return to the world outside and was afraid of vegetating. The Commission examined these allegations one by one and dismissed them all. Since the reasoning of the Commission is indicative of its attitude concerning Article 3, it may prove apposite to quote some relevant passages. Regarding overcrowding, the Commission stated the following:

The Commission notes, firstly, that the applicant has a tendency to exaggerate the inadequacy of conditions in Broadmoor Hospital partly because of his uncooperative and negative attitude towards the institution where he considered he should never have been detained.

Nevertheless certain of the applicant's complaints have some basis, particularly that concerning overcrowding. There is no doubt that there was deplorable overcrowding in the dormitory accommodation in which the applicant slept from February 1974 to December 1976. Particularly unpleasant must have been the dormitories in Kent and Cornwall Houses between February and August 1974. This serious overcrowding is borne out by official reports of the Parliamentary Estimates Committee and the Butler Committee. Moreover, although major improvements have been carried out by the time of the [Commission's] Delegates visit to Broadmoor in July 1977, the dormitory accommodation still appeared cramped and bleak. However by that time the applicant had been located to a single room.

Although the overcrowding obviously led to a lack of privacy and the applicant's fear of attack by other patients, the Commission finds that the applicant's fears were exaggerated and that hospital staff maintained an adequate degree of control over patients.<sup>21</sup>

This argument is indeed surprising. It seems that one of the reasons for dismissing the applicant's complaints was his tendency to exaggerate the harshness of conditions of detention. The Commission also attached importance to the fact that, although for two and a half years the applicant had suffered from overcrowding, when the Commission's Delegates visited Broadmoor, he had been located in

21 Dec. 7 October 1981, Application no. 6870/75, DR 32, pp. 29-30, paragraphs 175-77.

a single room. It is submitted that the fact of getting a single room at the time of the Delegates' visit can in no way reduce the importance of, let alone cancel, the previous conditions of overcrowding. One is left with the feeling that the Commission deliberately avoided passing judgment on whether or not overcrowding – to the extent that the applicant had suffered from it for a long period of time – amounted to inhuman treatment.

Let us now move on to the way the Commission tackled the question of alleged lack of sanitation and hygiene. It stated the following:

As regards the applicant's complaints about sanitary conditions, contrary to the applicant's assertions, there were toilet facilities in Kent and Cornwall Houses. It is true, however, that there were no such facilities in the small dormitory on Ward II of Dorset House during the applicant's stay there from October 1974 to about the late summer of 1975. There were only chamber pots and a commode. The toilet, which was subsequently installed, appears not to have been screened by a curtain at first. Moreover, it was accepted by hospital staff during the Delegates' visit in July 1977 that, outside the dormitories, the sanitary conditions, washing facilities and toilets, were less than satisfactory. It appears that the applicant unduly and obsessively magnified his complaint concerning the absence of toilet paper.

The applicant also seems to have exaggerated his complaint of a lack of hygiene in the hospital. It appears that many patients were employed on ward cleaning, although for a limited time, but that, given the nature of the institution, facilities could rapidly become soiled. However the Commission finds no reason to doubt that regular cleaning was carried out during the applicant's detention in Broadmoor. The Commission ... concludes that, although facilities in Broadmoor Hospital at the material time were extremely unsatisfactory, nevertheless, in all the circumstances of the case, they did not amount to inhuman or degrading treatment contrary to Art. 3 of the Convention.<sup>22</sup>

Again, one cannot but express dissatisfaction with the Commission's reasoning. Regarding the sanitary conditions, one of the principal reasons for the Commission's rejection of the applicant's complaints was his so-called obsession with the absence of toilet paper. The Commission did not, however, investigate whether the lack of sanitation and the consequent necessity for detainees to comply with the needs of nature in the presence of other detainees, together with the poor washing facilities and toilets outside the dormitories, amounted to inhuman or degrading treatment. The Commission simply ducked the issue.

Let us now consider how the Commission dealt with the applicant's complaint about the alleged total lack of adequate employment and occupation. It rejected the complaint with the following words:

The Commission notes that during the assessment period (December 1973–February 1974) in Norfolk House, when the applicant was first admitted to Broadmoor, he was not given any employment as he underwent the routine tests given to new arrivals. From February 1974 to December 1975 the applicant was employed on cleaning chores which would have only lasted a short time each, probably not more than one

22. *Ibid.*, p. 30, paragraphs 178–79 and 181.

hour ... This work lasted an average of about five hours a day, five days per week. The applicant had not been willing to take advantage of other offers of employment off the ward, such as in the workshops, for fear of assault by other patients. It is true that the applicant had requested a much demanded job in the hospital garden, but in view of his uncooperative attitude, the time he required off work for his visits, etc. and the privileged (reward) nature of the employment, the request was refused. In the circumstances, the Commission does not find that the applicant was treated unfairly vis-à-vis other patients in this respect.

The Commission also finds that the applicant's complaints of a lack of recreational and occupational facilities were unfounded. He refused to take advantage of educational facilities, up to Open University level, which the hospital could offer, even though he was an intelligent person, with quite advanced educational qualifications already. Weather permitting, he was able to play cricket and football and receive visits on the terrace. He was a member of the classical film club and could make use of the library, albeit small.<sup>23</sup>

Although here the Commission's arguments appear to be more plausible, one may still wonder why it did not take into account that, since the applicant suffered from paranoid schizophrenia, it was fairly natural for him to refuse employment in the workshops or to take advantage of education facilities for fear of assault by other patients. One may also wonder why the Commission did not question the suitability of the British authorities' decision not to give the applicant the gardening job he so strongly requested. It can be reasonably concluded that, although probably not inhuman, the attitude of the British authorities as regards the applicant's employment and occupation had nevertheless been, at the very least, highly questionable.

Let us now come to the final point raised by the applicant, that concerning his medical treatment. The Commission first of all pointed out that three different issues were to be examined, namely, the necessity for the applicant to be confined at Broadmoor Hospital, the surveillance of his mental health, and the actual medical treatment he had been given. It then disposed of the first two issues with sound arguments. As for the question of psychiatric treatment, the Commission stressed that the applicant had been given none, for he had always refused any such treatment. While expressing reservations about the attitude of the medical officer in charge of the applicant, the Commission concluded that the behaviour of the medical staff did not amount to a breach of Article 3.<sup>24</sup>

In addition to the questionable way in which the Commission dealt with specific points concerning the applicant's complaints, the Commission's decision lends itself to a more general criticism: it deals with each issue *per se*, without considering a possibly cumulative effect, that is to say, without tackling the question whether each aspect of the British authorities' alleged misconduct, although not very serious in itself, collectively added up to a general standard of inhuman treatment. This sort of criticism was voiced by a member of the Commission, Mr

23. *Ibid.*, p. 31, paragraphs 183–85.

24. *Ibid.*, pp. 31–35, paragraphs 187–202.

Opsahl, in his dissenting opinion (which was shared in this respect by another member, Mr Melchior). Mr Opsahl also added another objection: in his view the Commission should have considered the question of proportionality, namely whether there was a 'lack of proportionality between the applicant's past behaviour (offence) and its adverse consequences for him.'<sup>25</sup> I submit that this criterion is, however, too broad to be workable as a standard for gauging whether or not national authorities infringe upon Article 3 with regard to conditions of detention.

Another significant case where the findings of the Commission are open to objection is *Chartier v. Italy*, decided in 1982. The applicant, a French national detained in Italy as a result of a conviction for murder, was very ill: he suffered from hereditary obesity and from various respiratory troubles, as well as hypertension and pancreatic diabetes. He claimed that his detention amounted to inhuman treatment, for in the detention centre for the physically handicapped where he was held, he was unable to get the medical treatment necessary for his condition. He also pointed out that the medical authorities of the detention centre had requested the Italian Ministry of Justice to authorize his hospitalization in a centre specializing in the treatment of obesity. The applicant therefore asked to be released on parole, in order to be able to be treated at this kind of highly specialized medical institution. The Commission rejected the application, with a tortuous argumentation. It first stated that the medical records produced showed that the applicant had been given the necessary medical treatment in prison; it added, however, that it was true that, given his serious health problems, detention for Mr Chartier was a 'particularly painful experience.' In this context the Commission made two remarks: first, it was gratified to see that the Italian authorities had undertaken to hospitalize the applicant whenever this should prove necessary; second, the Commission 'would be sensitive to any measure the Italian authorities might take with a view to either attenuating the effects of his detention or to terminating it.' It is submitted that the reasons that the Commission brought to bear were not compelling enough to demonstrate that the detention of the applicant did not amount to inhuman treatment. It is striking that the Commission did not find it necessary to make use of the three aforementioned criteria for the application of Article 3 (intent, suffering, lack of justification). In this connection it can be argued that at least two of these criteria – precisely those two which in my view are decisive (see further discussion below) – may lead to a belief that Italy was indeed in breach of Article 3; the degree of suffering caused by detention to the applicant was very high, and at the same time the security requirements justifying detention were not so compelling as to outweigh the necessity that the applicant should not suffer. It is also striking that the Commission indulged in suggestions or appeals to the respondent Government; although the making of such appeals probably comes within the Commission's province, it would have

<sup>25</sup> Ibid., pp. 41–44.

been more straightforward to opt neatly for a breach, or a lack of breach, of Article 3.

Let us now consider the numerous cases concerning *solitary confinement*. As pointed out above, in a large number of Commission decisions a difference is drawn between two situations: the first, where a detainee is subjected to total social and sensory isolation, and the second, where a detainee is removed from association with other prisoners for security, disciplinary or protective reasons. According to the Commission, in the first case isolation can destroy the detainee's personality or cause severe mental or physical suffering; it is therefore contrary to Article 3. By contrast, the other form of segregation is not normally to be regarded as inhuman treatment or punishment, depending of course on the circumstances surrounding each particular instance.<sup>26</sup> With regard to the second category the Commission has often added that 'prolonged solitary confinement is undesirable, especially where the person is detained on remand.'<sup>27</sup>

With all due respect, it should be emphasized that, by so doing, the Commission has chosen a fairly easy way out. For, by saying that total social and sensory isolation undoubtedly amounts to inhuman treatment, it has stated the obvious: this sort of isolation would be equivalent to being placed in a kind of tomb; who could therefore deny that it would be in breach of Article 3? It is no coincidence that so far the Commission has never come across any cases of this kind; without going to the lengths of saying that such treatment can only exist as a figment of the imagination, it is at least probable that it is not ever carried out – at any rate not among Council of Europe Members. Indeed, this isolation, as envisaged by the Commission, would presuppose a combination of a medieval dungeon, where the prisoner would not even be able to speak to the jailer and where food and water would be passed through a small slot, and a highly sophisticated modern cell, equipped with soundproofing and permanent electrical lighting. Having ruled out the compatibility of this extreme sort of isolation with Article 3, the Commission has opted for the admissibility – in principle, and subject to the circumstances of each case – of what we may call 'ordinary' solitary confinement. It then has hastened to add a caveat: 'it is undesirable.' Now, it is precisely this latter category of isolation that constitutes the typical deprivation of social intercourse in prisons – witness the fact that it is with precisely this issue that the Commission has had to deal any time it has been presented with the question of solitary

<sup>26</sup> See, e.g., Dec. Application no. 1392/62, *X v. FRG*, CD 17, p. 1; Dec. Application no. 5006/71, *X v. UK*, CD 39, p. 91; Dec. Application no. 2749/66, *Kenneth Hugh De Courcy v. UK*, Yearbook 10, p. 382; Dec. Application no. 6038/73, *X v. FRG*, CD 44, p. 115; Dec. Application no. 4448/70, Second *Greek case*, CD 34, p. 70; Dec. Application no. 7854/77, *Sergio Bonazi v. Switzerland*, DR 12, p. 185; Dec. Application no. 8317/78, *McFeeley and others v. UK*, DR 20, p. 44; Dec. 10 July 1980, Application no. 8158/78, *X v. UK*, DR 21, p. 99; Rep. 16 December 1982, Application no. 8463/78, *Kroecker and Moeller v. Switzerland*, Report, p. 53; Dec. 7 March 1988, Application no. 11701/85, *E. v. Norway*, DH(88)2, pp. 17–18.

<sup>27</sup> See, e.g., Dec. Application no. 6948/73, *X v. FRG*, CD 44, p. 115; Rep. 16 December 1982, Application no. 8463/78, *Kroecker and Moeller v. Switzerland*, Rep. p. 53; Dec. 7 March 1988, Application no. 11701/85, *E. v. Norway*, pp. 17–18.

confinement. On this typical form of isolation, the Commission has uttered pronouncements that often appear questionable. I shall mention only three cases here.

In the *X v. UK* case the applicant had been held in solitary confinement for approximately 760 days. According to the respondent Government, the restrictions on the applicant's freedom to associate with other prisoners were due to his being classified as 'category A' (a high security risk), to his being on the escape list, and also to various disciplinary punishments. The Commission noted that, on the one hand, the applicant's confinement was justified by security reasons, while on the other, his conditions in prison did not resemble social and sensory isolation: he was allowed normal visits, received a daily exercise period of one hour (on some occasions with other 'category A' prisoners), was able to borrow books from the prison library, had access to writing materials and newspapers, could work in his cell and was allowed to attend chapel service, albeit segregated from the rest of the congregation. The Commission therefore concluded that, although the applicant had been 'segregated for an unusual and undesirable length of time,' his isolation was neither arbitrary nor of such severity as to fall within the scope of Article 3.<sup>28</sup>

Two objections can be made. First, it is highly questionable whether a comparison between the situation at issue and an abstract case of total social and sensory deprivation is of any value. Once one takes as a standard of evaluation an extreme (and, to my mind, entirely theoretical) situation of this type, it clearly follows that any condition falling short of it becomes admissible. To put it another way: what is fallacious, in the Commission's reasoning, is its point of departure, namely the abstract situation referred to. Second, when comparing the security reasons warranting segregation and the ill-effects of segregation for the detainee, one should weigh up security considerations against not only the possible physical or mental harm caused by isolation, but also *two basic requirements concerning imprisonment* (both laid down in the European Prison Rules): (a) the requirement that deprivation of liberty be the only penalty meted out to detainees, that is, that no further suffering be inflicted on them as a result of very poor prison conditions, harsh disciplinary measures and the like; and (b) the requirement that imprisonment be geared as much as possible to rehabilitation, so as to enable prisoners to return to normal life after detention. This means that, when faced with a case of solitary confinement, one should in particular ask oneself whether it may not jeopardize the detainee's chances of attaining social reinsertion after prison, or, at the very least, whether it may aggravate his or her psychological conditions. In this respect it is worth citing a passage from the Explanatory Memorandum to the Recommendation (No. R(82)17) on the custody and treatment of dangerous prisoners, adopted by the Committee of Ministers of the Council of Europe on 24 September 1982:

<sup>28</sup> Dec. 10 July 1980, Application no. 8158/78, DR 21, pp. 98-100.

Human dignity is to be respected notwithstanding criminality or dangerousness and if human persons have to be imprisoned in circumstances of greater severity than the conventional, every effort should be made, subject to the requirements of safe custody, good order and security and the requirements of community well being, to ensure that living environment and conditions offset the deleterious effects - decreased mental efficiency, depression, anxiety, aggressiveness, neurosis, negative values, altered biorhythms - of the severer custodial situation. In the most serious instances prisoners regress to a merely vegetative life. Generally the impairment may be reversible but if imprisonment, especially in maximum security, is prolonged, perception of time and space and self can be permanently and seriously impaired - 'annihilation of personality' (para 43).

Similar considerations can also be put forward for the other two cases. One is very famous: *Kroecher and Moeller v. Switzerland*. In this case the conditions of detention were so extreme that even by the Commission's own standards it should have been easy to find that Article 3 had been infringed upon by the Swiss authorities. Indeed, isolation was even harsher than in the *X v. UK* case, although only in the first month of the two German terrorists' detention: their cells were located on a floor which was empty at the time (the occupants of the other cells had been removed); the cells' windows had frosted glass panes, and even the small rectangle in the window which was usually of transparent glass had been painted over; there was continuous artificial lighting. Nevertheless, the Commission held that this was not contrary to Article 3, for there was no acoustic isolation from the other floors, nor were the cells equipped with any special form of soundproofing. Similarly, there was no total social isolation, for the detainees could have regular medical examinations (presumably by prison doctors), could read books and write letters, and had a right (which they did not exercise) to talk to the chaplain or to representatives of the Prisoners' Aid Committee (the detainees were allowed to have contact with their lawyers and families only after the first month of isolation). The reasoning of the Commission once again brings to the fore the artificiality of its taking as a point of reference 'total sensory and social isolation.' If one considers the conditions of the two German terrorists in their first month of isolation, one cannot help thinking that were one to apply the Commission's standards, a breach of Article 3 could have been found only if they had been literally walled in. One is at a loss to see how being able to hear some noise from other prison floors can be regarded as sensory communication. Similarly, one cannot see how being visited by a prison doctor, being able to send and receive (presumably censored) letters, and being able to read books can be regarded as tantamount to human communication. It is therefore not surprising that four members of the Commission expressed their disagreement in a forceful and thoroughly convincing dissenting opinion.<sup>29</sup>

<sup>29</sup> See the opinion of Commissioners Tenekidis, Melchior, Sampaio and Weitzel, *ibid.*, pp. 57-58.



No less disquieting is the other case, *E. v. Norway*. The applicant had spent approximately eight years in various Norwegian prisons, placed in 'preventive detention' after receiving various sentences for a number of violent crimes. Of these eight years he had spent approximately five in solitary confinement, including a total of 118 days in security cells. It appeared from medical records that, although not insane, he was extremely aggressive and had an 'underdeveloped and impaired mental capacity.' The Commission made a series of remarks, some of them contradictory. It stressed, first, that the applicant's segregation was to a large extent related to his aggressive behaviour. It then pointed to the features of his segregation: apart from when he was placed in security cells, he had access to radio and, to a certain extent, television; he could read newspapers and borrow magazines and books from the prison library; every day he spent one hour in the exercise yard (presumably by himself); and several times a day he had contact with prison staff. Third, the Commission noted that in his most recent stay at Ullesmo prison, the applicant had been subjected to a system which was quite different from that of the other prisoners in solitary confinement: among other things he had been allowed to go home for short periods approximately once every three months and had also been released from prison under protective surveillance, although these attempts had failed due to the applicant's own behaviour. Fourth, the Commission emphasized that it was not convinced that 'the applicant's placement in prison was suitable to counteract [his] aggressive tendency.' But then it immediately hastened to point out that 'the care and treatment which the applicant received while in detention does not reveal to the Commission any indications which could lead to the conclusion that the applicant was not looked after as well as prison conditions allowed. Further, ... the prison authorities appear to have done what was possible under their competence, including working out programmes which could increase the applicant's contact with the outside community.' Fifth, the Commission then added a remark that appears to be contradictory both with what it had already stated and within itself:

The Commission has not overlooked the statements of the Norwegian courts ... from which it appears that the applicant should have received treatment for his mental deficiencies in a hospital rather than being placed in preventive detention where he obviously could not receive any such treatment. The Commission can only support these views. Furthermore, the Commission has noted with concern that the authorities, under the court authorisation given to them, obviously failed for a regrettable period of time to implement the measures appropriate to the applicant's needs. Nevertheless, having regard to the case-law of the Commission and the Court of Human Rights and to the circumstances of the applicant's detention, in particular in the light of his distinct dangerousness, the Commission must conclude that the stringency of the measures, when compared to the objective pursued and the effects on the applicant, did not attain the level of seriousness which would make the treatment inhuman or degrading within the meaning of Art. 3 of the Convention.<sup>30</sup>

<sup>30</sup> Dec. Adm., 7 March 1988, Application no. 11701/85, DH(88)2, pp. 17-18.

My short summary of the Commission's considerations, as well as the passage just quoted, clearly show, I believe, that the ultimate reason for the Commission's holding that in the case at issue there was no breach of Article 3 was its intent to stick to its own case-law. For it clearly appears from the Commission's recital of the facts and the law that the applicant had indeed been kept in total social isolation for a very long period of time, that the prison authorities had failed to implement the measures appropriate to his needs and - what is even more important - his mental problems would have been better addressed in a hospital. The conclusion that seems to me to be inescapable is that in this case solitary confinement was an utterly inadequate response to the detainee's aggressive behaviour; instead of improving his mental condition, such treatment was bound simply to worsen it. The balancing of security requirements against the rights and needs of the applicant should, in fact, have led to the conclusion that the respondent Government had disregarded Article 3.

## 2. Torture

The Commission and the Court have consistently stated that torture is an aggravated form of inhuman treatment and is characterized by its purpose, which may be the obtaining of information or confessions, or the infliction of punishment.<sup>31</sup> The Court has also pointed out that Article 3, by using the term torture, intended 'to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.'<sup>32</sup> Thus, it is clear that the two organs distinguish torture from inhuman treatment or punishment in two respects: torture is *more serious or grave*, in that it causes greater suffering; and torture is always carried out for a *purpose* (which may be one of those just mentioned, or also that of intimidating or coercing the tortured or a third person or that of discriminating against the tortured or a third person, to make use of the definition enshrined in Article 1 of the 1984 UN Convention Against Torture). This entails that for the Commission and the Court the mere intent to cause severe mental or physical suffering (which, as we saw above, is one of the constitutive elements of 'inhuman treatment or punishment') is not sufficient: in addition to this intent there must also be a specific purpose, that is, one of the purposes just referred to.

It goes without saying that the appraisal of the circumstances of each case, in order to establish if the requisite conditions are met, is a matter of judicial

<sup>31</sup> See Op. Com., 5 November 1969, *Greek case*, Yearbook 12, p. 186, paragraph 2; Dec. Adm. Com., 3 February 1971, Application no. 4220/69, CD 37, p. 59 (Yearbook 14, p. 276); Op. Com., 25 January 1976, *Ireland v. UK*, Yearbook 19, p. 794; Op. Com., 14 December 1976, *Tyler v. UK*, p. 13, paragraph 29; *Ireland v. UK* judgment of 18 January 1978, Series A no. 25, pp. 66-67 (Yearbook 21, p. 602); *Tyler v. UK* judgment of 25 April 1978, Series A no. 26, p. 13; *Campbell and Cosans v. UK* judgment of 25 February 1982, Series A no. 48, p. 12.

<sup>32</sup> See *Ireland v. UK* judgment of 18 January 1978, Series A no. 25, pp. 66-67, paragraph 167. This statement has since been taken up by the Court in subsequent pronouncements.

discretion, as in the case of 'inhuman treatment or punishment.' This is indeed borne out by the fact that in at least one instance the Commission and the Court widely differed on the characterization of the relevant facts: as is well known, in the *Ireland v. UK* case, the Commission held that the five 'techniques' used by the British police in Northern Ireland for 'aiding' interrogation constituted a form of torture, while the Court found instead that they were not tantamount to torture but to 'inhuman treatment.'

Let us now consider the cases where the Commission or the Court have found a State responsible of having inflicted torture. While the Court so far has not made such a finding (in the *Ireland v. UK* case it disagreed with the Commission), the Commission has made a finding of torture in two cases: the *Greek case* and the *Ireland v. UK* case. Given that I have already recalled the main elements of the latter, I shall here refer briefly to the former. The Commission investigated 30 instances of alleged torture by the Greek authorities and was satisfied that in at least 11 of them torture had been practised beyond any doubt. Torture took mostly the form of *falanga* (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), and severe beatings of all parts of the body. But it also included the application of electric shock, mock execution or threats to shoot or kill the victim, squeezing of the head in a vice, pulling out of hair from the head or pubic region, kicking of the male genital organs, dripping water on the head and intense noise to prevent sleep.<sup>33</sup>

### 3. Degrading treatment or punishment

The Commission and the Court have consistently argued that a treatment or punishment is degrading when it grossly humiliates an individual before himself or others, or drives him to act against his conscience or will.<sup>34</sup> The Court has also emphasized that, for a punishment to be 'degrading,' the humiliation or debasement involved must exceed a particular level and must in any event be different from the normal humiliation involved in being criminally convicted.<sup>35</sup> In addition, it need not be necessary that the humiliating treatment or punishment cause severe or long-lasting physical effects or adverse psychological effects; while these are likely to occur, they are not indispensable – or, at any rate, crucial – elements

of this notion.<sup>36</sup> What matters is that the treatment or punishment should constitute 'an assault on precisely that which is one of the main purposes of Art. 3 to protect, namely a person's dignity and physical integrity.'<sup>37</sup> As is apparent in the *Campbell and Cosans v. UK* case, the physical or mental suffering may, however, prove important as evidence of whether or not the alleged victim of debasement felt humiliated in his own or others' eyes.<sup>38</sup>

The Court has also stated that '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 treatment or punishment itself and the manner and method of its execution.<sup>39</sup>

It is apparent from the above that in the opinion of the Commission and the Court the concept of degrading treatment or punishment does not hinge on the three elements propounded by the Strasbourg organs for the notion of 'inhuman' treatment or punishment (that is, intent, severe mental or physical suffering, and lack of justification), nor, *a fortiori*, does it require the elements of gravity and purpose necessary for establishing the existence of torture. Instead, degrading treatment or punishment means severe humiliation (in either the victim's own or others' eyes) or severe debasement, driving the victim to act against his will or conscience.

*Asoglyw  
nva becew  
dyst katopon  
lender ogryly*

Let us now briefly consider the major cases where the Commission and the Court have pronounced on this issue. In the *Tyrer v. UK* case the Commission and the Court found that the applicant, who had been sentenced to three strokes of the birch in accordance with the penal legislation of the Isle of Man, had been subjected to a judicial corporal punishment that was degrading and hence fell short of the demands of Article 3. The Court, in particular, used forceful arguments to reach this conclusion and phrased its reasoning in lofty language that is worth quoting:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutional-

<sup>33</sup> Com. Rep., 18 November 1969, *Yearbook* 12, pp. 499-500.

<sup>34</sup> See in particular Op. Com., 5 November 1969, *Greek case*, *Yearbook* 12, p. 186; Op. Com., 25 January 1976, *Ireland v. UK*, *Yearbook* 19, p. 748; *Tyrer v. UK* judgment of 25 April 1978, Series A no. 26, p. 15 (*Yearbook* 21, p. 612); *Guzzardi v. Italy* judgment of 6 November 1978, Series A no. 39, p. 31, paragraph 80; *Campbell and Cosans v. UK* judgment of 25 February 1982, Series A no. 48, p. 13.

<sup>35</sup> *Tyrer v. UK* judgment of 25 April 1978, Series A no. 26, p. 15, paragraph 30.

<sup>36</sup> *Ibid.*, p. 16, paragraph 33.

<sup>37</sup> *Ibid.*

<sup>38</sup> Judgment of 25 February 1982, Series A no. 48, pp. 13-14, paragraphs 30-31. This case concerned the corporal punishment of two school children. One of them had not even been threatened with the punishment, while the other had been threatened with the punishment but had never actually been subjected to it, for he refused the disciplinary measure and was suspended from school. The Court, after excluding that the alleged victim felt humiliated in the eyes of others on account of his being threatened with corporal chastisement, also ruled out that he was debased in his own eyes, because he had not actually been subjected to the punishment and in addition it had not been shown 'by means of medical certificates or otherwise' that either he or the other child 'suffered any adverse psychological or other effects.' The Court added that the pupil on whom the disciplinary measure had been imposed but not executed 'may well have experienced feelings of apprehension or disquiet when he came close to an infliction' of the corporal punishment, 'but such feelings are not sufficient to amount to degrading treatment within the meaning of Art. 3.'

<sup>39</sup> *Ibid.*, p. 15, paragraph 30.

ized 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 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 ...

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' ... 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.<sup>40</sup>

Other important cases where the Commission found that a degrading treatment or punishment had been inflicted, or could be regarded as having been meted out, are the *East African Asians v. UK* case<sup>41</sup> and the *M. and K. Warwick v. UK* case. In the latter a school headmaster, after seeing two young females students smoking cigarettes in the street outside the school, had given a stroke with a cane on the left hand of one of them, in front of the deputy headmaster and the other girl. The Commission found that considering the circumstances of the case as a whole, 'the corporal punishment inflicted upon the second applicant [the first

40 Series A no. 26, pp. 16–17, paragraphs 33 and 35.

41 The applicants, who were citizens of the UK and Colonies or had an equivalent status, and were holders of UK passports, had been denied entry or permanent residence in the UK. They claimed that this refusal amounted to treating them as second-class citizens and was a degrading treatment. In its decision on admissibility of 10 October 1970, the Commission stated the following: '[D]iscrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Art. 3 of the Convention ... [T]he Commission considers that it is generally recognised that a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity ... [T]herefore, differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment in circumstances where differential treatment on some other ground, such as language, would raise no question' (*Yearbook* 13, p. 994). As is well known, following the adoption by the UK of measures intended to facilitate the entry of UK passport holders from East Africa, on 21 October 1977 the Committee of Ministers decided that no further action was called for with regard to Article 3. However, it did not authorize the publication of the Commission's report.

was her mother] caused her humiliation and attained a sufficient level of seriousness to be regarded as degrading within the meaning of Art. 3 of the Convention."<sup>42</sup>

By contrast, no breach of Article 3 was found by the Commission or the Court in the *Campbell and Cosans v. UK* case (the child of one of the two applicants had merely been threatened in a Scottish school, as a disciplinary measure, with being struck on the palm of his hand with a leather strap or 'tawse'; the child of the other applicant had not been even threatened);<sup>43</sup> nor was a breach found in the *Guzzardi v. Italy* case (concerning the detention in cramped quarters of a member of the Mafia on the small island of Asinara).<sup>44</sup> Similarly, the Commission held that Article 3 was not breached by the penalty of being struck off the roll of the Medical Association and being prohibited from practising medicine,<sup>45</sup> nor by the imposition on a detainee, as a disciplinary measure, of a restricted diet coupled with confinement in a cell,<sup>46</sup> nor by the 'close body search' of detainees by prison officers,<sup>47</sup> nor by the disadvantages that a transsexual experienced as a result of the discrepancy between her appearance and her identity papers, which recorded that she was male at birth.<sup>48</sup>

#### IV. A Critical Assessment of the Concept of 'Inhuman Treatment or Punishment' as Laid Down by the Commission and the Court

I have mentioned above the various criteria set out by the two Convention institutions for applying the three concepts enshrined in Article 3. While the notion of torture and degrading treatment or punishment, propounded by the Commission and the Court, and the relative criteria for establishing whether in specific cases Article 3 is breached, are quite persuasive, the same does not hold

42 Com. Rep., 18 July 1986, Application no. 9471/81, paragraph 88. Five members of the Commission (Schermers, Badiner, Vandenberghe, Hall and Soyer) dissented from the Commission on the application of Article 3. On the issue relating to Article 3 the Committee of Ministers was unable to attain the required two-thirds majority (see Resolution DH(89), Application no. 9471/81, of 2 March 1989). The Commission had subsequently the opportunity to pronounce upon corporal punishment in other cases, in which a friendly settlement was reached (see *Three Members of the A. Family v. The UK*, Rep. of 16 July 1987, Application no. 10592/83 and *X v. The UK*, Dec. of 11 May 1988, Application no. 10172/82), or the Commission held the application inadmissible (see *W. and J. Castello-Roberts v. The UK*, Dec. of 13 December 1990, Application no. 13134/87, and *X and Y v. The UK*, Dec. of 13 December 1990, Application 14229/88).

43 Com. Rep., 16 May 1980, Application nos 7511/76, 7743/76 and 7819/77; judgment of 25 February 1982, Series A no. 48.

44 Com. Rep., 7 December 1978, Application no. 7367/76; judgment of 6 November 1980, Series A no. 39.

45 Op. Com., 14 December 1981, *Albert and Le Compte* case, pp. 24–25, paragraphs 54–57.

46 Dec. Adm. Com., 15 May 1980, Application no. 8317/78, DR 20, p. 89.

47 Dec. Adm. Com., 13 May 1980, Application no. 8317/78, *McFoley et al. v. UK*, DR 20, p. 85.

48 See *B. v. France*, Rep. of 6 September 1990, Application no. 13343/87. See at pp. 21–23 the dissenting opinion of three members of the Commission.

true for the notion offered by the two bodies of 'inhuman treatment or punishment.'

As I have already pointed out, according to the case-law of the Commission and the Court, three elements are required for the existence of 'inhuman treatment or punishment': intent, severe mental or physical suffering, lack of justification. I submit that while the first element (intent) is not indispensable, the third (lack of justification for the measures impugned) needs to be drastically revised.

#### A. Intent

The Commission and the Court have repeatedly stated that inhuman treatment or punishment must be 'deliberate' for it to be against Article 3; that is, it must 'deliberately cause' severe and unjustifiable suffering.<sup>49</sup> Furthermore, in a number of cases both the Court and the Commission have gone even further, for they have – surprisingly – contended that 'premeditation' is needed.<sup>50</sup> I suggest that although the intention to cause suffering may be one of the constituent elements of inhuman treatment or punishment, it is not indispensable. In other words, it ought not to be regarded as one of the factors the absence of which warrants the conclusion that no inhuman treatment or punishment is meted out.

Proof that the above proposition is tenable can be found precisely in those cases where the Commission soundly, if contradictorily, held that the respondent Government was guilty of a breach of Article 3 without requiring the intention to cause suffering. A case in point is the Commission's decision in the *Cyprus v. Turkey* case, where the Commission held among other things that there was a 'withholding of food and water and of medical treatment, in a number of cases' from detainees in the hands of Turkish troops. The Commission rightly concluded that this behaviour was in breach of Article 3 as amounting to inhuman treatment, without looking into whether or not the Turkish forces which had so acted had intended to cause severe and unjustifiable suffering.<sup>51</sup> The same applies to the Commission's dicta whereby 'failure to provide adequate medical treatment may be contrary to Art. 3.'<sup>52</sup> Clearly, what matters here is not the possible intention of the persons failing to provide medical treatment to wilfully inflict suffering on those deprived of that treatment, but the objective fact that the treatment was not provided. Furthermore, in the *Greek* case the Commission held that in certain cells the conditions of detention of persons arrested for political reasons were con-

49 See, e.g., Op. Com., 5 November 1969, *Greek case*, Yearbook 12, p. 186; Op. Com., 7 December 1978, *Guzzardi v. Italy* case, p. 31, paragraph 80; judgment of 6 November 1980, Series A no. 39.

50 See, e.g., *Ireland v. UK* judgment of 18 January 1978, Series A no. 25, p. 66 (Yearbook 21, p. 602); *Soering v. UK* judgment of 7 July 1989, Series A no. 161, p. 39, paragraph 100; Rep. Com., 11 December 1990, *Felix Tomasi v. France*, Application no. 12850/87, p. 18, paragraph 91.

51 See *ibid.*, paragraphs 395–405.

52 See the cases cited in note 7 above.

trary to Article 3, without asking itself whether or not the Greek authorities had purposefully caused the ensuing suffering.<sup>53</sup> In the same case the Commission also held that 'the extreme manner of the separation of detainees from their families and the conditions of gross overcrowding in the camps on Leros' constituted a breach of Article 3.<sup>54</sup> Again, the Commission rightly refrained from asking itself whether the separation of families and overcrowding had been caused by the Greek authorities with the purpose of bringing about distress and anguish in the detainees.

The truth of the matter is that in many cases a treatment or punishment is objectively inhuman, regardless of the intention of the relevant authorities to cause serious harm. The Commission and the Court should therefore endeavour to be consistent and drop from their definition of 'inhuman' treatment or punishment the element of intent – subject to the exception of the absolutely involuntary causing of suffering (that is, suffering resulting from an act not involving any culpable negligence or recklessness).

In short, my proposition has, it is submitted, three merits. First, it allows instances of ill-treatment to be covered which otherwise – should one rigorously stick to the definition set out by the Commission and the Court – could not be regarded as breaches of Article 3. Secondly, it would make the case-law of the two Strasbourg bodies consistent: that is, it would do away with the contradictions currently existing in this case-law. Thirdly, and more importantly, it would bring the definition of 'inhuman treatment or punishment' in line with that of 'degrading treatment or punishment,' for both concepts would hold without any intent to cause suffering, and both would be geared to objective circumstances.

In this way, the general picture resulting from a correct interpretation of Article 3 would be as follows: (a) neither in the case of 'inhuman treatment or punishment' nor in that of 'degrading treatment or punishment' would any intent to cause suffering be required; (b) in the former case, however, a certain level of mental or physical suffering would be necessary and, in addition, would need to be out of proportion to the security and other considerations behind the 'inhuman' measure or behaviour; (c) in the case of 'degrading treatment or punishment,' a high level of debasement or humiliation would be needed; (d) as for torture proper, it would be markedly distinct from the other two categories, as it would hinge on a specific purpose (that of extracting information or a confession, of punishing, intimidating or coercing, or of wilfully discriminating) and would in addition require a degree of mental or physical suffering higher than that needed for 'inhuman treatment or punishment.'

53 See Rep. Com., 18 November 1969, Yearbook 12, p. 505.

54 *Ibid.*

### B. The absence of justification for inhuman measures

I have already mentioned that the Commission has dwelt on this element particularly in cases concerning conditions of detention. In these, it has weighed up the security considerations behind measures such as harsh conditions of detention or solitary confinement, against the suffering caused thereby. To my mind the standards of reference to be taken into account against the demands of security should not lie simply in the need for a detainee to be immune from suffering or anguish. Rather, one should take as a reference point, besides the dignity of the detainee and the whole corpus of his rights, something no less important: the extent to which the allegedly inhuman measures jeopardize the basic purpose of imprisonment, namely the rehabilitation of the detainee with a view to his possible reinsertion into society after release.

If the approach is broadened in such a way, one can then try to establish – according to a criterion akin to (but less loose than) that suggested by Mr Opsahl in his dissenting opinion referred to above (see note 25) – whether there is proportionality between, on the one hand, security or other considerations, and, on the other, the demands of persons deprived of their liberty.

I shall add that the remarks I have made above could prove particularly useful in such cases as prolonged solitary confinement or repeated infliction of disciplinary measures, or failure to provide an adequate regime (work, training, association, exercise, and so forth) for convicted detainees or for prisoners on remand who spend fairly long periods in prison before trial.

### V. New Trends in the Case-Law of the Commission and the Court

Recently the two Strasbourg bodies have started taking a broader approach to Article 3, in particular to the notion of 'inhuman treatment or punishment.' While not departing from their definition of such proscribed treatment or punishment formally, the two Convention institutions have in many respects made innovations in their case-law by propounding a more liberal construction of Article 3. I shall briefly consider the new direction taken by the Commission and the Court in three different cases.

#### A. The notions of 'extraterritorial reach' of the Convention and of liability for potential breaches (the *Soering* case)

I have already mentioned above the Commission's copious case-law stating that extradition or expulsion to a country where an individual is likely to be tortured or seriously persecuted for political reasons or to be subjected to inhuman or degrading treatment might give rise to issues relating to Article 3. Strikingly, whenever the Commission has formulated this dictum, it has in actual fact dismissed the application. One might have therefore thought that this case-law was a sort of keg full of wet powder, for the Commission seems to confine itself to issuing to Governments a serious warning, without ever finding a breach of

Article 3. Luckily, in the *Soering v. UK* case the Court has recently applied that dictum and held that the respondent Government was in breach of Article 3 because it intended to extradite to the US a German national who had allegedly committed a crime in the US, for which he was there liable to capital punishment after spending many years on 'death row.' The judgment of the Court is important not only because it sets an exceedingly important precedent, but also because the Court has enunciated two important notions.

Let us first examine what we could call, in non-technical terms, the 'extraterritorial reach' of the Convention. The respondent Government contended that Article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which would occur outside its jurisdiction (both the possible infliction of capital punishment on a person who was only 18 years old at the time of his crime and in addition suffered from 'an abnormality of mind,' and the likely stay of this individual on 'death row' for many years before eventual execution). Indeed, a literal construction of Article 3, read in conjunction with Article 1 ('The High Contracting parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section 1 of this Convention'), could well lead to the belief that the contention of the UK was right. The Court has instead held that the obligation not to extradite a person to a country where he could be subjected to torture or inhuman or degrading treatment or punishment 'is inherent in the general terms of Art. 3,' for it 'would be hardly compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedoms and the rule of law" to which the Preamble refers, were a Contracting State to knowingly surrender a fugitive to another State' where he could be subjected to the aforementioned treatment or punishment. 'Extradition in such circumstances [the Court proceeds] while not explicitly referred to in the brief and general wording of Art. 3, would plainly be contrary to the spirit and the intention of the Article.'<sup>55</sup> Clearly, the Court, by privileging a teleological interpretation over a literal and logical construction, has greatly extended the scope of Article 3. Indeed, it has stated that the basic values enshrined in Article 3 must be respected *not only in Europe* (within the circle of the States Parties to the Convention), but also *abroad*, whenever a State Party to the Convention gets involved in some sort of action which may extend its effects beyond the confines of Europe.

Let us now move to the other considerable merit of this case. The respondent Government had submitted that, even assuming that one might apply Article 3 to extradition cases, this application must be limited to those occasions in which the treatment or punishment abroad was certain, imminent and serious. In its view, the fact that by definition the matters complained of were only anticipated, required a very high degree of risk that ill-treatment would actually occur. The Court to a large extent met this point by the following remarks: 'It is not normal-

<sup>55</sup> Judgment of 7 July 1989, paragraph 83.

ly 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 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.<sup>56</sup>

It is apparent from this ruling that again the Court has placed a liberal interpretation on the Convention, by resorting to the principle of effective interpretation (the so-called *principe de l'effet utile*). The Court has thus – rightly – broadened the scope of the Convention's prescriptions.<sup>57</sup>

#### B. The presumption of ill-treatment of persons in police custody (the *Tomasi v. France* case)

Recently the Commission had to pronounce on a case of injuries allegedly caused by police officers to a person being held in police custody. The respondent Government objected that, first, there was no evidence that the injuries were attributable to police officers and, second, in any case they were light and therefore did not reach the threshold of severity required by Article 3.

As regards the first point, the Commission emphasized, on the one hand, that it was apparent from various medical reports that the applicant had bruises and ecchymoses when he left the police station, and, on the other, that the respondent Government had not claimed that he already had such bruises and ecchymoses before entering the police station, nor had it claimed that he caused the injuries to himself or that they resulted from an attempted escape. From these considerations the Commission drew the following inference: the injuries to the applicant were sustained while he was in police custody, and were caused by police officers.<sup>58</sup>

With regard to the question of the nature of the injuries, the Commission noted that, however light they might appear to be, they were the result of physical force used against a person deprived of his liberty and hence vulnerable and in a state of inferiority (the Commission emphasized in this respect that the applicant had been held 48 hours in police custody without any contact with the outside

<sup>56</sup> Ibid., paragraph 90.

<sup>57</sup> Recently the Commission reached a friendly settlement in some cases of expulsion (see *Leila Sami El-Makhour v. FRG*, Rep. of 10 July 1989, Application no. 14312/88 and *Abdel-Quader Hussein Yassin Mansi v. Sweden*, Rep. of 9 March 1990, Application no. 15658/89), whereas in another case the application was rejected by a vote of seven to seven, with a casting vote of the President (see *Nadarajah Vilvarajah et alii v. The UK*, Rep. of 8 May 1990, Application no. 13163/87; see at pp. 43–44 the dissenting opinion of the seven members in favour of the application of Article 3); on 30 October 1991, by eight votes to one, the European Court too held that the UK had not breached Article 3 (judgment no. 45/1990/236/302–6).

<sup>58</sup> Rep. Com. 11 December 1990, Application no. 12850/87, pp. 19–20, paragraphs 97–104.

world, not even with his family or lawyer). This kind of treatment, the Commission said, could not be justified and therefore, in the circumstances of the case, appeared to be both inhuman and degrading.<sup>59</sup>

There can be no doubt that this decision marks a turning point in the Commission's case-law, in two respects. First, because the Commission ingeniously suggested that in cases where no witnesses are available to check the veracity of a detainee's allegations, resort can be had to a *presumption*: one should presume that injuries to a person held in police custody have been caused by those who detained him, if the respondent Government does not prove that these injuries existed before or were self-inflicted (the onus of proof is thus reversed, for it falls to the respondent Government to prove that the injuries were not caused by its authorities). Second, undoubtedly the Commission has lowered the threshold of suffering previously required for a finding of inhuman treatment. Although the reasoning of the Commission on this issue is perhaps too succinct, arguably the reasons for such lowering lie chiefly in the fact that ill-treatment of suspects held for interrogation by police officers lacks any justification whatsoever. The element of lack of justification is so strong in this case, that one may accept that the other element – the mental or physical suffering – be made less stringent. It should be added that the Commission rightly found that the ill-treatment in question, in addition to being inhuman, was degrading. There is clearly an element of debasement in the fact that representatives of the State's enforcement bodies profit from their position of superiority vis-à-vis persons held in custody by ill-treating them: at the very least the dignity of that person is lowered and he is humiliated both in his and their own eyes. The fact that ill-treatment is thus regarded as also degrading strengthens the conclusion reached by the Commission, for, as I pointed out above, in the case of degrading treatment the mental or physical suffering involved plays a lesser role than that required for inhuman treatment.

#### C. The criterion of the cumulative effects of various forms of ill-treatment (the *Herczegfalvy v. Austria* case)

So far the Commission and the Court, when dealing with Article 3, have gone into the various individual facets of ill-treatment by considering each issue *per se* and not as part of a global picture. In other words, they have considered in isolation each aspect of the conduct or measures allegedly contrary to Article 3; they have scrutinized these on their own merits, to determine if they passed the stringent test to be administered under Article 3. To use a well-known metaphor,

<sup>59</sup> Rep. Com. 11 December 1990, Application no. 12850/87, p. 20, paragraph 105. One member of the Commission, Mr Soyser, appended a dissenting opinion concerning both issues discussed above (ibid., pp. 30–37). More recently the Commission declared admissible the application of a Colombian who allegedly had been ill-treated by Swiss police officers during and after his arrest (see *X v. Switzerland*, Application no. 17549/90, decision of 3 April 1992, unpublished).

they have looked at every single tree one by one, and neglected to establish if the combination of various trees added up to a forest. Recently, and for the first time, the Commission has chosen to resort to a new standard for gauging the conformity of States' behaviour to Article 3: the possible cumulative effect of various factors, each of which, taken by itself, would not amount to inhuman treatment.

In the case where the Commission has taken this innovative approach (*Herczegfalvy v. Austria*), the applicant, a Hungarian refugee living in Austria, complained among other things that when detained in a psychiatric hospital in the period 1978–1984, he had been subjected to treatment falling foul of Article 3, as he had been subjected to compulsory medical treatment, to artificial feeding and had been held in isolation. The Commission examined each of these three issues.

Regarding the compulsory medical treatment, it noted that the complaint concerned both the use of force on the occasion of an incident which occurred on 15 January 1980, and the measures taken thereafter by the hospital authorities. On 15 January the applicant, who was on a hunger strike and therefore very weak, became extremely agitated about the compulsory treatment which the medical authorities intended to administer to him. He fell into a rage; the staff of the hospital were unable to control him and an emergency squad was called in. After the incident the applicant collapsed and developed pneumonia and nephritis. Following this incident he was fettered continuously to his bed for several weeks, including a period when he was unconscious. The Commission pointed out, with regard to the incident just mentioned, that the use of force seemed to have contributed to the applicant's state of agitation and his complete physical breakdown. Although the medical authorities could not have foreseen this development when the compulsory treatment was started, they should 'have reconsidered the appropriateness of the measures taken to overcome the applicant's physical resistance once their effect on his state of health became apparent.' As for the use of physical restraint resorted to after the incident, the Commission noted that 'even if fettering may have been unavoidable in order to secure his [the applicant's] effective treatment, the manner in which it was carried out and the period during which it was maintained appear disproportionate.' The Commission concluded that although the applicant's compulsory medical treatment was not, as such, contrary to Article 3, the particular manner in which it had been administered amounted to a breach of that provision.<sup>60</sup>

As regards the applicant's compulsory feeding, the Commission noted that the 'medical authorities' margin of appreciation' had not been overstepped: the feeding was necessary and the methods applied (infusions and artificial feeding through a tube) corresponded to the standards of medical science. However, 'the maintenance of artificial feeding through a tube during a long period of time

60 Rep. Com. 1 March 1991, Application no. 10533/83, pp. 48–49, paragraphs 242–48.

when such acute danger [for the applicant's health resulting from his hunger-strike] no longer existed was ... unusual from the medical point of view, even if it may have had a therapeutical purpose in the context of the simultaneous psychiatric treatment of the applicant.<sup>61</sup>

Finally, with respect to isolation in the psychiatric hospital, the Commission noted that the applicant, apart from short periods, was relatively free to move around in the ward and was able to have contact with other mental patients in the ward when he was not the only inmate there; he also had contact with the medical staff and other staff, besides receiving visits from outside. In addition, the Commission emphasized that his isolation was partly a result of his own conduct. It is thus apparent that this sort of segregation was not the kind of total social and sensory deprivation which under the Commission's case-law could amount to a breach of Article 3. Nevertheless – and here comes the breakthrough in the Commission's attitude – this body held that, 'insofar as imposed on him by the hospital, it [the isolation] constituted, together with the compulsory artificial feeding and medical treatment, a further element to be considered under Art. 3.'<sup>62</sup>

The Commission wound up its handling of the case from the viewpoint of Article 3 with a finding that 'the applicant's compulsory medical treatment and the way in which it was administered, combined with its artificial feeding and isolation, amounted to inhuman and degrading treatment.'<sup>63</sup> The criterion of the cumulative effect of various factors, some of which by themselves would not reach the requisite threshold, could not have been set out more forcefully.

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## VI. Prospects for the Future

We have just seen that recently the Commission and the Court have taken a more dynamic approach to Article 3. They are now increasingly placing a liberal interpretation on that all-important provision, thus contributing to a better safeguard of some fundamental values in Europe. One should not, however, underrate some possible pitfalls in this case-law, as well as the harsh criticisms which the new trends have aroused. Furthermore, there are areas of human rights where the Commission and the Court could make more headway by gradually revising the bulk of their interpretation of Article 3. I now propose to deal briefly with these issues.

### A. Is there a need to resort to sociological standards?

It is possible to see in the case-law of the two Convention institutions a certain tendency to refer to the attitude of the community of a given country vis-à-vis the behaviour of States' authorities, as a sort of acid test to appraise whether or not

61 *Ibid.*, p. 49, paragraphs 248–50.

62 *Ibid.*, p. 50, paragraphs 251–53.

63 *Ibid.*, p. 50, paragraph 254.

that behaviour is admissible. This approach first came to the fore in the Commission's report in the *Greek* case. The Commission stated the following:

It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. Such roughness may take the form of slaps or blows of the hand on the head or face. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them. However, the allegation raised in the proceedings generally concern much more serious forms of treatment which, if established, clearly constitute torture or ill-treatment.<sup>64</sup>

Although the Commission did not go into the various instances of this 'rough treatment,' for it considered the allegations of torture as more important, it nevertheless propounded a test which is open to criticism: the test of the extent to which public opinion and the persons concerned (the detainees) consider some sort of treatment as admissible. This test, it is submitted, is very dangerous, for it could lead to a difference of treatment among various Member States of the Council of Europe, depending on the attitude of the population there, and even among various social groups in each country. This would open a Pandora's box likely to lead to preposterous results: for instance, manhandling of academics or judges by police officers might be regarded as inhuman or degrading, whilst it might be acceptable if practised against petty criminals or uneducated people from the lower classes. It is instead imperative that the Strasbourg bodies should uphold a set of standards valid for all the Contracting Parties to the European Convention, whatever their economic and social background and their cultural traditions.

Luckily, in a later judgment, the Court put things in the right perspective. In the *Tyrer v. UK* case, concerning the fact that Mr Tyrer, a British citizen living on the Isle of Man, had been sentenced by a local juvenile court to three strokes of the birch in accordance with the legislation of the island, the Court stated the following:

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 concept of 'degrading punishment' appearing in Art. 3, the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Man 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

64 Com. Rep. 18 November 1969, *Yearbook* 12, p. 501. This passage was then quoted by the Commission in its report on the *Ireland v. UK* case (*Yearbook* 19, pp. 388-89).

be, or actually is, an effective deterrent or an aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to 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 the penal policy of the member States of the Council of Europe in this field.<sup>65</sup>

It is difficult to find a more balanced and judicious appraisal of the role that social standards and public opinion can play in this matter. As the Court rightly emphasized, what counts in the field of application of Article 3 are present-day conditions and, even more importantly, the commonly accepted standards in the penal policy of the Council of Europe, as reflected in the European Prison Rules.

It should be added that the Court, in a subsequent judgment, while reaffirming that public opinion should not be a decisive factor for evaluating the conformity of State measures with Article 3, did nevertheless make allowance for some sort of a role for public opinion. In the *Campbell and Cosans v. UK* case, the applicants had assailed corporal punishment practised as a disciplinary measure in Scottish schools. As I mentioned before, the Court held that there had been no degrading punishment within the meaning of Article 3, among other things because no punishment had actually been inflicted. Before reaching this conclusion the Court stated the following:

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 Art. 3, simply because the measure has been in use for a long time or even meets with general approval ... 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 at all.<sup>66</sup>

It is submitted that to the limited extent underscored by the Court, public opinion or the views prevailing in a social group may be taken into account. (Indeed, in the case at issue, the crucial point for determining whether the punishment was degrading was different: it revolved around the question whether the punishment was debasing or humiliating in the pupil's own eyes.) However, as was soundly reaffirmed by the Court, the important point is that generally speaking no importance should be attached to social perceptions of certain measures in a given State. Except for the very limited role they can play in cases such as that just referred to, these social perceptions may be taken into account only for pre-legal purposes, that is, for the purpose of better understanding the

65 Judgment of 25 April 1978, Series A no. 26, pp. 16-17, paragraph 31.

66 Judgment of 25 February 1982, Series A no. 48, p. 13, paragraph 29.



historical and social reasons why certain conducts or measures are widespread in some countries or are tolerated by some social groups there.

**B. Is there any likelihood that the prescriptions of Article 3 will be trivialized?**

In their partially dissenting opinion in the *Warwick v. UK* case, four members of the Commission, Schermers, Batliner, Vandenberghe and Hall, together with another member, Soyer, stated that the corporal punishment inflicted on one of the applicants by her school headmaster was not so severe as to be in breach of Article 3, and then warned the Commission against a possible weakening of the protection afforded by this provision. They stressed that:

There might be to some extent two dangers in weakening the protection of Art. 3. The one would be to interpret it too flexibly in following changing social and political conditions which would result in the adverse effect that in difficult times the Article might lose a great deal of its protection. The other risk consists in overloading the content and of amplifying the Article with matters of a lesser degree of severity and thus weakening the very serious nature of a breach of Art. 3.<sup>67</sup>

The same point was forcefully taken up by Mr Soyer in his dissenting opinion in the *Tomasi v. France* case. After attacking the majority's decision to consider as a breach of Article 3 the ill-treatment of a person in police custody by police officers – an ill-treatment that in his view was not so severe as to reach the threshold required by Article 3 – Mr Soyer again sternly cautioned against an overstretching of the bans laid down in Article 3. He warned that the majority's decision would result in a trivialization of inhuman or degrading treatment which would be far from constituting a better prevention against it ('une banalisation du traitement inhumain et dégradant qui n'en constitue pas la meilleure prévention, loin s'en faut'). He went on to say the following:

Aujourd'hui, un État qui reconnaît la prééminence du Droit peut redouter la condamnation du chef de l'Art. 3, jusqu'ici largement synonyme de manquement majeur, d'infamie internationale, parce qu'elle n'est retenue qu'à titre exceptionnel et dans des situations de particulière gravité.

Mais si la gravité majeure n'est plus requise, la barrière psychologique s'abaisse, la dissuasion morale s'affaiblit. S'agit-il là d'une bonne politique jurisprudentielle? ... Pense-t-on que si l'Art. 3 peut s'appliquer à des lésions relativement légères, l'Art. 15 conservera son sens d'ultime sauvegarde devant les convulsions de l'histoire? Et pense-t-on que cet Art. 3, ainsi dévalué, pourra continuer de faire obstacle aux extraditions, aux expulsions qu'il empêchait jusqu'à présent?<sup>68</sup>

With all due respect, I submit that this view is wrong. Four arguments can be adduced against it. First, although admittedly breaches of Article 3 carry an aura of infamy and dishonour for the responsible State, there is no legal justification

<sup>67</sup> Com. Rep., 18 July 1986, p. 21.

<sup>68</sup> Rep. Com., 11 December 1990, Application no. 12850/87, p. 37, paragraphs 32–33.

for contending that Article 3 must be applied exceptionally and with regard to extremely grave situations. The upgrading of Article 3 to such a special and unique status is not warranted by any sort of interpretation – literal, logical or teleological. What can be deduced from the wording of Article 3, and the general context of this provision is simply that it aims to ban unacceptable practices against human dignity, and for this reason has been elevated to the rank of a non-derogable norm, on a par with the ban on unlawful deprivation of life, on slavery or servitude and on the retroactivity of criminal legislation (see Article 15, paragraph 2). Furthermore, the text of the provision establishes a sort of hierarchy between different categories of outrages, in that it regards torture as the most serious, whilst it admits that inhuman or degrading treatment may take the form of a less damaging injury.

Second, the proposition that the broadening of the scope of Article 3 will entail that in times of emergency its impact is lessened, and that therefore the Article 'may lose a great deal of its protection' is begging the question. It is difficult to see why the impact of the prescriptions of Article 3 – if these were to be endowed with a broader content than that conceived of by the aforementioned five members of the Commission – should diminish in times of emergency. What matters is that Article 3 should be strictly complied with. Why should a State, on the one hand, abide by this provision in times of emergency if it prohibits only the most extreme forms of inhuman or degrading treatment, and, on the other hand, fail to observe it if it bans less appalling manifestations of outrageous conduct too? Not too great an importance should be attached to the psychological attitude of States. They are at liberty to believe what they want to believe; the fact remains that what ultimately matters is that they must obey international imperatives as authoritatively interpreted by the Commission and the Court, be it in normal or in exceptional conditions. If they fail to comply with those prescriptions, the supervisory bodies will take the appropriate measures.

These first two points have been argued from an essentially negative point of view; I shall now set forth two positive reasons for upholding the view of the Commission's majority. My third point is that the opinion to which I am taking exception is probably based to some extent on an old idea of torture and inhuman or degrading treatment, one that dates back to forms of treatment carried out in medieval times (dislocation of a person's limbs by straining them by cords and levers on a rack, chaining detainees to a wall and depriving them of food and drink until they starve to death, and so forth). A quick view of the various instruments exhibited in the Museum of Torture at Prinsegracht at The Hague is enough to give us a clear idea of the forms this took in the past.

Today, however, in Europe we are no longer confronted with either these atrocious and extreme practices or with the modern, sophisticated but no less appalling methods obtaining in other continents – witness Amnesty International's reports. Allegations usually relate to more subtle and inconspicuous forms of ill-treatment: beating detainees on the head with telephone directories; hanging them by their wrists for short periods of time after padding the wrists; giving

electrical shocks for short periods of time with a low-intensity voltage; beating the soles of the feet with sticks, again for short periods of time; hosing naked detainees with pressurized cold water; beating prison inmates with rubber truncheons; and so on. The essential feature of these practices is that normally they do not leave any physical marks or scars. Often, officials are said to use a combination of various methods to break a detainee's will without leaving physical evidence of ill-treatment. In addition to these forms of 'trivial' or 'petty' torture, there is said to be frequent resort to sometimes unintentional forms of inhuman or degrading treatment, such as deprivation of medical care or treatment, very poor living conditions in prison cells, overcrowding coupled with poor sanitation, protracted solitary confinement and the like. These trends should be seen against their general historical and political background: at present a number of States feel that, in order to cope with the increasing criminality (often linked to terrorism and drug-trafficking), harsh methods of interrogation and detention may help both to achieve the required results quicker, and to produce markedly deterrent effects. This political philosophy, combined with the increased 'professionalism' of law enforcement officials, often results in a change in the modes of ill-treatment, which are now less dramatic, less conspicuous and less painful (at least at the physical level). If this is so, international law should adjust itself to these new developments. Since, as the Court rightly stated in the *Tyrer v. UK* case, the Convention is a *living instrument* which, as the Commission also stressed in dealing with the same case, must be interpreted in the light of present-day conditions, one fails to see why the Commission and the Court should not lower the threshold of Article 3, precisely to take account of these new manifestations of ill-treatment.

Fourth, a further consequence follows from the need – just referred to – to interpret the Convention in the light of present-day conditions. It is a fact that there is increasing opposition in the world, and in Europe in particular, to ill-treatment. As for Europe, tangible and official proof of this opposition can be seen in the adoption in 1987, by the Council of Europe, of the Convention for the prevention of torture and inhuman or degrading treatment or punishment, and the subsequent working of the Committee set up in this regard. The increased awareness about the adverse effects of ill-treatment means that public opinion and Governments alike have become more sensitive to the need to protect human dignity; it also means that they have become alert to classes of misconduct that previously went either unnoticed or were to some extent taken for granted.<sup>69</sup> *The area of unacceptable misbehaviour by State agencies has thus greatly*

<sup>69</sup> What is stated in the text does not of course imply that one should underrate the tension existing between the requirement that the prison be 'une maison de guérison,' as Clemenceau put it as early as 1906, and the claims by some segments of public opinion, and even some national authorities, that it should instead be a place where exemplary punishment is meted out under such harsh conditions as to deter future crime. On this tension see the apposite remarks by R. Badinter, *La prison républicaine* (Paris, Fayard 1992), pp. 387–92.

*broadened.* Important evidence of this new trend can also be found in decisions handed down by national courts, which pay increasing attention to precisely these new forms of ill-treatment.<sup>70</sup> If this is so, why should the Commission and the Court refrain from taking account of this increasing awareness and sensitivity when interpreting and applying Article 3? Taking a fresh look at Article 3 and placing a broader interpretation on its scope and purport can only be beneficial to human dignity and more conducive to a better implementation of the aims set out in the Preamble of the Convention.

#### VII. Possible Further Developments

It stands to reason that the Commission and the Court, which have already made so much headway in interpreting and applying Article 3, can easily strengthen and widen the scope of their case-law. This, in particular, can be achieved if they first of all avoid making decisions that offer no substantial reasoning, as has happened in some cases.<sup>71</sup> What is even more important, they should endeavour to do away with the element of 'intent' on the one hand, and to make use of the criterion of proportionality between proper terms of reference in the case of 'inhuman treat-

<sup>70</sup> By way of illustration, mention can be made of a number of recent decisions delivered by courts of some European States. Thus, for instance, various Spanish courts have applied Article 204 bis of the Spanish Penal Code prohibiting torture (this provision was introduced into the Penal Code in 1978; in 1989 a new paragraph 2 was added which provides a harsher penalty for some categories of torture). See for instance the following judgments of the Supreme Tribunal: 10 May 1985, in *Repertorio de Jurisprudencia* (1985), pp. 2098–90 (a police officer was sentenced to eleven years in prison for ill-treating a suspect, whose death he also accidentally caused after a scuffle); 5 July 1985, *ibid.*, pp. 3326–33 (some prison officers were sentenced to light penalties for beating a group of detainees on the occasion of their transfer to prison); 25 September 1989, *ibid.* (1989), pp. 7810–13 (police officers had allowed other, unidentified, police officers to cause injuries to a suspect in police custody, by making burns on the soles of his feet; they were sentenced to four months in prison plus suspension from service); 26 October 1989, *ibid.*, pp. 9019–20 (a prison officer was sentenced for placing a detainee in solitary confinement into a 'blind cell' which was unfit and was not to be used); 23 January 1990, *ibid.* (1990), p. 533 (a police officer caused injuries to a suspect during interrogation in order to obtain a confession; he was sentenced to one month and one day in prison); 24 February 1990, *ibid.*, pp. 2129–33 (a police officer was sentenced to a penalty of two months in prison and suspension from service for one year for causing injuries to a suspect); 23 April 1990, *ibid.*, pp. 4269–76 (police officers who had allowed other officers to cause injury to a suspect were sentenced to four months in prison; a fine; disqualification for six years, presumably from active and passive voting rights; and suspension from service for one month); 18 May 1990, *ibid.*, pp. 5475–77 (a police officer was sentenced for ill-treatment and threats against a person suspected of drug-trafficking).

<sup>71</sup> As a telling illustration of a regrettable lack of reasoning one may mention the *van Volven v. Belgium* case (Com. Dec. Adm. 9 May 1990, Application no. 14641/89, published in *2 Rev. Universelle des Droits de l'Homme* (1990), 384–85. See on this decision the comments by F. Sudre (*ibid.*, pp. 349–53) and C. Petriti (*Droit social* (1991), pp. 87–88), as well as my note in *2 European J. of Int. Law* (1991), pp. 141–45. Another illustration of a lack of reasoning can be found in the *Wilson and others v. UK* case (13 April 1989, Application no. 13004/87, unpublished), where some of the applicants complained about their conditions of detention on remand (they had been subjected to rigorous surveillance). The Commission confined itself to stating that the level of severity of the measures complained of did not attain the requisite level of severity, without spelling out why this was the case.

ment or punishment,' on the other (see discussion above). It would also be helpful if the Commission or the Court could spell out that the concept of 'degrading treatment or punishment' as envisaged by Article 3 does not require, as an indispensable element, a severe level of physical or mental suffering, and that humiliation and debasement may also consist in a state of anxiety which does not necessarily bring with it intense suffering (for instance, a prison inmate's being obliged, because of overcrowding and lack of sanitation, to comply with the needs of nature in the presence of other detainees in the same cell could be regarded as degrading, without there being any intense physical or mental suffering). Significant results can also be attained if the two bodies continue to use the criterion of the 'cumulative effect' of different factors which individually may appear to be below the requisite threshold, a criterion propounded by the Commission in the *Herczegfalvy v. Austria* case, as well as the presumption of ill-treatment set forth by the Commission in the *Tomasi v. France* case. It may well also prove very helpful if the Commission and the Court made greater use of the European Prison Rules, as a valuable set of standards which may help shed light on the applicability of Article 3.<sup>72</sup>

As for the areas where the two institutions might explore the possibility of applying Article 3, these include general socio-economic conditions, and health and living conditions in prisons (for instance, the impact of overcrowding and lack of sanitation on individual detainees, forced feeding of detainees on a hunger strike or of mentally impaired inmates, as well as extreme cases of such stringent measures as protracted and harsh solitary confinement). Furthermore, it may well be useful for the Commission and the Court to explore the possibility of applying Article 3 as much as possible to instances of ill-treatment inflicted by private groups (such as terrorist groups) when some sort of State responsibility is involved, for example, for failure to take adequate preventive measures.<sup>73</sup>

72 In some cases the Commission has already made reference to the Rules. Mention can be made of the *X v. FRG* case (11 July 1977, Application no. 7408/76, in Dec. 10, pp. 221-23). The applicant complained about the harshness of the disciplinary sanction to which he had been subjected. With regard to the applicability of Article 3 the Commission stated that 'in this respect ... [it] had regard to the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe Resolution 73-5) which forbid corporal punishment, detention in a dark cell, as well as brutal, inhuman and degrading punishment for disciplinary offences. These Rules reflect the efforts of the Council of Europe Member States generally to improve the conditions of prisoners and in this context the Commission notes with interest that under the revised version of the Prison Rules for Prisoners on Remand of 15 December 1976 the FRG has abolished the possibility of making the disciplinary detention more severe by hard bed and reduction of food' (*ibid.*, p. 222).

73 So far the Commission has already raised the eventuality of some sort of *Drittwirkung*. For instance, in the *G.M. v. FRG* case (14 May 1987, Application no. 12437/86, unpublished), the applicant complained that his expulsion to Lebanon involved serious dangers to his life, arising not from Government authorities but from 'autonomous groups.' The Commission recalled 'its previous case-law in which it left open the question whether, in examining a case of this kind from the standpoint of Art. 3, it may take into account an alleged danger arising not from public authorities, but from autonomous groups (see no. 8481/79, D.R. 29, p. 48).' It then

Certainly, in these and similar areas the Commission and the Court ought to tread warily, lest the delicate balance established by the Convention between States' requirements, on the one hand, and demands of human dignity on the other, should be jeopardized. The wisdom shown so far by these two institutions, however, bodes well for the future of the protection of human rights in Europe.

added that 'even assuming that in the present case an alleged danger arising from autonomous groups may be taken into account,' in any event the German authorities had issued an indefinite stay of execution for the applicant's expulsion. See also *X v. Switzerland*, Dec. of 1 October 1990, Application no. 14912/89, p. 5. It should be added that recently the Commission found that a Contracting State is bound under Article 1 of the Convention to prohibit corporal punishment contrary to Article 3 in independent schools: see *W. and J. Castello-Roberts v. The UK*, Dec. of 13 December 1990, Application no. 13134/87, pp. 6-7.

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