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New Court, New Thresholds, New Obligations

This chapter reviews the transformation of the norm against torture and inhuman or degrading treatment during the new Court by focusing on key moments and key obligations. In the earlier years of its tenure, the new Court issued a series of important rulings that fundamentally transformed the norm against torture and inhuman or degrading treatment. First, taking the living instrument principle introduced in *Tyrer* v. *the United Kingdom* to heart, the new Court began lowering the bar for what constituted a violation. In so doing, the new Court reversed the compromises that the old Court made, especially regarding the member states' national security concerns. This also meant that the new Court, compared to the old Court, had a drastically higher rate of finding states in violation, as explained in Chapter 3.

Second, unlike the old Court, the new Court also showed a willingness to recognise a series of novel claims – some of which were resource-intensive positive obligations and some concerned violations perpetrated by private actors. The reason the new Court could deviate from the practices of the old Court was that it could enjoy a wider discretionary space and therefore felt less compelled to offer trade-offs to states and resort to forbearance. When the new Court took over, this prohibition began to cover a wide range of new obligations. These included, for example, offering a legal remedy to the victims of domestic violence and child abuse or providing sufficient medical care to inmates, elderly care patients, and detained irregular migrants.[1] This chapter lists the achievements of the new Court, and it highlights how its approach differs from the stand taken by the old Court.

[1] For a comprehensive account of the doctrinal developments under Article 3, see Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford and New York: Hart Publishing, 2021); Laurens Lavrysen and Natasa Mavronicola, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (London: Hart Publishing, 2020).

Lowered Thresholds for Torture

While the old Court used the living instrument principle only twice in the context of Article 3, the new Court resorted to the living instrument principle immediately after its inception in the 1999 *Selmouni* v. *France* judgment. Ahmed Selmouni brought up this case and complained that he had been tortured while in police custody. The French government objected to this characterization, arguing that similar acts had not been considered torture in previous case law. They referred specifically to *Ireland* v. *the United Kingdom,* in which, as we have seen in Chapter 4, the old Court declared specific intense interrogation methods were inhuman and degrading treatment – but not torture.[2] The Court found that Selmouni suffered various forms of ill-treatment that caused him physical and mental pain and suffering, characterizing this treatment as torture because the mistreatment was *intentional* for the purpose of extracting a confession.[3] In response to the French objection, the Court declared that certain acts that had been defined as *inhuman and degrading treatment* in the past could be defined as *torture* in the future, emphasizing the need for increasingly high standards when reviewing claims about breaches of fundamental rights.[4]

This progressive spirit did not end with *Selmouni*. The Court continued to lower the thresholds for torture when interpreting Article 3 in the years that followed. For example, in 2005, in *Nevmerzhitsky* v. *Ukraine*, the Court decided not to focus solely on the intent of the perpetrators when classifying an act as torture. It found that force-feeding an inmate on hunger strike amounts to torture based on the severity of the treatment and the suffering it caused and not on whether the government had intended to inflict the pain.[5] The Ukrainian government had not been able to demonstrate that its force-feeding of Nevmerzhitsky was medically necessary, but it was also clear that they had not force-fed the inmate for the purpose of extracting information or a confession either.[6] Setting aside the issue of

[2] The case concerned the treatment of detainees linked to the Irish Republican Army (IRA) in Northern Ireland. The allegations included the "five techniques": wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drinks. The Court found that these acts amounted to only inhuman and degrading treatment in 1978.

[3] *Selmouni* v. *France*, application no. 25803/94, ECHR[GC] (July 28, 1999) §98.

[4] *Selmouni* v. *France,* §101.

[5] In response to the applicant's resistance, he was handcuffed and forced to swallow the tube to transfer food. *Nevmerzhitsky* v. *Ukraine,* application no. 54825/00, ECHR (April 5, 2005) §90.

[6] Ibid., §96.

whether the suffering caused was intentional or not, the Court decided the treatment constituted torture.

The standard used in *Nevmerzhitsky* was very different from what had been established not only in prior jurisprudence, but also in the definition of torture under the Convention against Torture (CAT). The intentionality of the treatment to extract information or to punish had consistently been considered the decisive element in identifying torture.[7] So, why did the Court suddenly relax this standard in *Nevmerzhitsky*? An experienced judge, whom I interviewed at the Court, explained to me that proving intent is difficult, but such difficulty should not disqualify the complaint. Although a clear intention will always be a decisive factor, when it is difficult to establish, then the Court's decision will turn on the severity of the treatment.[8] The introduction of this new twofold standard enabled the new Court to classify *Nevmerzhitsky* as torture. It was an audacious move, and afterward, more and more violent acts could be characterised as torture whether or not the intent was proven.[9]

Lowered Thresholds for Inhuman or Degrading Treatment

The definitions of what constitutes inhuman or degrading treatment also substantially changed in the late 1990s.[10] One of the most telling examples of this transformation is the changing view around whether unacceptable detention conditions constitute a form of inhuman or degrading treatment. As Antonio Cassese explains, "the conditions of prison detention," including solitary confinement, deficiencies in medical treatment of detainees, or life imprisonment, were not initially considered Article 3 violations.[11] With the exception of the *Greek Case*, where the Commission found unacceptable detention conditions to be a violation, complaints in relation to detention conditions or intrusive detention measures were

[7] For a comprehensive doctrinal assessment of the definition of torture, see Ergün Cakal, "Assessing (and Making Sense of) Severity: Conceptualising and Contextualising Torture's Core," *Nordic Journal of International Law* 91, no. 2 (2022): 284–309.

[8] Interview 8.

[9] Manfred Nowak and Elizabeth McArthur, "The Distinction between Torture and Cruel, Inhuman and Degrading Treatment," *Torture* 16, no. 3 (2006): 150.

[10] For an assessment of the Court's approach to vulnerability, see Corina Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Oxford: Hart Publishing, 2021).

[11] Antonio Cassese, "The Prohibition on Torture and Inhuman or Degrading Treatment or Punishment," in *Human Dimension of International Law: Selected Papers of Antonio Cassese*, ed. Paola Gaeta and Salvatore Zappala (New York: Oxford University Press, 2008), 302.

disregarded during the time of the old Court. This hesitation was mostly because ensuring acceptable detention conditions, a form of positive obligation, was resource-intensive. It required states to dedicate funds to improve the living conditions in detention centres. In that sense, the obligation to provide acceptable detention conditions had a resemblance to those deriving from social and economic rights, which called for states to take progressive measures to guarantee the enjoyment of rights.

The old Court did not view Convention rights through the lens of positive obligations at the time. It had a quite limited view of what constituted inhuman or degrading treatment. For example, in *B.* v. *the United Kingdom* (1981), the applicant complained about his detention conditions in Broadmoor Hospital, where he had been receiving medical treatment for paranoid schizophrenia. Specifically, he claimed that the cells were overcrowded, they lacked adequate sanitary facilities, and that he had no privacy.[12] He expressed a constant fear of being attacked by other patients due to the lack of privacy and overcrowding.[13] Upon reviewing the evidence presented, the Commission dismissed the applicant's allegations. The Commission found them "exaggerations" and argued as follows:

> 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.* (…)
>
> 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

[12] *B.* v. *the United Kingdom*, application no. 6870/75, European Commission of Human Rights (October 7, 1981) §5. The rest of the complaint under Article 3 concerned the applicant's employment and the medical treatment that he went through.

[13] *B.* v. *the United Kingdom,* § 174.

> 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.*[14]

Brushing off the allegations in this manner, the Commission concluded that the facilities' conditions were "extremely unsatisfactory," but did not find a violation.[15]

Let us examine the way in which the Commission constructed its reasoning in *B.* v. *the United Kingdom*. First, the Commission did not fully engage with how the conditions affected the psychology of the applicant, who was already suffering from a mental condition. In so doing, it downplayed his legitimate complaints. Second, the Commission found it sufficient that the applicant was moved to a single room by the time of the official visit of the delegation, although he had to struggle in an overcrowded cell for two and a half years before the move.[16] Cassese rightfully criticises this decision, arguing that the applicant's relocation to the single room at the time of the official visit could "in no way reduce the importance of, let alone cancel, the previous conditions of overcrowding."[17] He then adds, "[o]ne 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."[18] As Cassese observes, the decision was evasive in that the Commission simply avoided addressing whether unacceptable detention conditions could violate Article 3. The dissenting opinion of Commissioners Opsahl and Tenekides reflected the shape of things to come. They proposed that "there are no watertight distinctions between social and civil rights" and "a modern welfare state cannot use compulsion in social and mental care – or crime control – without at the same time taking the responsibility for a sufficient follow-up."[19] They argued further

[14] (Emphasis added) *B.* v. *the United Kingdom*, § 175–78.
[15] Ibid., § 180.
[16] Cassese, "The Prohibition on Torture and Inhuman or Degrading Treatment or Punishment," 304.
[17] Ibid.
[18] Ibid.
[19] *B.* v. *the United Kingdom* (Mr. Opsahl and Mr. Tenekides, dissenting opinion).

that the detainee's rights "to live in acceptable conditions and be treated for illness" could fall under Article 3.[20]

The vision the Commissioners Opsahl and Tenekides expressed in 1981 would be fully realised twenty years later when the Court issued the *Dougoz* v. *Greece* judgment.[21] The applicant, a refugee awaiting expulsion from Greece due to drug-related offences, complained about his detention conditions. He claimed that his cell was overcrowded to the point that some detainees had to sleep in the corridor and that they were not given beds or mattresses. He further argued that the cell was unhygienic and lacked sufficient sanitary facilities, natural light, and fresh air.[22]

This complaint was received differently from *B.* v. *United Kingdom* in a number of ways. First, the Court granted credibility to the applicant's claim. It emphasised that the government did not deny his allegations concerning the lack of beds and bedding.[23] Second, referring to the *Greek Case*, the Court argued, "conditions of detention may sometimes amount to inhuman or degrading treatment."[24] Third, the Court relied on the European Committee for the Prevention of Torture (CPT) reports concerning the detention centres at issue. These reports highlighted that "the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling."[25] Finally, the Court concluded that the detention conditions, particularly "the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions" are in violation of Article 3.[26]

In *Dougoz,* the Court established that condemning detainees to live in unacceptable conditions could amount to degrading treatment. In doing so, it effectively expanded the scope of Article 3. More symbolically, this decision showed how the minimum threshold of severity required to invoke Article 3 had decreased over time. Issues that the Commission did not consider to be serious enough in *B* v. *the United Kingdom* were viewed as constituting degrading treatment twenty years later in *Dougoz*.

[20] Ibid.
[21] *Dougoz* v. *Greece*, application no. 40907/98, ECHR (March 6, 2001).
[22] Ibid., §20.
[23] Ibid., §45.
[24] Ibid., §46.
[25] Ibid.
[26] Ibid., §48.

This trend, surely, is not isolated or limited to the norm against torture and inhuman or degrading treatment. Several other scholars have noted a tendency to apply higher standards over time for human rights in general. Margaret Keck and Kathryn Sikkink, for example, describe this phenomenon as "raising the bar,"[27] while Christopher J. Fariss refers to it as "the changing standard of accountability."[28] In essence, all refer to the same phenomenon: Courts and other human rights institutions have applied increasingly higher standards when assessing human rights violations. But as we see in this book, this trend might have occasional slowdowns or even reversals.

Against the Ticking Time Bomb Scenario: The Prohibition of Torture Is Absolute

To conclude the story about lowering thresholds, I now turn to one last important case, which reversed the compromise that had been made in *Ireland* v. *the United Kingdom* and underscored the absolute nature of the prohibition against torture: *Gäfgen* v. *Germany*. Issued only one year after the decision concerning Nahide (*Opuz* v. *Turkey*), *Gäfgen* certainly shares its forward-looking vision. While in Nahide's case, the Court audaciously found Turkey in violation for not taking measures to protect her from her abusive husband, in *Gäfgen,* the Court found that even threatening a suspect with torture is a form of inhuman treatment. These two decisions shook the prior understandings around the prohibition of torture. While the former reaffirmed that states could be held accountable for violations committed by private actors, the latter certified that torture can never be justified.

Gäfgen v. *Germany (2010)*

> In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law, the prohibition on ill treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk.
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> (*Gäfgen* v. *Germany,* application no. 22978/05, ECHR[GC] (June 1, 2010), §107)

[27] Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998).

[28] Christopher J. Fariss, "Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability," *American Political Science Review* 108, no. 2 (2014): 297–318.

Only three years after the new Court's creation in 1998, the world would be shaken by the terrorist attacks of September 11, 2001. Amid the anxiety that arose after 9/11, the new Court – just like the old Court – was called to strike a balance between protecting rights and respecting national security laws and measures. European societies, in full solidarity with the United States, condemned the terrorist attacks. This solidarity was perhaps most famously expressed in *Le Monde*'s headline, "We are all Americans now."[29] European countries were quick in identifying transnational terrorism as a threat to international security, but they did not feel as threatened as the Americans, whose national psyche was scarred by 9/11.[30] It was only after the Madrid train bombings of 2004 and the London attacks of 2005 that Europe's vulnerability became clear too.[31] Realizing that the threat could lie well within the borders of Europe, Europeans took measures at both the national and the EU levels.[32] Several European states developed counter-terrorism strategies, including intrusive anti-terror laws and stringent border control regimes that monitor migratory networks.[33] The EU mirrored these policies. Europol (the law enforcement body of the EU) increased its authority,[34] and FRONTEX (a new border management agency that monitors migration and external borders) was established in 2004.[35]

In addition, there was a series of attempts to declare emergency laws.[36] For example, under the Anti-Terrorism, Crime and Security Act of 2001, the United Kingdom requested derogation from its obligations under

[29] Karin Von Hippel, "Introduction: Europe Confronts Terrorism," in *Europe Confronts Terrorism*, ed. Karin Von Hippel (Basingstoke and New York: Palgrave Macmillan, 2005), 1.

[30] Vinca LaFleur, "A View from America: Tactical Unity, Strategic Divide," in *Europe Confronts Terrorism*, ed. Karin Von Hippel (Basingstoke and New York: Palgrave Macmillan, 2005), 196.

[31] Von Hippel, "Introduction: Europe Confronts Terrorism," 4.

[32] Jörg Monar, "Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and Its Problems," *Government and Opposition* 42, no. 3 (2007): 296; Doron Zimmermann, "The European Union and Post-9/11 Counterterrorism: A Reappraisal," *Studies in Conflict and Terrorism* 29, no. 2 (2006): 139.

[33] Peter Mandaville, "Muslim Transnational Identity and State Responses in Europe and the UK after 9/11: Political Community, Ideology and Authority," *Journal of Ethnic and Migration Studies* 35, no. 3 (2009): 503.

[34] Coolsaet Rik, "EU Counterterrorism Strategy: Value Added or Chimera?," *International Affairs* 86, no. 4 (2010): 862.

[35] Neal Andrew W., "Securitization and Risk at the EU Border: The Origins of FRONTEX," *JCMS: Journal of Common Market Studies* 47, no. 2 (2009): 338–43.

[36] This picture changed in 2015 following a series of terror attacks, which targeted France in particular and resulted in the deaths of 148 people. In January 2015, gunmen affiliated with Al-Qaeda attacked the offices of the satirical magazine Charlie Hebdo and a Jewish kosher

Article 5 of the Convention (which provides protection against arbitrary detention or imprisonment without a fair trial), claiming that there was a "public emergency threatening the life of the nation."[37] However, in 2005, after the House of Lords found the "indefinite administrative detention of foreign national terrorism suspects to be incompatible with the Convention" (*Belmarsh* case), the government withdrew its derogation claim.[38] Other anti-terror laws introduced in several other European countries have restricted freedom of assembly, the right to liberty and security, and the right to privacy – sometimes targeting specific national, ethnic, and religious groups.[39]

In this new context, the work of domestic courts and the European Court has become even more essential. They have assumed the important mission of holding the line against excesses of executive and legislative branches in the fight against terrorism.[40] Fully aware of this responsibility, the Court has taken on the daunting task of carefully balancing the member states' security interests with its mandate to uphold the Convention principles. *Gäfgen* v. *Germany* serves as an expression of this determination. In *Gäfgen,* the Court established that even threatening to torture a suspect may amount to a violation under Article 3.[41] Although *Gäfgen* is not perfectly emblematic of complaints arising from the fight against terrorism, it helped to flesh out the principles that can be applied to them.

store. Then on November 13, 2015, a group of terrorists affiliated with the so-called Islamic State of Iraq and Syria (ISIS) carried out a coordinated attack in Paris, killing 130 people. While suicide bombers carried out an attack at the Stade de France stadium, heavily armed men simultaneously opened fire at the Bataclan concert hall and several restaurants and bars. These attacks elevated the threat perception in France and beyond. On November 14, Francois Hollande, former President of France, described the attacks as an "act of war" and declared a state of emergency, which remained in force until November 1, 2017.

[37] Joint Committee on Human Rights (House of Lords, House of Commons), "Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In – Human Rights Joint Committee" (London, March 25, 2010), https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/86/8607.htm.

[38] Joint Committee on Human Rights (House of Lords, House of Commons), §25.

[39] Daniel Moeckli, *Human Rights and Non-Discrimination in the "War on Terror"* (Oxford and New York: Oxford University Press, 2008).

[40] Colin Warbrick, "The European Response to Terrorism in an Age of Human Rights," *European Journal of International Law* 15, no. 5 (2004): 1017.

[41] Steven Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?," *Human Rights Law Review* 15, no. 1 (2015): 101; Stijn Smet, "Conflicts between Absolute Rights: A Reply to Steven Greer," *Human Rights Law Review* 13, no. 3 (2013): 496; Natasa Mavronicola, "Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer," *Human Rights Law Review* 17, no. 3 (2017): 481; 489.

Magnus Gäfgen complained about the ill-treatment he suffered while being interrogated about a boy he had kidnapped. At the time of the interrogation, neither the police nor the boy's family knew that the applicant had already killed the boy. In order to extract information about the boy's whereabouts without resorting to physical force, police threatened the applicant. Following a ten-minute interrogation under the threat of ill-treatment, he disclosed the information that the interrogators sought. According to the Court, this constituted a violation of Article 3. The threat of torture was the decisive factor in this decision. The applicant, who had previously refused to reveal any information, did so only following the interrogators' threats. The Court reasoned thus: "the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish, and mental suffering."[42] It noted that the use of threat was not "a spontaneous act but was premeditated and calculated in a deliberate and intentional manner."[43] The Court, therefore, deemed this experience as having amounted to inhuman treatment.[44]

By doing so, the Court underlined that even in circumstances where the lives of persons are at risk, ill-treatment could not be justified.[45] The Court emphasised that "the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities."[46] What is also interesting to note is that the Court reached this conclusion even without requiring a medical report showing the long-term impact on the applicant. The message was loud and clear: the prohibition of torture is absolute.[47] This approach effectively contradicted

[42] *Gäfgen* v. *Germany*, application no. 22978/05, ECHR[GC] (June 1, 2010), §103.
[43] Ibid., § 104.
[44] Ibid., § 108.
[45] Ibid., § 107.
[46] Ibid.
[47] The principle that the prohibition of torture is absolute, regardless of the victim's conduct, was first iterated in *Chahal* v. *the United Kingdom,* application no. 22414/93, ECHR[GC] (November 15, 1996). It should be noted, however, that the true nature of this absoluteness has been subject to a debate today – known as *the Gäfgen debate*. According to Steven Greer, when evaluating the Gäfgen case, the Court neglected the real victim's (the child who was abducted) right not to be tortured. He further underlines that the state also had an obligation to protect the boy from being tortured and murdered by Mr Gäfgen. In doing so, Greer points to a conflict between two absolute rights. Therefore, he finds the requirement that no exception to this prohibition "can be accepted, defended, justified, or tolerated in any circumstances whatever," problematic. To resolve this moral dilemma, Stijn Smet proposes the following: in such cases of conflict between absolute rights, a negative right (the right to be free from torture) should outweigh a positive right (the right

the arguments for necessity invoked to justify pressuring a (terror) suspect in order to extract information to save others in "ticking bomb" like scenarios.[48] It also reversed the *Ireland* v. *the United Kingdom* compromise by underlining the prohibition of torture is absolute, and it cannot be taken lightly or justified even for the purpose of saving lives or in the name of national security.

The Dawn of Positive Obligations

Nearly a decade before acknowledging the Turkish government's obligation to protect Nahide from her abusive husband, the Court began laying down other positive obligations that enhance the protections offered under the prohibition of torture and ill-treatment. The innovation of positive obligations is an example of sudden change because they entered the picture in the late 1990s within a short span of time and in rapid succession. As we may remember from Chapter 1, there are five main positive obligations identified.[49] These are the obligations to provide legal protection and remedy, to inform the relatives of disappeared persons, to provide acceptable detention conditions, to provide necessary medical care, and to carry out effective investigations.

Although these obligations are wide-ranging in coverage, they have some common denominators. That is to say, the Court embraced positive obligations that share one of two characteristics: either they are semantically linked to the prohibition of torture and ill-treatment, or they have an auxiliary value – strengthening the degree of protection Article 3 provides.

First, these obligations are logically linked to the prohibition's core meaning (i.e., its central concern).[50] In the case of the norm against torture,

to be protected from torture perpetrated by state agents or private parties). Moreover, Natasa Mavronicola argues that the absoluteness of the prohibition refers to its "legal non-displaceability" and not the fact that there cannot be any "circumstances in which some might defend or even tolerate torture [and inhuman or degrading treatment]." Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?," 101; Stijn Smet, "Conflicts between Absolute Rights," 496; Mavronicola, "Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law?," 481.

[48] For a comprehensive assessment of this argument, see Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture* (Chicago: The University of Chicago Press, 2012).

[49] There are also two unsuccessful obligations: the obligation to facilitate euthanasia and the obligation to provide a healthy environment.

[50] For a discussion on a norm's core meanings, see Nicole Deitelhoff and Lisbeth Zimmermann, "Things We Lost in the Fire: How Different Types of Contestation Affect

this is the victim's mental or physical suffering or impaired dignity. This is no surprise, because this prohibition was initially only concerned with the pain and suffering caused by the treatment or punishment of prisoners, criminals, or terrorist suspects in detention. This reference was kept for positive obligations, too. This is how, for example, the Court established Nahide's victimhood in *Opuz* v. *Turkey*. In *Opuz*, the victim's case was argued as follows: "[the victim] had been subjected to violence, injury, and death threats several times but the authorities were negligent towards her situation, which caused her *pain and fear*."[51] The decision centred on the pain she had to endure due to the authorities' negligence. That is, Nahide's treatment could be categorised as a form of inhuman or degrading treatment based on the pain and suffering that the government's *inaction* generated.

As a matter of fact, the Court employed a similar logic when recognizing negative obligations that are not traditionally associated with the prohibition of torture. For example, the Court began considering the destruction of property, homes, or livelihood under Article 3 using a similar logic. This issue was brought to the Court's attention in the context of the Kurdish conflict in Turkey in the 1990s. The Court found the Turkish security forces' destruction of homes and property – as a counterterrorism tactic – a violation in *Selçuk and Asker* v. *Turkey* in 1998 for the first time.[52] Ordinarily, destruction of homes or property would not be associated with Article 3, but with Article 8 (right to respect for private and family life), or Article 1 of Protocol 1 (protection of property). However, the Court began acknowledging the destruction of homes and livelihood as Article 3 violations, not due to the actual loss of property, but rather due to the destruction's effect on the victim's psychology and the extreme distress and hardship it generates.

Second, in addition to appealing to the core meaning, another trait that positive obligations share is their auxiliary protection value. This is how procedural obligations are created and justified, for example. The Court first recognised states' procedural obligations under Article 3 in *Assenov and Others* v. *Bulgaria* in 1998.[53] The case concerns the

the Robustness of International Norms," *International Studies Review* 22, no. 1 (2020): 51–76; Nicole Deitelhoff and Lisbeth Zimmermann, "Norms under Challenge: Unpacking the Dynamics of Norm Robustness," *Journal of Global Security Studies* 4, no. 1 (2019): 2–17.

[51] *Opuz* v. *Turkey*, application no. 33401/02, ECHR (June 9, 2009) § 154.

[52] *Selçuk and Asker* v. *Turkey,* application no. 12/1997/796/998–999, ECHR (April 24, 1998).

[53] *Assenov and Others* v. *Bulgaria,* application no. 90/1997/874/1086, ECHR (October 28, 1998).

Bulgarian police's ill-treatment of Anton Assenov, a teenage boy of Roma origin.[54] The Assenov family complained both about Anton's ill-treatment and the domestic authorities' failure to carry out a prompt and impartial investigation. Upon reviewing the complaint, the Court could not find sufficient evidence to ensure the injuries Anton sustained were due to police violence, but it did not stop there. Instead of dismissing Anton's complaint, the Court found the Bulgarian government in violation for not carrying out an effective investigation.[55] Specifically, it argued that Articles 1 and 3, read together, would require "by implication that there should be an effective official investigation. (…) If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."[56] Hence, the Court emphasised that the prohibition of torture and ill-treatment cannot be fully realised without effective investigations and that procedural obligations offer a supplementary layer of protection.

While the Court laid out the legal foundations of procedural obligations under Article 3 in *Assenov*, consolidating this obligation was not necessarily a straightforward affair. Two years after *Assenov*, the Court retreated from its strong position in that case. In *Ilhan* v. *Turkey* (2000), it proposed that finding a procedural violation under Article 2 (right to life) would be justified as the provision entails the obligation to protect the right to life.[57] Nevertheless, this would not always be the case for Article 3, the Court argued. Since Article 3 is defined in substantive terms, it would not include an innate procedural obligation. The Court then qualified this statement, arguing that it may find a procedural breach if the circumstances require it.[58] To back up its argument, the Court pointed out that there is already a separate article concerning effective remedy in the Convention, Article 13.[59] According to Article 13, "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the

[54] *Assenov and Others* v. *Bulgaria,* §8–10.
[55] Ibid., §106.
[56] Ibid., §102.
[57] *Ilhan* v. *Turkey,* application no. 22277/93, ECHR [GC] (June 27, 2000).
[58] *Ilhan* v. *Turkey,* §92.
[59] Ibid.

violation has been committed by persons acting in an official capacity." Victims could seek redress and procedural safeguards relying on this article, the Court argued, and it showed its hesitation to establish procedural obligations under Article 3 in *Ilhan*.[60]

This position had supporters. For example, the former British Judge Nicholas Bratza was an ardent critic of establishing separate procedural obligations under Article 3. In his separate opinion in *Poltoratskiy* v. *Ukraine,* Judge Bratza supported the reasoning presented in *Ilhan.* He stated that the complaint concerning effective investigations should have been examined under Article 13 instead of "the so-called 'procedural aspects' of Article 3."[61] Similarly, in *Kuznetsov* v. *Ukraine* (2003), Judge Bratza dissented and expressed that "[his] preference would have been to examine the complaint concerning the lack of effective official investigation into the applicant's allegations of ill-treatment under Article 13 of the Convention instead of Article 3."[62] As Judge Bratza emphasised in his dissenting opinions, addressing states' procedural obligations was a matter of preference at the time.

The Court thus initially oscillated between reviewing procedural violations under Article 3 and declining to do so, instead referring to Article 13. For example, in *Çakıcı* v. *Turkey* (1999), the Court found it would not be necessary to find a separate procedural violation under Article 3, as the alleged deficiencies in the investigation would be covered under Article 13.[63] Yet, in *Labita* v. *Italy*, it followed the *Assenov* line of reasoning and decided that there was a procedural breach due to the ineffectiveness of the investigation conducted.[64] After a series of inconsistent decisions, the Court settled on the existence of procedural obligations in Article 3 and gave them more recognition by coining the phrase "the procedural limb of Article 3."[65] Subsequently, a new

[60] Ibid., §92.

[61] *Poltoratskiy* v. *Ukraine,* application no. 38812/97, ECHR (April 29, 2003), (Nicholas Bratza, separate opinion).

[62] *Kuznetsov* v. *Ukraine*, application no. 39042/97, ECHR (April 29, 2003), (Nicholas Bratza, partly dissenting opinion).

[63] *Çakıcı* v. *Turkey,* application no. 23657/94, ECHR[GC] (July 8, 1999) §93. See also *Berktay c. Turquie*, application no. 22493/93, ECHR (March 1, 2001); *Denizci and Others* v. *Cyprus*, application nos. 25316–25321/94 and 27207/95, ECHR (May 23, 2001);

[64] *Labita* v. *Italy*, application no. 26772/95, ECHR[GC] (April 6, 2000) §133–136. See also *Sevtap Veznedaroglu* v. *Turkey*, application no. 32357/96, ECHR (April 11, 2000); *Dikme* v. *Turkey*, application no. 20869/92, ECHR (July 11, 2000).

[65] The practice of looking into a "procedural limb" under Article 3 was first introduced in the following cases: *Balogh* v. *Hungry*, application no. 47940/99, ECHR (July 20, 2004);

practice of looking at the violations under both *substantive* and *procedural* limbs of Article 3 began.[66]

This is to say, procedural obligations under Article 3 were first recognised in 1998 and consolidated around the mid-2000s in a relatively swift manner. Today procedural obligations are no longer questioned. Moreover, the Court referred to procedural obligations, and in particular, the duty to investigate, as a type of "detachable obligation" that is "capable of binding" states separately.[67] It appears that states' procedural obligations are on their way to turning into autonomous obligations separate from the substantive elements under Article 3,[68] and they are widely invoked, as we saw in Chapter 3. They are the single most invoked obligations under Article 3, to be exact.

Procedural obligations were, of course, not the only example of positive obligations. All in the same year, 1998, the Court recognised the obligation to provide legal protection in *A* v. *the United Kingdom* (a case concerning domestic abuse of a minor);[69] the obligation to inform the family

Khashiyev and Akayeva v. *Russia*, application nos. 57942/00 and 57945/00, ECHR (February 24, 2005); *Akkum and Others* v. *Turkey*, application no. 21894/93, ECHR (March 24, 2005); *Süheyla Aydin* v. *Turkey*, application no. 25660/94, ECHR (May 24, 2005). The phrase was used for the first time in a partly dissenting opinion written by Judges Rozakis, Bonello, and Straznicka in *Calvelli and Ciglio* v. *Italy* (2002). There, the dissenting judges referred to the "procedural limb of the protection of the right to life." Therefore, the term first was first employed in the context of Article 2 and then travelled to Article 3, in *Balogh* v. *Hungary* (2004), where the Court referred to the procedural limb of Article 3 for the first time.

[66] See, for example, *Bekos and Koutropoulos* v. *Greece,* application no. 15250/02, ECHR (December 13, 2005); *Danelia* v. *Georgia*, application no. 68622/01, ECHR (October 17, 2006); *Affaire Melinte c. Roumanie,* application no. 43247/02, ECHR (November 9, 2006); *Akpinar and Altun* v. *Turkey*, application no. 56760/00, ECHR (February 27, 2007); *Gök and Güler* v. *Turkey,* application no. 74307/01, ECHR (July 28, 2009); *Premininy* v. *Russia,* application no. 44973/04, ECHR (February 10, 2011).

[67] While this characterization concern only Article 2 (right to life), it has implications for Article 3 claims. *Varnava and Others* v. *Turkey*, application nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, ECHR[GC] (September 18, 2009), §138. This issue was first raised in *Šilih* v. *Slovenia*, application no. 71463/01, ECHR[GC] (April 9, 2009) §159. This same logic was applied in *Association 21 December 1989 and Others* v. *Romania,* application no. 33810/07, ECHR (May 24, 2011), where the Court established that "although [procedural obligation] is triggered by the acts concerning the substantive aspects of Article 2, it can give rise to a finding of a separate and independent 'interference'" (§116).

[68] *Šilih* v. *Slovenia* (Joint Dissenting Opinion of Judge Bratza and Türmen), §9. See also Lucy Colter and Can Yeginsu, "Inquests and the 'Detachable' Article 2 Obligation: In Re McCaughey," *Judicial Review* 16, no. 3 (2011): 293.

[69] *A* v. *the United Kingdom,* application no. 100/1997/884/1096, ECHR (September 23, 1998).

of disappeared persons in *Kurt* v. *Turkey* (a case concerning an enforced disappearance);[70] and the obligation to refrain from destroying home and property for the first time in *Selçuk and Asker* v. *Turkey* (a case concerning counterterrorism operation in the southeast of Turkey).[71] As epitomes of sudden change, these positive obligations assumed a taken-for-granted status not long after their initial acknowledgement.[72]

Limits of Progress under the New Court

This rapid, progressive jurisprudential trend had its limits, too. For example, one area in which the Court showed inhibition was to recognise the systematic nature of some discriminatory policies that violate Article 3, as I have argued elsewhere.[73] While the Court was willing to recognise that isolated instances of discrimination against minorities may amount to a violation of Article 3, it was less willing to accept the systemic nature of targeted discriminatory policies or the racial motivations behind gross human rights violations.[74] For example, in *Ahmet Özkan and Others* v. *Turkey*, a case concerning Turkish forces' raid on a remote village in the southeast of Turkey and the treatment of detained villagers, the Court found that the Turkish government violated Article 3.[75] However, the Court declined to consider the punitive purposes of this operation and its targeted nature.

Similarly, in *Anguelova* v. *Bulgaria,*[76] a case concerning the ill-treatment of a person of Roma origins and failure to provide them with an effective remedy,[77] the Court did not situate this individual incident in "the broader

[70] *Kurt* v. *Turkey*, application no. 15/1997/799/1002, ECHR (May 25, 1998).
[71] *Selçuk and Asker* v. *Turkey*.
[72] One year before, the European Commission confirmed the states' obligation to provide medical care in *P.M* v. *Hungary* (a case concerning the treatment of a life-sentence prisoner). *P.M.* v. *Hungary*, application no. 23636/94, European Commission of Human Rights (September 9, 1998).
[73] Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," *European Journal of International Law* 31, no. 1 (August 7, 2020): 86. This was also revealed in an interview with a lawyer who brought cases before the European Court. Interview 35.
[74] Dia Anagnostou, "The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities," in *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, ed. Dia Anagnostou and Evangelia Psychogiopoulou (Leiden, Boston: Brill Nijhoff, 2010), 1–26.
[75] *Ahmet Özkan and Others* v. *Turkey*, application no. 21689/93, ECHR (April 6, 2004).
[76] *Anguelova* v. *Bulgaria,* application no. 38361/97, ECHR (June 13, 2002).
[77] Ibid., §3.

context of systematic racism and hostility which law-enforcement bodies in Bulgaria had repeatedly displayed," as the applicant requested.[78] This decision, however, sparked one of the sharpest dissenting opinions of the Convention system's history. Judge Bonello came down on the majority decision, with which he partly disagreed:

> I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim. Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion.
>
> Frequently and regularly, the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.[79]

In *Nachova and Others* v. *Bulgaria,*[80] the next case complaining about police violence against the Roma, the Court once again faced the question of whether the alleged acts were motivated by racist attitudes toward the Roma.[81] This time, the applicants complained that military police shot and killed their relatives, and they brought a witness statement confirming that one of the officers shouted, "You damn Gypsies" at the victims.[82] The European Roma Rights Centre (ERRC), Interights, and the Open Society Justice Initiative (OSJI) intervened as third parties on the side of the applicants.[83] They made the case for shifting the burden of proof to

[78] Ibid., §164.
[79] Ibid. (Partly dissenting opinion of Judge Bonnello), §2–3.
[80] *Nachova and Others* v. *Bulgaria,* application no. 43577/98 and 43579/98, ECHR[GC] (July 6, 2005).
[81] Ibid., §2.
[82] Ibid., §153.
[83] Ibid., §138–43.

the responding government and criticised the Court's strict standards when reviewing claims concerning systemic racism.[84] Regardless, the Court found that the "statement is in itself an insufficient basis for concluding that the respondent State is liable for a racist killing."[85] It further added that "[i]t is true that a number of organizations, including intergovernmental bodies, have expressed concern regarding the occurrence of such incidents. However, the Court cannot lose sight of the fact that its sole concern is to ascertain whether in the case at hand the killing of [the victims] was motivated by racism."[86] Finally, the Court held that it was not possible to establish whether "racist attitudes" were a factor in the alleged acts and, therefore, could not find a substantive violation.[87] But it found a procedural violation and delegated the responsibility of establishing racist motivations behind "hate-induced violations" to the national authorities.[88]

The Court's reluctance to acknowledge the racial dimension behind the complaints related to police violence against the Roma came to a halt in *Stoica* v. *Romania*, where the Court found the imposition of discriminatory measures constituted a violation of Article 3 in conjunction with Article 14 (protection from discrimination).[89] The case was represented by the ERRC and the Roma Center for Social Intervention and Studies ("the Romani CRISS").[90] The applicant, who was of Roma origin, came with a similar complaint – namely, ill-treatment by the police and the failure to investigate his allegations. The applicant also claimed that "the impugned events and the flaws in the investigation had been motivated by racial prejudice," relying on Article 3 in conjunction with Article 14.[91]

Seeing the persistent attempts of the victims and the civil society organizations,[92] the Court followed a different approach in this case. It found the responding government in violation after making a strong statement on racial violence and states' responsibility to fight racism:

[84] Ibid., §140–41.
[85] Ibid., §153.
[86] Ibid., §155.
[87] Ibid., §158.
[88] Ibid., §164.
[89] *Stoica* v. *Romania,* application no. 42722/02, ECHR (March 4, 2008).
[90] Ibid., §2.
[91] Ibid., §3.
[92] James A. Goldston, "The Struggle for Roma Rights: Arguments That Have Worked," *Human Rights Quarterly* 32, no. 2 (2010): 311–25; James A. Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges," *Human Rights Quarterly* 28, no. 2 (2006): 492–527.

> Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.[93]

This achievement is a significant jurisprudential leap, yet it has not been a straightforward success story. What is more, *Stoica* is not the final word on the racist motivation behind discriminatory policies. There are other cases that have continued to test the Court's willingness to recognise the systematic nature of some discriminatory policies that are in violation of Article 3.[94] At the moment of writing this book, this topic has not been fully resolved within the European human rights regime.[95]

Conclusion

This chapter has explored how the new Court, immediately after its creation in 1998, enforced increasingly lower thresholds for severity to find a violation under the prohibition of torture and inhuman or degrading treatment and introduced several key positive obligations. I have explained that with a few audacious rulings, the new Court reversed the compromises that the old Court made, especially regarding the member states' national security concerns. Different from the old Court, its audacity was across the board. The new Court accepted almost all the novel claims brought before it – even those concerned with resource-intensive positive obligations and the violations perpetrated by private actors. Having described the achievements of the new Court, I have also discussed the areas where this progress was slower. In particular, I have looked at the Court's treatment of claims arising from systemic racist policies. The following chapter explains why the norm's fundamental transformation transpired rapidly and smoothly in the late 1990s, detailing what was peculiar about this period.

[93] Ibid., §117.

[94] See, for example, *V.C.* v. *Slovakia,* application no. 18968/07, ECHR (November 8, 2011), *X.* v. *Turkey*, application no. 24626/09, ECHR (October 9, 2012), *Identoba and Others* v. *Georgia*, application no. 73235/12, ECHR (May 12, 2015).

[95] For a discussion of discrimination based on sexual orientation, see Paul James Johnson and Silvia Falcetta, "Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities," *European Law Review*, April 2018, 167–85. https://eprints.whiterose.ac.uk/127012/.