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**The implied State's duty under Article 3 and its areas of overlap
with Article 13 of the European Convention on Human Rights**

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ABSTRACT

This thesis investigates the scope and implied State's duty under Article 3 and its overlap with Article 13 of the European Convention on Human Rights. The hypothesis is that the procedural part of Article 3 may threaten the absolute and unconditional character of the substantive part of Article 3 and there can be convincing legal reasons for choosing Article 13 over Article 3 when examining the lack of a thorough and effective investigation an arguable claim based on Article 3.

This thesis has mainly adopted the legal approach and therefore it is an article-specific legal paper. The entire substantive and procedural areas of the paper are discussed in the context of Article 3 and Article 13 jurisprudence of the European Convention on Human Rights. In addition to that, however, time-to-time jurisprudence of Article 1 and 2 of the Convention are referred in order to support the argument and explain the scopes of Article 3 and 13 better.

The methodology of this paper is based on legal analysing of the European Human Rights Court case-laws, judgments and interpretation of these articles concerning to ill-treatment which illustrate the operational and procedural rules, the application of substantive law, as well as the right to an effective remedy.

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INTRODUCTION

Presentation of the topic

With its absolute nature of prohibition the Article 3 of the European Convention on Human Rights comprises a prohibition to engage in actual torture as well as implies duty to provide remedies for the victims of torture by the contracting states. They are inherent obligations and certain rights under the Convention which have the substantive and procedural aspects that are separate from each other. The substantive obligations in Article 3 are absolute and unqualified but procedural obligations of it are not absolute because the State can exercise some judgment in applying them. In a number of cases the European Court of Human Rights finds a breach of the procedural part of Article 3 while finds no breach at its substantive part.¹ This thesis accordingly will try to learn in what conditions the procedural part of Article 3 may be threatening the absolute and unconditional character of the substantive part of Article 3 and what is a implied State's duty to conduct an effective investigation in case of alleged violation of Article 3.

In addition to the above mentioned focus this thesis also investigates the state obligation to carry out an effective investigation either from the standpoint of the procedural obligation inherent in Article 3 or from the standpoint of the right to an effective remedy under Article 13. In other words, the thesis aims to discuss a scope of Article 3 and its implied State's duty and investigate whether Article 13 can constitute the appropriate legal basis for examining the lack of an effective investigation into an arguable claim based on Article 3. In order to establish the boundaries of the Contracting Parties' jurisdiction within the meaning of Article 3 and Article 13, interpret and apply the implied State's obligations under these articles the case-laws of the Court have been referred. No doubt that there could be many reasons to accuse of ignoring some cases and points at the paper but the reason by doing this is that the thesis tries to choose those decisions and judgments which best give picture of inter- article relations and introduce how the European Human Rights Court recognize the jurisprudence of Article 3 and Article 13.

¹ Read Chapter 1.3.3 Is the procedural part of Article 3 threatening the substantive part of it?

Methodology

Due to its article-specific nature and legal analysis approach of this thesis all the substantive and procedural areas are discussed in the context of Article 3 and Article 13 jurisprudence of the European Convention on Human Rights. The methodology of this paper accordingly is based on legal analysing of the Court case-laws, judgments and interpretation of mentioned Article 3 and Article 13 concerning to ill-treatment which illustrate the operational, procedural rules, the application of substantive law and as well as the right to an effective remedy.

Under jurisprudence of Article 3 torture and most forms of inhuman treatment/punishment can not be justified in any circumstances but some degrading treatments can be justified in some circumstances. Accordingly, some legal punishments can be justified as degrading. For example, the Court has drawn a distinction between ordinary prison conditions and those which fall below an acceptable standard. The below standard prisons can be argued inhuman and degrading violation but since intention of this thesis is not to find out what is a acceptable standard and limit for the behaviour and actions both by state and individuals in order to argue whether Article 3 is violated or not and therefore, this paper will not discuss prohibited activities under Article 3 neither separately nor generally. This research intends to refer to prohibited activities under Article 3 as an “ill-treatment” or “torture” and to investigate inter-article relations, Article 3 and Article 13, and state’s implied obligations under these articles.

Research Questions

The research questions are formulated in order better illustrate the operational and procedural rules, the application of substantive law and the right to an effective remedy of Article 3 and Article 13. Since the duty to conduct effective investigation in connection to arguable claims relating to torture forms part of the prohibition of torture under Article 3 and as the Court’s standing jurisprudence dictates, the Convention is intended to guarantee rights which are not theoretical or illusory but practical and effective², the questions of this thesis are as following:

² *Ilhan v. Turkey*, no. 22277/93, 27 June 2000 § 91

1. Is the procedural part of Article 3 threatening the absolute and unconditional character of the substantive part of Article 3?
2. Should the Court examine the substantive violation at the root of the application for Article 3 or should it confine itself to establishing a procedural violation?
3. How much implied duty of States to conduct an effective investigation in case of alleged violations of Article 3 overlap with Article 13 which already provides a similar positive obligation or which Article should be chosen over another one for to conduct an effective investigation?

The absolute nature of the prohibition of torture in international law

Universal Declaration of Human Rights (Article 5); International Covenant on Civil and Political Rights (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples' Rights (Article 5); Arab Charter on Human Rights (Article 13); United Nations Convention Against Torture and European Convention for Prevention of Torture and Inhuman or Degrading Treatment or Punishment recognize the prohibition of torture and other forms of ill-treatments. The prohibition against torture is backbone of the international humanitarian law and applicable rules of customary international law. The absolute nature of the prohibition of torture under treaty is reinforced by its higher, *jus cogens* status under customary international law. In other words, no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law.³

In *Selmouni v. France*⁴ case the Court manifestly expressed the aim of increasing standard of human rights⁵. The ill-treatment that might previously have been regarded by the Court as causing suffering could now be classified as 'torture'. The Court required greater firmness assessing breaches of the fundamental values of democratic society. Naturally,

³ Joint Third Party intervention of Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interights, the International Commission of Jurists, Open Society Justice Initiative and Redress in *Ramzy v. Netherlands*, 22 November 2005

⁴ *Selmouni v. France*, no. 25803/94, 28 July

⁵ *Selmouni v. France*, no. 25803/94, 28 July, § 101 The court states: It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

the Article 3 enshrines one of the most fundamental⁶ values to be protected under the Convention. The Article 3 of the European Convention on Human Rights states these most fundamental values as following:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Article 3 concerns freedom from torture, inhuman treatment, degrading treatment or inhuman and degrading punishment. It covers three main separate prohibited categories of treatment that are:

- (a) *Torture*: deliberate inhuman treatment causing very serious and cruel suffering
- (b) *Inhuman treatment*: treatment that causes intense physical and mental suffering
- (c) *Degrading treatment*: treatment/punishment that arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibility breaking his or her physical or moral resistance.

At the case-laws the Court means that suffering must be inflicted intentionally and for a purpose, such as obtaining evidence, punishment, or intimidation. In *Aksoy v. Turkey* case the Court indicates that:

63. In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 (art. 3) between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering.⁷

The situations like ill-treatment in detention, deportation or extradition where there is a real risk of inhuman treatment in the country of destination,⁸ anxiety caused by failure to carry

⁶ *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002, §???

⁷ *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 63

⁸ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989

out a proper investigation into a disappearance,⁹ destruction of personal property¹⁰ have been found by the Court to amount to inhuman treatment.¹¹

Above mentioned categories of treatments places a negative duty on the state not to inflict them on human beings and it also puts duty to ensure that these treatments and sufferings are not endured. The importance of this article reflects in its absolute nature of the prohibition of torture and non-derogable status.¹² The European Court has held that the Article 3 prohibition protects “one of the fundamental values of the democratic societies making up the Council of Europe”.¹³ The Court has found many forms of conduct to be capable of breaching Article 3.¹⁴ Although most if not all punishments are degrading and inhuman treatment or punishment and they may often be found coexisting with degrading treatment or punishment. The Court defined that degradation must be intentional¹⁵ and treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.¹⁶ This test, “minimum level of severity”, will apply whatever the category of conduct in issue.¹⁷

The use of terms

The European Court of Human Rights at this paper is referred as “the Court”; the Convention for the Protection of Human Rights and Fundamental Freedoms as “the

⁹ *Kurt v. Turkey*, no. 15/1997/799/1002, 25 May 1998

¹⁰ *Selcuk and Asker v. Turkey*, no. 12/1997/796/998-999, 24 April 1998, § 78

¹¹ C. Ovey & Robin White, *Jacobs & White: The European Convention on Human Rights*, 4th edition, Oxford University Press, 2006, p. 81

¹² Article 15(2) of Convention for the Protection of Human Rights and Fundamental Freedoms

¹³ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989

¹⁴ Chapter 15 of European Human Rights Law by Keir Starmer, Legal Action Group, 1999

¹⁵ *Denizci and Others v. Cyprus* (2001), CEDH) § 383: “... Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. the United Kingdom*, cited above, p. 65, § 162). However, in order to determine whether a particular form of ill-treatment should be characterized as torture, the Court must have regard to the distinction, embodied in the provision, between that notion and that of inhuman or degrading treatment. As the Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Selmouni*, cited above, § 96).”

¹⁶ *Assenov and Others v. Bulgaria* case-law: “The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the *Tekin v. Turkey* judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517–18, §§ 52 and 53).”

¹⁷ C. Ovey & Robin White, *Jacobs & White: The European Convention on Human Rights*, 4th edition, Oxford University Press, 2006, p. 75

Convention” or as “European Convention on Human Rights”; and a collective term for all forms treatment prohibited by Article 3 such as torture, inhuman treatment and degrading treatment as either “torture” or “ill- treatment”.

The structure of the thesis

The first chapter introduces the European Convention on Human Rights and the Court as well as elaborates inherent obligations of Article 3 and its state obligations. The State’s obligations like the obligation to take effective investigation after the breach of the article, the obligation to take effective measures within state jurisdiction against the violation and importance of introduction of effective criminal law are discussed.

The discussion related to the scope of Article 3 and its current role in the international law explains importance of the article. In addition to that, the state responsibility to refrain from using torture and ill-treatment against civilians in its jurisprudence and its duty effectively investigate in case of the breach regardless violation made either by the state actors or by private individuals. The importance of criminal law and required grounds for effective protection of rights and duties to take effective investigation are among explained and discussed state obligations.

The chapter two discusses the inherent state’s obligations under Article 13 of the Convention. At this chapter other application areas of Article 13 are also discussed. Clear analysing of grounds of effective remedy like ‘arguable claim’ and ‘aggregate of remedies’ opens deeper analysing and understanding of the jurisprudence of Article 13.

The chapter three brings inter-article jurisprudence and scale overlapping and effectiveness of measuring implied state’s obligations under Article 3 and 13 together. The purpose of this chapter is to discuss effective investigation opportunities inherited by the Article 3 and Article 13 and investigate whether ill-treatment should be investigated from the standpoint of Article 3 or from the standpoint of Article 13. The chapter also tries to define and show overlapping areas between the implied State’s duty under Article 3 and that under Article 13 and argues the reasons why Article 13 should be chosen over Article 3 in some situations.

The last Chapter of the thesis is a Conclusion Chapter which sums up all the discussions at the different Chapters and measures if the hypothesis was proved right or wrong by the European Court of Human Right.

CHAPTER I

INHERENT STATE OBLIGATIONS UNDER ARTICLE 3

1. The European Convention on Human Rights and scope of Article 3

The European Convention on Human Rights was drafted under the auspices of the Council of Europe and signed first in 1950.¹⁸ The Article 1 of the Convention states that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the ... Convention”.¹⁹ The Convention Articles from Articles 2 until Article 14 are declaratory in the sense that they do not, on their own, impose any obligations on the Contracting Parties. It is Article 1 of the Convention which transforms this declaration of rights into a set of obligations for the Contracting Parties²⁰ and leaves the domestic authorities to decide how best to set up the required legal framework.²¹ The object and purpose of the Convention have had a strong influence on the interpretation of the Convention. The domestic authorities are expected to apply techniques of interpretation of the Convention with good faith and admit the principal purpose of the Convention to protect individual rights from infringement by the state and refrain from interference with the rights in question. The domestic authorities are expected to interpret the Convention articles as the Vienna Convention on the Law of Treaties requires:

...shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.²²

The Convention guarantees majority civil liberties including the right to life, freedom from torture, freedom from arbitrary arrest and etc. The protected rights²³ by the Convention are mostly civil and political²⁴ rights in nature and may be loosely categorized as absolute,

¹⁸ The first ratification of the Convention came from the United Kingdom, 8 March 1951 but ten months later the second ratification came from Norway. Norwegian ratification did not contain declaration on individual petition nor on the Court, but Swedish ratification which followed on 4 February 1952, did contain a declaration recognizing the right of individual petition to Commission.

¹⁹ Convention for Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950

²⁰ C. Ovey & R. C.A. White, *Jacobs & White: The European Convention on Human Rights*, 3rd edition, Oxford University Press, 2002, p. 14

²¹ STARMER, Keir: *European Human Rights Law*, Legal Action Group, London, 1999, p.196

²² Article 31, The Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

²³ The rights protected under the Convention are framed in wide terms.

²⁴ Exception: The right to property and the right to education in Protocol 1.

limited and qualified rights. The rights such as the protection from torture in Article 3 are absolute rights. The absolute rights have positive obligations on the states and require an appropriate legal framework capable of protecting individuals from such conduct.²⁵ Moreover, this kind of rights, the absolute rights, is not balancing of the right against public interest and derogation is not permitted. Therefore, it has absolute prohibition use of torture in any case. In *Corsacov v. Moldova*²⁶ case the Court states that:

54. ...Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93).²⁷

Article 13 of the Convention requires that everyone whose rights and freedoms set forth in the Convention are violated shall have an effective remedy before a national authority, even though that the violation has been committed by the state agent. For those cases where a national procedure is not available or does not provide for an adequate remedy or in the last resort has not available has not produced satisfactory result in the opinion of the rights violated person the Convention itself provides for a supervisory mechanism on the basis of individual and State complains. The Convention had an objective to set up international machinery to protect human rights where individuals can obtain respite from oppressive acts of the Government under whose jurisdiction he or she happens to be.²⁸

²⁵ These obligations of a special type are assumed by each contracting state to persons within their jurisdiction, and not to other contacting states.

²⁶ *Corsacov v. Moldova*, no. 18944/02, 4 April 2006

²⁷ *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, § 54

²⁸ R. Beddard, *Human Rights and Europe*, Cambridge 1993, p. 7

1.1 The European Court of Human Rights

Article 19 of the Convention sets legal grounds for the establishment of the European Court of Human Rights and it makes the Convention the first international legal instrument to safeguard human rights through an enforcement mechanism. It provides safeguarding of human rights for both states and individual applications. Under Article 33, any party may bring an application alleging a breach by another party that has ratified the Convention. Furthermore, the Court's power and duties are best described by the Court itself in *J. H v. the United Kingdom* case-law:

76. ...its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.²⁹

Although the Court is not authorized under the Convention to order a State to carry out particular measures of reparation or to change its law or practice in any particular way but Article 32 of the Convention extends Court's jurisdiction to all matters concerning the interpretation and application of the Convention. The Court speaks through its judgments and in every decision and judgments adopted by the Court, there is references to, and quotations from, previous decisions and judgments of the Convention institution.³⁰

1.2 The scope of Article 3

The scope of Article 3 of the Convention has been elaborated and the boundaries of the Contracting Parties' jurisdiction have been resolved by the Court in its case-laws. The case-laws show that the obligation of safeguard personal integrity under Article 3 may require states to do more than enact and enforce criminal law. Citing *A. v the United Kingdom* case, the Court held that the Article 3 duty obliges states to take reasonable steps:

²⁹ *P.G and J. H v. the United Kingdom*, no. 44787/98, 25 September 2001, § 76

³⁰ STARMER, Keir: *European Human Rights Law*, Legal Action Group, London, 1999, p. 54

... The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.³¹

Although Article 3 is phrased in substantive terms, it puts both procedural (positive) and substantive (negative) obligations upon States. The substantive obligations in Article 3 are absolute and unqualified but procedural obligations of it are not absolute because the State can exercise some judgment in applying them. All judgments, decisions and advisory opinions of the European Court of the Human Rights reconfirm absolute nature of Article 3 and consider whether there has been breach of this Article from inherent state's duty context.

1.3 State obligations under Article 3

The European Convention on Human Rights guarantees to individuals a certain sphere of freedom against the state. Most human rights provisions in the Convention and its Protocols³² were accordingly phrased in a substantive way. The Court already expressed in its view that in addition to such negative obligations the Convention rights includes also positive obligations. Furthermore, the Court finding a substantive violation of Article 3 does not always exclude the possibility of determining that there has been a breach of the effective investigation obligation.³³ The Court has recognized a wide variety of positive obligations flowing from all human rights provisions in the Convention which guarantees that the rights under the Convention are not theoretical or illusory but practical and effective.³⁴

³¹ *A. v the United Kingdom*, no. 90 (1998) 27 EHRR 61

³² Protocols No. 1, 4, 5, 6, 7, 12, 13 and 14

³³ *Menesheva v. Russia*, no. 59261/00, 9 March 2006, § 61-74

³⁴ *Ilhan v. Turkey* (2000), no. 22277/93, 27 June 2000, §91

The wording of Article 3 appears only to contain a negative obligation that Contracting Parties ensure that its authorities refrain from inflicting ill-treatment³⁵ on individuals within their jurisdiction. Moreover, Article 3 also imposes positive obligation to prevent and ensure that individuals within Contracting Parties' jurisdiction are not subjected to torture and other forms of ill-treatment by state agents or private individuals. The Court, drawing on case-law under Article 2, has argued that the fundamental character of Article 3 read together with Article 1 created such obligation.³⁶ Notwithstanding, a failure to conduct a proper and timely investigation by itself constitute a violation of the Convention, but the absence of such an investigation is likely to make it difficult to prove plausible explanation for supports the applicant's evidence.³⁷

The principal purpose of the Article 3 is to protect individual rights from violation and require a state to refrain from interference with the rights but if violation occurs the state has obligation to investigate in order to find violator regardless he or she is state agent or private individual. In *Osman v. the United Kingdom* case the Court held that states have obligations to take reasonable steps to prevent vulnerable persons from being subject to ill-treatment where the domestic authorities had or ought to have had knowledge of that ill-treatment. The Court sees that if persons are known to be at risk in that case situation puts duty upon states to take specific protective operational measures where individuals are known to be at immediate risk from others.³⁸ Article 3 places a negative duty on the state not to inflict the proscribed suffering on human beings, as well as a positive duty to ensure that these forms of suffering are not endured. In addition to that, the Court has developed the scope of Article 3 to include an implied duty of States to conduct an effective investigation in case of alleged violations of Article 3.

These inherent obligations and certain rights under Article 3, which have the substantive and procedural aspects, are separated from each other. Following section discusses the procedural obligations such as the obligation to investigate allegations of ill-treatment and the obligation to protect against ill-treatment by private individuals under Article 3.

³⁵ Like: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

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

³⁷ *Z. and Others v. The United Kingdom*, no 29392/95, 10 May 2001

³⁸ *Osman v. the United Kingdom*, no. 23452/94, 28 October 1998 § 116

1.3.1 The procedural obligations

The Court's case-laws indicate that the positive obligation of protection under Article 3 places states under a positive obligation to prevent torture and ill-treatment and to carry out effective investigation into allegations of ill-treatment and punish violator of Article 3. Accordingly, states have a positive obligation to ensure that individuals within their jurisdiction are not subjected to the prescribed treatment, including ill-treatment administered by a private individual.³⁹ In addition to these, the positive obligation manifests itself in the principle that state may violate Article 3 even by extraditing an individual to a country where there are substantial grounds for believing that there is a real risk to the extradited individual to be subjected to torture or ill-treatment. It can be further argued that the expulsion and extradition may infringe Article 3 because of their direct physical or mental effects.⁴⁰ The famous cases like, *Soering v. United Kingdom*,⁴¹ *Chahal v. United Kingdom*,⁴² and *D. v. United Kingdom*⁴³ cases show that deportation of a person to a country where a real risk that individual could be tortured which offend Article 3. These cases show that positive obligation under Article 3 puts duty on the states to prevent torture both within their jurisdiction and not to give grounds to other states to do so as a result of their involvement. In *Soering v. United Kingdom*, the Court puts like that:

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

³⁹ *Pretty v. United Kingdom* (2002) 35 EHRR 1 case shows that the obligation of the state to ensure that individuals within its jurisdiction is not subjected to torture or ill-treatment does not extend to the provision of lawful opportunity for assisted suicide in circumstances of significant physical and mental suffering.

⁴⁰ Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, Oxford, 2006, p. 428

⁴¹ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989

⁴² *Chahal v. United Kingdom*, no. 22414/93, 15 November 1996

⁴³ *D. v. United Kingdom*, no. 30240/96, 2 May 1997

88. The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).⁴⁴

The positive obligations contain both preventative and investigatory elements. At his book, *European Human Rights Law*, Keir Starmer argues that positive obligations may encompass a wide range of duties where the scope of these duties and the circumstances in

⁴⁴ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, §82

which they apply will vary from case to case. These duties⁴⁵ are recognized by the Court, may be generalized as following:⁴⁶

- 1) a duty to put in place a legal framework which provides effective protection for Convention rights;
- 2) a duty to prevent breaches of Convention rights;
- 3) a duty to provide information and advice relevant to the breach of Convention rights;
- 4) a duty to respond to breach of the Convention rights;
- 5) a duty to provide resources to individuals to prevent breaches of their Convention rights

In order to narrow state positive obligations even more down under the Article the state obligations can be examined with following generalisation: a) the obligation to investigate allegations of ill-treatment and b) the obligation to protect against ill-treatment by private individuals.

The obligation to take effective investigation in case of torture or ill-treatment is the procedural limb of Article 3. The jurisprudential justifications for the Court to develop these obligations are derived from a combination of the substantive Convention rights allied with the general duty of member states to secure Convention right and freedoms to all persons in their jurisdictions. However, from pragmatic reason subjecting states to duties of investigation is to seek to ensure that, among others, right freedom from torture or ill-treatment by state agents are respected and enforced in practice. The Court at the case-law, *Corsacov v. Moldova* determined that:⁴⁷

69...The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see the *Assenov and Others v. Bulgaria*, § 103 et seq.). They

⁴⁵ They are NOT complete list of all possible obligations of the state. Other steps can be taken in order to protect Convention rights properly.

⁴⁶ STARMER, Keir: *European Human Rights Law*, Legal Action Group, London, 1999, p.196

⁴⁷ *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, §69

must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see, *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 104 et seq. and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

The Court has acknowledged the theoretical basis of Article 3, however, has only been willing to recognize the practical relevance of Article 3. Failures of the judicial authorities to take up investigations will also engage the obligation in Article 3. In its judgment in the case of *Ilhan v. Turkey*, the Court added the following:

1. Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective.⁴⁸

The obligation to carry out an effective investigation into allegations of ill-treatment is a procedural obligation. Violation of Article 3 based on failures to comply with the positive obligation is referred to as procedural obligation of Article 3.⁴⁹ In *Assenov v. Bulgaria* case the Court made a finding of procedural breach of Article 3 also due to inadequate investigation made by the authorities into the applicants complains. The court describes the importance of investigation and revealing of violators:

102...where and individual raises an arguable claim that he has seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that punishment of those responsible... If this were not the case, the general legal prohibition of

⁴⁸ *Ilhan v. Turkey* (2000), no. 22277/93 §91

⁴⁹ *Elci and Others v. Turkey*, no 23145/93 and 25091/94 I13 November 2003, § 649

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”.⁵⁰

The obligation to protect against ill-treatment by private individuals better illustrated at the *A. v the United Kingdom* case. The Court acknowledges that the positive obligation of protecting under Article 3 may require states to do more than enact and enforce criminal law. It requires states to take action to protect persons from serious ill-treatment originating from both state agents and private individuals. The Court makes judgment with at the *A. v the United Kingdom* case with this wording:

... The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.⁵¹

The positive obligations which have an impact on national criminal law are aimed at protecting citizens from state and non-state actors. Such protection requires the existence of effective domestic law provisions criminalising ill-treatment by private individuals and adequate application of those provisions by the judiciary.⁵² The Court has, *inter alia*, recognized obligations to put in place criminal law provisions to deter certain forms of behavior, to create and operate law-enforcement machinery for the prevention, suppression and sanctioning of breaches of those provisions and to investigate reasonable claims of human rights violations. The Court thus requires the state, in certain circumstances, to use criminal law to secure Convention rights. In other words, the positive obligation of protection under Article 3 may require states to do more than enact criminal law offences designed to safeguard personal integrity.

⁵⁰ *Assenov v. Bulgaria*, no. 24760/94, 28 September 1998 § 102

⁵¹ *A. v the United Kingdom*, no. 90 (1998) 27 EHRR 61

⁵² Ugur Erdal & Hasan Bakirci, *Article 3 of the European Convention on Human Rights*, Geneva 2006, p. 233

It follows from the jurisprudence discussed above that the positive obligation is to take steps to protect individuals from ill-treatment at the hands of the state agents or private individuals and effectively investigate alleged violation of Article 3 and punish rights violator. In other words, the State's obligation in this respect includes in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from criminal act of another individual (state agent or private individual). However, in some cases the use of force is allowed against individuals in the exercise of legitimate State functions, as in the context of making arrest. The following section investigates the limit of justified use of force, and negative obligation on State's obligation to refrain from inflicting ill-treatment on individuals within their jurisdiction.

1.3.2 Substantive obligations (negative obligations)

The wording of Article 3 is phrased in substantive terms. At the first sight, Article 3 appears to impose only a negative obligation on Contracting Parties to ensure prohibition of maltreatment by law enforcement officers, such as police and security forces within its jurisdiction. However, as discussed in the previous sub-sections, there is a positive obligation under Article 3 to carry out effective investigation into allegations of ill-treatment and to take measures designed to ensure that individuals within Contracting Party jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals. Therefore, the Court recognized that Article 3, read in conjunction with the general obligation to rescuer rights under Article 1, stipulates a duty to provide remedies for the victims of torture and makes Article 3 not theoretical or illusory but practical and effective.⁵³ Moreover, this sub-section discusses only a substantive (negative) obligation of the Contracting Parties under Article 3 where State has obligation to refrain from inflicting serious harm on persons within their jurisdiction. In *Pretty v. the United Kingdom* case:

2. An examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment

⁵³ *Ilhan v. Turkey*, no. 22277/93, 27 June 2000 § 91

emanated from intentionally inflicted acts of State agents or public authorities... It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise...

3. In particular, the Court has held that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals... A positive obligation on the State to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example, *A. v. the United Kingdom*..., where four child applicants were severely abused and neglected by their parents. Article 3 also imposes requirements on State authorities to protect the health of persons deprived of liberty...”⁵⁴

Despite the absolute nature of the prohibition of ill-treatment by the Article 3 there are situations where law enforcement officers of States sometimes must use force when effecting an arrest if the arrestee resists the arrest by violent or forceful means. In *Klaas v. Germany*⁵⁵ case the dissenting opinion of judge Pettiti states:

“While the police must intervene to provide the necessary protection and law enforcement, they have to respect fundamental rights when doing so. The basic rule is that the police must protect the individual from any violence and ensure people’s physical safety. When called upon to act in regard to serious criminal offences, they are not entitled to use violence

⁵⁴ *Pretty v. The United Kingdom*, 2346/02, 29 April 2002

⁵⁵ *Klaas v. Germany*, no. 15473/89, 22 September 1993

other than in circumstances of self-defense (légitime défense) or forceful resistance, and then the response must be proportionate to the danger.”⁵⁶

The Court did not find a violation of Article 3, for example in *Klaas v. Germany* and *Douglas-Williams v. the United Kingdom*⁵⁷ cases because it concluded that the use of force by police officers in the course of arrest was justifiable. Meanwhile, there are many cases in which the Court has found a substantive violation of Article 3 where the Court found that such use of force were excessive and therefore amounted to ill-treatment within the meaning of Article 3.⁵⁸ In *Pretty v. the United Kingdom* case the Court held its judgment:

50. An examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities... It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction.⁵⁹

These cases in which the Court has found a substantive violation can be divided into three different groups of cases: 1) ill-treatment intentionally inflicted by law enforcement officers, such as police and other security forces;⁶⁰ 2) ill-treatment resulting from a lawful or unlawful act carried out by State agents;⁶¹ 3) ill-treatment resulted from State agent's failing to assist persons in need.⁶² In generally speaking, these cases are about the

⁵⁶ *Klaas v. Germany*, no. 15473/89, 22 September 1993, Dissenting Opinion of Judge Pettiti

⁵⁷ *Douglas-Williams v. the United Kingdom*, no. 56413/00, 8 January 2002

⁵⁸ *Rehbock v. Slovenia*, no. 19462/95, 20 May 1998, § 68-78

⁵⁹ *Pretty v. the United Kingdom*, 2346/02, 29 April 2002 § 50

⁶⁰ *Egmez v. Cyprus*, no. 30873/96, 21 December 2001 (ill-treatment by police officers at the time of arrest and immediately afterwards), *Salman v. Turkey*, no. 21986/93, 27 June 2000 (ill-treatment during interrogation in police custody), *Selmouni v. France*, no. 25803/94, 28 July 1999 (physical and mental violence in police custody), *Aydin v. Turkey*, no. 23178/94, Commission Report of 7 March 1996 (rape in gendarmerie station), *Nevmerzhtsky v. Ukraine*, no. 54825/00, 5 April 2005 (the force-feeding of an applicant on hunger strike), *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978 (interrogation techniques employed by law enforcement officers)

⁶¹ *Soering v. the United Kingdom*, no. 14038/88, 7 Junly 1989 (expulsion or extradition), *Tyrer v. the United Kingdom* no. 5856/72, 25 April 1978 (corporal punishment), *Ayder and Others v. Turkey*, no. 23656/94, 8 January 2004 (destruction homes and properties), *Kurt v. Turkey*, no 24276/94, 25 May 1998, § 134

⁶² *McGlinchey and Others v. the United Kingdom*, no. 50390/99, 29 April 2003 (failure to provide adequate medical assistance), *Keenan v. the United Kingdom*, no. 27229/95, 3 April 2001 (suicide risk of mentally ill person)

violations where state agents, national authorities have involved to commit or failed to assist persons in order to avoid breach of Article 3.

This reasoning indicates that violation of substantive obligation to ensure prohibition of ill-treatment by law enforcement officers, such as police and security forces within its jurisdiction can be violated by the ill-treatment inflicting from lawful actions of State agents and ill-treatment inflicted from unlawful actions of State agents. In either case, as procedural obligation of State under the Convention demands, the state has duty to conduct an effective investigation in order to identify and punish of the person responsible for the alleged violation.

In *Assenov and Others v. Bulgaria* case the Court found a breach of the procedural part of Article 3 but no breach of substantive part of Article 3. In fact, sometimes the Court is unable to find a substantive violation precisely because the burden of proof shifts on the national authorities responsible for providing a complete and sufficient explanation when the state in question fails to take basic investigative steps. It is a reason the substantive violation might be very difficult or impossible for the applicants to prove.⁶³ In *Kmetty v. Hungary* case, the Court stated:

4. The Court observes that following the applicant's complaint, the authorities carried out an investigation into the applicant's allegations. It is not, however, persuaded that this investigation was sufficiently thorough and effective to meet the above requirements of Article 3.⁶⁴

In a number of the cases, as those that will be discussed in this section, involving alleged breaches of the right to be free from ill-treatment guaranteed by Article 3 of the Convention the applicants have been unable to establish required standard of proof for the substantive violation. The Court has found a procedural violation on the account of the lack of an effective investigation.

⁶³ *Kmetty v. Hungary*, no. 57967/00, 16 December 2003, *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, *Kuznetsov v. Ukraine*, no. 39042/97, 29 April 2003, *Sadik Onder v. Turkey*, no. 28520/95, 8 January 2004, *Iorgov v. Bulgaria*, no. 40653/98, 11 March 2004, *G. B v. Bulgaria*, no. 42346/98, 11 March 2004, *Toteva v. Bulgaria*, no. 42027/98, 19 May 2004

⁶⁴ *Kmetty v. Hungary*, , no. 57967/00, 16 December 2003, § 32

1.3.3 Is the procedural part of Article 3 threatening the substantive part of Article 3?

At the previous sub-sections, the procedural and substantive obligations of Article 3 were analyzed and discussed. This sub-section is trying to answer the research question number 1 of the thesis: whether procedural part of Article 3 is threatening the absolute and unconditional character of the substantive part of it. It is one of the problematic issued for the Court approach to the cases under the scope of Article 3 of the Convention. Luzius Wildhaber, the then president of the European Court of Human Rights, also admitted that sometimes the Court finds itself something of a dilemma like, should it examine the substantive complaint at the root of the application, or confine itself to establishing a procedural violation.⁶⁵ The scope of the positive obligations depends on the nature of the complaint,⁶⁶ including the nature of the substantive rights invoked in conjunction, with a stricter and broader obligation recognized in the case of alleged violations of fundamental rights of non-derogable nature, such as the freedom from torture or other forms of ill-treatment.⁶⁷ The procedural obligation under Article 3 of the Convention is not linked to the actual violation of a primary substantive obligation safeguarded by the provision. The lack of effective investigation or the failure to award remedies may on their own account amount to a breach of Article 3. In other words, under Article 3 of the Convention, a state must conduct an effective official investigation that should lead to the identification and punishment of the persons responsible for the alleged violation. This approach was reaffirmed in *Assenov and Others v. Bulgaria* case-law with regard to the scope of Article 3. In *Assenov* case, the Court found a breach of the procedural part of Article 3 but no breach of substantive part of Article 3. In fact, sometimes the Court is unable to find a substantive violation precisely because the burden of proof shifts on the national authorities responsible for providing a complete and sufficient explanation when the state in question fails to take basic investigative steps. It is a reason why the substantive

⁶⁵ Luzius Wildhaber, “The place of the European Court of Human Rights in the European Constitutional landscape”, Conference of European Constitutional Courts XIIth Congress, <http://www.confcoconsteu.org/reports/Report%20ECHR-EN.pdf>

⁶⁶ *Khashiyev and Akayeva v. Russia*, no. 57942/00 and 57945/00, 24 February 2005, § 182

⁶⁷ Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, Oxford, 2006, p 999-1000

violation might be very difficult or impossible for the applicants to prove.⁶⁸ In *Kmetty v. Hungary*, case the Court states:

36. In these circumstances, the Court finds it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police exceeding the force necessary to overcome his resistance to a lawful police measure, either while immobilising and taking him to the police station or during his custody.⁶⁹

In a number of the cases⁷⁰ involving alleged breaches of the right to freedom from ill-treatment guaranteed by Article 3 of the Convention has been unable to establish required standard of proof for the substantive violation. The Court has found a procedural violation on account of the lack of an effective investigation but no breach of substantive part of Article 3. A procedural violation does not carry same stigma as a substantive violation and a procedural violation is *obviously less serious than a violation of ill-treatment*. Along these lines, the procedural violation of inadequate investigation is not as grave as an accusation that state officials engaged in torture. In any this kind of event effective judicial proceedings at national level capable of establishing the true facts at the origin of the allegation fails. In *Poltoratskiy v. Ukraine* case the Court had not established “beyond reasonable doubt” that ill-treatment attaining the minimum level of severity had occurred. The Court found not a breach of the substantive part of Article 3 but finds a breach at the procedural part:

“5. ...the Court shares the findings and reasoning of the Commission and concludes that the applicant’s arguable claim that he was ill-treated in prison was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

⁶⁸ *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, *Kuznetsov v. Ukraine*, no. 39042/97, 29 April 2003, *Sadik Onder v. Turkey*, no. 28520/95, 8 January 2004, *Iorgov v. Bulgaria*, no. 40653/98, 11 March 2004, *G. B v. Bulgaria*, no. 42346/98, 11 March 2004, *Toteva v. Bulgaria*, no. 42027/98, 19 May 2004

⁶⁹ *Kmetty v. Hungary*, no. 57967/00, 16 December 2003, §36

⁷⁰ *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, *Kuznetsov v. Ukraine*, no. 39042/97, 29 April 2003, *Sadik Onder v. Turkey*, no. 28520/95, 8 January 2004, *Iorgov v. Bulgaria*, no. 40653/98, 11 March 2004, *G. B v. Bulgaria*, no. 42346/98, 11 March 2004, *Toteva v. Bulgaria*, no. 42027/98, 19 May 2004

6. There has therefore been a violation of Article 3 of the Convention in this regard.”⁷¹

It is not necessary for the Court to find a substantive violation of Article 3 before the Court can examine whether the respondent Contracting Party has complied with its procedural obligation under that article. In other words, before the identification of separate substantive and procedural obligations of Article 3, an inadequate investigation can be an element on which an applicant could rely to prove a violation of the Article as whole. In fact sometimes the Court is unable to find a substantive violation accurately because the respondent Government has violated its procedural obligation by not conducting an effective investigation.⁷² In particular, where the authorities fail to take basic investigative steps the substantive violation might very difficult or impossible for the applicant to prove. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiary. It was well expressed by the Court in *Z. and Others v. the United Kingdom* case:

7. ... the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiary. In that context, Article 13, which requires an effective remedy in respect of violations of the Convention, takes on a crucial function. The applicants' complaints are essentially that that they have not been afforded a remedy in the courts for the failure to ensure them the level of protection against abuse to which they were entitled under Article 3 of the Convention. The domestic courts referred to “the public-policy

⁷¹ *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2009 § 127-128

⁷² Ugur Erdal & Hasan Bakirci, *Article 3 of the European Convention on Human Rights – A Practitioner's Handbook*, Geneva 2006, p. 228

consideration that has first claim on the loyalty of the law” as being that “wrongs should be remedied” ...⁷³

The effective judicial proceedings at national level are capable of establishing the true facts at the origin of the allegations. The case like *Khashiyev and Akayeva v. Russia* showed that it was not possible for the Court to conclude that the victims were tortured before they were killed. The judgment of the *Khashiyev and Akayeva* ruled that failed conduct of investigation makes for the court impossible to find a substantive violation of Article 3. With this finding of procedural violation the Court recognized that:

8. The procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, deriving, at least in part, from the failure of the authorities to react effectively to such complaints at the relevant time...⁷⁴

Above mentioned cases, the Court’s approach, are problematic for the absolute and unconditional character of the substantive part of Article 3. This approach undermines an applicant’s attempt to prove substantive violation of Article 3 and it can be seen that when the Court finds a procedural violation of Article 3, it may be less inclined to find a substantive one. The main concern here is that a procedural violations does not carry the same stigma as substantive violation. The procedural violation of inadequate investigation is not as grave as a judgment that state officials engaged in torture. Besides, the procedural violations are often met with procedural, not substantive, remedies. For example, the Committee of Ministers⁷⁵ decides whether the state promulgated general measures to prevent new violations.⁷⁶ In this logic, when the Court finds a procedural violation of Article 3, the faulty policy is investigation procedure. The state accordingly would at most be responsible for changing the procedure not for preventing or revealing

⁷³ *Z and Others v. The United Kingdom*, no 29392/95, 10 May 2000, § 103

⁷⁴ *Khashiyev and Akayeva v. Russia*, no. 57942/00 and 57945/00, 24 February 2005 § 178

⁷⁵ The Committee of Ministers, which consists of the Ministers of Foreign Affairs of the Member States, is decision making body of the Council of Europe. Its function include, in particular, supervising the execution of judgments of the European Court of Human Rights

⁷⁶ When a government policy is likely to lead to similar violations in the future, the state is obliged to change it.

any ill-treatment practices that might exist. In other words, the negative prohibition in Article 3 is absolute but positive obligations which flow from it are not absolute because the State can exercise some judgment⁷⁷ in applying them.⁷⁸ Thus, the focus on the procedural components of Article 3 threatens the absolute and unconditional character of the substantive part of Article 3.

⁷⁷ Rhona K. M. Smith, *International Human Rights, Third edition*, Oxford, 2007, p. 165

⁷⁸ Luzius Wildhaber, the then president of the European Court of Human Rights, at the Conference of European Constitutional Courts XXth Congress said: The fulfillment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law.

CHAPTER II

INHERENT STATE OBLIGATIONS UNDER ARTICLE 13

2. Right to an Effective Remedy before a National Authority

Article 13 of the European Convention on Human Rights has proven difficult both to interpret and apply. This article may only be invoked in conjunction with an alleged violation of a right protected in the Convention and thus, it is not a free standing rights. The Court's methodology was not to engage in detailed, separate assessment under Article 13, but to reiterate its findings concerning the lack of effective investigations under a substantive provision of Article 3 to justify its separate finding of a breach of Article 13. This chapter discusses interpretation and application of implied state duty of Article 13 in conjunction with Article 3. The Article 13 of the Convention states that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13 of the European Convention on Human Rights require states to provide effective remedies before the national authorities in respect of complaints made by persons that their Conventional rights have been violated.⁷⁹ The Court's jurisprudence on the interpretation of Article 13 is well described in the case of *Silver and Others v. the United Kingdom*.⁸⁰ The Court ruled that:

"113. The principles that emerge from the Court's jurisprudence on the interpretation of Article 13 (art. 13) include the following:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress...;

⁷⁹ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context*, Third edition, Oxford, 2008, p. 938 -939

⁸⁰ *Silver and Others v. the United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/7, 22 March 1983

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- (b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective...;
- (c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so...;
- (d) neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law...⁸¹

The object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having complaint before the Court. Moreover, Article 13 has more general obligation on State to provide an effective remedy than for example the obligation to be found under Article 6. The requirement of effectiveness under Article 13 can be usefully compared with the meaning of remedies under Article 35, which need to be exhausted by the domestic remedies before an applicant brings complains before the Court. Article 6 (1)⁸² in this regard guarantees procedural rights, including the right of everyone to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. It is more concrete and increases effectiveness by introducing approach of “within a reasonable time”. Luzius Wildhaber, the then President of European Court of Human Rights, argues that:

⁸¹ *Silver and Others v. the United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/7, 22 March 1983, § 113

⁸² Article 6.1: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

“...the Convention guarantees contain an implied positive obligation to set up and render effective procedures making it possible to vindicate the right concerned at national level. This is of course confirmed by the requirement of exhaustion of domestic remedies under Article 35 of the Convention and the obligation to afford an effective remedy under Article 13.”⁸³

In *Z. and Others vs. the United Kingdom*⁸⁴ case the Court indicates that Article 13 have some applicability in cases involving the indirect responsibility of the state arising out of its positive duties to take action to avoid violations by individuals of the human rights of others. The Court rules that:

109. ... where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure... These cases, however, concerned alleged killings or infliction of treatment contrary to Article 3 involving potential criminal responsibility on the part of security force officials. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for

⁸³ Luzius Wildhaber (President of European Court of Human Rights), “*The place of the European Court of Human Rights in the European Constitutional landscape*”, Conference of European Constitutional Courts XIIth Congress, <http://www.confcoconsteu.org/reports/Report%20ECHR-EN.pdf>

⁸⁴ *Z. and Others vs. the United Kingdom* , no. 29392/95, 10 May 2001

the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies.

Thus, the object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Conventional rights before having to set in motion the international machinery of complaint before the Court.⁸⁵ In the context of Article 13, adequate remedy means that the national authority must be able to assess the element of risk primarily with reference to those facts which were known or ought to have been known to the state at the time of lawful use of force. The implied state obligations under Article 13 can be examined with following generalisations:

- a) obligation to provide an effective domestic remedy where person have an arguable claim to be the victim of a violation of Convention rights;
- b) obligation of effective investigation.⁸⁶

The duty of effective investigation under Article 13 is to be seen as an integral element of the general obligation of member states to provide effective domestic remedies for alleged breaches of the Convention. An effective domestic remedy to determine complaints regarding unreasonable delays in civil and criminal proceedings is one of the major concerns of the Court.⁸⁷ The Court held in *Kudla v. Poland* case that obligation on the contracting Parties would be:

155. If Article 13 is, as the Government argued, to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of

⁸⁵ *Kudla v. Poland*, no. 30210/96, 26 October 2000, § 152

⁸⁶ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004 p. 221-214

⁸⁷ *Nuvoli v. Italy*, 41424/98, 16 May 2002

human rights protection set up by the Convention is liable to be weakened.⁸⁸

The obligation of effective investigation was created equivalent forms of positive obligation under Article 13. In *Velikova v. Bulgaria* case the Court stated that:

“...The scope of obligation under Article 13 also varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be ‘effective’ in practice as well as in law, in particular in the case that its exercise must not unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”⁸⁹

Furthermore, the Court found implications for Article 13 at the right safeguarded under Article 3. It described this jurisprudence in *Aksoy v. Turkey*⁹⁰ case as such:

98. The nature of the right safeguarded under Article 3 of the Convention (art. 3) has implications for Article 13 (art. 13). Given the fundamental importance of the prohibition of torture (see paragraph 62 above) and the especially vulnerable position of torture victims, Article 13 (art. 13) imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express

⁸⁸ *Kudla v. Poland*, no. 30210/96, 26 October 2000 § 155

⁸⁹ *Velikova v. Bulgaria*, no. 41488/98, 18 May 2000, §89

⁹⁰ *Aksoy v. Turkey*, no. 59741/00, 31 October 2006

provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13 (art. 13) (see, mutatis mutandis, the Soering judgment cited at paragraph 62 above, pp. 34-35, para. 88).⁹¹

Another ambiguity in the Article 13 cases relates to the circumstances where the Court willing to examine whether there has been an effective investigation under both Article 3 and Article 13. An effective investigation is the crucial foundation for other remedies then the Court is likely to examine the issue under Article 13, in addition to applying obligations under the substantive Article. The Court puts it in specific way in the case of *Akdeniz and Others v. Turkey*:⁹²

9. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent...⁹³

⁹¹ *Aksoy v. Turkey*, no. 59741/00, 31 October 2006, § 98

⁹² *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001

⁹³ *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001, § 112

Finally, the effect of Article 13 is that this article generates close relationship between effective investigation, effective remedies and the requirement of exhaustion of domestic remedies. In *Paul and Audrey Edwards v. the United Kingdom*⁹⁴ case the Court clarified that the obligation of effective investigation “is not an obligation of result, but of means”.⁹⁵ On the other hand, if an applicant succeeds in demonstrating that a particular remedy is ineffective,⁹⁶ the conduct complained of constitutes an administrative practice than there is no obligation to exhaust ineffective remedy. In this case the situation will release the applicant from requirement of exhausting domestic remedy as well as it may also lead the Court to find a procedural violation of Article 3 or a violation of Article 13.⁹⁷

It was confirmed in the context of Article 13, the Court pointed direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishing an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The Article 13 accordingly provides a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.

⁹⁴ *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, 14 March 2002

⁹⁵ *Ibid.*, §71

⁹⁶ *Mikheyev v. Russia*, no. 77617/01, 26 January

⁹⁷ Ugur Erdal & Hasan Bakirci, *Article 3 of the European Convention on Human Rights – A Practitioner’s Handbook*, Geneva 2006, p.232

CHAPTER III

INVESTIGATION OF ILL-TREATMENT

3. Overlapping at the effective official investigation of ill-treatment in compliance with the requirements of Article 3 and Article 13 of the Convention

At the previous chapters, the State obligation to carry out effective investigation was discussed either from the standpoint of the positive obligation inherent in Article 3 or from the standpoint of the right to an effective remedy under Article 13. In other words, the ineffectiveness of an investigation is a violation of the positive obligation under Article 3 and/or of the obligation under Article 13 to provide an effective remedy. This Chapter is discussing overlapping jurisprudence of Article 3 and Article 13 on an effective official investigation of ill-treatment and, additionally, investigates whether there is convincing reasons for choosing Article 13 “over” Article 3 or only choosing procedural part of Article 3 should be sufficient for examining the lack of a thorough and effective investigation during the breach of Article 3. This part of the thesis is going to bring a legal explanation to the research question number 3 of the thesis which addresses the same problem: How much implied duty of States to conduct an effective investigation in case of alleged violations of Article 3 overlap with Article 13 which already provides a similar positive obligation or which Article should be chosen “over” another one for the conduct of the effective investigation.

The Court recognized that Article 3, read in conjunction with the general obligation to secure rights under Article 1, requires a duty to provide remedies for the victims of torture. With this conjunction, the remedy for torture extends to *everyone* and not only to those victims, whose torture involves the respondent state.⁹⁸ The Court has also created corresponding forms of positive obligations under Article 13 complains involving alleged breaches of Article 3. The chapter II discussed that Article 13 may only be invoked in conjunction with an alleged violation of a right protected under the Convention, which in

⁹⁸ Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of European Court of Human Rights*, <http://ejil.oxfordjournals.org/cgi/reprint/14/3/529.pdf>, p. 551

other words, it is not a free standing right. The Court case laws repeatedly emphasised that once an individual makes out an arguable claim relating to the substance of the complaints under Article 3, the notion of effectiveness under Article 13 entails the institutional⁹⁹ and investigative/procedural¹⁰⁰ elements parallel to that established under Article 3.¹⁰¹ The Court has argued that “...as regard to Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an effective remedy entails, in addition to payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”¹⁰²

When the duty not to commit torture is violated and breach of a substantive duty is on stick it is an incumbent on the Court to carry out a separate consideration under Article 13. It reconfirms that in case of an alleged breach of the procedural limb of the positive obligations under Article 3 there is an overlapping relationship between such obligation and the effectiveness requirements under Article 13. In other words where there are no or insufficient procedural safeguards protecting the right in question, there may well be a violation of the right in both its substantive and procedural aspects of Article 3 and Article 13.

As it was discussed earlier, the Court’s developed scope of Article 3 has included an implied duty of States to conduct an effective investigation in case of alleged violations of Article 3. This development has taken place in spite of Article 13 already providing a similar positive obligation. The Court has many times examined the allegations of a lack of an effective investigation under both Article 3 and Article 13 and found a violation of both Articles.¹⁰³ In the circumstances, if the individual’s right not to be subjected to torture and to benefit from an effective investigation about torture were breached by the State then the individual’s complain would be considered arguable by the Court for the purposes of Article

⁹⁹ The institutional obligations under Article 13, the Court stresses at the case of *Ogur v. Turkey* (no. 21594/93, 20 May 1999, par. 91) that the need not only of the absence of institutional connection but also ‘practical independence’ of the persons responsible for carrying out the investigations into alleged ill-treatment

¹⁰⁰ Article 13 demand thorough and effective investigation’ that can lead to the identification and punishment of those responsible for the violation of Article 3 and ensures effective access by the complainant or the relatives to the investigatory procedure

¹⁰¹ Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, Oxford, 2006, p. 1008-9.

¹⁰² *Aksoy v. Turkey*, no. 21987/93, 18 December 1996 § 98

¹⁰³ For example: *Corsacov v. Moldova*, no. 18944/02, 4 April 2006

13.¹⁰⁴ In the *Assenov and Others vs. Bulgaria* case the Court refers to its findings that the applicant "had an arguable claim that he had been ill-treated by agents of the State and that the domestic investigation of this claim was not sufficiently thorough and effective."¹⁰⁵ Analyzing the substantive and procedural issues – whether the ill-treatment was motivated by the State policy or whether the authorities failed to investigate possible ill-treatment falls into the scope of Article 3. The Court has recognized an implied positive obligation upon states violating Article 3's substantive prohibition but Alastair Mowbray argues that the application of this duty by different Chambers has been problematic. He thinks that the Court's eager to conduct domestic investigations under Article 3, in contrast utilizing Article 13, remain obscure.¹⁰⁶ In addition to this the Court also finds violation of Article 13 of the Convention at *Assenov* case. The Court states that: "...in cases of alleged ill-treatment contrary to Article 3, the State authorities were under an obligation under Article 13 to investigate promptly and impartially."¹⁰⁷ The Court finding at this case confirms that in the case of an alleged breach of the procedural limb of the positive obligations under Article 3 is an overlapping relationship between such obligations and the effectiveness requirement under Article 13.

However, it must be admitted the Court's policy remains obscure and unclear when it comes to the relationship between the requirements to accumulate an effective investigation into alleged ill treatment under Article 3 and the corresponding requirement under Article 13. In *Mehment Emin Yuksel vs. Turkey* case "[t]he Court does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation" and it finds investigation more appropriately examined under Article 13.¹⁰⁸ As it was reflected at the quotation the Court's methodology is not to engage in a detailed and separate assessment under Article 13, but to reiterate its findings concerning the lack of effective investigations under a substantive provision to justify its separate finding of a breach of Article 13. In *Ilhan vs. Turkey* case the Court states that "[w]hether it is appropriate or necessary to find a procedural breach of Article 3 will ... depend on the circumstances of the particular case."¹⁰⁹ The discussion related to

¹⁰⁴ *Ibid.*, 80

¹⁰⁵ *Assenov v. Bulgaria*, no. 24760/94, 28 September 1998 § 102

¹⁰⁶ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004, p 64

¹⁰⁷ *Ibid.*, § 114

¹⁰⁸ *Mahmut Kaya vs. Turkey*, no 22535/93, 28 March 2000 § 120

¹⁰⁹ *Ilhan v. Turkey*, no. 22277/93, 27 June 2000

the procedural duties of Article 3 and Article 13, is closely entwined with the inconsistency of the approaches followed by the Court in relation to the question whether the finding of a substantive violation of Article 3 can justify the exclusion of determining a breach of the effective investigation obligation under the same provision.

3.1 Is investigation of alleged violations of ill-treatment effective more under Article 3 or Article 13 and why?

As discussed above in case of an alleged breach of the procedural limb of the positive obligations under Article 3 there is an overlapping relationship between such obligation and the effectiveness requirements under Article 13. This would rise a question whether holding a respondent State to have breached the inquires of obligations under Article 3 would justify abandoning a separate examination and a finding of a breach of the corresponding obligations under Article 13 or conversely whether such obligation can be ascertained solely in the context of Article 13. Following this argument this section will investigate to what extent article 13 supports the procedural obligations under article 3, and whether it should not just be applied in stead of or "chosen over" article 3, but rather used as complementary and supportive.

The *Ilhan v. Turkey* case indicated that Article 13 should constitute the appropriate legal basis for examining the lack of an effective investigation into an arguable claim based on Article 3 cases. The applicant, *Ilhan*, claimed that there was a breach of Article 3 due to the lack of an effective investigation. The Court makes judgment on the grounds that:

10. ... the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials. The Court's case-law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure... Whether it is

appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.

11. In the present case, the Court has found that the applicant has suffered torture at the hands of the security forces. His complaints concerning the lack of any effective investigation by the authorities into the cause of his injuries fall to be dealt with under Article 13 of the Convention.¹¹⁰

In this connection, as stated above, the requirement of an effective remedy in Article 13 was generally sufficient for an individual with an arguable claim of breach of Article 3. In this case, however, the Grand Chamber failed to explain why issues of investigative obligations under Article 3 can be so differentiated from the comparable obligations under Article 2 as to exempt on independent finding of violation under Article 3.¹¹¹ The Court has recognized the importance of an Article 13 remedy in view of the fundamental importance of the prohibition of torture and the vulnerable position of a torture victim. Hence, indicated that Article 13 should constitute the appropriate legal basis for examining the lack of effective investigation into an arguable claim based on Article 3. However, in the context of ill-treatment occurring under the responsibility of state agents, examining it under Article 13, the Court has a number of occasions stated that *the requirements* of that Article are *broader* than the effective investigation duties respectively arising under Article 3.¹¹² The linkage between the shortcomings of an investigation and the ultimate effectiveness of domestic remedies, which is inherent to Article 13, does not exist under Article 3.

The context of the actual occurrence of torture is hardly relevant for understanding the scope of Article 3. In this regard, the text of Article 13 is broad enough to encompass any torture in a similar way as in Article 3.¹¹³ The Court has taken the view that the absence of

¹¹⁰ *Ilhan v. Turkey*, no. 22277/93, 27 June 2000 § 92-93

¹¹¹ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004, p. 1015

¹¹² Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Second edition, Oxford, 2009, p. 572-574

¹¹³ While the comparable Article 2 procedural obligation applies to all Article 2 cases, it is not clear whether the Article 3 obligation has the same general application. Article 3 obligation was first identified in *Assenov v Bulgaria* and later with more restrictive approach in *Ilhan v Turkey* case.

any limitation clauses under Article 13 does not mean that this right is absolute. Therefore, Article 13 has disadvantage that it may be derogated from in time of public emergency, whereas Article 3 may not.¹¹⁴ Article 13 should be considered as having inherent limitations. Alastair Mowbray in his book, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, argues that: the non-derogable nature of Article 2 and 3 rights are more susceptible to a separate and stringent appraisal of the requirements of Article 13 than in instances involving other provisions. In the *Leander v. Sweden* case, the Court therefore stated that:

”79. ...the requirements of Article 13 will be satisfied if there exists domestic machinery whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws...”¹¹⁵

Article 3 is more restricted arises when there is an arguable claim that a person has been seriously ill-treated by state agents. In *Ilhan v. Turkey* case, a Grand Chamber took a more restrictive approach and stated that the requirement of an effective remedy in Article 13 was generally sufficient for an individual with an arguable claim of breach of Article 3. It ruled that the existence of a procedural obligation to investigate under Article 3 would depend on the circumstances of the particular case. However, later the Court has not always looked for exceptional circumstances in which procedural obligation have been established. The danger that state agents might be tempted to ill-treat individuals is not insignificant in many Contracting states consequently a strong application of the effective investigation duty will provide additional discouragement for this form of abuse. Requiring such investigations under Article 3 is stronger rather than under Article 13. Notwithstanding, it is important to underline that the effectiveness of a remedy for the purpose of Article 13 does not hinge on the certainty of a favourable outcome for the applicant. The ambiguity in the Article 13 cases relates to the circumstances where the Court is willing to examine whether there has been an effective investigation under both substantive Articles (Article 3, 3 or 5) and Article 13. This argument is a conclusion for this chapter that Article 13 supports the procedural obligations under article 3, and it is not just be applied in stead of Article 3, but is used rather as complementary and supportive.

¹¹⁴ Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms

¹¹⁵ *Leander v. Sweden*, no 9248/81, 26 March 1987, § 79

CONCLUSION

As this thesis has supported its arguments with the Court judgments, case-laws, who has repeatedly held that where an individual makes a credible assertion that he or she has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State or private individuals, that provision read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation. As it was discussed, it is a procedural obligation under Article 3 upon the Contracting Parties of the Convention. In addition to this, as mentioned at the Chapter II, Article 3 imposes a negative obligation, an obligation to refrain from inflicting ill-treatment on individuals with their jurisdiction. If the Court finds that a Contracting Party has failed in its negative obligation, it finds a violation of Article 3 in its substantive aspect.

The outcome of the research, the thesis, on implied Contracting Party's obligation under Article 3 of the Convention is convincing for the question number one of the research; whether procedural part of Article 3 threatening the absolute and unconditional character of the substantive part of Article 3. The thesis argued that the procedural obligation of Article 3 is threatening its absolute and unconditional character of the substantive part. The cases like, *Assenov and Others v. Bulgaria*, *Poltoratskiy v. Ukraine and Khashiyev and Akayeva v. Russia* confirmed that the Court finds no required standard of proof for the substantive violation if the Contracting Party fails to conclude that whether the victims were tortured or not. This approach shows that because of the lack of information the Court cannot conclude and prove the substantive violation of Article 3.

No reason to mention again that the Court's approach is problematic for the absolute and unconditional character of the substantive part of Article 3. This approach undermines an applicant's attempt to prove substantive violation of Article 3 and it can be seen that when the Court finds a procedural violation of Article 3, it may be less inclined to find a substantive one. The main concern here is that a procedural violations does not carry the same stigma as substantive violation. The procedural violation of inadequate investigation is not as grave as a judgment that state officials engaged in torture. Besides, the procedural violations are often met with procedural, not substantive, remedies. To conclude, the negative prohibition in Article 3 is absolute but positive obligations which flow from it are

not absolute because the State can exercise some judgments¹¹⁶ in applying them.¹¹⁷ Thus, the focus on the procedural components of Article 3 threatens the absolute and unconditional character of the substantive part of Article 3.

The second question of the thesis, whether the Court should examine substantive violation at the root of the application for Article 3 or should it confine itself to establishing a procedural violation, has also brought interesting discussion to the Chapter I. As a conclusion, the thesis can argue that it is not necessary for the Court to find a substantive violation of Article 3 before the Court can examine whether the respondent Contracting Party has complied with its procedural obligation under that article. In other words, before the identification of separate substantive and procedural obligations of Article 3, an inadequate investigation can be an element on which an applicant could rely to prove a violation of the Article as whole. In fact, as mentioned previously, sometimes, the Court is unable to find a substantive violation accurately because the respondent Government has violated its procedural obligation by not conducting an effective investigation.¹¹⁸ In particular, where the authorities fail to take basic investigative steps the substantive violation might very difficult or impossible for the applicant to prove. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiary.

The third question of the thesis, whether conduct an effective investigation in case of alleged violations of Article 3 overlap with Article 13 which already provides a similar positive obligation or whether which Article should be chosen over another one for to conduct an effective investigation, investigated the scope of Article 3 and Article 13. Chapter II developed an argument that the scope of Article 3 of the Convention has been elaborated and the boundaries of the Contracting Parties' jurisdiction have been resolved by the Court in its case-laws. The case-laws showed that the obligation of safeguard

¹¹⁶ Rhona K. M. Smith, *International Human Rights, Third edition*, Oxford, 2007, p. 165

¹¹⁷ Luzius Wildhaber, the then president of the European Court of Human Rights, at the Conference of European Constitutional Courts XXth Congress said: The fulfillment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law.

¹¹⁸ Ugur Erdal & Hasan Bakirci, *Article 3 of the European Convention on Human Rights – A Practitioner's Handbook*, Geneva 2006, p. 228

personal integrity under Article 3 may require states to do more than enact and enforce criminal law.

The research also showed that the emergence of a procedural right under Article 3 will likely result in more findings of faulty state investigations. The main concern for this is that in the context of Article 3 adequate remedy means that the national authority must be able to assess the element of risk primarily with reference to those facts which were known or ought to have been known to the state at the time of ill-treatment. Ever since in *Assenov v. Bulgaria*¹¹⁹ case the Court was established duties to investigate under Article 3 respectively, it has repeatedly found procedural violations of those Articles without concurrent substantive ones. Alastair Mowbray argues that the effective investigation obligation under Article 3 is less developed and more uncertain in its application at the Court that the corresponding obligation created via Article 2.¹²⁰ This research is also sharing this statement since obscure and unclear policy of the Court made it difficult when it came to the relationship between the requirement to accumulate an effective investigation into alleged ill-treatment under Article 3 and the corresponding requirement under Article 13.

Since there are many Contracting Parties to the Convention, accordingly, the types and methods of domestic criminal investigations and criminal trails vary considerably. Neither the Convention nor the Court's case-laws require uniformity in this respect. However, the Court's paramount consideration is that whatever methods are employed, criminal investigations should be capable of establishing the accuracy of breach of ill-treatment and lead to the identification and punishment of those responsible. Additionally, it should be noted that the obligation to investigate "is not an obligation of result, but means".¹²¹ In *Mikheyev v. Russia* case the Court stated that there is not a requirement for every criminal investigation result in a conviction. Attention must once more be made of the relationship between effective remedies and the requirement of exhaustion of domestic remedies. If an applicant succeeds in demonstrating that a particular remedy is ineffective, this will not

¹¹⁹ *Assenov v. Bulgaria*, no. 24760/94, 28 September 1998

¹²⁰ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004, p. 64

¹²¹ *Paul and Audrey Edwards v. the United Kingdom*, no 46477/99, 14 March 2002, § 71

only absolve the applicant from requirement of exhausting that remedy but may also lead the Court to find a procedural violation of Article 3 or a violation of Article 13.

Finally, Article 3 has proved a difficult provision to interpret because of the generality of its text. Article 3 places a negative duty on the state not to inflict the proscribed suffering on human beings, as well as a positive duty to ensure that these forms of suffering are not endured. Requiring such investigations under Article 3, rather Article 13, will reflect the seriousness with which the Court characterises this type of ill-treatment. This does not reduce the importance of Article 13 in securing co-operation between national level systems and the internationally. It proved that extended article 13 supports the procedural obligations under article 3 and can be used as a complementary and supportive.

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