



# *Article 3 ECHR*



# Article 3. Prohibition of torture

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



In the case *Gäfgen v. Germany*, 30 June 2008 the Court had to deal with the following situation:

*Mr. Magnus Gäfgen lured J. von Metzlar – the youngest son of a renowned German banking family – into his flat and suffocated him. Subsequently, Mr. Gäfgen deposited a letter at J.'s parents' place of residence, stating that J. had been kidnapped by several persons. Only if the kidnappers received one million Euros and managed to leave the country would the child's parents see their son again. The applicant then drove to a pond at a private property and hid J.'s corpse under a jetty at the pond.*



*Mr. Gäfgen* picked up the ransom at a tram station. From then on he was secretly observed by the police and, subsequently, arrested before he could board a plane at Frankfurt airport.

During the interrogation *Mr. Gäfgen* originally stated that other kidnappers held the boy.

Detective officer *E.*, acting on the orders of the deputy chief of the Frankfurt police, *D.*, told the applicant that he would suffer considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him into a cell with two huge black people who would sexually abuse him. The officer also hit him once on the chest with his hand and shook him so that his head hit the wall on one occasion.



For fear of being exposed to the measures he was threatened with, the applicant disclosed the precise whereabouts of the child after a short time.

In a note for the police file, the deputy chief of the Frankfurt police, *D.*, stated that that morning *J.*'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be questioned by police officer *E.* under the threat of pain which would not cause any injuries. According to the note, the applicant's questioning was exclusively aimed at saving the child's life rather than furthering the criminal proceedings concerning the kidnapping.



Which considerations lead the police officer *D.* to his decision?

**Maybe he thought his behaviour was justifiable?**

Several criminal codes justify or excuse an individual for the use of force in self-defence or to protect another person's life or health (or another higher value protected by the law). So why should he not use violence to protect the boy's life...?



## **Or he might have thought of Article 2 ECHR?**

Article 2 of the Convention may allow the deprivation of life in specific circumstances, defending a person from unlawful violence.

So why would the police officer not be allowed to use violence or threaten to use violence to defend the life of a kidnapped boy against such unlawful violence by the kidnapper? Violence or just threatening to use violence inflicts much less harm than killing somebody...



**Well ... that was wrong!**

Private individuals might be excused for what the police officers did, but not a representative of the state.

Article 3 ECHR - relevant for all actions by state officials - reads as follows:

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





Intentionally inflicting pain or suffering to a prisoner to extract a confession may constitute **torture** and violates Article 3.

In Selmouni v. France, 28 July 1999, the Court found:

“98. [T]he pain or suffering was inflicted on the applicant intentionally for the purpose of, *inter alia*, making him confess to the offence which he was suspected of having committed [...] by police officers in the performance of their duties. [...]

105. [T]he physical and mental violence, considered as a whole, committed against the applicant's person caused “severe” pain and suffering and was particularly serious and cruel. Such conduct must be regarded as **acts of torture** for the purposes of Article 3 of the Convention.”



To threaten to use torture is also a violation of Article 3. The Court stated that sufficiently real and immediate threats of deliberate ill-treatment in order to extract a statement from a detainee constitutes **at least inhuman treatment**:

In Gäfgen v. Germany, 30 June 2008, the Court found:

*“66. Moreover, a mere threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may be in conflict with that provision. Thus, to threaten an individual with torture may constitute **at least inhuman treatment**.”*



Now we know that threatening to use torture as well as actually inflicting pain and suffering for the purpose of making a detainee confess is prohibited by Article 3.

**But can it not be justified in exceptional circumstances?**

- To save a life (like in our case)?
- To prevent a terrorist attack and save many lives?



## It cannot.

Article 3 embodies one of the fundamental values of democratic societies. There are **no exceptions and no derogations possible under Article 15 ECHR**.

This is what we call the **absolute protection** guaranteed by Article 3: it is **always applicable and nobody is excluded**; regardless of how criminal, dangerous or undesirable a person may be!



**Article 3 is the only provision of the ECHR not underlying any limitations, restrictions or exceptions.**

Other provisions contain limitations, for example Art. 8 § 2...

*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is **necessary in a democratic society** in the interests of **national security, public safety or the economic well-being** of the country, for the **prevention of disorder or crime**, for the protection of **health or morals**, or for the protection of the **rights and freedoms of others**.*

or Art. 9 § 2:

*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are **necessary in a democratic society** in the interests of **public safety**, for the protection of **public order, health or morals**, or for the protection of the **rights and freedoms of others**.*



**Even in exceptional circumstances**, such as

- Fight against terrorism
- Fight against organised crime and
- Kidnappings

the Convention prohibits torture, inhuman or degrading treatment or punishment **in an absolute manner, without any limitations**. **Article 3 has no paragraph 2!**



It is universally recognised that prohibition of torture, provided by Art.3 of the Convention, constitutes fundamental and an absolute right that according to general international law is considered to be *jus cogens* norm.

Vienna Convention On the Law of Treaties – Art. 53 specifies that a treaty conflicting with *jus cogens* at the time of its conclusion is void. Similarly, a treaty becomes void and terminates, if it is in contradiction with a peremptory norm of international which has newly emerged.

*Jus cogens* - a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.



***Now let's have a closer look at Article 3 in general terms!***



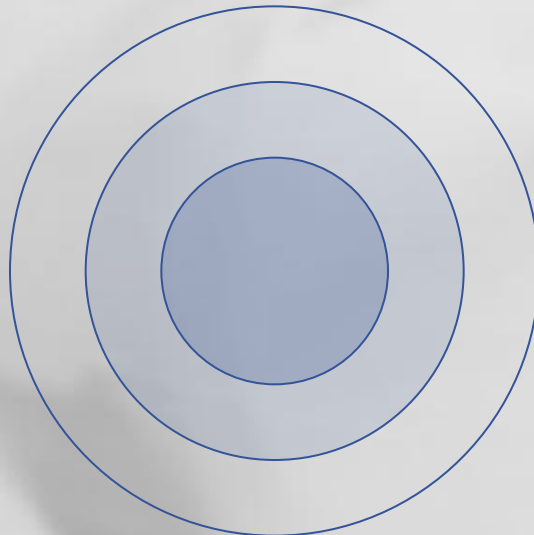


## Definition of Art. 3 by the ECtHR:

### **Article 3 ECHR:**

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

These terms are gradual, according to the severity of the ill-treatment:





## Definition of Art. 3 by the ECtHR:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. Therefore not every ill-treatment will constitute a violation of Article 3. The assessment of the minimum level of severity depends on all the circumstances of the individual case including

- *duration*
- *physical and mental effects*
- *the sex, age and state of health of the victim*
- *the manner and method of its execution.*

Therefore the question of the severity of a specific treatment is relevant in two aspects:

- *to establish whether Article 3 is violated at all and*
- *to qualify the ill-treatment within the gradual terms of Art. 3*



## Definition of Art. 3 by the ECtHR:

The distinction between **torture** and **the other forms of ill-treatment** of Article 3 is found in the

1. **purpose** of the violence and
2. **intensity and cruelty** of the violence.



## Definition of Art. 3 by the ECtHR:

**Torture** is defined as violence used with the **purpose** of obtaining a confession, inflicting a punishment or intimidation. To find out the exact meaning of “Torture”, one can resort to the definition of the UN Convention against Torture. The Court referred to this definition and the purposive element on several occasions (see - inter alia - Salman v. Turkey, Grand Chamber, 27 June 2000, § 114).

Going beyond that purposive element, acts of physical and also mental violence being **particularly serious and cruel** and capable of causing “severe” pain and suffering amount to torture (see Selmouni v. France, 28 July 1999, § 105).



## Definition of Art. 3 by the ECtHR:

The Court found **torture** in the following cases:

- “Palestinian hanging” – the detainee was stripped naked, with his arms tied together behind his back, and suspended by his arms, leading to paralysis:  
(Aksoy v. Turkey, 18 December 1996, para. 23 and 64)
- Rape of a detainee by a police officer:  
(Aydin v. Turkey, 25 September 1997, para. 86)
- Intentionally inflicting pain or suffering on the applicant for the purpose of, inter alia, making him confess to the offence which he was suspected of having committed:  
(Selmouni v. France, 28 July 1999, para. 98)



## Definition of Art. 3 by the ECtHR:

The Court has stated that the distinction between torture and **inhuman or degrading** treatment or punishment is to be made on the basis of “a difference in the intensity of the suffering inflicted” (*Ireland v. UK*, 18 January 1978, para. 167). The severity, or intensity of the suffering inflicted can be gauged by reference to the factors referred to before:

- duration
- physical and mental effects
- the sex, age and state of health of the victim
- the manner and method of its execution.



## Definition of Art. 3 by the ECtHR:

Ill-treatment that is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading treatment.

In *Ireland v. United Kingdom, 18 January 1978* the Court classified physical injuries inflicted to detainees as **inhuman treatment**. In this case, the “five techniques” caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and leading to acute psychiatric disturbances during interrogation (*Ireland, para 167*).



## Definition of Art. 3 by the ECtHR:

**Inhuman treatment** covers deliberately used violence, causing severe mental and physical suffering. In the judgment Yankov v. Bulgaria the Court describes inhuman treatment as causing “*either actual bodily injury or intense physical and mental suffering*”.

According to that same judgment Yankov v. Bulgaria the Court classifies treatment to be **degrading treatment** if it is such “*as to diminish the victims' human dignity or to arouse in them feelings of fear, anguish and inferiority capable of humiliating and debasing them*”.

While the purpose of inhuman treatment is to cause suffering, the focus of degrading treatment (as the “least severe” form of ill-treatment falling under Article 3) is the humiliation of the victim.





## Definition of Art. 3 by the ECtHR:

Examples of **inhuman treatment** in the Court case law are:

- the “five techniques”: (Ireland v. United Kingdom, 18 January 1978);
- insertion of a tube by force through the nose of a suspect and administration of emetics to provoke the regurgitation of a bubble of cocaine: (Jalloh v. Germany, 11 July 2006);
- the destruction of the homes and most of the property of the victim by security forces, depriving the victims of their livelihoods and forcing them to leave their village: (Selçuk and Asker v. Turkey, 24 April 1998).



## Definition of Art. 3 by the ECtHR:

Examples of **degrading treatment (/punishment)** in the Court case law are:

- corporal punishment – birching:  
(*Tyrer v. United Kingdom*, 18 January 1978, para 35);
- detention of a severely disabled person (four limb-deficiency) in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty:  
(*Price v. the United Kingdom*, 10 July 2001, para 30);
- unnecessary strip-search of the blindfolded and handcuffed applicant:  
(*Wiesner v. Austria*, 22 February 2007, para 40ff.);
- weekly strip-searches in a prison without specific security needs:  
(*Lorsé and others v. the Netherlands*, 4 February 2003, para 73ff.).



## Definition of Art. 3 by the ECtHR:

However – one has to bear in mind that this classification by the Court into **torture**, **inhuman** or **degrading** treatment or punishment could change in the future.

In Selmouni v. France, 28 July 1999, para 101, the Court stated:

*“[H]aving regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” [...], the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. 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.”*



# POSITIVE OBLIGATIONS

- The Court developed a series of positive obligations under Article 3 declaring that the principle of effectiveness demands States complete certain specific acts in order to secure the rights and freedoms of the Convention for individuals in their jurisdiction. The positive duties imposed on states can be categorised broadly as **duties to prevent** breaches and then **duties to respond** to breaches.



The **preventative duties** require States to enact proper measures to protect all individuals in their jurisdiction against torture and ill-treatment generally.

The Court continued to develop its Article 3 positive obligations in a manner similar to under Article 2 in the *Z v. UK* case - the relevant authorities have a duty to take reasonable steps to prevent ill-treatment which they **knew of, or ought to have known of**.

The limits of these positive duties were seen in the *Pretty* case, where the State's obligation to protect did not require them to remove or mitigate the harm being suffered by the applicant by allowing her husband to assist her in committing suicide.



A state's **duty to respond** to a breach of an individual's Article 3 rights has also developed parallel to that of a state under Article 2. The Court set down, in its Assenov decision that where an arguable claim is raised that the applicant has been seriously and unlawfully ill-treated by state agents there must be an effective and independent official investigation. Again these requirements have been justified on the pragmatic grounds that it is necessary to ensure rights are respected and enforced in practice and not merely in theory.

The Court reiterates that the obligation to protect life under Article 3 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force



## Summary: basic principles

### What have you learned so far?

- The **protection** guaranteed by Article 3 **is absolute**.
- A violation **can never be justified**, not even in exceptional situations.
- **No derogations**, not even in times of war or other emergencies threatening the life of the nation.
- The Court distinguishes **torture** (the most severe form of ill-treatment), **inhuman** and **degrading** treatment/punishment. The distinction is made according to the purpose, the intensity and cruelty of the violence and other factors related to each individual case.



## Application of the principles:

Back to the case *Gäfgen*:

Do you understand why the police officer in the case *Gäfgen v. Germany* was violating Article 3 ECHR, even though he was only trying to protect the life of a minor - which would be protecting one of the fundamental values in our societies?





## Application of the principles:

Back to the case *Gäfgen*:

Well, there are 3 questions to answer:

1. How would you qualify the treatment with which *Gäfgen* was threatened?
2. Is the mere threat with torture already a violation of Article 3?
3. Is the intention to save the life of *J. von Metzlar* an acceptable justification?



## Application of the principles:

Here is the answer of the Court:

*“69. Thus, the Court finds that the treatment the applicant was threatened with would, if carried out, amount to torture. However, the questioning lasted for some ten minutes only and, as was established in the criminal proceedings against the police officers [...], took place in an atmosphere of heightened tension and emotions owing to the fact that the police officers, who were completely exhausted and under extreme pressure, believed that they had only a few hours to save J.’s life, elements which can be regarded as mitigating factors [...]. Furthermore, the threats of ill-treatment were not put into practice and have not been shown to have had any serious long-term consequences for the applicant’s health.*

*70. In the light of the above, the Court considers that in the course of the questioning by E. on 1 October 2002 the applicant was subjected to inhuman treatment prohibited by Article 3 of the Convention.”*

As to the first question the Court held that the treatment would amount to **torture**. The threats as such also amounted to a violation: however the Court argues that due to several factors the threats are not to be qualified as torture but as **inhuman treatment**. As to the last question: although the intention to save the life of the boy was a mitigating factor, it was **NOT a justification**.



## Case law on the absolute protection of Article 3:

Chahal v. the United Kingdom, 15 November 1996, para 79:

**No exception, no derogation of Art. 3, even in the fight against terrorism.**

“Article 3 enshrines one of the most fundamental values of democratic society [...]. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. 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 even in the event of a public emergency threatening the life of the nation.”



## Case law on the absolute protection of Article 3:

Ramirez Sanchez (Grand Chamber) v. France, 4 July 2006, para 115f:

**No exception, no derogation of Art 3, even in fight against terrorism or crime.**

“115. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

116. In the modern world States face very real difficulties in protecting their populations from terrorist violence. However, 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 [...]. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned [...]. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.”



## Case law on the absolute protection of Article 3:

Gäfgen v. Germany, 30 June 2008, para 69:

**No exception, no derogation of Art 3, not even in order to save a person's life.**

*“The Court would like to underline in this connection that in view of the absolute prohibition of treatment contrary to Article 3 irrespective of the conduct of the person concerned and even in the event of a public emergency threatening the life of the nation – or, a fortiori, of an individual – the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations.”*