

EXPLORING THE PROHIBITION OF DEGRADING TREATMENT WITHIN ARTICLE 3 OF  
THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## ABSTRACT

This thesis addresses the meaning and scope of application of the right not to be subjected to degrading treatment, a distinct form of harm within the absolute prohibition of torture, inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights. Through an interpretive case-law analysis, the thesis presents a deeper conceptual understanding of the meaning of degrading treatment than is found in existing human rights literature. It is a central argument of this thesis that the concept of human dignity occupies a key position in the interpretation of degrading treatment adopted by the European Court of Human Rights. Consequently, it is argued that the meaning of human dignity in this context ‘frames’ the potential boundaries of the right. The thesis aims to facilitate identification of situations that may convincingly be argued to amount to potential instances of degrading treatment through generating a richer appreciation of the right’s proper scope of concern. A comprehensive account of the meaning of degrading treatment and corresponding state obligations is offered. This account provides a framework for future application of the right that is both practical and plausible.

## DECLARATION

I declare that I have composed this thesis, that it is my own work and that it has not been submitted for any other degree.

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*In another moment Alice was through the glass, and had jumped lightly down into the Looking-glass room. The very first thing she did was to look whether there was a fire in the fireplace, and she was quite pleased to find that there was a real one, blazing away as brightly as the one she had left behind.<sup>1</sup>*

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<sup>1</sup> Carroll, Lewis (1971), 'Through the Looking Glass And What Alice Found There', in R. L. Green (ed.), *Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass And What Alice Found There* (London: Oxford University Press) at 128.

## CHAPTER ONE

### INTRODUCTION

#### **Statement of research**

This thesis explores the meaning of the right not to be subjected to degrading treatment within Article 3 of the European Convention on Human Rights (ECHR). It builds upon the judicial interpretation of degrading treatment by the European Court of Human Rights (ECtHR; the Court) and aims to draw conclusions about its scope of application. The thesis aims to arrive at a deeper understanding of the conceptual essence of the right in order to facilitate identification of situations that may appropriately be argued to fall within its scope.

The ECtHR has established several ‘reference points’ that are used to judge the existence of degrading treatment. In an approach that has remained largely constant since the 1970s, degrading treatment is recognised by the following characteristics: treatment that drives the victim to act against will or conscience, by feelings of fear, anguish or inferiority capable of humiliating or debasing the victim, or breaking his or her physical or moral resistance, or as treatment having an adverse effect on the victim’s personality. These points of reference indicate the core of the Court’s understanding of the concept of degradation within Article 3. Conceptual gaps remain, and these invite investigation. In terms of the meaning of treatment within the right, this is left almost entirely unarticulated by the Court. The meaning of treatment, therefore, also invites further enquiry. In-depth investigation is needed in order to articulate a more detailed meaning of degrading treatment that can guide our understanding of the substantive boundaries of the right.

The central research questions are what does degrading treatment mean (which is more than re-stating the reference points of the ECtHR, which provide minimal substance), and in what circumstances can the state be held responsible for a violation of the right not to be subjected to degrading treatment? These two questions can be broken down

into further distinct questions: what precisely is the state expected to do, or refrain from doing, to protect this right?; what do the components identified by the Court as indicative of the existence of degradation<sup>2</sup> actually mean (for example, what does humiliation mean in this context? And what more can be said about what it means to be driven to act against one's will or conscience)? Also, how is the term treatment understood (for example, who or what may inflict the treatment)? The research addresses such questions by exploring the case-law of the ECtHR. The aim is to draw conclusions that will facilitate identification of situations that may properly (i.e. currently rather than in an ideal society) be described as potential instances of degrading treatment.

A unifying thread running throughout the analysis is the idea of interpretation in a broad sense. This captures the way in which the research will engage with the jurisprudence of the ECtHR. It also captures the nature of the conclusions that are sought and presented within the thesis – the analysis is an exercise in interpretation rather than normative critique. The idea of interpretation notably provides the lens through which to view the relevance of the concept of human dignity for our understanding of the scope of application of the prohibition of degrading treatment. It will be argued that the concept of human dignity, manifest in the jurisprudence, is reflected in the meaning of degrading treatment and the scope of application of the prohibition. The prominent and decisive position occupied by human dignity can be captured in the visual metaphor of the 'looking glass'. In the opening chapter of Carroll's sequel to *Alice's Adventures in Wonderland*, the looking glass acts as a portal to a mirror image world. Although everything is reversed on the other side of the glass, some things remain recognisable, including the fire that Alice finds still blazing in the fireplace – back-to-front but nevertheless burning 'as brightly as the one she had left behind.' It will be argued that the concept of human dignity can be seen to assume such a focal and recognisable presence in relation to the meaning of its conceptual opposite, degrading treatment. Further, it will be argued that it is indispensable to acknowledge this relationship since

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<sup>2</sup> The Convention and the ECtHR use the term degrading treatment, rather than degradation, but the term degradation is nevertheless useful and appropriate to denote the conceptual core of the prohibition. This is in line with the separation of the terms degrading and treatment for the purpose of analysis, as will be referred to below. Note that the ideas of degrading treatment and degradation have been elided in literature on Article 3; see Lawson, Anna and Mukherjee, Amrita (2004), 'Slopping Out in Scotland: The Limits of Degradation and Respect', *European Human Rights Law Review*, 6, 645-59, and Duff, R. Anthony (2005), 'Punishment, Dignity and Degradation', *Oxford Journal of Legal Studies*, 25 (1), 141-55.

the sense in which human dignity is understood, in the eyes of the Court, to be violated – i.e. dignity in its back-to-front, negative manifestation – mirrors the parameters of the meaning of degrading treatment.

### Existing literature in the field of study

In addition to gaps existing in the case-law – in some cases of a substantial nature – gaps also remain in secondary literature, in which the full scope of the degrading treatment element of Article 3 has not been systematically analysed and explored. This literature is generally limited to identifying degrading treatment as a distinct violation within the right not to be subjected to torture, inhuman or degrading treatment or punishment and to collating conclusions from the case-law, and does not proceed to a full excavation of the distinctive substance of degrading treatment. An overview will now be given of the literature that has been surveyed in order to demonstrate its scope and to begin to map the areas to which the thesis aims to contribute.

Harris, O’Boyle and Warbrick, in their general treatise on the ECHR, include reference to the basic characteristics of the right<sup>3</sup> and various sections are included for each of the categories of torture, inhuman treatment, inhuman punishment, degrading treatment and degrading punishment and within each, significant jurisprudence is highlighted. In relation to degrading treatment, reference is made to the minimum level of severity and to the question of intention of the ‘perpetrator’. Important cases are outlined, the application of the right in relation to discrimination is discussed, as are conditions of detention and claims relating to ‘other diverse contexts’.<sup>4</sup> Such general ECHR literature, even where a chapter is devoted to Article 3, is limited in the attention it can afford to the specific rights violation that is degrading treatment.

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<sup>3</sup> I.e. the fact that Article 3 is absolute, unqualified and non-derogable; reference to the relativity of the minimum threshold of severity; the distinction between categories of ill-treatment; and state responsibility; see Harris, David J., O’Boyle, Michael and Warbrick, Colin (1995), *Law of the European Convention on Human Rights* (London: Butterworths) at 55-59. These basic characteristics of the prohibition of torture, inhuman and degrading treatment or punishment will be laid out in Chapter Two of the thesis.

<sup>4</sup> Harris et al. (1995) at 81-88.

In Lester and Pannick's *Human Rights Law and Practice*, one chapter is also dedicated to Article 3 ECHR, which begins with an introduction to the basic characteristics of the right. On 'the meaning of torture, and inhuman or degrading treatment or punishment', and in relation to degrading treatment specifically, several points that have developed in the case-law are noted<sup>5</sup>, as well as the distinction between forms of ill-treatment within Article 3. Examples of cases are given throughout.<sup>6</sup> Categories are given of situations to which Article 3 has been relevant and indicative cases are outlined; for example, arrest and detention, immigration control, asylum seekers and extradition, and corporal punishment.<sup>7</sup> Van Dijk et al. take a similar approach, one which includes a relatively extensive chapter on Article 3. The authors include discussion of the relationship between the forms of ill-treatment, a general summary of the Court's understanding of each form, including reference to serious humiliation or debasement, and the relevance of publicity and intention in the context of degrading treatment/punishment. There is also an outline of the Article 3 procedural obligation and the obligation of states to protect individuals from prohibited treatment by private parties, as well as examples of application of the severity threshold and issues of mental suffering and consent. Case-law is further explored in relation to categories of application of Article 3: imprisonment, detention and arrest, admission, asylum, expulsion and extradition, the death penalty and loss of life, asylum, and medical cases.<sup>8</sup> Again similarly, Ovey and White include a chapter on the prohibition of torture. A section on degrading treatment highlights the centrality of humiliation or debasement and gives examples of case-law (notably in relation to discrimination). Other points are referred to (positive obligations, extraterritorial effect) before a range of categories are outlined to which Article 3 in general has been applied: disappearances, destruction of homes, acts in the course of arrest and detention, conditions of detention, detention and mental health, immigration,

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<sup>5</sup> I.e. the minimum level of severity, relative assessment, mental suffering, and sufficiency of threat of treatment; Lester, Anthony and Pannick, David (2004) (eds.), *Human Rights Law and Practice* (2<sup>nd</sup> edn.; London: LexisNexis) at 133-38.

<sup>6</sup> E.g.: 'The birching of a teenage boy by a stranger in humiliating circumstances was held to constitute a degrading punishment in the case of *Tyrer v UK*. On the other hand, the ECt HR held in *Albert and Le Compte v Belgium* that striking a doctor off a medical register did not constitute a degrading punishment.' See Lester and Pannick (2004) at 137.

<sup>7</sup> Lester and Pannick (2004) at 142-51.

<sup>8</sup> Van Dijk, Pieter, Van Hoof, Fried, Van Rijn Arjen and Zwaak, Leo (eds.) (2006), *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edn.; Antwerp: Intersentia) at Chapter 7.

extradition and corporal punishment.<sup>9</sup> Other references to degrading treatment within general work on the ECHR take this approach of surveying the case-law, reiterating what the Court has said about degrading treatment and categorising situations with which degrading treatment has been associated; including Mowbray (who in *Cases and Materials on the European Convention on Human Rights* discusses the detail of significant case-law examples and the Court's approach, including in the areas of conditions of detention and discrimination)<sup>10</sup>, and Grosz, Beatson and Duffy (who refer to the prohibition in general terms and consider categories including interrogation techniques, corporal punishment, discrimination, extradition, asylum and expulsion, and detention conditions).<sup>11</sup>

Such accounts are generally limited to a summary of the Court's characterisation and examples of the case-law. This is unsurprising, and by no means a criticism, given the context in which these accounts of degrading treatment occur; that is, in literature on the ECHR as a whole, which valuably surveys the case-law on the entire range of Convention rights but which, consequently, cannot be expected to address the full extent of degrading treatment as a specific violation. Therefore, there is a need, on the one hand, for conceptual analysis of the meaning of degrading within Article 3, and on the other hand, for a close reading of the case-law to deduce the full meaning of treatment (on treatment, Ovey and White, for example, note only that it is not normally necessary to distinguish treatment from punishment<sup>12</sup>); what the term treatment can actually encompass is generally entirely glossed over. In addition, there is no consensus on the precise content of state obligations pertaining specifically to degrading treatment in general ECHR literature.

Aside from general ECHR literature, *Cruelty – An Analysis of Article 3* by John Cooper is one work that focuses specifically on Article 3. The principles that have developed in the case-law are laid out systematically. However, no in-depth analysis of degrading

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<sup>9</sup> Ovey, Claire and White, Robin (2006), *Jacobs and White, The European Convention on Human Rights* (4<sup>th</sup> edn.; Oxford: Oxford University Press) at Chapter 5, 82-83, 90-107.

<sup>10</sup> Mowbray, Alastair (2007), *Cases and Materials on the European Convention on Human Rights* (2<sup>nd</sup> edn.; Oxford: Oxford University Press) at Chapter 5, 210-19.

<sup>11</sup> Grosz, Stephen, Beatson, Jack and Duffy, Peter (2000), *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell) at 184-90.

<sup>12</sup> Ovey and White (2006) at 83-84.

treatment in particular, nor an analysis going beyond summarising and collating what the Court has said, features within this. For example, in relation to treatment it is stated simply that it must display the established signs of degradation.<sup>13</sup> And as with secondary literature on the ECHR as a whole, Cooper's book focuses on categorising situations to which Article 3 has been applied and highlights important case-law authorities.<sup>14</sup> Also writing on Article 3, P. J. Duffy summarises and considers the Court's case-law in a section on the term degrading, then moves to general considerations in relation to Article 3 and discusses the application of Article 3 in a range of situations (including punishment, imprisonment, asylum, and discrimination).<sup>15</sup> This thesis aims to address a lack of concern with, and analysis of, what the terms actually mean; something that is missing in the body of human rights literature on the ECHR, which tends to focus on enumerating the practices and situations that have been construed before the Court.<sup>16</sup>

A two-part introductory article by John Vorhaus, entitled 'On degradation', is the closest to a study of degrading treatment that has been identified.<sup>17</sup> This deals in the first instance with the relationship between the three elements of Article 3 (torture, inhuman treatment/punishment, and degrading treatment/punishment), arguing against a distinction based on levels of suffering, and considers the way in which the Strasbourg organs see the relationship between humiliation and degradation. The article begins to consider the meaning of the idea of degradation as well as the ideas of humiliation and dignity. The present research will further contribute in this respect and will move beyond

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<sup>13</sup> Cooper, John (2003), *Cruelty – An Analysis of Article 3* (London: Sweet & Maxwell) at Chapter One, 22, para. 1.31. A similar example is a guide to Article 3 published by the international umbrella organisation *The World Organisation Against Torture*. This document includes discussion of case-law and the meaning of 'torture' and 'inhuman or degrading treatment or punishment' but focuses primarily on the procedural aspects of Article 3; Erdal, Uğur and Bakirci, Hasan (2006), 'Article 3 of the European Convention on Human Rights: A Practitioner's Handbook', OMCT Handbook Series Vol 1, available at [http://www.omct.org/pdf/UNTB/2006/handbook\\_series/vol1/eng/handbook1\\_full.pdf](http://www.omct.org/pdf/UNTB/2006/handbook_series/vol1/eng/handbook1_full.pdf).

<sup>14</sup> Cooper (2003) at Chapters 3 to 9.

<sup>15</sup> Duffy, Peter J. (1983), 'Article 3 of the European Convention on Human Rights', *International and Comparative Law Quarterly*, 32 (2), 316-46.

<sup>16</sup> An example of Article 3 literature with a different focus is: Addo, Michael K. and Grief, Nicholas (1995), 'Is there a Policy Behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?', *European Law Review*, 20 (2), 178-93. This article considers how the Convention organs reach decisions; it does not touch upon the meaning of the terms in Article 3 generally or on degrading treatment in particular, nor on the scope of application of the right.

<sup>17</sup> Vorhaus, John (2002), 'On Degradation. Part One: Article 3 of the European Convention on Human Rights', *Common Law World Review*, 31 (4), 374-99; (2003), 'On Degradation. Part Two: Degrading Treatment and Punishment', *Common Law World Review*, 32 (1), 65-92.

this approach both in terms of focus and extent of analysis. The most recent, and unique, contribution to the field is in the form of a legal philosophical perspective on the meaning of the terms inhuman and degrading in a 2008 seminar paper and lecture by Jeremy Waldron.<sup>18</sup> The focus of this contribution rests on the meaning of inhuman and degrading. This represents a significant step beyond reiteration of case-law decisions, although it adopts a different approach to that which is taken in the thesis: it engages directly in interpretation of the text of the Convention, rather than in interpretation of the case-law that has been developed by the ECtHR. The thesis will additionally consider the dimension of treatment, as well as state obligations.

Other literature exists on inhuman and degrading treatment combined, which considers the application of the prohibition in different contexts; notably socio-economic circumstances<sup>19</sup> and in relation to refugees.<sup>20</sup> Such discussions explore the relevance of the prohibition of inhuman and degrading treatment to new situations. As will be further noted below, it is intended that the outcomes of the thesis will be valuable in considering such questions about the kinds of situations to which the prohibition of degrading treatment might apply, having explored the nature of state obligations, the meaning of degrading treatment, and what the right is in essence intended to protect.

## Motivations and objectives

The research question is motivated by several factors. The first motivation stems from an interest in the substance of the concept of human dignity, which is instinctively significant for the meaning of degrading. What is the relationship between human dignity and degradation? How does this play out in the interpretation of the prohibition? What are the conceptual and practical consequences of a role played by the concept of human dignity? The study of degrading treatment is an opportune area in which to gain

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<sup>18</sup> Waldron, Jeremy (2008), 'Cruel, Inhuman and Degrading Treatment: The Words Themselves', *New York University Public Law and Legal Theory Research Paper Series*, Working paper no. 08-36, available at <http://ssrn.com/abstract=1278604>.

<sup>19</sup> Cassese, Antonio (1991), 'Can the Notion of Inhuman and Degrading Treatment be applied to Socio-economic Conditions?', *European Journal of International Law*, 2, 141-45.

<sup>20</sup> Fabricotti, Alberta (1998), 'The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases', *International Journal of Refugee Law*, 10 (4), 637-61.

insight into questions concerning the substance of this concept. It occupies a foundational place in international human rights law, and the prohibition of degrading treatment forms part of the human right that is widely accepted as having the most intimate relationship with the concept of dignity and as reflecting most clearly the desire to protect dignity that underlies the ECHR. Furthermore, within the right not to be subjected to torture, inhuman or degrading treatment or punishment, degrading treatment in particular may be seen as the element that evokes most directly, by linguistic association, this concept of human dignity.

Engagement with the idea of dignity occurs within the context of what seems to be a recent revival of academic and public interest in the concept. Significant interest is evident in a range of academic literature, in human rights literature specifically, in arguments before the ECtHR, in civil society organisations, as well as in the wider international law sphere. General academic interest is buoyant. Authors including Dworkin and Waldron in legal and political theory<sup>21</sup>, Christopher McCrudden in relation to judicial interpretation<sup>22</sup>, Teresa Iglesias taking a philosophical approach<sup>23</sup> and Beylvelde and Brownsword in the bioethics context<sup>24</sup> have all recently contributed to the substantial body of academic literature on human dignity. They are joined by a range of cross-disciplinary perspectives in collected anthologies defending human dignity and exploring its violation.<sup>25</sup> Similar anthologies are also present specifically in the human rights sphere, as is scholarship that refers to dignity as an element of human rights theory.<sup>26</sup> Béatrice Maurer argues that the principle of respect for human dignity has evolved in recent years and is making a comeback, and asks whether judges of the ECtHR will show reticence in relation to the principle, or whether they will allow

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<sup>21</sup> See Dworkin, Ronald (2006a), *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press); Waldron, Jeremy (2007), 'Dignity and Rank', *European Journal of Sociology*, 48 (2), 201-37.

<sup>22</sup> McCrudden, Christopher (2008), 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, 19 (4), 655-724.

<sup>23</sup> Iglesias, Teresa (2001), 'Bedrock Truths and the Dignity of the Individual', *Logos*, 4 (1), 114-34.

<sup>24</sup> Beylvelde, David and Brownsword, Roger (2001), *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press).

<sup>25</sup> E.g. Kraynak, Robert P. and Tinder, Glenn (eds.) (2003), *In Defense of Human Dignity – Essays for Our Times* (Indiana: University of Notre Dame Press).

<sup>26</sup> E.g. Kretzmer, David and Klein, Eckhart (eds.) (2003), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International); Gearty, Conor (2005), *Principles of Human Rights Adjudication* (Oxford: Oxford University Press) at Chapter 5 in particular.

themselves to be ‘seduced’ by the ‘current climate’ and favour the ‘widest’ use of the concept.<sup>27</sup> Paulo César Carbonari proposes that human dignity should be at the core of human rights discussion and the guiding principle for protection efforts.<sup>28</sup> Berma Klein Goldewijk argues forcefully for the ‘regaining’ of the basic notion of dignity, stating that ‘[h]uman dignity needs to be brought to the centre of the human rights debate’.<sup>29</sup> The domain of economic, social and cultural rights appears to be a ripe area for a re-focusing on dignity as a push towards enforcement.<sup>30</sup> As an example of dignity being raised before the ECtHR, *Pretty v. UK*, concerning assisted suicide and touching upon the ‘death with dignity’ debate, clearly reflects a view of dignity as significant in the judicial human rights arena.<sup>31</sup> Within the realm of civil society, examples of the currency of human dignity abound.<sup>32</sup> Klein Goldewijk also notes that the issue of addressing violations of human dignity has been central to recent UN debates over minimum humanitarian standards, providing an example of its international law relevance.<sup>33</sup> It is also probable that the concept has acquired force through the increased attention paid to crimes against humanity in the last decade.<sup>34</sup> Undoubtedly, debate in the sphere of

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<sup>27</sup> Maurer, Béatrice (1999), *Le Principe de Respect de la Dignité Humaine et la Convention Européenne des Droits de l’Homme* (Paris: La Documentation française) at 26: ‘...va-t-il se laisser séduire par l’air du temps et en favoriser le recours le plus large?’

<sup>28</sup> Carbonari, Paulo César (2002), ‘Human Dignity as a Basic Concept of Ethics and Human Rights’, in B. Klein Goldewijk, A. C. Baspineiro, P. C. Carbonari (eds.), *Dignity and Human Rights – The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia), 35-44, at 39.

<sup>29</sup> Klein Goldewijk, Berma (2002), ‘Economic, Social and Cultural Rights: Globalization and the Search for Alternatives and International Political Impacts’, in B. Klein Goldewijk, A. C. Baspineiro, P. C. Carbonari (eds.), *Dignity and Human Rights – The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia), 301-04, at 302.

<sup>30</sup> Indeed the link between dignity and economic, social and cultural rights has been established in several national constitutions. E.g., the constitution of Belgium states that ‘Everyone has the right to lead a life in conformity with human dignity’, to which end, economic, social and cultural rights are guaranteed (Article 23, Constitution of Belgium, 17 February 1994); the constitution of Finland states that ‘Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care’ (Section 19(1), Constitution of Finland, 1 June 1999).

<sup>31</sup> *Pretty v. UK*, no. 2346/02, ECHR 2002-III.

<sup>32</sup> For example, a public statement made by Amnesty International in 2005 during UN General Assembly hearings on reforms, is entitled ‘UN Reform: Freedom to live in dignity’, and argues that human rights, as the foundation of efforts to achieve freedom to live in dignity, must have a stronger standing (Amnesty International, UN Reform: Freedom to live in Dignity, 24 June 2005). Another example is the international academic/activist organisation Human Dignity and Humiliation Studies (<http://www.humiliationstudies.org/>).

<sup>33</sup> Klein Goldewijk (2002) at 6.

<sup>34</sup> See Maurer (1999) at 9, citing the first judgment of the International Criminal Tribunal for the Former-Yugoslavia, which makes reference to dignity; see *The Prosecutor v. Drazen Erdemovic*, no. IT-96-22-T, 29 November 1996, para. 28.

bioethics has also had the effect of placing the concept firmly in the limelight.<sup>35</sup> This high degree of interest and the prominence of human dignity in these environments raises the profile of the concept and motivates further enquiry. This is manifested in the thesis through questioning the meaning of dignity in relation to degrading treatment and its relevance to conclusions on the right's scope of application.

The second motivation for the thesis is a perceived need to better understand the meaning of degrading in this context. The term degrading is interesting in that in everyday language one tends to have an idea of what the term may be associated with at the same time as not being able to articulate precisely why certain behaviour should be described as degrading as opposed to some other kind of harm. Furthermore, there is a common sentiment that one person's idea of what is degrading may not necessarily be the same as another person's. These elements combine with the fundamental and absolute nature of the prohibition of degrading treatment in the ECHR context to create intriguing questions that require to be answered if the content of the right is not to be left obscure. Exploration of the meaning of degrading within the thesis will embrace various points: from a comprehensive account of the range of situations that have been considered on the merits by the ECtHR, to analysis of the meaning of notions such as humiliation and being shown contempt for one's personality.

A further motivation relates to the meaning of treatment. The Court has focused almost no attention on the meaning of treatment and this gap is echoed in the literature. Ironically, the word treatment might be presumed to have a clear and unproblematic meaning based on the way in which the word is commonly used in everyday language, which contrasts with the perhaps commonly perceived fluidity, and even vagueness, of the term degrading. And yet upon examination of the case-law, clarification of the scope of meaning of treatment seems equally important. Through a close examination of the content of relevant cases, the thesis aims to highlight patterns and to propose a particular range of meanings that can be accorded to the term treatment. In considering the

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<sup>35</sup> E.g., this is reflected in a 1999 Council of Europe Recommendation (Council of Europe, Parliamentary Assembly, *Recommendation 1418, Protection of the human rights and dignity of the terminally-ill and the dying*, 25 June 1999) and see Report of the Council of Europe Social, Health and Family Affairs Committee, *Assistance to patients at end of life*, Doc. 10455, 9 February 2005 (n.b. that this report discusses the draft resolution which was later rejected by the Parliamentary Assembly on 27 April 2005).

meaning of treatment, the crucial question of the nature of the obligations of the state is highlighted. This is particularly so in the context of positive obligations of the state, in relation to which significant questions arise about the way that both treatment and the engagement of the responsibility of the state are understood by the ECtHR. In European human rights literature generally, there is significant discussion but no systematic approach to positive obligations, which consequently results in a lack of uniform application and difficulties in ascertaining whether such obligations are relevant to a particular situation. The thesis aims to clarify the nature and extent of state obligations in the degrading treatment context.

A further, and significant, normative motivation is grounded simply in the conviction that the protection afforded by the right not to be subjected to degrading treatment, particularly given its perceived link to human dignity as well as the absolute nature of the guarantee, should be made available where that protection is due. In consequence, the research is directed by a desire to facilitate practical application. The thesis can be viewed as a starting point for research (notably, socio-legal) that might apply the degrading treatment conclusions to any number of situations, particularly (although not exclusively) situations that may appear to be surprising or unlikely inhabitants of the degrading treatment landscape. The treatment of asylum seekers in the United Kingdom is one such situation, and it is one that has recently been found by the House of Lords to entail degrading treatment.<sup>36</sup> Prostitution is also an issue that could potentially be considered in these terms; as shall be pointed out, an association has recently been made between prostitution and Article 3 before the ECtHR.<sup>37</sup> Begging as a result of destitution is an area that it is believed would be particularly interesting to analyse in light of a developed understanding of the right not to be subjected to degrading treatment. Another is societal treatment of the elderly. To begin to delineate such fields of application the scope of meaning and application of the right itself must be explored in-depth. The objective, therefore, is to gain as clear a picture as possible of the scope of the right's

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<sup>36</sup> *R (Limbuela) v. Secretary of State for the Home Department, R (Tesema) v. Same, R (Adam) v. Same* [2005] 3 WLR 1014. The House of Lords, dismissing the Secretary of State's appeal, found that the denial of support (both financial and in terms of shelter) to asylum seekers coupled with a ban on working amounted in these cases to inhuman or degrading treatment. See also *R (Q. and others) v. Secretary of State for the Home Department* [2003] 3 WLR 365; *R (Hawbir Zardasht) v. Secretary of State for the Home Department* [2004] EWHC 91.

<sup>37</sup> *Tremblay v. France*, no. 37194/02, 11 December 2007; see Chapter Six of thesis.

application and simultaneously to be able to identify situations that can properly be described as potential instances of degrading treatment.

Taking these motivating factors together, the overarching question becomes: how far might the boundaries of the right not to be subjected to degrading treatment extend? The perceived need for, and perceived utility of an in-depth, comprehensive study of the prohibition of degrading treatment can in itself be seen to constitute a motivating factor behind the research. The thesis aims to move beyond the current boundaries of investigation, within which the prohibition of degrading treatment has not been the subject of focused and detailed analysis. Whilst the research will chart the development of the right and its application since the inception of the ECHR system, the analysis of the scope of the right will be guided not only by the circumstances in which violations have already been found, but primarily by the meanings of the terms and the corresponding obligations of the state on the basis of the existing body of case-law. This case-law will be clarified and *built upon*, offering more detailed interpretations where this will contribute to gaining a clearer picture of the substance of the right and its scope of application. This exploration is valuable because several question marks have been left hanging in gaps void of, or with minimal, substance.

The majority of secondary literature that includes discussion of degrading treatment, which focuses on significant cases and common categorisations, does not tell us enough about the *meaning*, and hence *scope of application*, of the prohibition of degrading treatment. As has been suggested in the overview given above, general ECHR/Article 3 literature essentially informs us of the domains in which the right has already been argued and found to apply. This thesis, starting from the way that degrading treatment has been characterised in the case-law, aims to elucidate a picture of what degrading treatment means in a conceptual sense. This is in order to understand the *potential* scope of application of the right through basing the analysis on its *meaning* and *purpose*. This approach will allow for conclusions to be drawn about when the prohibition of degrading treatment can be appropriately invoked. It is intended that this will also allow us to understand why the categories highlighted in secondary literature exist – *why* have detention conditions, corporal punishment and certain forms of discrimination been successfully associated with degrading treatment? Substantive gaps remain in the conceptual understanding of degrading treatment seen in the case-law.

The fact that such gaps are identified invites a reading between the lines, to add substance and to clarify inconsistencies where necessary. To point out gaps in the case-law should not be viewed as an implied criticism. Given the immediate concerns of the judicial forum such elaboration could not be an expected feature of the day-to-day judgments of the Court. As Martha Nussbaum suggests of the questioning of a jury in any case involving emotions (such as degradation and related concepts, as will be argued in the thesis)<sup>38</sup>, an understanding of the concepts involved only requires to extend so far in the context of judicial application; questioning is contained at the level of the particular (i.e. were the facts correct, was the reaction reasonable?).<sup>39</sup> Likewise, the role of the ECtHR in cases involving degrading treatment is routinely limited in this sense to making a judgment based on the particular circumstances of the case at hand. A more substantive understanding of the concepts becomes important, however, when enquiry moves away from particular facts and is undertaken at a greater level of generality (Nussbaum refers, for example, to an Aristotelian account of anger); at this point an ‘account’ of the concepts becomes helpful.<sup>40</sup>

Where the Court’s interpretation is elaborated upon in the thesis, and gaps are filled, this shall be conducted in a way that is judged to be coherent with the overall approach already existing under the Convention (in relation to which Dworkin’s chain novel metaphor will be invoked as an illustration). The research does not aim primarily to criticise or test the appropriateness of the current approach of the ECtHR to degrading treatment and corresponding state obligations. And the aim is not to restrict, or necessarily to enlarge, the scope of application of the prohibition. It is intended that the research findings should be amenable to practical application and should facilitate the making of realistic and useful conclusions. Conclusions on meaning and scope of application must, therefore, be plausible and coherent if they are to have practical impact in the here and now. There is undoubtedly a place for critique, but the intention presently is to explore the case-law in a way that aims at conclusions that are not contingent upon

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<sup>38</sup> Nussbaum considers the emotions of anger and fear in the context of the criminal law; see Nussbaum, Martha C. (2004), *Hiding from Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press) at Chapter 1.

<sup>39</sup> Nussbaum (2004) at 67-68.

<sup>40</sup> Nussbaum (2004) at 68.

the acceptance of arguments about what the ECtHR's interpretation *should* be in the abstract; rather, the aim is simply to move forward in the vein of the already existing interpretation.

The meaning of degrading treatment will, therefore, be considered via the jurisprudence of the ECtHR. Incidentally, this could be seen to mirror the exercise of national courts taking the Strasbourg jurisprudence into account<sup>41</sup>; it is an endeavour to understand the *interpretation of the Convention by the Court*. In aiming to understand the meaning of degrading treatment via the jurisprudence of the Court there will be explicit recognition, not only that the Court's exercise vis-à-vis the text of the Convention is, of course, one of interpretation, but also that the objective of the thesis is equally interpretation. The thesis will present what will be argued to be plausible interpretations of the existing case-law, taking steps forward in line with the current judicial approach. Interpretation will play a pivotal role in arriving at, and determining the nature of conclusions on the scope of application of the right, both in directing interpretation of the case-law in the thesis and in understanding the interpretation of the Convention by the ECtHR. Although directed towards different objects and with different characteristics, the concept of interpretation is key.

## Methodology and scope

In contrast to the existing range of literature, the thesis will focus solely on a systematic exploration of the prohibition of degrading treatment. The research will not be concerned with torture or with inhuman treatment/punishment, or with relationships between the different components of Article 3. The focus will lie on degrading treatment rather than on the narrower idea of degrading punishment (treatment seems able to capture the idea of punishment within it, which is not the case from the opposite perspective). In aiming to move beyond consideration of how the right has been applied to date, to consider what the jurisprudence means in-depth and the implications of this for the scope of the right's application, it is more interesting to think about the broader idea of treatment rather than

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<sup>41</sup> See Lord Hope in *N. v. Secretary of State for the Home Department* [2005] 2 WLR 1124 at 23: '[...] it is not the words of article 3 of the Convention that we are being asked to construe but the jurisprudence of the European Court of Human Rights in Strasbourg [...]'].

punishment. Punishment also invokes an immediate association with individuals in detention. The thesis does not approach the prohibition with preconceived ideas about its limits; for example, it does not assume that the physical space in which a violation of the right can occur is, or will remain, primarily within situations of detention (a perception that is implicitly suggested, for example, by Vorhaus).

The research will focus on the ECHR and its protection organ, the ECtHR. Similar guarantees prohibiting torture, inhuman and degrading treatment or punishment are found across the range of international and regional human rights instruments. However, the jurisprudence relating specifically to degrading treatment, rather than torture notably, in institutions such as the European Committee for the Prevention of Torture and the UN Committee against Torture, is not as vast as that which has developed under the ECHR.<sup>42</sup> It has been noted that the ECtHR is a leader of the international approach to the prohibition of torture, inhuman and degrading treatment or punishment under other human rights instruments.<sup>43</sup> In addition, conducting this study from the United Kingdom, the ECHR is of particular interest since it is the protection system of most immediate relevance.

The law of the ECtHR will be treated as a self-standing body of law; in exploring the meaning of the prohibition of degrading treatment, a comparative approach with national legal systems of States Parties to the ECHR or other states has not been adopted. There are a number of reasons for not considering comparative use of the terms degrading and treatment in national ECHR states: Firstly, there is no evidence in degrading treatment case-law of the Court referring explicitly to the jurisprudence of other jurisdictions to

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<sup>42</sup> The European Committee for the Prevention of Torture has mostly identified ‘inhuman and degrading treatment’ rather than specifically ‘degrading treatment’ in its reports. See, e.g., Committee for the Prevention of Torture, *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 29 July-10 August 1990, para. 57; and *Report to the French Government on the visit to France carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 11-17 June 2003. See also Evans, Malcolm D. and Morgan, Rod (1998), *Preventing Torture – A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press) at 241-45 on the Committee’s use of the terms inhuman and degrading. In relation to the Convention against Torture, no views given by the Committee against Torture have separated the forms of treatment within cruel, inhuman or degrading treatment or punishment.

<sup>43</sup> Evans and Morgan (1998) at 74.

inform its own understanding of the *meaning* of degrading treatment.<sup>44</sup> Generally speaking, where the Court refers to the law of the States Parties, it does so in terms of the approach of the national state to a particular situation that bears upon the *application* of the right (for example, in the Article 3 corporal punishment cases of *Tyrer v. UK* and *Campbell and Cosans v. UK*, the Court referred to developments in the penal policy of the Council of Europe states and observed the traditional and widely accepted nature of corporal punishment in the communities in question).<sup>45</sup> Carozza describes the Court's use of comparison as a 'justificatory method of comparative law'; that is, it is used to justify the Court's conclusion after it has exercised its discretion; it is not used expressly to arrive at the *meaning* of Convention provisions.<sup>46</sup>

A further reason is that, if the ECtHR relies implicitly on national jurisprudence to understand the meaning of degrading treatment, the influence of this will have been integrated into the ECtHR's own established understanding that is visible in its case-law. Presumably it is the case that the national traditions influence the Court's understanding of the Convention indirectly, given the range of national experience that is inherent in the composition of the Court through its judges.<sup>47</sup>

Also, crucially, the ECtHR provides the authoritative interpretation of the ECHR.<sup>48</sup>

Focusing on the jurisprudence of the ECtHR bolsters the likelihood of practical relevance; the conclusions drawn in the thesis on the meaning of degrading treatment are indeed intended to be persuasive and should be capable of being used to illuminate the existing approach of the ECtHR in the application of the prohibition of degrading

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<sup>44</sup> Paolo G. Carozza notes that any comparative references in the Court's judgments tend not to be specific about the object or nature of the comparison; Carozza, P.G. (1998), 'Uses and Misuses of Comparative Law in International Human Rights: Some reflections on the jurisprudence of the European Court of Human Rights', *Notre Dame Law Review*, 73 (5), 1217-37, at 1224-25. See also Quint, Peter E. (2001), 'International Human Rights: The convergence of comparative and international law', *Texas International Law Journal*, 36, 605-10, at 607.

<sup>45</sup> *Tyrer v. UK*, judgment of 25 April 1978, Series A, no. 26, para. 31; *Campbell and Cosans v. UK*, judgment of 25 February 1982, Series A, no. 48, para. 29.

<sup>46</sup> Carozza (1998) at 1225, 1234; see Carozza generally for a helpful discussion of the use of comparative references by the Court.

<sup>47</sup> Bernhardt, Rudolf (1993), 'The Convention and Domestic Law', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff), 25-40, at 35.

<sup>48</sup> Articles 44 and 46 ECHR (as modified by Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted at Strasbourg on 11 May 1994).

treatment. It would be inappropriate, therefore, to base conclusions on case-law external to the ECtHR. The meaning of degrading treatment must be the meaning that is tenable within this jurisprudence.

This point is linked to the choice not to engage with a comparative approach with non-States Parties' case-law. It would be an interesting exercise to explore different understandings of degrading treatment, particularly where innovative interpretation of the prohibition of torture, inhuman and degrading treatment or punishment might have taken place (for example, in jurisdictions with strong constitutional human rights jurisprudence and recourse to the concept of human dignity).<sup>49</sup> In pragmatic terms, however, it is not possible within the limits of the thesis to engage in deep comparative conceptual analysis alongside the conceptual analysis of ECHR case-law, although this would be a worthwhile enquiry for future work.

Finally, substantive understandings of the emotional concepts relied upon by courts tend not to be visible in routine judgments, which are immediately concerned with application of the rule to the case at hand (as noted above with reference to Nussbaum). In light of this, a surface-level comparative account of the use of the term degrading treatment would be unlikely to provide answers to the question of the *meaning* of degrading treatment. It would be necessary to delve behind the facade of such accounts to construct a picture of the meaning of the concept being relied upon, as will be necessary in relation to the ECtHR jurisprudence. The thesis, therefore, is not intended to be a comparative study.

A rich and detailed jurisprudence on Article 3 has developed under the supervision of the ECtHR and pre-1998, prior to the restructuring of the Convention system by Protocol no. 11, the European Commission on Human Rights (EComHR; the Commission). Priority has been given to judgments of the Court as the final and binding decisions. Some interesting insight can also be gained from the Commission's discussions in certain cases and some of these have indeed been drawn upon where considered particularly important, including the rare cases that were not referred to the Court pursuant to the

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<sup>49</sup> E.g., in South Africa, India and Germany. For a brief overview of human dignity in the constitutional context, see Chaskalson, Arthur (2002), 'Human Dignity as a Constitutional Value', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International), 133-44.

Commission's report. In terms of systematic and comprehensive analysis, the cases are limited to judgments on the merits handed down by the Court since this body came into existence in 1959.

The point of departure, therefore, is a close reading of degrading treatment case-law of the ECtHR, which will provide a solid base on which to construct a picture of the scope of the right. Judgments have been searched and accessed via the Council of Europe's HUDOC database, holding all judgments of the Court.<sup>50</sup> This case-law comprises one hundred and forty-five judgments concerning degrading treatment, which have been systematically examined.<sup>51</sup> In order to allow a comprehensive examination of the meaning of the term treatment, the list of degrading treatment judgments has been expanded to examine one hundred and twenty-three additional judgments relating to inhuman treatment.<sup>52</sup> This audit of judgments and decisions covers the period from the establishment of the Court until 1<sup>st</sup> June 2006. This systematic, comprehensive analysis aims to offer an authoritative view of the current position in relation to degrading treatment, and aims to provide a full and accurate underpinning for conclusions on the scope of meaning and application of the right. In addition, several significant ECHR cases are drawn upon (including very recent degrading treatment judgments that were not included in the initial search), as well as international law cases and domestic cases, which will be referred to as a supplementary resource.

Secondary legal literature has been surveyed in detail and legal theoretical literature has been drawn upon to construct the framework of interpretation for the thesis. Where it has been felt necessary to go beyond the realm of the legal, non-legal secondary literature has been consulted to fill gaps in understanding left by the case-law or relevant legal literature. Notably, literature in the areas of philosophy and social analysis has been called upon. French language literature has also been used.<sup>53</sup>

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<sup>50</sup> Printed case collections have been consulted for certain Commission reports and for admissibility decisions prior to 1986 that are not available via the HUDOC database.

<sup>51</sup> This total excludes eight cases that were returned on the search (based on the 'keyword' degrading treatment) but which were struck out by the Court and not examined in the case-law analysis.

<sup>52</sup> The total number of cases returned (on an inhuman treatment 'keyword' search) was three hundred and twenty-three, ninety-one of which were struck out by the Court and one hundred and nine of these cases had already been returned and examined as part of the list of degrading treatment judgments.

<sup>53</sup> This has been used to complement secondary literature in English and where cited, it is paraphrased or a translation provided.

## Structure

The first step in the thesis will be to provide an overview of the prohibition of torture, inhuman or degrading treatment or punishment and to clarify that degrading treatment can be analysed in its own right as a semi-distinct element of the wider prohibition. At the same time, the implications of inclusion within the prohibition of torture will be highlighted. This shall be the task of the next chapter.

The meaning of state obligations – what they consist of and how they are breached – is derived from within the proscription that ‘no one shall be subjected to’ degrading treatment, read in conjunction with Article 1 of the Convention obliging States Parties to ‘secure’ the Convention rights. The range and scope of state obligations is clearly significant and has a substantial bearing upon the scope of application of the right. For those reasons, the question of state obligations will be clarified before moving on to consider the substantive meaning of degrading treatment. A framework of obligations will be advocated in Chapter Three that is applicable specifically in the case of degrading treatment. The margin of appreciation and the principle of proportionality will also be addressed, where it will be argued that neither is relevant to the application of the right.

The role of interpretation will form the core of Chapter Four. Firstly, various points relating to the understanding of interpretation relied upon in the thesis will be highlighted, and these will support the plausibility of certain meanings that will be proposed in subsequent chapters. The ECtHR’s approach to interpretation of the text of the Convention will also be pinpointed, and within this a space occupied by the concept of human dignity will be highlighted. There is a lack of clarity and consensus on the meaning of human dignity generally – Oscar Schachter’s statement is an apt summary: ‘I know it when I see it even if I cannot tell you what it is’.<sup>54</sup> Such challenges will not deter further exploration; starting from references to human dignity in the Court’s case-law, dignity will be argued to play a particular role and be relevant in a particular sense in the context of Article 3. It will be argued that the scope of the concept of human dignity in this connection ‘frames’ the conceptual contours of degrading treatment. These

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<sup>54</sup> Schachter, Oscar (1983), ‘Human Dignity as a Normative Concept’, *American Journal of International Law*, 77, 848-54, at 849.

conclusions will guide the analysis in Chapters Five and Six. As shall be further explained in Chapter Four, this analysis must also be recognised explicitly as an exercise in interpretation. Interpretation will guide the nature of inquiry into, and the nature of conclusions on, the substantive boundaries of the right, and in that sense can be considered as the core of the theoretical framework of the thesis.

As suggested above, the view taken within the thesis is that the scope of application of the prohibition of degrading treatment cannot be fully understood unless the scope of the terms constituting the prohibition are themselves fully understood. Following Brian Bix, the scope of application of a rule is understood to be determined at least in part by the scope of the terms within the rule.<sup>55</sup> This justifies the breaking down of the prohibition of degrading treatment for the purpose of analysis into its principal component parts, i.e. a separate focus on degrading and treatment respectively (which is not the common approach in Article 3 scholarship). Chapter Five will explore the substantive meaning of the term degrading on the basis of the reference points established in degrading treatment case-law. It will be suggested that the idea of degradation, the scope of which may appear unworkably vague, has an identifiable, limited core of concern as developed by the Court. Chapter Six will explore the meaning of treatment. An enumeration of situations to which the term has been applied will serve to clarify inconsistencies; such clarification is significant since misunderstanding narrows the perceived range of meanings of the term. The potential sources of treatment will also be discussed, i.e. who or what can inflict or bring about the treatment; a question that will be linked back full-circle to the nature of state obligations. It will be submitted that the meaning of treatment, although normally afforded no attention, can in fact be seen to have an interesting and potentially broad meaning. The scope of both degrading and treatment are of equal importance for understanding the substantive scope of the right.

Taking together significant general points and principles relating to Article 3, specification of the nature of relevant state obligations, the key concept of interpretation, and conclusions on the meanings of degrading and treatment, the detailed components of

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<sup>55</sup> Bix, Brian (1993), *Law, Language and Legal Determinacy* (Oxford: Clarendon Press) at 19. Bix makes this statement in the context of discussing the particularities of legal language – as legal rules have the objective of guiding behaviour and must often be applied on ‘an indefinite number of occasions’, the scope of application of the rule is important.

the degrading treatment picture will be visible. The final concluding chapter will include a sketch of this picture in the form of an application chart, in order to facilitate practical use of its conclusions, including prospective application of the research findings to new situations that might be seen as having the potential to engage the right. It will clarify the various elements that must be taken into consideration when assessing whether a situation might appropriately be argued to engage the right not to be subjected to degrading treatment.

In summary, this focused study of degrading treatment aims to bring into view a deeper understanding of the right that will allow us to understand better why certain practices or situations do, or should, fall within the ambit of the prohibition of degrading treatment. The synthesis of findings will combine to form an in-depth, comprehensive analysis of this right – an analysis that has not been undertaken to date. The thesis aims to go beyond a reiteration of the Convention’s degrading treatment case-law by identifying the ECtHR’s approach to interpretation of the text of the Convention, and by pursuing a particular interpretive approach to analysing this case-law, within which a place for the concept of human dignity will be articulated. The analysis of the scope of the right not to be subjected to degrading treatment, therefore, aims to address various strands that may contribute individually, and as a whole, to both conceptual and practical fields of knowledge and application.

## CHAPTER TWO

### ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND DEGRADING TREATMENT

#### Chapter introduction

The right expressed in Article 3 ECHR is often referred to, in condensed form, as the prohibition of torture. This is perhaps because the notion of torture dominates the right, absorbing attention, leaving the other forms of ill-treatment to pale in comparison and giving the impression that the right is relevant only to the very gravest of situations.<sup>56</sup> Or perhaps this is simply because the shorthand is more convenient. It is important to recall that Article 3 goes beyond torture to equally prohibit inhuman and degrading treatment and punishment. The absolute nature of the right (outlined below) applies equally to these other elements of the right.<sup>57</sup> Addo and Grief confirm that: ‘all forms of ill-treatment which fall within the scope of Article 3 are prohibited with equal force no matter which end of the spectrum they fall’.<sup>58</sup> And as Evans and Morgan note: ‘even if Article 3 is understood as embracing three separate concepts [...] it still prohibits them all in single measure [...]’.<sup>59</sup> The right is among the most fundamental of human rights and has been referred to as ‘one of the most categoric’ of guarantees.<sup>60</sup> This chapter will present an introduction to the prohibition of degrading treatment, moving from the wider

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<sup>56</sup> On this last point, see Castberg, Frede, Opsahl, Torkel and Oucherlony, Thomas (1974), *The European Convention on Human Rights* (Leiden: Sijthoff) at 83.

<sup>57</sup> See, e.g., *Soering v. UK* concerning extradition, in which the ECtHR found the death row phenomenon in the United States to amount in this case to inhuman and degrading treatment or punishment. The Court reiterated that a person must not be extradited to face a real risk of torture, and that this also extended to a real risk of inhuman or degrading treatment or punishment (Judgment of 7 August 1989, Series A, no. 161, para. 88). This reinforces the equal prohibition of these other forms of ill-treatment.

<sup>58</sup> Addo, Michael K. and Grief, Nicholas (1998), ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’, *European Journal of International Law*, 9 (3), 510-24, at 512.

<sup>59</sup> Evans and Morgan (1998) at 79.

<sup>60</sup> Cooper (2003) at 7, para. 1-01.

prohibition of torture, inhuman or degrading treatment or punishment to the prohibition of degrading treatment as a category of ill-treatment that can be, and merits to be, analysed in its own right. The minimal level of articulation given to degrading treatment in the case-law will be noted in order to make clear the starting point for further systematic interpretation of the meaning of degrading treatment.

### **The prohibition of torture, inhuman or degrading treatment or punishment**

The most significant documents in the human rights catalogue count the prohibition of torture, inhuman or degrading treatment or punishment amongst their provisions. Article 5 of the Universal Declaration of Human Rights (UDHR) states that: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, with the same wording reproduced in the American Declaration on the Rights and Duties of Man, also adopted in 1948. With the omission of the term ‘cruel’<sup>61</sup>, Article 3 ECHR followed in 1950. The International Covenant on Civil and Political Rights (ICCPR), 1966, established the prohibition in a legally-binding international treaty, using similar wording as the UDHR.<sup>62</sup> Slightly different formulations are used in the 1969 American Convention on Human Rights<sup>63</sup> and the 1981 African Charter on Human and Peoples’ Rights.<sup>64</sup> In 1984, the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The

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<sup>61</sup> Examination of the Travaux Préparatoires suggests that the wording of Article 3 reflects a general compromise between a model based on the UDHR and a model favoured by the UK, who argued for a more precise enumeration and definition of the rights. There was no particular discussion about the omission of the word ‘cruel’; see Council of Europe (1977), *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights Vol. IV* (The Hague: Martinus Nijhoff). It has been subsequently stated that the omission does not indicate any difference in substance; see Harris et al. (1995) at 58.

<sup>62</sup> A second part of Article 7 ICCPR states: ‘In particular, no one shall be subjected without his free consent to medical or scientific experimentation’.

<sup>63</sup> Reference is made to respect for ‘physical, mental and moral integrity’. The first part of Article 5(2) uses the standard formulation, with the other sub-paragraphs giving specifications relating to accused persons, minors and the object of punishment; see Article 5.

<sup>64</sup> Article 5 provides a slightly different formulation, which makes direct reference to respect for human dignity: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.’

prohibition is equally found in the Convention on the Rights of the Child, 1989<sup>65</sup>, and also resides in the humanitarian sphere, having long been significant in the laws of war.<sup>66</sup>

#### Absolute and non-derogable right

As human rights courts and committees unfailingly reiterate, the right not to be subjected to torture, inhuman or degrading treatment or punishment is a fundamental value of democratic societies.<sup>67</sup> This goes hand in hand with the absolute nature of the right, in that it is unqualified and non-derogable. It is unqualified in the sense that no exceptions are provided for in the text of the ECHR, nor in any of the other human rights instruments listed above. This is in contrast to the majority of rights found alongside the prohibition in international instruments, to which legitimate limitations are permitted. When one compares Article 3 ECHR with Articles 8-11 ECHR the difference is most visible – limitations of the right in the interests of national security and/or public safety, for the protection of public order, health, or morals, etc<sup>68</sup>, are not permissible under the Convention in relation to the prohibition of torture, inhuman or degrading treatment or punishment. This is unlike even the right to life, which is susceptible to limitation in delineated circumstances.<sup>69</sup> The Strasbourg organs have repeatedly reaffirmed the right's absolute nature.<sup>70</sup> This absolute nature attests to the significant weight, and high level of protection, accorded to this right. The right is also one of the few that are non-derogable, removing it from the permitted ambit of temporary abrogation in time of war or public

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<sup>65</sup> Article 37(a).

<sup>66</sup> The 1949 Geneva Conventions contain in their common Article 3 a similar prohibition on '[...] cruel treatment and torture [...] humiliating and degrading treatment'.

<sup>67</sup> E.g. *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V, para. 95: 'The Court reiterates that 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.' For further examples in ECHR case-law, see *Soering v. UK*, para. 88; *Z. and others v. UK*, no. 29392/95, ECHR 2001-V, para. 73; *Pretty v. UK*, para. 49.

<sup>68</sup> The justifications for legitimate limitations differ slightly depending on the Article.

<sup>69</sup> As a result of a sentence imposed by law, or as a result of a proportionate use of force in defence of a person from unlawful violence, to effect a lawful arrest or prevent escape of a detainee, or in lawful action to quell a riot or insurrection (Article 2 ECHR).

<sup>70</sup> See, e.g., *Ireland v. UK*, judgment of 18 January 1978, Series A, no. 25, para. 163; *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII; *Pretty v. UK*, para. 49; *Yankov v. Bulgaria*, no. 39084/97, 11 December 2003, para. 103.

emergency.<sup>71</sup> Being endowed with the ‘absolute’ label can also be seen to lend additional significance; it has been argued by Addo and Grief to give the right certain ‘conceptual characteristics’. Building on Alan Gewirth’s theoretical conceptualisation of absolute rights<sup>72</sup>, Addo and Grief note firstly that there is an expectation that the right will be subject to the most rigorous protection possible; secondly, if there is any doubt about the scope of the right, the benefit of that doubt must be given to the alleged victim; thirdly, ‘potential violators [...] should enjoy only limited discretion in respect of such a right’; and fourthly, redress must be ensured if a violation is established.<sup>73</sup> The existence of such characteristics is supported in the Court’s case-law. The ECtHR has held that the right must be protected ‘irrespective of the victim’s conduct’<sup>74</sup>; the Court has not entertained proportionality considerations, nor has it afforded a margin of appreciation to the state in respect of this right (see Chapter Three); it has consistently described the right as enshrining a fundamental value of democratic societies (as noted above) and has upheld its application in the most challenging situations, from cases of expulsion of convicted and suspected terrorists<sup>75</sup> to cases in which economic constraints have been offered as a defence against a finding of a violation.<sup>76</sup> The ECtHR has indeed been vigorous and resolute in its application of Article 3.

### Three forms of ill-treatment

The drafting history of the ECHR indicates that no discussion was had on whether or not to distinguish amongst the forms of ill-treatment within Article 3<sup>77</sup>, but demonstrably distinctions have been made. Evidence of this is found in the many cases in which ill-

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<sup>71</sup> Article 3 ECHR is explicitly removed from the scope of Article 15, which details derogation.

<sup>72</sup> See Gewirth, Alan (1982), *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press) at Chapter 9. Gewirth’s approach to absolute rights is part of his rational account of moral rights and human dignity, founded on the basis of the agency of human persons. Three senses of absolutism are identified by Gewirth – Principle, Rule and Individual Absolutism, which are succinctly explained by Addo and Grief and mapped onto Article 3 ECHR; see (1998) at 514-15.

<sup>73</sup> Addo and Grief (1998) at 516.

<sup>74</sup> See, e.g., *Ireland v. UK*, para. 163.

<sup>75</sup> E.g. *Saadi v. Italy*, no. 37201/06, 28 February 2008; *Chahal v. UK*, no. 22414/93, *Reports* 1996-V.

<sup>76</sup> *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI.

<sup>77</sup> Council of Europe (1977).

treatment is classified specifically as one form as opposed to another.<sup>78</sup> The principal distinction made between the different kinds of ill-treatment<sup>79</sup> in Article 3 is between torture on the one hand and inhuman/degrading treatment/punishment on the other hand. This was the case in *Selmouni v. France* in which the intention to attach a ‘special stigma’ to acts of torture was confirmed.<sup>80</sup> Inhuman and/or degrading treatment/punishment is treatment that does not reach the level of ‘severity and cruelty’ to amount to torture.<sup>81</sup> The distinction between forms of ill-treatment further extends to a differentiation between inhuman and degrading. This distinguishing line is often blurred or not elaborated upon at all (as will be further discussed in the following section), but it is clear that inhuman and degrading treatment/punishment can be treated as distinct. Inhuman treatment has been understood by the ECtHR as being premeditated, applied for hours at a stretch and causing intense physical and mental suffering<sup>82</sup>, which differs from its understanding of degrading treatment or punishment. One would presume that the different terms inhuman and degrading mean different things in a substantial sense. A notable difference in the Court’s understanding is that the element of intention is more prominent in relation to inhuman treatment/punishment (although this difference does not appear to be watertight).<sup>83</sup> At the same time, given that the different forms of ill-treatment are nevertheless parts of the same prohibition, one can assume that there are

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<sup>78</sup> See, e.g., the following ECtHR cases: *Tyrer v. UK* (‘degrading punishment’); *Yankov v. Bulgaria* (‘degrading treatment’); *Bilgin v. Turkey*, no. 23819/94, 16 November 2000 (‘inhuman treatment’); *Selmouni v. France* (‘torture’).

<sup>79</sup> Addo and Grief refer to the different forms of ill-treatment as ‘levels of harm’ with ‘different thresholds of suffering and intention’ (Addo and Grief (1995) at 193). This can be read as reflecting an understanding, commonly identified in Article 3 jurisprudence, of a distinction between forms of ill-treatment based on severity of suffering. Evans and Morgan identify in the Article 3 case-law of the Commission and Court an approach to Article 3 based on different degrees of suffering constituting different forms of treatment in an hierarchy ((1998) at 77, 79), but the authors argue that such an approach is not necessarily reflected in practice and themselves advocate a different approach; see (1998) at 77-79, 97-98). Cooper also notes the common hierarchical approach; see (2003) at 7, para. 1-02. See also Vorhaus, who argues against a distinction based on levels of suffering (Vorhaus (2002) at 374-99). The primary concern at present is with degrading treatment as a distinct category, rather than the relationships between the different elements of the right; nevertheless, in order to acknowledge the lack of consensus on this point, the term ‘forms of ill-treatment’ will be preferred over ‘levels of harm’.

<sup>80</sup> *Selmouni v. France*, para. 96. This confirmed the position set out in *Ireland v. UK*, para. 167.

<sup>81</sup> *Ilascu and others v. Moldova and Russia* [GC], no. 48787/99, 08 July 2004, para. 440.

<sup>82</sup> See *Ireland v. UK*, para. 167; *Soering v. UK*, para. 100.

<sup>83</sup> Intention is more significant in relation to inhuman treatment/punishment, which is evidenced by the use of the term ‘premeditation’ in relation to inhuman treatment; however, the ECtHR has also suggested that inhuman treatment can be inflicted unintentionally (see *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000-III, para. 118). Intention is important but not necessary for treatment to be ‘degrading’ (to be discussed below); see *Raninen v. Finland*, para. 55.

also common elements between them. In an early case, the EComHR stated that all torture is necessarily inhuman and degrading, and all inhuman treatment is degrading.<sup>84</sup> This, however, is not helpful if it acts to obscure the particular character of the different forms of ill-treatment that have been included in the right. It will be implicitly suggested in the following chapters that an interpretive link to the concept of human dignity begins to highlight commonalities between the forms. Furthermore, a deeper understanding of degrading treatment to emerge from the thesis might lay the foundations for a deeper analysis of the meaning of inhuman treatment. The central objective at the moment is simply to make clear, as is recognised in secondary literature, that degrading treatment is a category of violation that exists in its own right.

### The category of degrading treatment

The distinct category of degrading treatment has indeed been the subject of a significant number of decisions and judgments. The Strasbourg organs have produced a greater volume of jurisprudence relating specifically to degrading treatment than has been produced under the Inter-American Convention or the ICCPR. Perhaps more often than not, however, the precise form of prohibited treatment (i.e. whether it is inhuman treatment or degrading treatment that has occurred) is not actually specified by the applicant or by the Strasbourg organs. Applicants under the ECHR have often alleged a violation of Article 3 without specifying the element of the prohibition that is arguably transgressed<sup>85</sup>, or have alleged inhuman *and/or* degrading treatment or punishment.<sup>86</sup> On several occasions the ECtHR has found treatment ‘contrary’ to Article 3 without additional elaboration<sup>87</sup>; it has even found treatment to be inhuman *or* degrading.<sup>88</sup>

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<sup>84</sup> *The Greek case*, Commission Report, 5 November 1969, Yearbook of the European Convention on Human Rights XII (1969) at 186, para. 2.

<sup>85</sup> This has often been so in cases involving risk of prohibited treatment on deportation or extradition. See, e.g., *Ahmed v. Austria*, judgment of 17 December 1996, *Reports 1996-VI*, para. 35; *HLR v. France*, judgment of 29 April 1997, *Reports 1997-III*, para. 30.

<sup>86</sup> E.g. *Tomasi v. France*, judgment of 27 August 1992, Series A, no. 241-A, para. 112; *Becciev v. Moldova*, no. 9190/03, 04 October 2005.

<sup>87</sup> *E. and others v. UK*, no. 33218/96, 26 November 2002; *Pantea v. Romania*, no. 33343/96, ECHR 2003-VI; *R.L. and M.-J.D. v. France*, no. 44568/98, 19 May 2004; *McGlinchey and others v. UK*, no. 50390/99, ECHR 2003-V.

<sup>88</sup> *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II, para. 63.

Nevertheless, there are numerous case-law examples of behaviour/situations that have been associated specifically with a violation of the prohibition of degrading treatment.

An overview of degrading treatment arguments in Strasbourg

Within the framework of the present research, an audit of degrading treatment case-law has been conducted in order to clearly demonstrate that degrading treatment is a distinct element of the prohibition within Article 3, which can be examined in its own right. As previously suggested, degrading treatment is indeed treated as a distinct category in secondary literature on the ECHR; nevertheless, as a basic point in the foundations of the thesis it has been deemed important to confirm this by examining the primary sources. Furthermore, this audit will provide an overview of the range of situations to which the prohibition of degrading treatment has been argued to apply.

Included in the outline below are cases in which no violation was found, since the present purpose is simply to explore in a general sense the arguments that have been associated – successfully and unsuccessfully – with degrading treatment, in order to confirm that degrading treatment forms an independent category and at the same time to provide an impression of the range of situations with which this particular element of Article 3 has been associated. Certain categories of situation (of successfully argued allegations of degrading treatment) have emerged in the jurisprudence, such as cases relating to detention conditions or corporal punishment. It is not considered necessary to engage in such categorisation at present – partly because this work has already been done (indeed it is the dominant approach found in European human rights literature as highlighted in the summary of secondary literature in the introductory chapter), and partly because not privileging categorisation allows a more nuanced picture to emerge, which is of greater value than fixed categories when exploring the potential scope of the right.

The following are the circumstances of degrading treatment cases that have been accepted for consideration on the merits before the Court (on which categories pointed to in secondary literature, in various combinations, are based): corporal punishment (by

state authorities and in a private school)<sup>89</sup>; discrimination by the state on grounds of sex, race or birth<sup>90</sup>; living conditions caused by pollution from a waste treatment plant<sup>91</sup>; interrogation by state officials<sup>92</sup>; application of an official policy of exclusion of homosexuals from the armed forces<sup>93</sup>; repeated imprisonment for refusal to carry out military service<sup>94</sup>; detention conditions (including a strip search<sup>95</sup> and the shaving of a prisoner's hair)<sup>96</sup>; severe suffering caused by a terminal illness<sup>97</sup>; ill-treatment by police officers during a driving control<sup>98</sup>; failure to provide adequate medical care in detention<sup>99</sup>; changes in rules relating to sentences of life imprisonment, including a lack of possibility for parole<sup>100</sup>; anguish caused to a father by the mutilation of his son's dead body by security forces<sup>101</sup>; suffering caused as the result of a deficient state investigation into a disappearance<sup>102</sup>; and subjection to extremely poor living conditions (combined with racial discrimination and authorities' mishandling of complaints).<sup>103</sup>

The first point to clarify in relation to the above overview is that degrading treatment forms a category of ill-treatment in its own right. The second point to clarify in relation to these situations that have been argued to be contrary to the prohibition of degrading treatment, is that the most common situations concern conditions of detention. However,

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<sup>89</sup> *Campbell and Cosans v. UK*; *Tyrer v. UK* (more directly concerned with degrading punishment rather than treatment, but degrading treatment was suggested by the applicants).

<sup>90</sup> *Abdulaziz, Cabales and Balkandali v. UK*, judgment of 28 May 1985, Series A, no. 94.

<sup>91</sup> *López Ostra v. Spain*, judgment of 09 December 1994, Series A, no. 303-C.

<sup>92</sup> *Raninen v. Finland*.

<sup>93</sup> *Smith and Grady v. UK*, no. 33985/96; 33986/96, ECHR 1999-VI.

<sup>94</sup> *Ulke v. Turkey*, no. 39437/98, 24 January 2006.

<sup>95</sup> Cases include *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II; *Peers v. Greece*, no. 28524/95, ECHR 2001-III; *Price v. UK*, no. 33394/96, ECHR 2001-VII; *Valasinas v. Lithuania*, no. 44558/98, ECHR 2001-VIII; *Mayzit v. Russia*, no. 63378/00, 20 January 2005; *Nevmerzhitsky v. Ukraine*, no. 54825/00, 05 April 2005; *Romanov v. Russia*, no. 63993/00, 20 October 2005.

<sup>96</sup> *Yankov v. Bulgaria*.

<sup>97</sup> *Pretty v. UK*.

<sup>98</sup> *Barbu Anghelescu v. Romania*, no. 46430/99, 05 Oct 2004.

<sup>99</sup> *Farbtuhs v. Latvia*, no. 4672/02, 02 December 2004; *Nevmerzhitsky v. Ukraine*; *Sarban v. Moldova*, no. 3456/05, 04 October 2005.

<sup>100</sup> *Kafkaris v. Cyprus*, no. 21906/04, 11 April 2006.

<sup>101</sup> *Akkum and others v. Turkey*, no. 21894/93, 24 March 2005.

<sup>102</sup> *Gongadze v. Ukraine*, no. 34056/02, 08 November 2005.

<sup>103</sup> *Moldovan and Others v. Romania*, no. 41138/98; 64320/01, 12 July 2005.

it is also clear that the breadth of the range of situations stretches beyond detention conditions: from the potential striking of a young boy on the palm with a leather tawse<sup>104</sup>, to discrimination<sup>105</sup>, to the causing of mental suffering as a result of the mutilation of a son's body<sup>106</sup>; this simultaneously disproves the seemingly common idea that degrading treatment is almost exclusively linked to detention, and attests to the creativity<sup>107</sup> of both applicants and the Court.

As discussed in Chapter One, factual categories of degrading treatment are found in existing secondary literature on the ECHR and Article 3 (such as arrest and detention, extradition and corporal punishment). Such categorisations are extremely helpful in providing an accessible summary of the *factual circumstances* of application of the right *to date*. The objective in the thesis is to move beyond categorisation of factual circumstances. The objective is to clarify and conceptually explore the meaning of the terms degrading and treatment in order to draw conclusions about the essence of the right's proper scope of concern based on its meaning and purpose. The valuable categorisation work that has been done in existing human rights literature tells us what has come before – it does not suggest why such situations have been, or any other situation might in future be, encompassed within the scope of the right. The analysis within the thesis aims to provide an additional dimension to our understanding of the prohibition of degrading treatment by providing an understanding of *why* the situations currently summarised in these categories have been associated with degrading treatment at all, and at the same time, an understanding of the substantive boundaries of the right and its *potential* scope of application. The starting point for this analysis is the approach taken in Strasbourg to assessing the existence of degrading treatment.

#### Degrading treatment reference points

Standard approaches to describing degrading treatment have been established in the case-law. Several points of reference are used to assess whether the situation being

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<sup>104</sup> *Campbell and Cosans v. UK*.

<sup>105</sup> *Abdulaziz, Cabales and Balkandali v. UK*.

<sup>106</sup> *Akkum and others v. Turkey*.

<sup>107</sup> This term is used by Mowbray. See Mowbray, Alastair (2005), 'The Creativity of the European Court of Human Rights', *Human Rights Law Review*, 5 (1), 57-79.

complained of has the characteristics that the Court has accorded to degrading treatment, and can be summarised as follows: degrading treatment is characterised by feelings of fear, anguish or inferiority capable of humiliating or debasing the victim, or breaking his or her physical or moral resistance, by treatment that drives the victim to act against will or conscience, or as treatment having an adverse effect on the victim's personality.<sup>108</sup>

Feelings of fear anguish, and/or inferiority capable of humiliating, debasing, breaking physical or moral resistance

In the landmark case of *Ireland v. UK* in the late 1970's, the Court stated, referring to 'five techniques' of interrogation under discussion, that:

*[They] were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.*<sup>109</sup>

Three decades later and this exact formulation remains the primary, most oft-quoted description of degrading treatment. It is perhaps significant to note that it does not appear necessary for *all* of these elements to be present. Whereas, for example, the Court in *Ireland* used the phrase 'fear, anguish *and* inferiority', in the case of *Pretty v. UK*, the Court looked for 'fear, anguish *or* inferiority'.<sup>110</sup> Similarly, 'humiliating *and* debasing', became 'humiliation *or* debasement' in *Campbell and Cosans v. UK*.<sup>111</sup>

The Court also stipulates, in relation to humiliation and debasement, that an intention to humiliate is not necessary. A person may be humiliated despite the lack of intention to humiliate on the part of the inflictor of the alleged degradation. In several cases the

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<sup>108</sup> The ECtHR has stated that the threat alone of prohibited treatment could potentially violate Article 3 where the threat is 'sufficiently real and immediate'; see *Campbell and Cosans v. UK*, para. 26. (It should be noted that this formulation is distinct from that of 'real risk' in situations concerning expulsion of foreign nationals). It is also (unsurprising, but in the interests of completeness) pertinent to note, that the fact that the situation which gave rise to a violation has ceased to exist, does not imply that the person is not a victim; *López Ostra v. Spain*, para. 42. See also *Kalashnikov v. Russia*, in which the ECtHR accepted that the government had made improvements to prison conditions since the applicant had filed his complaint, however this did not detract from the fact that the applicant had indeed endured unacceptable conditions during the period under consideration; *Kalashnikov v. Russia*, para. 99; also *Kuznetsov v. Ukraine*, no. 39042/97, 29 April 2003, para. 128.

<sup>109</sup> *Ireland v. UK*, para. 167.

<sup>110</sup> *Pretty v. UK*, para. 52 (emphasis added).

<sup>111</sup> *Campbell and Cosans v. UK*, para. 28 (emphasis added).

ECtHR has explicitly accepted that the (for example) institution in question did not intend to humiliate or cause suffering to the applicant, but stressed that a finding of degrading treatment was possible nevertheless.<sup>112</sup> Intention remains significant and it is assessed whether the object of the treatment was indeed to humiliate and/or debase, and if such intention were apparent, this would be a central factor in an eventual finding of a violation.<sup>113</sup> It may be relevant to the *determination of intention* that the treatment is carried out in public, but this is not decisive.<sup>114</sup>

Whether treatment occurs in public or not is also relevant to the Court's determination as to whether treatment has been degrading. In the 1978 case of *Tyrer*, a fifteen year-old boy was sentenced to three strokes of the birch by a juvenile court on the Isle of Man, administered by a policeman in the presence of the boy's father and a doctor, and this was found to be degrading within the meaning of Article 3. The Court referred to the relevance of a public dimension:

*Publicity may be a relevant factor in assessing whether a punishment is "degrading" within the meaning of Article 3 [...] but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.*<sup>115</sup>

That it may be sufficient for a person to be humiliated in her or his own eyes has been reiterated in several cases. In *Smith and Grady v. UK* it was stated that:

*It is also recalled that treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance [...] Moreover, it is sufficient if the victim is humiliated in his or her own eyes [...]*<sup>116</sup>

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<sup>112</sup> See, e.g., *T. v. UK* [GC], no. 24724/94, 16 December 1999, para. 69; *Price v. UK*, para. 30; *Mayzit v. Russia*, para. 42.

<sup>113</sup> *Raninen v. Finland*, para. 55.

<sup>114</sup> *Raninen v. Finland*, para. 55; *Berktaş v. Turkey*, no. 22493/93, 01 March 2001, para. 175.

<sup>115</sup> *Tyrer v. UK*, para. 32.

<sup>116</sup> *Smith and Grady v. UK*, para. 120.

Being driven to act against will or conscience

The Commission's Report on the Greek case in 1969 in fact provided the original formulation of degrading treatment: treatment that drives the victim to act against his 'will or conscience'.<sup>117</sup> This formulation is relied on infrequently, but does continue to be used in judgments of the Court: in the 2001 case of *Keenan v. UK*, the ECtHR stated that that which is degrading can be seen as treatment 'driving the victim to act against his will or conscience [...]'.<sup>118</sup>

Adverse effect on one's personality

Also included in the Court's characterisation of degrading treatment is the question of whether the treatment has had an adverse effect on the victim's personality. *Albert and Le Compte v. Belgium* was the first time in which the Court referred to this reference point. The Court held that a disciplinary measure against one of the applicants, who was struck off a medical practice register, did not intend to debase his personality, and did not 'adversely affect his personality in a manner incompatible with Article 3 [...]', and this has been repeated in subsequent cases.<sup>119</sup> A very similar statement was made by the Court shortly afterwards in *Abdulaziz, Cabales and Balkandali*, in which the question was whether the treatment complained of showed contempt or lack of respect for the applicants' personalities.<sup>120</sup>

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<sup>117</sup> *Greek Case*, Commission Report, Chapter IV, section A(2), at 186.

<sup>118</sup> *Keenan v. UK*, no. 27229/95, ECHR 2001-III, para. 110.

<sup>119</sup> *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A, no. 58, para. 22. See, e.g., *Raninen v. Finland*; *Ahmet Ozkan and others v. Turkey*, no. 21689/93, 06 April 2004.

<sup>120</sup> *Abdulaziz, Cabales and Balkandali v. UK*, para. 91. It is also helpful to briefly clarify one other description that has arisen relating to 'rank, position, reputation or character'. This is not a reference point that has become an established element of degrading treatment. Before reference to adverse effect on personality had occurred, the Commission in its report on the *East African Asians* case considered the definition of degrading treatment *offered by the applicants*: that treatment could be degrading if it lowered the victim in 'rank, position, reputation or character' (the definition that is in fact found in the Oxford Dictionary under 'degraded'). The Commission were of the opinion that this general definition could be a useful starting point but stressed that the purpose of Article 3 was to 'prevent interferences with the dignity of man of a particularly serious nature', and suggested that the definition offered must be narrowed to take account of this (*East African Asians v. UK*, no. 4403/70, et al., Commission Report of 14 December 1973, Decisions and Reports 78, at 55, para. 189). The Commission again mentioned lowering of rank alongside feelings of fear, anguish, etc, as well as the question of whether contempt or lack of respect had been shown, in its Report in the case of *Raninen v. Finland* (no. 20972/92, Commission Report of 24 October 1996, para. 50-52). In the judgment in *Raninen*, however, the Court adopted adverse effect on the applicant's personality (para. 55).

## Relative assessment of a minimum level of severity

Interpretation of the meaning of degrading treatment is accompanied in the case-law by consideration of the severity of the alleged treatment suffered. The minimum level of severity is the threshold, or ‘boundary’<sup>121</sup>, that has been developed, which a situation must cross in order to activate the protection of Article 3. This is an essential element of the Court’s assessment. ‘Difficult’ or ‘undoubtedly unpleasant or even irksome’<sup>122</sup> treatment does not equate to degrading treatment. The ECtHR has stated that a practice was ‘discreditable and reprehensible’<sup>123</sup>, and that a situation may have been ‘distressing and humiliating’<sup>124</sup>, whilst neither obtained the minimum level of severity. When this condition is met, the Court may simply state that treatment ‘reached the threshold’<sup>125</sup>, or was of ‘sufficient severity’.<sup>126</sup>

There is no ‘standard level of severity for all cases’.<sup>127</sup> Whether the threshold has been crossed is decided on the basis of a relative assessment; that is, an assessment that takes into account all the circumstances of the case. Such circumstances include the duration of the treatment, whether the individual’s age or state of health adds a special dimension, and so on. The Court’s standard formulation is as follows:

*The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, etc.*<sup>128</sup>

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<sup>121</sup> Cooper (2003) at 27, para. 2-01.

<sup>122</sup> *López Ostra v. Spain*, para. 60; *Guzzardi v. Italy*, judgment of 06 November 1980, Series A, no. 39, para. 107, respectively.

<sup>123</sup> *Ireland v. UK*, para. 181.

<sup>124</sup> *Smith and Grady v. UK*, para. 121.

<sup>125</sup> *Z. and others v. UK*, para. 74.

<sup>126</sup> *Yankov v. Bulgaria*, para. 120.

<sup>127</sup> Addo and Grief (1995) at 188.

<sup>128</sup> *Ireland v. UK*, para. 162. See also, e.g., *Tyrer v. UK*, para. 30; *Labzov v. Russia*, no. 62208/00, 16 June 2005, para. 41.

It appears that the Court will take account of such variables individually and will equally take account of their cumulative effect; this has been made explicit in relation to conditions of detention.<sup>129</sup> This relative assessment, therefore, implies a tailored conclusion for each case.

### The inherent scope for evolution

One of the hallmarks of the Strasbourg organs has been the interpretation of the Convention as a flexible and adaptable system of rights protection. That the Convention, and Article 3 more particularly, have been interpreted in an expanding range of contexts is widely recognised<sup>130</sup>, this having been achieved through the establishment of the notions of ‘practical and effective’ protection, and of the Convention as a ‘living instrument’. Famously, in the 1979 case of *Airey v. Ireland*, the Court stated that: ‘The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’<sup>131</sup>, consolidating the emergence of positive state obligations.<sup>132</sup> Mowbray states that the use of this principle reflects the Court’s view that rights cannot be fully secured by States who simply remain passive.<sup>133</sup> Closely related to ‘practical and effective’ protection is the idea of the Convention as a ‘living instrument’. The Court for the first time made explicit the idea of evolutive interpretation in *Tyrer v. UK*, where it described the Convention as a living instrument that must be interpreted in light of present day conditions.<sup>134</sup> This position had recently been expressed by the then-President of the Commission in a report entitled ‘Do the rights set forth in the ECHR in 1950 have the same significance in 1975?’, in which he concluded that the Convention had to adapt in order to keep pace with social change.<sup>135</sup> Grosz, Beatson and Duffy summarise this point as follows:

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<sup>129</sup> *Kalashnikov v. Russia*, para. 95; see also *Van der Ven v. the Netherlands*, para. 40.

<sup>130</sup> See, e.g., Mowbray (2005) at 58; Harris et al. (1995) at 88; Cremona, J.J. (1990), *Selected Papers 1946-1989* (Marsa: Malta PEG) at 246; Fabbriotti (1998) at 638.

<sup>131</sup> *Airey v. Ireland*, judgement of 09 October 1979, Series A, no. 32.

<sup>132</sup> This is discussed by Mowbray (2005) at 72.

<sup>133</sup> Mowbray (2005) at 78.

<sup>134</sup> *Tyrer v. UK*, para. 31. See also *Selmonui v. France*, para. 101; *T. v. UK*, para. 70.

<sup>135</sup> Prebensen, Søren C. (2000), ‘Evolutive interpretation of the European Convention on Human Rights’, in P.Mahoney, F. Matscher, H. Petzold, L. Wildhaber (eds.), *Protection des droits de l’homme: la*

*[...] the Strasbourg institutions are not wedded to the words of the Convention or the intentions of the drafters at the time, since such an approach would allow the Convention rights to ossify, rendering them incapable of reflecting contemporary values.*<sup>136</sup>

The Convention case-law certainly testifies to this non-static approach. In what can be seen as a related variation of this, in *Campbell and Cosans v. UK*, the ECtHR stated that: ‘simply because the measure [corporal punishment] has been in use for a long time or even meets with general approval [...]’ does not necessarily exclude it from being degrading.<sup>137</sup>

Article 3 has been subject to a number of clarifications as to its evolutionary nature. The ECtHR has reiterated that treatment that was in the past excluded from the scope of application of Article 3 could be considered as portraying the minimum degree of severity in future.<sup>138</sup> It has equally been stressed that the Article will encompass new situations where appropriate:

*[...] given the fundamental importance of Article 3 [...] in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article [...] in other contexts which might arise [...]*<sup>139</sup>

## Chapter summary

The right not to be subjected to degrading treatment – a distinct form of ill-treatment within Article 3 – has been argued and accepted to cover a wide range of situations. The spectrum that has been covered has been made possible by the inherent scope for evolution that is now firmly established within the Convention; it has been consistently reaffirmed that interpretation of the right must evolve according to social and political context and encompass new situations where appropriate.

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*perspective européenne, Protecting Human Rights: The European Perspective – Studies in memory of Rolv Ryssdal* (Köln: Heymanns), 1123-37 at 1123.

<sup>136</sup> Grosz et al. (2000) at 167, para. C0-08.

<sup>137</sup> *Campbell and Cosans v. UK*, para. 29.

<sup>138</sup> *Farbtuhs v. Latvia*, para. 53. See also *Selmouni v. France*, para. 101

<sup>139</sup> *D. v. UK*, judgment of 02 May 1997, *Reports 1997-III*, para. 49. See also *Pretty v. UK*, para. 50.

The ECtHR routinely relies upon a number of points of reference (humiliation and contempt for personality, etc) and associated principles (such as the possibility of non-intentional humiliation) in relation to the meaning of degrading treatment and assessment of the requisite level of severity. This approach, however, relies upon concepts that have not been fully explored by the Court. As noted in Chapter One, this is not a criticism of the case-law. It is not to be expected that the Strasbourg organs would have explicitly elaborated to any significant extent on conceptual understandings of what it means to be degraded, since the Court, as a judicial body, must focus first and foremost on application of the right in the concrete circumstances before it. The idea of treatment, however, does not have the same emotional, conceptual content as degradation and its development, therefore, could conceivably have been the subject of greater elaboration.

Nor has degrading treatment been conceptually explored in secondary literature to any significant extent. As noted also in the introductory chapter, Waldron has recently begun to consider the meaning of the terms inhuman and degrading, not via the Court's case-law as such, but directly. This is a constructive development. As has also been noted, Vorhaus' article takes a step towards considering the concepts of degradation and humiliation.<sup>140</sup> These are minority, limited examples of a focus on the meaning of degrading treatment; existing literature on degrading treatment tends to focus on questions of application of the prohibition of degrading treatment (normally alongside inhuman treatment) or on relationships between the forms of ill-treatment in Article 3 and the question of the severity threshold. Such literature does not analyse the right in the way that is currently proposed, which is to focus on the meaning of degrading treatment in order to gain an impression of the conceptual reach of the right, and to articulate the state obligations relevant specifically to degrading treatment in order to gain an impression of the right's potential scope of application.

For the most part, human rights literature that refers to degrading treatment is of general ECHR scope. The contribution of this general literature is in facilitating access to the main principles adopted under the Convention in relation to the prohibition of degrading treatment. The present Chapter has not been concerned with categorisation of degrading

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<sup>140</sup> See Waldron, Jeremy (2008), in particular at 29-40. See also comments in Chapter One of the thesis in relation to the article by Vorhaus (2003).

treatment case-law (to reiterate: such categorisation is extremely valuable in the context of a treatise presenting an overview of the ECHR but the present purpose is different – it is to lay the foundations for a full exploration of the boundaries of the right). This chapter has, nevertheless, engaged in a similar exercise as the existing ECHR literature, in condensed form, by breaking down the Court’s jurisprudential characterisation of degrading treatment. General ECHR literature conducts a similar summary of degrading treatment case-law but this has been repeated, beginning from a systematic case-law survey, in order to make clear the starting point for exploration in subsequent chapters and the doctrines that will have a bearing upon conclusions about the right’s scope of application. The thesis now aims to move forward on the basis of this synopsis of the ECtHR’s approach to degrading treatment – by analysing the Court’s understanding of its own degradation reference points, its own understanding of the meaning of treatment, and its own understanding of state obligations.

Beyond human rights literature, and beyond legal literature, the concepts referred to in Strasbourg, including humiliation and being driven to act against one’s will or conscience, etc, have been addressed to varying extents in broader philosophical and related literatures. The concept of humiliation, for example, is limited in case-law to something induced by fear, anguish or feelings of inferiority, whereas, as is evident in social philosophical literature, it is a concept that encompasses complex states and emotions.<sup>141</sup> In order to better understand *when* and *why* humiliation or debasement, for example, has occurred, it is submitted that it is necessary to better understand the meaning and scope of the terms involved. This requires a degree of conceptual enquiry that has not been systematically undertaken in legal literature. Furthermore, as aforementioned, almost nothing is visible in the case-law or literature on the meaning of treatment. Both dimensions are of paramount importance in order to understand the scope of application of the right.

In addition to a lack of analysis of, and clarity concerning, the meaning of degrading treatment, the relevance and influence of the concept of human dignity in the Court’s interpretation has been insufficiently explored. The relevance of dignity to understanding degrading treatment is strongly suggested in the case-law itself, and is also noted in the

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<sup>141</sup> Authors including Avishai Margalit and William Ian Miller will be discussed in Chapter Five.

literature (as will be discussed in Chapter Four), but no in-depth analysis exists of the link between the concept of dignity and the *meaning* of degrading treatment. The system of interpretation relied upon by the Court and the place, meaning and role of the concept of dignity within that system, can act as a connecting thread in illuminating the meanings of both degrading and treatment, which will emerge from close consideration of the case-law. The preliminary step, before moving to interpretation of degrading treatment, is to clarify the pivotal nature of the state's obligations in relation to this right. In order to gain a deeper understanding of the scope of application of the right, an elaborated understanding of the meaning of degrading treatment must be inextricably linked to the engagement of state responsibility.

## CHAPTER THREE

### THE CONTENT AND BREACH OF STATE OBLIGATIONS

#### **Introduction**

The imputation of responsibility to the state for human rights violations is of course crucial. In considering the potential scope of the right not to be subjected to degrading treatment, this chapter will enquire into the range and extent of obligations upon the state. Both negative and positive obligations will be discussed, although positive obligations, which require greater clarification and have been the subject of greater academic attention, will occupy the majority of discussion. Accounts of the nature of positive obligations in secondary literature vary substantially in their conclusions from one author to another and for the most part do not focus on Article 3. The case-law relating to degrading treatment will be examined in the present chapter in order to identify the substance of the positive obligations that relate specifically to this element of Article 3. Secondary literature will be considered alongside this. A practicable framework of three forms of positive obligation will be identified: firstly, a positive obligation to take measures to protect individuals from suffering degrading treatment at the hands of the state's agents; secondly, a positive obligation to take measures to protect individuals from suffering degrading treatment stemming from 'actors' outside the State Party to the Convention, for example, a private person or another state; and thirdly, a positive obligation to conduct an effective investigation into allegations of degrading treatment.

It will be argued, although it is not normally the case in analysis of state obligations, that it is in the interests of conceptual clarity to explicitly separate the issue of the content of obligations from the issue of engagement of the responsibility of the state. The two will be considered as distinct questions; a distinction that is visible in case-law references.

The aim is to bring optimal clarity to the substance of state obligations and also the meaning of treatment (to be discussed in Chapter Six). Specific points to note in relation to Article 3 as an absolute right will also be discussed; it has been suggested that the doctrines of proportionality and the margin of appreciation can play a role, not where negative obligations in Article 3 are in issue, but in influencing the application of positive obligations, which might lead to a questioning of the absolute nature of the right. It will be argued that neither doctrine has a place in relation to the application of Article 3.

### The human rights obligations of states

The dominant approach to the existence and scope of state obligations has taken the form of a distinction between negative and positive obligations incumbent upon States Parties to the ECHR. This approach, which has been present from the early days of the Convention<sup>142</sup>, shall form the primary framework for discussion.

Article 1 of the Convention (that States Parties shall secure to everyone within their jurisdiction the rights and freedoms therein) has anchored this dual responsibility. This obligation to *secure* rights has allowed for negative obligations to be complemented by positive obligations. Harris et al. describe negative obligations – those often most readily associated with civil and political rights – as demanding that the state refrain from interference in the enjoyment of a right, and positive obligations as demanding that the state must take action to secure rights.<sup>143</sup> Cordula Dröge provides a succinct description:

*The term positive obligation designates a protective duty of the state [...] Positive obligations address the question of the state as a guarantor rather than a violator of human rights. Whereas negative obligations are the obligations of the state to refrain from statal interference, positive obligations address the state's wrongful omission.*<sup>144</sup>

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<sup>142</sup> See *Belgian Linguistics Case*, judgment of 23 July 1968, Series A, no. 6; see section 1, A and B.

<sup>143</sup> Harris et al. (1995) at 19.

<sup>144</sup> Dröge, Cordula (2003), *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention; Positive Obligations of States under the European Convention of Human Rights* (Berlin: Springer) at 380.

Positive obligations were traditionally seen as being reserved for economic, social and cultural rights, although this is no longer the case. It is now well-recognised that civil and political rights also often require the fulfilment of positive obligations. Dimitrios Evrigenis, former ECtHR judge, portrays well the change in conception in relation to the role of the state:

*This change in the legal content and function of basic rights reflects a change in social realities [...] Modern human rights legislation increasingly relies on the concept of a 'State conferring benefits' [...] Human Rights have become an area in which the State finds itself confronted with a subtle, shifting synthesis between prohibited interference and compulsory intervention.*<sup>145</sup>

This 'shifting synthesis' has not yet abated. Evrigenis' account remains an extremely accurate description of the ongoing complexity of state obligations. This complexity is evident in case-law and in the small but varied range of literature that deals specifically with this issue.

Positive obligations will occupy the vast majority of the present discussion, primarily because negative obligations are indisputably less complicated and contested, but also because the ongoing development of positive obligations is the most significant aspect to explore in terms of the potential scope of application of the right not to be subjected to degrading treatment.

### **The negative/positive dichotomy**

Due to a recent development in a UK House of Lords case, a number of clarifications might helpfully be made regarding the distinction between negative and positive obligations. In the context of an alleged violation of Article 3, specifically in relation to degrading treatment, the usefulness of this distinction was questioned. It will be suggested that this case should not be read as undermining the negative/positive dichotomy, and that it in fact provides a good illustration of the intersection between

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<sup>145</sup> Evrigenis, Dimitrios (1982), 'Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights', *Human Rights Law Journal*, 3, 121-39 at 136.

negative and positive obligations and also highlights the crucial dimension of engagement of state responsibility.

In the case of *Limbuela v. Secretary of State for the Home Department*, Lord Brown made the following statement:

*[...] it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.*<sup>146</sup>

This suggests that it may not be beneficial to rely upon the negative/positive dichotomy. The assertion is not elaborated upon and does not appear to have been commented upon elsewhere. One possible motivation may have been the application of what is essentially ECHR Article 8 jurisprudence to Article 3. The ECtHR has stated that the distinction between negative and positive obligations has been irrelevant in a number of Article 8 cases where the legitimate limitation test has been seen as broadly similar regardless of whether negative or positive obligations are in question. For example:

*Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 [...] or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2 [...], the applicable principles are broadly similar [...]*<sup>147</sup>

Referring to Article 8 cases, both Pieter Van Dijk and Keir Starmer have recognised that the relevance of the negative/positive distinction has diminished.<sup>148</sup>

A second possible reason is the complexity and potentially convoluted nature of the distinctions involved – between positive and negative obligations, between acts and

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<sup>146</sup> *R (Limbuela) v. Secretary of State for the Home Department*, para. 92; see also Lord Hope at para. 53.

<sup>147</sup> *López Ostra v. Spain*, para. 51.

<sup>148</sup> Van Dijk, Pieter (1998), 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?', in M. Castermans-Holleman, F. Van Hoof and J. Smith (eds.), *The Role of the Nation State in the 21<sup>st</sup> Century: Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (The Hague: Kluwer Law International), 17-33 at 27; Starmer, Keir (2001), 'Positive Obligations under the Convention', in J. Jowell and J. Cooper (eds.), *Understanding Human Rights Principles* (Oxford: Hart Publishing), 139-59 at 158.

omissions, between obligations to take action to secure rights, and between acts and omissions that may breach rights, and the intertwined question of when state responsibility is actually engaged. It is well recognised that the boundary between positive and negative obligations is not easily defined.<sup>149</sup> An alternative approach, moving away from the positive/negative distinction, would be attractive in that the analysis in terms of the positive/negative dichotomy is indeed often complicated and can seem somewhat artificial. An additional advantage in taking such a perspective would be recognition of the multidimensional nature of rights and rights protection, and the consequently multidimensional nature of state obligations.

Lord Brown suggests that perhaps a negative obligation was in issue in *Limbuella*; perhaps a positive obligation; perhaps a mixture of both. And essentially, that it was a distraction from the central issue to try to define this particular obligation. Lord Brown's comment is in the context of a convergence between an obligation to refrain from acting and an obligation to take action. *Limbuella* involved a combination of active and passive behaviour of the state, in the form of a refusal to provide financial and social support to asylum seekers coupled with a prohibition on working.<sup>150</sup> (In terms of the form of obligation involved, this is very similar to common cases concerning detention conditions that amount to degrading treatment and also cases concerning the need to provide adequate health care to persons in detention, both of which will feature in the list that will be outlined below). In *Limbuella* (as a result of the policies of the state), the fact was that the state could be seen as responsible for the harm suffered. This is the very reason for the convergence between the negative and positive forms of obligation – *state responsibility* seems unproblematic regardless of whether actions or omissions of the state are in question. Although the label attached to the content of the state's obligation in such situations of overlap between acts and omissions is not pivotal, it is nevertheless suggested that the positive/negative obligations distinction in relation to Article 3 more generally remains very much relevant.

Asking if the state can be properly seen as responsible does not necessarily allow us to explain *why* a human rights violation has occurred without having recourse to the

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<sup>149</sup> Lester and Pannick (2004) at 138; Starmer (2001) at 158.

<sup>150</sup> See, e.g., para. 70.

concrete obligations incumbent upon the state. For this reason, it is a mistake to view the positive/negative distinction as in some sense superfluous (note that Lord Brown does not say that the distinction should be abandoned; rather, that it is ‘unhelpful’ in relation to Article 3). The fact remains that Lord Brown’s comment *presupposes* an understanding of the kinds of obligations that in fact exist. The question of what human rights law demands of the state is logically prior to the question of whether the state can properly be seen as responsible for the harm suffered. An understanding of the things that the state cannot do, and must do, is a necessary prelude to a conclusion as to whether a violation of the right has occurred.

### Negative obligations

Negative obligations are the prototypical obligations, in line with the classic notion of human rights as protection of the individual against intrusion by the state. Such obligations impose upon the state a duty *not* to intrude into an individual’s life; to leave individuals free to lead the lives they choose without undue restriction or incursion. The ECtHR has specified that Article 3 can be seen as imposing primarily such a negative obligation.<sup>151</sup> The state has an obligation not to inflict torture, inhuman or degrading treatment or punishment. Cases providing examples of negative obligations include *Selçuk and Asker v. Turkey*, in which the destruction of homes and the ensuing treatment of the applicants demonstrated a breach of a negative obligation; *Selmouni v. France*, in which physical and mental abuse of the applicant during interrogation and detention amounted to torture and disclosed a breach of a negative obligation; and *Yankov v. Bulgaria*, in which the forcible shaving of the applicant’s head constituted degrading treatment and breached the state’s obligation not to inflict such treatment.<sup>152</sup> In human rights literature, the concept of negative obligations is afforded very little attention. This likely reflects both the perception that self-evident negative obligations need no discussion, and an attraction to the fertile area of positive obligations.

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<sup>151</sup> *Pretty v. UK*, para. 50.

<sup>152</sup> *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, *Reports 1998-II*; *Selmouni v. France*; *Yankov v. Bulgaria*.

## Positive obligations

The original negative obligation imputed to the state was swiftly complemented by a positive counterpart. The catalyst behind this was the ‘principle of effective protection’<sup>153</sup> – recognition that rights would not be effectively secured if states were never obliged to undertake ‘affirmative tasks’.<sup>154</sup> Starmer makes an interesting remark that further justifies the adoption by the Convention organs of such obligations: in comparing the approach to positive obligations of the US Supreme Court and the ECtHR, he notes that the purpose of the ECHR is not primarily the protection of individual freedom from the excesses of the state, as is the case in the US, but rather the protection of human dignity (this is a crucial point; the relevance and impact of the concept of human dignity in the context of Article 3 will be discussed in the following chapter). This, he writes, stems from the particular experience of World War II, in which atrocities were committed against minorities and dissidents with the widespread collaboration of ordinary citizens.<sup>155</sup> Whatever the motivation, positive obligations are now ingrained in the fabric of the Convention and have been for a number of decades.

As is clear from the case-law, and as certain authors note, the ECtHR has not expounded general principles on the content and scope of such obligations.<sup>156</sup> A number of authors have therefore extracted principles and suggested categories of positive obligations. There is agreement that positive obligations require the state to take action<sup>157</sup>, but in

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<sup>153</sup> See, e.g., Mowbray, Alastair (2004), *Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing) at 3 (reference to the early work of J.G. Merrills), 4, 221. See also Starmer, Keir (1999), *European Human Rights Law* (London: Legal Action Group) at 194-95.

<sup>154</sup> Mowbray (2004) at 2.

<sup>155</sup> Starmer (2001) at 144-45.

<sup>156</sup> See *Plattform Ärzte für das Leben v. Austria*, judgment of 21 June 1988, Series A, no. 139, para. 31. See Starmer and Dröge, who both find this lack of general theory characteristic of the ECtHR, and also unfortunate; Starmer (2001) at 139 and Dröge (2003) at 379.

<sup>157</sup> See, e.g., Mowbray (2004) at 2, referring to the opinion of Judge Martens in the case of *Gul v. Switzerland*, no. 23218/94, *Reports* 1996-I; Sudre, Frédéric (2000), ‘Les ‘Obligations Positives’ dans la Jurisprudence Européenne des Droits de l’Homme’, in P. Mahoney (ed.), *Protection des Droits de*

answering the question in what circumstances and to what extent, although there is significant overlap, the response is far from uniform. For example, whilst Starmer extracts general principles through an analysis of the Court's case-law resulting in five positive obligations<sup>158</sup>, Mowbray arrives at three broad groupings.<sup>159</sup> Dröge uses two broad categories; one of which is labelled very differently in comparison with these other authors.<sup>160</sup> Sudre highlights two forms of 'passive interference' that can breach positive obligations, focusing on the way in which obligations can be breached rather

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*l'Homme: La Perspective Européenne; Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal* (Köln: Heymanns) at 1359-76 at 1359 referring to *López Ostra v. Spain*.

<sup>158</sup> See Starmer (2001). In this relatively detailed classification, the state is seen to hold five kinds of obligation: to put in place a legal framework that provides effective protection (e.g. to provide criminal sanctions) (at 147-49); to prevent breaches of Convention rights (i.e. to take reasonable, specific steps to prevent violations where fundamental rights are at stake, where Article 8 'intimate interests' are at stake, or where the legal framework does not provide effective protection) (at 150-53); to provide information and advice relevant to a breach of Convention rights (in order to allow individuals to protect their own rights by giving them access to relevant information) (at 154-56); to respond to breaches of Convention rights (at 156-57); and to provide resources to individuals to prevent or remedy breaches of Convention rights (the main example given is *Airey v. Ireland* (judgment of 09 October 1979, Series A, no. 32) concerning the provision of resources to ensure that the right at stake was effectively protected) (at 157-58).

<sup>159</sup> See Mowbray (2004) for the identification of three broad groupings of obligation: a duty to take reasonable measures to protect the rights of individuals from infringement by private persons; a duty to properly treat and care for persons detained in state custody; and a duty to conduct effective investigations into allegations of rights violations (at 225-26). These groups are identified after an examination of the development of significant positive obligations under various Convention Articles – 2, 3, 5, 6, 8, 9, 10, 11 and 14, and 13. Two examples are given of the first obligation to take reasonable measures to protect the rights of individuals from infringement by private persons: at a basic level this entails an obligation on the state to enact adequate laws (at 225), and entails a 'more onerous form' to provide physical measures of security for an individual who is known to face immediate threats of violence (at 226). The second group contains obligations to properly treat and care for persons detained in state custody, such as an obligation to provide adequate medical treatment to detainees (at 226), to provide acceptable conditions of detention (at 226), and to account for detainees and safeguard against disappearances in custody (at 226). The third is the obligation to conduct effective investigations into allegations of violations (at 226-27).

<sup>160</sup> The first category given by Dröge (2003) includes positive obligations within what she calls the 'horizontal dimension' – an obligation to protect an individual against interference by a third party (at 381-82). In this connection, she cites cases such as *X. and Y. v. the Netherlands* (obligation to provide a criminal sanction for the sexual assault of a mentally-handicapped teenager) and *Costello-Roberts v. UK* (obligation to protect private school pupils from treatment contrary to Article 3). The second group of positive obligations is within a 'social dimension' and these obligations are much wider. She writes that these are: '[...] all the obligations of the state to realise the effective enjoyment of human rights in social reality' (at 382). *Airey v. Ireland* (obligation to provide legal aid) is cited; as is *D. v. UK* (obligation not to deport a terminally-ill individual to face inhuman treatment in the form of inadequate care and social support). She continues: 'They are claims of the individual to help and assistance by the state so as to realise his or her full autonomy or freedom' (at 382). This original approach also includes the argument that procedural guarantees (i.e. the obligation to respond to breaches of Convention rights with an effective investigation) are not a separate group (contrary to the interpretation of the other authors examined), but can form part of both groups – horizontal and social. Such guarantees are not a category in themselves, but rather an 'aspect' of both positive and negative obligations (at 383).

than what they demand.<sup>161</sup> Interpretation of the case-law in such literature has resulted in diverse conclusions. The objective of the present discussion is to reach one preferred framework in the degrading treatment context; therefore, our starting point shall be those degrading treatment judgments that have formed the basis of analysis so far. It is particularly important when enquiring into the scope of the right to understand as clearly as possible the scope of the corresponding state obligations. As the authors referred to above have done, in the present chapter principles shall be extracted from the case-law and positive obligations will be categorised accordingly.<sup>162</sup> The perspective adopted will be in terms of the demands placed on the state; what the state must do, rather than the ways in which positive obligations can be breached (which is the approach preferred by Sudre). The perspective of what the state is obliged to do is that which emerges directly from Court judgments and for this reason is the approach that shall be preferred.

#### Positive obligations in degrading treatment cases

Article 3 is amongst the rights that have been accepted as incorporating implied, rather than express, positive obligations.<sup>163</sup> The nature of Article 3's positive obligations may be significant in the sense that the scope of implied (as opposed to express) obligations attracts more controversy, as obligations that were not anticipated by states who were early signatories to the Convention. It has been suggested in this vein that a consequence

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<sup>161</sup> Sudre (2000): positive obligations can be breached by 'passive interference' which has two forms: an omission of the state amounting, in itself, to a violation of the right, or a failure of the domestic legal system, which makes possible, or tolerates, a violation of a right by non-state actors. As an example of his first category, Sudre cites Article 8 cases; one involving the insufficient regulation of air traffic noise levels and another the non-adoption of administrative measures which caused a disruption to a mother visiting her son in social care (at 1365). He invokes an Article 3 case concerning an alleged risk of prohibited treatment by drug traffickers after the return of a drug smuggler to his country of origin as an example of the second category, as well as a case in which the state failed to protect children from parental abuse (at 1366-68).

<sup>162</sup> An alternative possibility would have been to rely upon Alastair Mowbray and/or Stephanie Palmer's summary of positive obligations applicable to Article 3 (see below for further references). However, given the absence of existing literature on degrading treatment specifically, combined with the existence of diverse conclusions across the range of secondary literature on positive obligations under the ECHR more generally, it has been deemed necessary to articulate the relevant obligations directly on the basis of the primary sources. It will be suggested that the content of obligations that will be identified in degrading treatment case-law is consistent with the approach of both Mowbray and Palmer.

<sup>163</sup> Certain requirements to take action are included expressly in the text of the Convention (e.g. Art 5 (2-4)), whereas others have been read into the text by the Strasbourg organs. For discussion, see Van Dijk (1998).

of implied obligations is subjection to a test of proportionality (to be discussed below).<sup>164</sup> The fact that implied obligations have become ingrained in the Convention since they were first established in *Marckx v. Belgium* in 1979 is nevertheless undisputed.<sup>165</sup>

In *Costello-Roberts v. UK*, concerning corporal punishment in an independent school, the positive obligation was expressed as follows:

*The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 [...] to secure those rights and freedoms in its domestic law to everyone within its jurisdiction [...]*<sup>166</sup>

This is the general positive obligation – to *secure* to individuals within the state’s jurisdiction the right not to be subjected to degrading treatment. From cases relating to degrading treatment, three specific types of positive obligation are identifiable, and can be summarised as follows: firstly, there is evidence of a positive obligation to take measures to protect individuals from suffering degrading treatment at the hands of the state; secondly, a positive obligation to take measures to protect individuals from suffering degrading treatment that stems from ‘actors’ beyond the State Party, for example, a private person or another state; thirdly, a positive obligation to conduct an effective investigation into allegations of degrading treatment.<sup>167</sup> Furthermore, it will be submitted that these three obligations to emerge from degrading treatment cases accord with wider Article 3 positive obligations that are identified in secondary literature. The approaches of Palmer and Mowbray will be outlined; two authors who adopt a distinct focus on Article 3 positive obligations. This will be discussed below after an outline of the case-law.

The first form of positive obligation is to take positive measures to protect individuals from suffering degrading treatment at the hands of the state. The ECtHR has not expressed the obligation in these words. Rather, this is the essence of the obligation that

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<sup>164</sup> See the UK House of Lords judgment in *R (Munjaz) v. Mersey care NHS Trust* [2005] 3 WLR 793, para. 78.

<sup>165</sup> Harris et al. (1995) at 19-20; Starmer (2001) at 159.

<sup>166</sup> *Costello-Roberts v. UK*, judgment of 25 March 1993, Series A, no. 247-C, para. 26.

<sup>167</sup> This classification differs in breadth and scope from the approach of three of the authors noted above (Starmer, Dröge and Sudre).

can be drawn from references by the Court to obligations towards persons deprived of liberty in the context of degrading treatment. In *Mouisel v. France* (concerning the continued detention in prison of an individual suffering from a progressive illness and the conditions in which he was transferred to hospital for treatment), Article 3 was said to impose:

*[...] an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance [...] The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity [...]*<sup>168</sup>

The state had breached its positive obligation in this case by failing to take adequate positive measures to ensure that the applicant did not suffer prohibited treatment.<sup>169</sup> *Farbtuhs v. Latvia* (in which an 84 year old disabled applicant was suffering from several chronic illnesses) confirms that the protection of the physical well-being of detainees is a positive obligation, this being stated explicitly: Article 3 is said to impose a positive obligation to ensure that prisoners are detained in conditions compatible with their human dignity, and the health and well-being of detainees must be adequately safeguarded, notably through the provision of adequate medical care.<sup>170</sup> That the state must secure the health and well-being of persons in detention is reiterated in *Nevmerzhitsky v. Ukraine*.<sup>171</sup> The Court's reasoning in *Pretty v. UK* also supports the existence of a positive obligation under Article 3 to provide proper medical care.<sup>172</sup>

Degrading treatment, in these cases concerning the health and wellbeing of persons deprived of liberty, occurs at the hands of the state. The obligation is one of taking positive measures to prevent individuals from suffering degrading treatment. This obligation to ensure that prisoners are detained in conditions compatible with their human dignity and to safeguard their well-being can be otherwise expressed as an obligation to take positive measures to protect individuals from suffering degrading treatment *at the hands of the state*. That the obligation is one of protection from state agents is implicit in cases invoking the second form of obligation to be discussed below

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<sup>168</sup> *Mouisel v. France*, no. 67263/01, ECHR 2002-IX, para. 40.

<sup>169</sup> *Mouisel v. France*, para. 48.

<sup>170</sup> *Farbtuhs v. Latvia*, para. 51.

<sup>171</sup> *Nevmerzhitsky v. Ukraine*, para. 81.

<sup>172</sup> *Pretty v. UK*, para. 55.

– the obligation to take positive measures to protect individuals from suffering degrading treatment at the hands of other ‘actors’ – in which the Court has stated that measures must be taken to prevent degrading treatment, *including* where this stems from private individuals. This suggests that this second form of obligation is a progressive extension from the first.

The Court’s explicit statements in degrading treatment case-law refer specifically to situations of detention, whereas expressed as an obligation to take positive measures to protect individuals from suffering degrading treatment at the hands of the state, this does not imply any kind of geographical restriction. This should not be understood to lead, however, to a widening of the scope of the obligation. The question of geographical scope is not important in itself. The significant factor in cases invoking this first form of obligation relates to state responsibility. In situations where persons are physically detained – a paradigmatic act of state – responsibility is unquestionably engaged. It follows from the obligation to take positive measures to protect individuals from suffering degrading treatment *at the hands of the state* that state responsibility will be engaged, since the state is at the root of the degrading treatment whether in relation to a person who is physically detained or in relation to a person who is not under such direct control of the state (such as in *Limbuela* before the House of Lords).

Therefore, the obligation to take positive measures to protect individuals from suffering degrading treatment at the hands of the state is an alternative expression of the obligation to take measures to protect the health and well-being of persons deprived of liberty. It is helpful to describe this first form of obligation in these more general terms, with reference to degrading treatment stemming from the state itself, in that it allows for a more streamlined framework of positive obligations applicable to degrading treatment (when viewed alongside the second obligation to take positive measures to protect individuals from suffering degrading treatment at the hands of other ‘actors’). Furthermore, expressing the obligation in this way draws attention to the question of the source of the degrading treatment, which, as will be proposed in Chapter Six of the thesis, is a significant distinction in order to reach a clear understanding of the meaning and scope of the right not to be subjected to degrading treatment.

This first obligation is perhaps the least clear-cut in terms of having a distinctive content, but is often the least problematic in terms of engagement of the responsibility of the state (see below on this distinction between content of the obligation and the breach of the obligation through engagement of state responsibility). This is the form of obligation with which Lord Brown took issue in *Limbuella*. The content of the obligation lacks a degree of clarity in the sense that it might be perceived as being almost indistinguishable from a negative obligation. The provision of adequate medical care and conditions of detention, for example, might be seen to involve a negative obligation upon the state not to inflict degrading treatment. The reason for this is that the treatment stems from the state itself and the responsibility of the state for a violation of the right is therefore clearly engaged. Hence Lord Brown's comment that the key issue in *Limbuella* was that state responsibility was in fact engaged, regardless of whether the relevant obligation was understood as positive or negative. The line between the forms of obligation here is indeed fluid. Nevertheless, in terms of the content of this first form of positive obligation, the jurisprudence of the ECtHR cited above indicates that it is a *positive* obligation to take *positive action* to prevent degrading treatment.

As suggested above, the content of the second positive obligation follows from the first. This is the obligation to take positive measures to protect individuals from suffering degrading treatment that stems from a source beyond the state (the precise nature of these other sources of degrading treatment will be clarified in the process of analysing the meaning of treatment, and who can inflict treatment, in Chapter Six of the thesis). The content of this second obligation is evident in *Z. and others v. UK*, in which the degrading treatment did not stem from the state but was inflicted by a private individual:

*In its report the Commission expressed the unanimous opinion that there had been a violation of Article 3 of the Convention. It considered that there was a positive obligation on the Government to protect children from treatment contrary to this provision [...]*

*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 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 or degrading treatment, including such ill-treatment administered by private individuals [...]*<sup>173</sup>

This exact formulation is repeated in the case of *E. and Others v. UK*.<sup>174</sup> In *Pretty v. UK*, the Court stated that Article 3 ‘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’<sup>175</sup>, after which it went on to confirm the existence of positive obligations, repeating the formula used in *Z. and E*.<sup>176</sup>

The obligations relied upon in expulsion cases also fall within this category. The existence of a positive obligation, however, is made less explicit than in cases such as *E. and Others*. In *Soering*, the Court, agreeing with the applicant and confirming the Commission’s approach, held that Article 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.*<sup>177</sup>

The Court concluded that extradition could give rise to an issue under the Convention if it was established that there existed a real risk that the applicant would be subjected to prohibited treatment in the requesting state.<sup>178</sup> This is equally the case in *Nsona v. the Netherlands* for example, in which despite there being no explicit reference to positive obligations, it is similarly specified that expulsion can give rise to an issue under the Convention if there exists a real risk that the applicant will suffer prohibited treatment in the receiving state.<sup>179</sup> This can also be seen in *Ahmed v. Austria*<sup>180</sup> and *H.L.R. v. France*.<sup>181</sup> It is clear that the obligation of the state in these expulsion cases is *to protect*;

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<sup>173</sup> *Z. and others v. UK*, para. 70, 73.

<sup>174</sup> *E. and others v. UK*, para. 88.

<sup>175</sup> *Pretty v. UK*, para. 50.

<sup>176</sup> *Pretty v. UK*, para. 51.

<sup>177</sup> *Soering v. UK*, para. 82.

<sup>178</sup> *Soering v. UK*, para. 91.

<sup>179</sup> *Nsona v. the Netherlands*, judgment of 28 November 1996, *Reports* 1996-V, para. 91.

<sup>180</sup> *Ahmed v. Austria*, para. 39.

<sup>181</sup> *H.L.R. v. France* [GC], judgment of 29 April 1997, *Reports* 1997-III, para. 34.

to ensure that individuals are not subjected to degrading treatment at the hands of third states, etc, and therefore amounts to a positive obligation.<sup>182</sup>

A third form of positive obligation is to conduct an effective investigation, although several of these cases do not make explicit reference to the nature of the obligation. An example of this is found in *Kuznetsov v. Ukraine*:

*The Court recalls that where an individual raises an arguable claim that he has been subjected to ill-treatment by the police or other agents of the State unlawfully and in breach of Article 3 of the Convention, 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.*<sup>183</sup>

This invocation of Article 1 suggests that the procedural guarantee<sup>184</sup> of conducting an effective investigation is a positive obligation. In the later case of *Afanasyev v. Ukraine*, this is made explicit: 'The Court recalls that Article 3 of the Convention creates a positive obligation to investigate effectively allegations of ill-treatment [...]'<sup>185</sup>

This framework of three positive obligations applicable to degrading treatment is consistent with the approach of both Palmer and Mowbray.<sup>186</sup> Despite some differences in the way the categories are constructed, the obligations identified are essentially the

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<sup>182</sup> It is possible that an overlap could occur between the first and second forms of positive obligation. The case of *Pantea v. Romania* provides an example of this. The prison authorities in this case, in which the applicant was beaten by other inmates during his detention, were held to have failed in their positive obligation to protect the physical integrity of the applicant through insufficient surveillance and protection from harm. The Court stated that the injuries caused by the fellow detainees whilst under control of the prison authorities were: '[e]lements of fact that [...] are in themselves severe enough for the offences complained of to constitute inhuman or degrading treatment [...]' and found that this treatment was 'contrary to' Article 3. The Court then went on to establish 'whether the authorities in the respondent state [could] be held responsible for this.' The Court noted that the state had an obligation to 'take the practical preventative measures necessary to protect the physical integrity and health of persons who have been deprived of their liberty. This seems to suggest a confluence of the obligation to take measures to protect individuals from prohibited treatment stemming from both the state and private persons; *Pantea v. Romania*, para. 185-96.

<sup>183</sup> *Kuznetsov v. Ukraine*, para. 105. See also *Ahmet Ozkhan and Others v. Turkey*, para. 358; *Toteva v. Bulgaria*, no. 42027/98, 19 May 2004, para. 62.

<sup>184</sup> *Naumenko v. Ukraine*, no. 42023/98, 10 February 2004, para. 129.

<sup>185</sup> *Afanasyev v. Ukraine*, no. 38722/02, 05 April 2005, para. 69.

<sup>186</sup> Few authors have focused exclusively on Article 3 in discussion of positive obligations. Beyond general acceptance that such obligations exist, in-depth analysis is rare; see, e.g. Cooper (2003) at 33-34, para. 2-15-2-16.

same. Palmer touches upon positive obligations specifically relating to Article 3 from the perspective of state duties. Positive obligations are seen to fall into two broad categories: a duty to conduct effective investigations, and a duty to protect from, or deter, the suffering of proscribed treatment by state or non-state agents.<sup>187</sup> The obligation to conduct investigations is clearly the same. The other obligation listed by Palmer encompasses the first and second obligations listed above within one single heading. In elaborating upon the content of this obligation, the author indicates that it encompasses more specific ‘manifestations’. The examples given suggest a duty to protect against misconduct by state agents, a duty to take reasonable measures to prevent foreseeable risks of proscribed treatment by ‘officials of other States or non-State actors’ (which includes risks of ill-treatment as a result of expulsion), and a duty to put in place suitable legal deterrence regimes.<sup>188</sup>

The only element here that is unfamiliar based on the degrading treatment cases that have been examined is that of legal deterrence regimes. Palmer, and also Mowbray, both refer to the case of *A. v. UK* in this connection – an Article 3 case not relating specifically to degrading treatment and not one of the cases examined above, in which the Court found that the UK had breached its obligation to protect a child from Article 3 prohibited treatment at the hands of his step-father as a result of defective criminal law. It is stated that: ‘In the Court’s view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3’.<sup>189</sup> This can be aligned with the first and second category of obligations identified in degrading treatment judgements, of protecting against the suffering of degrading treatment either by the state or by another source beyond the state. This is consistent with Palmer’s placing of this specific obligation within the duty to protect from, or deter, the suffering of proscribed treatment by state or non-state agents.

Mowbray discusses Article 3 in a chapter of *The Development of Positive Obligations*. The author identifies a duty to conduct effective investigations into allegations of rights violations, as has been identified by Palmer and in the examination of degrading

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<sup>187</sup> Palmer, Stephanie (2006), ‘A Wrong Turning: Article 3 ECHR and Proportionality’, *Cambridge Law Journal*, 65 (2), 438-52, at 440.

<sup>188</sup> Palmer (2006) at 440-41.

<sup>189</sup> *A. v. UK*, judgment of 23 September 1998, *Reports* 1998-VI, para. 24.

treatment case-law.<sup>190</sup> Also identified is a duty to take protective measures to safeguard the rights of individuals from infringement by state agents<sup>191</sup> and private persons.<sup>192</sup> This is in line with both the first and second obligations listed above. Mowbray also refers specifically to a duty under Article 3 to provide acceptable detention conditions and to properly treat persons deprived of liberty. The author sees both as being in the same vein (in the book's conclusion, Mowbray includes the duty to provide acceptable detention conditions, along with the obligation to provide adequate medical care, as an example of the broad obligation concerning treatment of persons in detention).<sup>193</sup> As discussed above, these two obligations have been encompassed in the three-fold framework under an obligation to take positive measures to protect individuals from suffering degrading treatment at the hands of the state. It can also be noted that Palmer does not include a separate obligation to protect the health of persons deprived of liberty, which supports an understanding of this specific obligation as encompassed within an obligation to protect against the suffering of proscribed treatment stemming from state agents. It is submitted that the framework for degrading treatment positive obligations offered above can therefore be seen as consistent with the accounts of Article 3 obligations given by Palmer and Mowbray.

Furthermore, since Palmer and Mowbray refer to obligations arising under Article 3 generally, this supports a presumption that there are no additional obligations that have been applied in non-degrading treatment Article 3 cases that would also be applicable to degrading treatment. It is possible that additional obligations might have been articulated in cases on inhuman treatment or torture, beyond the scope of the present research, which have not been detected in the examination of degrading treatment judgments, but which would nevertheless be significant if applicable to Article 3 as a whole.<sup>194</sup> It is clear from degrading treatment cases that where the obligation is stipulated, it is an obligation that applies to Article 3, and not only to degrading treatment. For example, in *Z. and*

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<sup>190</sup> Mowbray (2004) at 59-64.

<sup>191</sup> Infringement here refers to omissions since the obligation is to take measures, and is therefore breached by a failure to act.

<sup>192</sup> Mowbray (2004) at 43-47.

<sup>193</sup> Mowbray (2004) at 48, 226.

<sup>194</sup> Indeed, as degrading treatment is an integral part of the Article 3 right, there would be no particular reason to assume that an obligation applying to inhuman treatment or torture would not equally apply. Having said that, a differentiation is not necessarily excluded.

*others v. UK*, Article 1 in conjunction with Article 3 was found to impose an obligation to ‘ensure that individuals [...] are not subjected to *torture or inhuman or degrading treatment*’.<sup>195</sup> In *Mouiel v. France*, it was held that: ‘[...] Article 3 [...] imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty [...]’.<sup>196</sup> In *Kuznetsov v. Ukraine*, the obligation to complete an effective investigation was said to arise: when ‘[...] an individual raises an arguable claim that he has been subjected to ill-treatment [...] in breach of Article 3 of the Convention [...]’.<sup>197</sup> However, neither of the accounts of Article 3 positive obligations given by Palmer and Mowbray suggest the existence of any such additional obligations, as is visible in the above outline of those accounts. The obligations applicable to degrading treatment and the wider prohibition of torture and inhuman treatment appear to be the same on the basis of this literature. This remains a presumption, but one that is not rebutted by these accounts of Article 3 positive obligations.

To summarise: there is evidence of an obligation to take measures to protect individuals from suffering degrading treatment at the hands of the state; an obligation to take measures to protect individuals from suffering degrading treatment stemming from sources other than the State Party, for example, a private person or third state; and an obligation to conduct an effective investigation into allegations of degrading treatment. It could be argued that these three obligations should be more detailed. This is a question of preference in terms of the degree of detail that is judged to optimise the ease of drawing upon the framework of obligations. A degree of detail has been favoured that is judged to allow identification of the relevant positive obligation whilst maintaining scope for including a range of perhaps unforeseen situations that it would be impossible to identify in advance.<sup>198</sup>

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<sup>195</sup> *Z. and others v. UK*, para. 73 (emphasis added).

<sup>196</sup> *Mouiel v. France*, para. 40 (emphasis added).

<sup>197</sup> *Kuznetsov v. Ukraine*, para. 105 (emphasis added). See also *Ahmet Ozkhan and Others v. Turkey*, para. 358; *Toteva v. Bulgaria*, para. 62.

<sup>198</sup> Thus far only positive obligations that have been applied to *Article 3* have been discussed. It is entirely possible that other forms of positive obligation have arisen in relation to other Convention Articles; this, combined with the fact that the content of positive obligations has clearly evolved over the years, raises the possibility that there are specific forms of obligation relevant to other rights that could be argued to *potentially* apply to Article 3 in addition to those whose application is already established. Starmer (2001) provides the clearest examples of such potential obligations: ‘the duty to provide information and advice relevant to a breach of Convention rights’ and ‘the duty to provide resources to individuals whose Convention rights are at stake’ (154-58). He argues, citing Article 8 and 2 cases, that

## Engagement of the responsibility of the state

State responsibility will be presently discussed as an element distinct from the content of state obligations. The term ‘content of obligations’ is intended to refer to the substance of what the state is obliged to refrain from doing and what the state is obliged to do. That which engages the responsibility of the state refers to the act(s) or omission(s) that trigger(s) a breach of an obligation and which renders the state responsible for a violation of a Convention right. It will be argued that it is in the interests of clarity to conceptually distinguish the question of the content of obligations from that of engagement of the state’s responsibility. Distinguishing between state obligations and engagement of state responsibility is equally pertinent to both positive and negative obligations.

### State responsibility

The term ‘state responsibility’ tends to invoke the international law doctrine of state responsibility. The description of the elements of an internationally wrongful act in Article 2 of the International Law Commission’s Draft Articles on the Responsibility of States can be seen as an appropriate description of when the responsibility of the state is engaged in the context of Article 3 ECHR:

*There is an internationally wrongful act of a state when conduct consisting of an act or omission:*

*(a) Is attributable to the State under international law; and*

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the former obligation has been recognised by the Court to allow individuals to protect their own rights by giving them access to relevant information. This can perhaps be seen as a variant of the obligation to conduct an effective investigation. It could be invoked alongside either of the substantive obligations to protect against violations of the right and would not likely be considered alien to Article 3 if such a situation were to arise. The latter obligation to provide material resources to individuals to prevent or remedy breaches (the main example given is *Airey v. Ireland*) might be viewed as a specific manifestation of the obligation to protect against the violation of the right by state agents or to protect against the violation of the right by agents beyond the state. This secondary literature does not immediately suggest the existence of non-Article 3 positive obligations that, in the interests of completeness, should be taken into account when clarifying those obligations significant for the prohibition of degrading treatment, but this would be a worthwhile avenue for further exploration.

(b) *Constitutes a breach of an international obligation of the State.*<sup>199</sup>

Although the major difference is that state responsibility at the international law level has traditionally been concerned with inter-state relations, whereas responsibility for human rights violations can also be reclaimed by individuals, the basic idea is the same in both contexts<sup>200</sup>: in respect of the ECHR, the state has international treaty obligations and the state is responsible for a violation if it breaches these obligations. This does not suggest that state responsibility under the ECHR is identical to the rules of state responsibility under general international law; nevertheless, Article 2 of the Draft Articles demonstrates that the core concern is the same. In short, and indeed quite simply, the act or omission that constitutes the infringement must be attributable to the state and there must be an obligation that has been breached.

State responsibility distinct from the content of state obligations

Separating the question of responsibility from the question of the content of state obligations under the ECHR is justified by a number of factors. The most notable are the explicit references to the engagement of responsibility of the state that arise in degrading treatment cases. For example:

*Expulsion – or removal – by a Contracting State of a non-national may give rise to an issue under Article 3 [...] and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing*

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<sup>199</sup> International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Supplement No. 10, Fifty-Sixth Session, 2001.

<sup>200</sup> This is supported by a number of scholars who see the international law framework as relevant: Romany refers to the relationship between human rights discourse and international state responsibility norms as one of ‘cross-fertilization’ (Romany, Celia (1994), ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’, in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press), 85-115 at 96). Chirwa supports an approach that sees the general international law rules on state responsibility as applicable to international human rights law, arguing that ‘human rights law and the general international law principles of state responsibility should be regarded as forming parts of a single whole’ (Chirwa, Danwood Mzikenge (2004), ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors to Account for Human Rights’, *Melbourne Journal of International Law*, 5 (1), 1-36. The vocabulary of the Court also supports an affinity with the international law rules. E.g., in *Ilascu and others v. Moldova and Russia* the Court refers to ‘State responsibility for a wrongful act’ (para. 351). Mowbray also highlights that the Court interprets another concept – that of jurisdiction – in accordance with principles of public international law, which supports the acceptance of an affinity between both bodies of law (Mowbray (2007) at 61).

*that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment [...]*<sup>201</sup>

The possibility of viewing state responsibility as conceptually distinct from the content and nature of state obligations also emerges from the questioning of the usefulness of the negative/positive dichotomy, as aforementioned. Lord Brown in *Limbuela*, in arguing that it does not matter whether the obligation is negative or positive, refers to what he sees as the ‘real issue’ of whether the state was responsible for the harm inflicted. This suggests that responsibility can be seen as a distinct question. His approach also suggests that isolating the question of responsibility can facilitate determination of whether or not there has been a violation of the right. The distinguishable dimension of engagement of state responsibility is also implicitly highlighted by Palmer in discussion of Article 3 positive obligations.<sup>202</sup>

In addition, the value of viewing state responsibility as conceptually distinct from the content and nature of state obligations will emerge through clarification of the meaning of treatment in Chapter Six. As will be discussed in that chapter, there is evidence of some confusion in the identification of, and distinction between, treatment in a particular situation and that which brings prohibited treatment within the scope of the state’s responsibility (to take the example of *Soering*, treatment refers to the conditions on death row; it does not refer to the act of expulsion, which is in fact the element that triggers the breach of the obligation, i.e. that engages the responsibility of the state).

This distinction is also valuable in terms of illuminating understanding of the content of state obligations themselves. A situation might arise in which the existence of the obligation itself is questioned because of concerns about how or why the state should be held responsible. It might be objected, for example, that an obligation is excessively wide and unacceptable because a state will be found to have violated the Convention when it has not inflicted the treatment, had nothing to do with the prohibited treatment, could not have prevented the treatment, etc. The case of *D. v. UK*, in which the removal of a terminally-ill man from the UK to his native St. Kitts was found to entail a potential violation of Article 3, is an example of such a situation; this case will be further

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<sup>201</sup> *Nsona v. the Netherlands*, para. 92.

<sup>202</sup> E.g.: ‘The acquiescence or connivance of State authorities in the ill-treatment of individuals by private parties may engage the State’s responsibility.’ See Palmer (2006) at 441.

discussed in relation to the meaning of treatment that it suggests. Identifying the obligation itself is one step; determining whether the responsibility of the state is engaged and the obligation is breached, although very closely linked, is nevertheless helpfully viewed as a conceptually distinct step. Separate determinations may not be necessary in most cases but for the purpose of gaining a clear understanding of the scope of application of the prohibition of degrading treatment it is helpful to make this distinction explicit. To take the example of *Soering* again, it is helpful to accurately identify the elements involved: the content of the obligation (a positive obligation to protect an individual from suffering inhuman and degrading treatment inflicted by another state) and the responsibility of the respondent state (engaged by the act of expulsion, which is the act that triggers a breach of the positive obligation).

The question of the responsibility of the state is an integral element of a decision as to whether a state has complied with or breached its human rights obligations, but for the most part this dimension is so fundamental that it is not explicitly acknowledged. It is suggested that highlighting engagement of state responsibility as a distinct consideration facilitates understanding of the content of state obligations (as well as, importantly, the meaning of treatment).

### **The margin of appreciation and proportionality**

It is appropriate, as part of this discussion of state obligations, to clarify the relevance – or otherwise – of the principles of the margin of appreciation and proportionality to the prohibition of degrading treatment. Both of these principles, prominent in general ECHR jurisprudence, are significant in terms of the state's response to alleged breaches of its obligations. Some particular considerations are necessary due to the absolute nature of the Article 3 guarantee.

No degrading treatment judgments of the ECtHR that have been examined support a margin of appreciation or a principle of proportionality as relevant to determining whether the state has conformed or not with its obligations. It is widely acknowledged that Article 3 is not subject to a margin of appreciation or proportionality considerations where a negative obligation is in issue, precisely due to its absolute nature. A number of

clarifications are necessary, however, concerning the applicability of these principles in conjunction with positive obligations. In relation to Article 3 positive obligations, the UK government has invoked the margin of appreciation before the ECtHR and literature on the issue is ambiguous. Allowing a margin of appreciation in the context of an Article 3 claim relying on positive obligations would permit the state a degree of discretion and restrict the extent of input made by the ECtHR. The consequences of its use are therefore significant: within a state's area of discretion, the Court will not intervene to question the state's judgment. The UK government (and UK domestic judges) have also invoked the principle of proportionality, and as we shall see, some of the literature on the question tends to be slightly unclear. If this principle were applicable, would it sanction a balancing of interests between the right of the individual not to suffer prohibited treatment and the interests of the community? This would have significant implications for the protection of the right and would bring into question its absolute nature. Since both the margin of appreciation and principle of proportionality are accepted as inapplicable to Article 3 where negative obligations are concerned, the question as to its application specifically where Article 3 positive obligations are concerned will be clarified.

#### The margin of appreciation

In the landmark *Handyside* judgment, the Court explained its understanding of, and motivations for, the attribution of a margin of appreciation:

*By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them [...] [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.*

*Consequently, Article 10 para. 2 [...] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator [...] and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force [...]*<sup>203</sup>

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<sup>203</sup> *Handyside v. United Kingdom*, no. 5493/72, judgment of 7 December 1976, Series A, no. 24, para. 48.

Harris et al. define the margin as a ‘certain measure of discretion, subject to European supervision, when [the state] takes legislative, administrative or judicial action in the area of a Convention right.’<sup>204</sup> The consequence of this ‘latitude of discretion’<sup>205</sup> is a limitation of the scope of the Court’s review.

The margin is applied in various situations. Yourow’s in-depth analysis of the development and use of the margin in Strasbourg case-law finds four categories of cases in which the margin of appreciation has been invoked: those dealing with derogations under Article 15; those concerning Articles 5 and 6 (criminal and civil due process-related); those concerning personal freedoms, notably Articles 8-11 with legitimate limitation clauses; and those invoking Article 14 on discrimination.<sup>206</sup> Harris et al. and Grosz et al. also identify these categories.<sup>207</sup> Article 3 does not feature in this list. In a specific reference to positive obligations, Harris et al. note that the margin may be relevant in determining whether a state has taken sufficient measures to comply with positive obligations (under Articles 8-11)<sup>208</sup>, and Grosz et al., citing a case containing an Article 8 claim, write that the margin is used ‘when establishing the ambit of positive obligations’.<sup>209</sup> Does this specific reference to the ‘ambit’ of positive obligations have relevance in the Article 3 context?

In cases that concern other Convention Articles alongside Article 3, if a margin of appreciation is referred to, it is in relation to those other articles rather than Article 3 (for example, in the case of *Marckx*, the margin of appreciation is relied upon as part of the Article 8 claim in conjunction with Article 14 but not in relation to Article 3).<sup>210</sup> The degrading treatment judgments that have been examined indicate that the margin of appreciation has been referred to on only one occasion – in the 2002 case of *Pretty v. UK*. This one identifiable reference in *Pretty* was made not by the Court, but by the UK

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<sup>204</sup> Harris et al. (1995) at 12.

<sup>205</sup> Yourow, Howard Charles (1996), *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff Publishers) at 13.

<sup>206</sup> Yourow (1996) at 12.

<sup>207</sup> Harris et al. (1995) at 13; Grosz et al. (2000) at 19, para. 2-05.

<sup>208</sup> Harris et al. (1995) at 13.

<sup>209</sup> Grosz et al. (2000) at 19, para. 2-05.

<sup>210</sup> *Marckx v. Belgium*, judgment of 13 June 1979, Series A, no. 31, para. 31, 53-54.

government, who argued that a margin of appreciation existed for the government to judge the *scope of positive obligations*:

*Even if Article 3 were engaged, it did not confer a legally enforceable right to die. In assessing the scope of any positive obligation, it was appropriate to have regard to the margin of appreciation properly afforded to the State in maintaining section 2 of the Suicide Act 1961.*<sup>211</sup>

Conversely, Mrs Pretty argued that there was no scope for a margin of appreciation in relation to Article 3.<sup>212</sup> The Court stopped short of engaging with this question, however, estimating that no positive obligation existed, and therefore the issue of its scope did not need to be determined.<sup>213</sup> An argument for the applicability of a margin of appreciation can be found in the judgment of Lord Bingham in the domestic hearings of the *Pretty* case.<sup>214</sup> An Article 8 case was cited, in which the ECtHR had afforded a wide margin of appreciation. The observations of the ECtHR in that case were taken to be of more general application, leading to the conclusion that the state also disposed of a margin of appreciation in relation to positive obligations under Article 3.<sup>215</sup> An Article 8 case is therefore used as authority for the relevance of the margin in determining the scope of positive obligations generally. The question is whether such a transposition can be made; in other words, whether the special status of Article 3 removes the possibility of an area of discretion being afforded to the state for it to judge, with more limited supervision by the Court, what the scope of positive obligations under Article 3 should be.

Scholarship dealing with the margin of appreciation is for the most part unhelpful in respect of its particular relevance to Article 3, including in relation to the ambit of Article 3 positive obligations. Article 3 is mentioned briefly in Yourow's final chapter, but is simply referred to as a fundamental right that is absolutely prohibited, without further precision.<sup>216</sup> Neither Harris et al. nor Grosz et al. make explicit reference to the applicability of the margin to Article 3. Van Dijk writes that the margin of appreciation in relation to implied positive obligations, which may entail a 'considerable financial or

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<sup>211</sup> *Pretty v. UK*, para. 48.

<sup>212</sup> *Pretty v. UK*, para. 46.

<sup>213</sup> *Pretty v. UK*, para. 56.

<sup>214</sup> *R (Pretty) v. Director of Public Prosecutions* [2001] 3 WLR 1598, para. 15.

<sup>215</sup> *Pretty v. UK*, para. 15.

<sup>216</sup> Yourow (1996) at 188.

organisational burden', is justifiably wide, although no reference is made to non-limited rights in this respect.<sup>217</sup> Lester and Pannick, referring to the malleable extent of the margin, state that a 'greater latitude is appropriate in relation to those rights which expressly require a balancing of competing considerations'<sup>218</sup>, suggesting that a (lesser-latitude of) margin can be applicable in relation to rights that do not require a balancing exercise. Furthermore, Lord Hope in a relatively recent UK case stated that 'even where the right is stated in terms which are unqualified', some margin of appreciation may still be appropriate.<sup>219</sup> It is therefore somewhat unclear whether the margin of appreciation can have a legitimate role in relation to Article 3 positive obligations – often no distinction is made between limited and non-limited rights, and in domestic cases there is some evidence of acceptance of a margin of appreciation.

As aforementioned, however, degrading treatment case-law under the Convention lends no support to the application of this doctrine. The author Johan Calleweart tends to support this conclusion: in an article dealing specifically with the margin in relation to Articles 2, 3 and 4, Calleweart agrees that the Court at the time of writing had not allowed a margin of appreciation in the application of Article 3.<sup>220</sup> Calleweart, however, does not refer specifically to determination of the scope of positive obligations. Rather, he distinguishes between two stages in the process of applying Article 3 in order to demonstrate clearly that a margin of appreciation is not applicable in either – these are the establishment of the facts, and the legal classification of the facts. In that connection, the author dispels potential confusion based on the fact that the Court relies upon the facts of the case as established by national authorities. In such cases, the Court bases its own assessment on the facts as found by the national authorities; it does not base its judgment on the assessments of those authorities and this should not be confused with an application of a margin of appreciation.<sup>221</sup> Nor is the margin applicable in the process of legal classification of the facts of the case, i.e. when deciding whether the treatment

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<sup>217</sup> Van Dijk (1998) at 22-23.

<sup>218</sup> Lester and Pannick (2004) at 94, para. 3.21.

<sup>219</sup> *R v. DPP, ex p Kebilene* [2000] 2 AC 326, para. 381, cited in Lester and Pannick (2004) at 98, para. 3.21, note 2.

<sup>220</sup> Calleweart, Johan (1998), 'Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?', *Human Rights Law Journal*, 19 (1), 6-9 at 6.

<sup>221</sup> Calleweart (1998) at 7.

complained of amounts to torture, inhuman or degrading treatment or punishment within the meaning of Article 3.<sup>222</sup> Although there is no explicit mention of the scope of positive obligations, Calleweart shows that the doctrine of the margin of appreciation is alien to other aspects of the application of Article 3. The most significant factor, however, pointing towards the conclusion that the margin does not apply to the prohibition of degrading treatment, even when positive obligations are in issue, remains the absence of references to it in degrading treatment case-law. There appears to be no evidence in degrading treatment cases for the relevance of the margin of appreciation; there is no evident reason, bearing in mind the absolute nature of the prohibition, why the situation should be different when positive as opposed to negative obligations are in issue.

### Proportionality

Concerning the doctrine of proportionality, which ‘implies the need to strike a proper balance between various competing interests’<sup>223</sup>, it seems that clarification is also necessary. This may be due to the fact that there are ‘various versions’ of proportionality<sup>224</sup> that have different implications in different contexts. Proportionality is ‘most evident’<sup>225</sup> in relation to the rights found in Articles 8-11 that can be legitimately restricted. Starmer, for example, first describes the principle in the context of such rights,

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<sup>222</sup> The reasons he gives for the non-applicability of a margin include the following: Its flexibility is incompatible with the absolute nature of Article 3. Under Article 3 the same circumstances must allow the same conclusion to be reached, i.e. the effect of the circumstances may be different based on the circumstances of the case but not based on conceptions held within the state. A margin would be incompatible since it would have the consequence of accepting differences in the *Convention's effects* in light of local circumstances. Also, given the nature of adjudication on Article 3, which requires a process of legal classification in order to determine whether or not the right has been violated, the Court must retain control over this process – the authoritative interpretation and definition of the Convention and its requirements, having effects on all of the Contracting States, is reserved to the Court by Article 45 of the Convention (now Article 32). As well as being incompatible with the territorially-limited competence of domestic authorities, allowing individual states to limit the ‘interpretive freedom’ of the Court would not be in line with the purpose of the margin of appreciation. He also emphasises the need for common standards in the application of Article 3, which he sees as the most prominent right symbolising universality (at 8-9).

<sup>223</sup> Van Dijk, Pieter and Van Hoof, G.J. H (1998), *Theory and Practice of the European Convention on Human Rights* (3rd edn.; The Hague: Kluwer Law International) at 80.

<sup>224</sup> Clayton, Richard and Tomlinson, Hugh (2000), *The Law of Human Rights, Volume 1* (Oxford: Oxford University Press) at 282, para. 6.45.

<sup>225</sup> Harris et al. (1995) at 11.

noting that if a fair balance between individual rights and the interests of the community is to be found restrictions of the right must be proportionate to the aim pursued.<sup>226</sup>

Clayton and Tomlinson list a range of situations in which some form of the doctrine applies, which includes proportionality in defining the limits of positive obligations.<sup>227</sup> As with the margin of appreciation, this would be the sense in which proportionality might be argued to be relevant to Article 3 where positive obligations are in issue. Grosz et al., in referring to the use of the principle to define the scope of positive obligations, draw support from an Article 8 case (echoing the use of Article 8 cases in relation to the margin of appreciation):

*Proportionality or fair balance also plays a role in the establishment of the scope of positive obligations. Although the Convention only expressly requires that these issues be addressed in relation to “interferences”, the Court has held that “(i)n determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual [...]”*<sup>228</sup>

Again, there is little analysis specifically pertaining to non-limited rights in this context, and again the following question arises: does such a balancing of interests have a place in relation to determining the limits of Article 3 positive obligations? Arguably it does not, although some confusion appears to have arisen, both in domestic UK cases on Article 3 and in literature on proportionality.

Palmer’s discussion of proportionality in relation to Article 3 provides some helpful clarification. The approach taken by Lord Hope in the House of Lords case of *Munjaz* is noted, in which he states, citing *Osman v. UK*, that: ‘[...] issues of proportionality will arise where a positive obligation is implied as where positive obligations arise they are not absolute.’<sup>229</sup> A number of months later, Lord Hope, in discussing Article 3 in *Limbuela* and after confirming the rejection of any kind of proportionality consideration

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<sup>226</sup> Starmer (1999) at 170.

<sup>227</sup> Clayton and Tomlinson (2000) at 279-80, para. 6.42. See also Grosz et al. (2000) at 172, para. C0-16.

<sup>228</sup> Grosz et al. (2000) at 172, para. C0-16, referring to *Rees v. UK*, judgment of 17 October 1986, Series A, no. 106, para. 37.

<sup>229</sup> *R (Munjaz) v. Mersey Care NHS Trust*, para. 78.

where a negative obligation is in issue<sup>230</sup>, went on to state that considerations of proportionality are ‘relevant when an obligation to do something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified.’<sup>231</sup> The paragraph in *Osman* to which Lord Hope refers states that where the authorities had, or ought to have had, knowledge of a specific risk to an individual of a violation of a fundamental right, the obligation to prevent such violation should not impose an ‘impossible or disproportionate burden’ on the state.<sup>232</sup> The UK government in *Pretty* also used this argument: that positive obligations were not absolute, but rather had to be interpreted so as not to impose on state authorities an ‘impossible or disproportionate burden’.<sup>233</sup> Palmer has dedicated discussion to the confusion surrounding proportionality in relation to Article 3, arguing that the approach taken by Lord Hope ‘indicates a flawed understanding of the nature of the positive obligation and the absolute character of Article 3.’<sup>234</sup>

Palmer argues that proportionality should not be seen as relevant to Article 3; neither in relation to the interpretation of Article 3 (i.e. in determining whether a certain practice amounts to one or more of the forms of harm within Article 3), nor in relation to the scope of the Article 3 positive obligation<sup>235</sup> (i.e. in determining the extent of the state’s obligation to take action). Lord Hope’s comments are in the context of determining scope of the positive obligation. What Lord Hope refers to as proportionality, Palmer argues is not in fact an application of the proportionality principle at all, but application of a different limit on the scope of the positive obligation – that of ‘reasonable expectation’.<sup>236</sup>

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<sup>230</sup> Lord Hope’s statement is in fact complex and relies heavily on the idea of direct responsibility for a violation. See para. 46-48, 53, 55.

<sup>231</sup> *Limbuella v. UK*, para. 55.

<sup>232</sup> *Osman v. UK*, no. 23452/94, ECHR 1998-VIII, para. 116.

<sup>233</sup> *Pretty v. UK*, para. 47.

<sup>234</sup> Palmer (2006) at 446.

<sup>235</sup> Palmer (2006) at 446. It seems that Palmer sees the first example as a dangerous use which would gain currency if proportionality were to be (mistakenly) applied in the second sense of determining the scope of an obligation.

<sup>236</sup> Palmer (2006) at 448.

It is helpful at this point to consider the Article 2 ECHR case of *Osman*, which is relied upon in the *Munjaz* case by Lord Hope and by Palmer in support of the reasonable expectation argument.<sup>237</sup> We can recall that Lord Hope refers to the stipulation in *Osman* that where the authorities had, or ought to have had, knowledge of a specific risk to an individual of a violation of a fundamental right, the obligation to prevent such violation should not impose an ‘impossible or disproportionate burden’ on the state. This indicates that the scope of a positive obligation can be determined by placing a limit, or drawing a line, at the point at which what is being asked of the state exceeds what is reasonable. It is not reasonable to expect the state to do something impossible or something that would place a disproportionate burden upon it. The Court’s choice of the word ‘disproportionate’ is unfortunate in that it invites confusion with the doctrine of proportionality. It is informative that in another Article 3 case, ‘impossible’ or ‘disproportionate’ are replaced by ‘intolerable’ or ‘excessive’.<sup>238</sup> In practical terms, it would of course be unachievable for the state to prevent all attacks on physical and/or mental integrity, and it is therefore clearly unreasonable to expect the state to do so.

That is the reason for the requirement that the state must have had specific knowledge of or, judged reasonably, should have had knowledge of, the impugned acts. The applicants in *Osman* stipulated, in their allegations under Article 2<sup>239</sup>, that a ‘careful scrutiny of events’ demonstrated that the police did not take adequate measures to protect the second applicant and his family from the acts of a private person, whilst the government argued that the response of the authorities, in light of the information they held, was reasonable.<sup>240</sup> The Court’s assessment found that the applicant had to show ‘that the authorities did not do all that could be reasonably expected of them’, which is ‘a question which can only be answered in the light of all the circumstances of any particular case.’<sup>241</sup> The Court conducted such an evaluation, including assessment of the levels of knowledge available, of how the input of professionals impacted upon the decisions of authorities, of the series of events and what could reasonably have been deduced from them, and, importantly, it considered whether the lack of action of the

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<sup>237</sup> Palmer (2006) at 449-50.

<sup>238</sup> *Pantea v. Romania*, para. 189.

<sup>239</sup> Article 3 cases referring to reasonable expectation will be discussed later in this section.

<sup>240</sup> *Osman v. UK*, para. 103, 109.

<sup>241</sup> *Osman v. UK*, para. 116.

authorities at particular points could be considered unreasonable.<sup>242</sup> In considering all the circumstances of a case, the Court is in a position to determine whether the state could have been *expected to do more* to prevent a violation. Palmer rightly argues that the only limit on the scope of a positive obligation under Article 3 pertains to the limits of what can reasonably be expected of the state; this is the only assessment that should be made, and it does not equate to a proportionality test.<sup>243</sup>

The approach in *Osman* appears to present an adequate model: the Court will consider in detail the circumstances of the case and will decide whether the state did in fact do all that could be reasonably expected of it, in practical terms, to prevent the violation. The same approach is used in Article 3 cases such as *E. and Others v. UK*, concerning protection of children from abuse by a private person in which reference is made to the taking of ‘reasonably available’ measures:

*The question therefore arises whether the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.*<sup>244</sup>

The case of *Pantea v. Romania* provides explicit evidence of the idea of impossible burden being used in the context of Article 3. The Court held that the state must take practical preventive measures to protect the physical integrity of persons in detention. However, this obligation should not impose an excessive burden on the authorities. Where Article 3 is concerned, the applicant must show that the authorities did not do all that could reasonably be expected of them to protect the applicant from a certain and immediate risk of ill-treatment of which they had or ought to have had knowledge.<sup>245</sup> This test leaves the absolute nature of the right intact, contrary to what is suggested by the use of the term proportionality. As Dworkin has stated in an example pertaining to absolute legal rights, the only reason for not protecting such rights, is impossibility.<sup>246</sup>

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<sup>242</sup> *Osman v. UK*, para. 115-22.

<sup>243</sup> Palmer (2006) at 449-50.

<sup>244</sup> *E. and Others v. UK*, para. 92. See also *Z. and Others v. UK*, para. 73.

<sup>245</sup> *Pantea v. Romania*, para. 190.

<sup>246</sup> Dworkin, Ronald (1975), ‘Hard Cases’, *Harvard Law Review*, 88 (6), 1057-1109, at 1069: ‘[...] a political theory which holds a right to freedom of speech as absolute will recognize no reason for not securing the liberty it requires for every individual; no reason, that is, short of impossibility.’

Palmer states that assessment of *reasonableness* of expectations includes assessment of ‘competing interests and objectives’ and suggests that the Court will take into account ‘operational choices and resource implications’ as well as the ‘interests of the community’. It is conceivable that the Court might refer to competing interests, etc, as part of the test of reasonable expectation (although the example of *Osman* does not appear to show evidence of taking into account the interests of the community, but rather the degree of knowledge available, and the bearing of the opinions of experts). It seems clear, however, that to use the terminology of competing interests and the interests of the community risks inviting confusion with the classic proportionality test that Palmer has refuted in this context; described by Van Dijk and Van Hoof (cited above and, incidentally, also cited by Palmer) as concerning the need to strike a balance between various competing interests. To give an example: if the Court was to hold that the state could not reasonably have been expected to prevent a child from suffering treatment contrary to Article 3 by an abusive adult because the authorities had to deal with too many families in the area and any more social service contact with the child would have deprived other needy families from support, this could perhaps be interpreted as introducing a question of fair balance between protection of the rights of the applicant and protection of the interests of the community, and hence, proportionality considerations. Palmer maintains, however, that a ‘classic’ proportionality balancing exercise is not relevant.<sup>247</sup> It seems that in Palmer’s view, competing interests and the interests of the community can be taken into account in the assessment of reasonableness but not *balanced* against those of the individual. This point must be stressed. Alternatively, it is perhaps preferable to privilege ways of expressing reasonable expectation considerations that avoid the terminology of competing interests and demands. For example, it would be sufficient to refer simply to *practical constraints on the state’s capacity of action*, a form of expression that can be seen to capture the idea of ‘competing interests and objectives’ and consideration of ‘operational choices and resource implications’, whilst encouraging the maintenance of a distinction between a test of reasonable expectation and a test of proportionality. Regardless, it must be

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<sup>247</sup> Palmer (2006) at 449-50. The classic proportionality test is described as the conducting of a balancing exercise with the ‘importance of the interference’ on the one hand balanced against ‘the seriousness of interfering’ with the right on the other hand (at 447).

emphasised that, in the assessment of reasonableness, a proportionality balancing exercise is not in play.

There is one important clarification that has not so far been made: the test of reasonable expectation within Article 3 need only apply to *one particular form of positive obligation*. The special procedural obligation to conduct an investigation clearly need not be subject to a test of reasonable expectation. However, it is worth clarifying the position in relation to the other two forms of positive obligation that have been discussed above. It is only when it is argued that prohibited treatment has stemmed, or will stem, from a source outside the state, but for which state responsibility is nevertheless argued to be engaged, that the scope of the positive obligation to protect can be limited by what can be reasonably expected of the state in the circumstances. The test of reasonable expectation, therefore, only applies when the obligation to take measures to protect against the suffering of prohibited treatment emanating from a private actor, etc, is invoked; i.e. the second form of obligation in the framework of three proposed above. In the ECHR cases that have been cited in discussion of the test of reasonable expectation (*Osman, E. and others v. UK*, and *Pantea v. Romania*) degrading treatment does not emanate from agents of the state. In instances of degrading treatment stemming from the omissions of state agents or institutions it would be illogical to see the scope of the positive obligation as limited by constraints of knowledge. As Palmer notes: ‘The issue of lack of foreseeability does not arise: when an individual is in the custody of the State, State authorities have a pre-existing and special responsibility for that individual’s welfare.’<sup>248</sup> Constraints of reasonable expectation only come into play in the context of the obligation to take measures to protect against the suffering of degrading treatment that finds its source beyond the state. To conclude discussion of the principle of proportionality in relation to Article 3, as with the margin of appreciation, the outcome is clear: neither is relevant to the absolute right contained in Article 3 even in the context of positive obligations.

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<sup>248</sup> Palmer (2006) at 450.

## Chapter summary

The aim of this chapter has been to clarify the human rights obligations that are incumbent upon the state. The focus has rested specifically on obligations evident in degrading treatment judgments, although some of the discussion is of more general relevance. The intention has been to arrive at a practicable framework that can be used to assess the existence and nature of obligations upon the state in relation to degrading treatment. As Dröge argues, the lack of a systematic approach to positive obligations results in a lack of uniform application and difficulties in trying to predict whether such obligations are relevant to a particular situation<sup>249</sup>; it is therefore desirable to construct what is suggested to be a manageable framework.

The established distinction between negative and positive obligations has been maintained, with the focus on positive obligations, which are subject to greater controversy and require a greater degree of clarification. Positive obligations have been placed into three groups: an obligation to take measures to protect against the suffering of degrading treatment at the hands of the state; an obligation to take measures to protect against the suffering of degrading treatment at the hands of, *inter alia*, a private person or another state; and an obligation to conduct an effective investigation into allegations of degrading treatment. Inherent in the exercise of arriving at this framework, is the finding of a balance between excessive detail and lack of clarity due to vagueness. These three categories are deemed to be sufficiently precise whilst allowing flexibility. The question of the responsibility of the state has been viewed as conceptually distinct from that of the content of state obligations in the hope of clarifying the scope of the right not to be subjected to degrading treatment. In the same vein, whilst it was clear that neither the margin of appreciation, nor the principle of proportionality applied in the context of Article 3 negative obligations, it has also been argued that neither is relevant to the application of Article 3 positive obligations. These clarifications have been necessary to lay the foundations for exploring the scope of application of the right not to be subjected to degrading treatment – the question of state obligations and responsibility of the state is pivotal. In proceeding to consider interpretation of the right and the meaning of relevant concepts such as being driven to act against will or conscience, or in specifying

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<sup>249</sup> Dröge (2003) at 379.

various potential sources of treatment, it is crucial to bear in mind the content of state obligations and the need for a trigger of state responsibility within the vertical ECHR protection system.

## CHAPTER FOUR

### INTERPRETATION – FRAMING THE CONCEPTUAL BOUNDARIES OF DEGRADING TREATMENT

#### Chapter introduction

This chapter will proceed from clarification of the obligations of the state to laying the foundations for conceptual analysis of the meaning of degrading treatment in the rest of the thesis. The framework for understanding the meaning of degrading treatment is anchored in the keyword ‘interpretation’. The significance of this keyword is three-fold: it can be described as relevant in an epistemological, judicial and analytical sense.

Firstly, interpretation takes the form of a basic concept that directs how meaning is drawn from a text, described as interpretation as epistemology; secondly, interpretation describes the judicial process through which *legal* meaning is derived from a text; and finally, interpretation designates the process of analysis of the text. The purpose of this chapter is to demonstrate that interpretation, taken together in these three dimensions, ‘frames’ the meaning of degrading treatment.

In constructing this framework for understanding the meaning of degrading treatment, the first step for the present chapter is to give a brief account of the nature of interpretation in the epistemological sense; simply an account of the way in which interpretation is seen to derive meaning. One’s understanding of the nature of the basic mechanism of interpretation shapes one’s perception of the meaning that can legitimately be drawn from a particular text. This will lay the foundations for understanding the way in which the ECtHR constructs the meaning of degrading treatment. It will also lay the foundations for understanding how eventual conclusions about the meaning of degrading treatment will be arrived at, therefore supporting the persuasiveness of such conclusions that will be presented in Chapters Five and Six.

Discussion will then focus specifically on what can be said about the judicial approach to interpretation adopted under the ECHR. Recognition of the Court's system of interpretation is a crucial step towards explaining the substantive boundaries of the meaning of degrading treatment. This is so because this approach will be argued to include a space that is occupied by the concept of human dignity. As shall be demonstrated below, the ECtHR clearly sees this concept as particularly relevant to its understanding of degrading treatment. Given the evident relevance of this concept, it is imperative to consider its impact on the meaning and scope of the prohibition of degrading treatment. The meaning of human dignity and the role that this concept can be seen to play within the Court's interpretation of the right will be addressed. It will be argued that the concept of human dignity in this connection has an identifiable negative substance; in other words, what it means for dignity to be violated is visible in degrading treatment case-law. It will be submitted that this meaning of dignity in the degrading treatment context is essentially limited to a sphere of concern that focuses on fundamental human status. In terms of the precise role of the concept of dignity, it will be argued that it takes the form of a fundamental value expressing the purpose of the prohibition of degrading treatment, where this purpose is protection of human dignity. It will be suggested that purposive, or teleological, interpretation, directed and limited by the meaning of dignity in this context, can be seen to 'frame' the meanings of the terms degrading and treatment.

It will be argued that analysis of the meaning of degrading treatment to be pursued in Chapters Five and Six can also be best characterised by the keyword interpretation – interpretation as analysis. Exploration of the meaning of degrading treatment will consist of interpretation in the form of analysis of the Court's case-law. It will be an exercise in understanding, exploration, clarification and elaboration. Explicitly characterising this exercise as one of interpretation is important; firstly, in that it will contextualise the relevance of conclusions on interpretation as epistemology. For example, it will clarify that the meanings of the terms degrading and treatment that will be developed in the subsequent analysis must fall within the legitimate scope of 'ordinary' meaning, where 'ordinary' meaning includes the most common meanings of the terms alongside uncommon or even 'special' meanings. The 'mechanics' of interpretation in this sense will have tangible consequences for the plausibility of conclusions reached in this analysis. Secondly, and crucially, acknowledging the interpretive nature of this analysis

will highlight why the dignity-centred teleological interpretation of the ECtHR must be replicated in the subsequent process of enquiry, and the outcomes of that process, within the thesis. If the meaning of dignity that is identifiable in degrading treatment case-law is seen to ‘frame’ the conceptual boundaries of the meaning of degrading treatment, this limits the possible interpretations of the case-law and limits the situations that can appropriately be argued to fall within the scope of the right. The idea of interpretation in these different dimensions will provide a framework for developing our understanding of the meaning of degrading treatment in a deeper and more structured way than has so far been done.

### Interpretation as epistemology – Deriving the meaning of degrading treatment

The meaning of degrading treatment will be revealed by exploring the way in which the term is *used* (‘Meaning is use’<sup>250</sup>) in the ECHR legal context. The aim is to understand the term degrading treatment; to better understand ‘when it is appropriate and when inappropriate to use it’.<sup>251</sup> Interpretation is understood as: ‘[...] an understanding or explanation of *the meaning* of an object.’<sup>252</sup> This is also expressed by Joseph Raz, who states that interpretation is to render meaning intelligible.<sup>253</sup> The *interpretandum* (the term used by Barak to describe the object of interpretation), may be written or oral; it

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<sup>250</sup> Bix, Brian (1995), ‘Questions in Legal Interpretation’, in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press). See also Endicott: ‘The meaning of a word is not an object for which it stands, but is a way (or a variety of ways) to use it.’; Endicott, Timothy A. O. (2002), ‘Law and Language’, in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press), 935-68, at 948.

<sup>251</sup> Bix, Brian (1995) at 142-43. Bix associates this with a Hartian perspective found in Hart’s early writings concerning the understanding of legal words, which Hart argues should be subject to a particular ‘method of elucidation’ based on their conditions of use. See Hart, H.L.A. (1953), ‘Definition and Theory in Jurisprudence’, reproduced in Hart, H. L. A (1983), *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press), 21-48. It is not necessary to enter further into theoretical discussion of the meaning of the term ‘meaning’; the important point presently is that ‘meaning’ is used to describe the way in which words are used; this is seen to correspond to the ‘legal meaning’ of the prohibition of degrading treatment that will be discussed below. For further discussion of the meaning of ‘meaning’ see, e.g., Marmor, Andrei (2005), *Interpretation and Legal Theory* (2nd edn.; Oxford: Hart), Chapter 2 ‘Meaning and Interpretation’.

<sup>252</sup> Marmor (2005) at 9.

<sup>253</sup> Raz, Joseph (1996), ‘Why Interpret?’, *Ratio Juris*, 9 (4), 349-63, at 355.

may be the text of the Convention or it may be the case-law decisions.<sup>254</sup> It should be clarified that to view the ECHR and the ECtHR's case-law decisions as objects of interpretation does not entail a presumption that the text uses language that is unclear. Literature suggests that contemporary understandings of interpretation generally favour an approach that views *all understanding* as interpretation; as Barak states: 'Every text requires interpretation. To understand is to interpret.'<sup>255</sup>

Legal interpretation can be thought of as identification of the legal meaning of a text. Barak provides a description of legal interpretation in this sense: it is described as the exercise of pinpointing the legal meaning of the text from amongst the range of possible semantic meanings.<sup>256</sup> This entails that conclusions will be based on the meaning of the legal norm; not necessarily on the way the terms constituting the text are employed in everyday language.<sup>257</sup> The legal and the everyday uses may accord with each other, or they may diverge. Interpretation is a decision as to which of the semantic meanings constitute the proper *legal meaning*:

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<sup>254</sup> Barak, Aharon (2005), *Purposive Interpretation in Law* (Princeton: Princeton University Press) at 3, 11. In the international law context, reference has been made to interpretation of treaties but also interpretation of international judicial decisions; see Bos (1984) at chapters vi and vii. Raz views the decisions of legal authorities as the *primary* objects of interpretation where the aim is to establish the content of the law that such authorities develop (Raz (1996) at 362).

<sup>255</sup> Barak (2005) at 38. See also Barak (2005) at 4: 'The plainness of a text does not obviate the need for interpretation, because such plainness is itself a result of interpretation. Even a text whose meaning is undisputed requires interpretation, for the absence of dispute is a product of interpretation.' The alternative possibility is to view interpretation as necessary only when a text is unclear. Dascal and Wróblewski describe the association of interpretation with a lack of clarity as the 'classical conception of legal interpretation'; one which has been criticised in contemporary approaches. For discussion of the critique of the 'classical' view, see Dascal, Marcelo and Wróblewski, Jerzy (1988), 'Transparency and Doubt: Understanding and interpretation in pragmatics and in law', *Law and Philosophy*, 7, 203-24 at 209-12. Dworkin makes a similar point with reference to the hypothetical judge Hercules when discussing the idea of clarity of statutory language, which can be seen to support this approach: 'The description "unclear" is the *result* rather than the *occasion* of Hercules' method of interpreting statutory texts.'; see Dworkin, Ronald (1986), *Law's Empire* (London: Fontana Press) at 352. For a contrary view, see, e.g., Moore, Michael S. (1995), 'Interpreting Interpretation', in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press), 1-29.

<sup>256</sup> Barak (2005) at 6. See generally Chapter One 'What is legal interpretation?', at 3-30.

<sup>257</sup> Wróblewski describes 'legal language' as a 'sub-type of natural language', which can be understood as a description of the same relationship. See Wróblewski, Jerzy (1985), 'Legal Language and Legal Interpretation', *Law and Philosophy*, 4, 239-55, at 240.

*Interpretation in law is a rational process by which we understand a text [...] It is a process that “extracts” the legal meaning of the text from its semantic meaning.*<sup>258</sup>

*Interpretive activity extracts or extricates the legal [...] norm from its semantic vessel.*<sup>259</sup>

The limit to what interpretation may legitimately derive from the text is in the language of the text. Barak views the language of the text not only as the words themselves, but as including ‘what we can infer from the text, its structure, organization, and the relationship among its different provisions.’<sup>260</sup> Within that language, limits of interpretation are found in the semantic meaning. The term semantic meaning refers to all the possible meanings that may be attached to the language of the text by those who speak the language. This is where dictionary meanings may be of use – to help an interpreter identify the range of semantic meanings. Barak makes explicit an important implication of this: dictionary meanings do not determine the legal meaning; rather the dictionary is a ‘linguistic tool’.<sup>261</sup> The semantic meanings constitute the boundary within which the legal meaning must be found:

*[...] interpretation can give a text an expansive or a constrictive meaning; the meaning may be natural to the language or innovative. But we must insist that interpretation confer upon the text a meaning that it is capable of bearing in the language in which it is expressed.*<sup>262</sup>

This brief outline of the concept of interpretation highlights the following points: Firstly, engagement in an exercise of interpretation does not as a corollary suggest that the text of the prohibition of degrading treatment and the text of the case-law lacks clarity. Secondly, the legal meaning of the text may, but does not necessarily, coincide with the most common usage of the language; this will aid understanding and acceptance of meanings of degrading treatment that may otherwise have been doubted or criticised for appearing to be uncommon or unusual. It suggests that degrading treatment can be given a meaning that is ‘expansive’ or ‘constrictive’, ‘natural’ or ‘innovative’ whilst remaining within the bounds of legitimate interpretation. Finally, the question of the usefulness and

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<sup>258</sup> Barak (2005) at 6-7.

<sup>259</sup> Barak (2005) at 12.

<sup>260</sup> Barak (2005) at 22.

<sup>261</sup> See Barak (2005) at 106-07.

<sup>262</sup> Barak (2005) at 18.

appropriateness of having recourse to dictionary meanings of words will be relevant when trying to gain a clear understanding of the Court's interpretation of degrading treatment and when filling gaps in that interpretation where necessary.<sup>263</sup>

## Interpretation as judicial process – The teleological system of the European Court of Human Rights

Beyond these fundamentals of interpretation, it is helpful to recognise explicitly that the ECtHR's reading of the Convention can be called *interpretation*; by no means a controversial statement.<sup>264</sup> The Convention is an international legal instrument and the Court is the relevant authoritative legal body. Nevertheless, it is important to specify this, since what follows from it is centrally significant for our framework of understanding. It is imperative to consider the reason why the Court, in its interpretation, chooses a particular legal meaning from amongst the range of possible semantic meanings. The 'why' question forms part of what Barak calls 'systems of interpretation in law'.<sup>265</sup> This distinction between interpretation and systems of interpretation can be seen as reflecting Dworkin's well-known distinction between *concepts* and *conceptions*; in this case, *concepts* and *conceptions* of interpretation. A system of interpretation is a method, approach, or set of techniques<sup>266</sup> used to guide interpretation in the broad sense. A system of interpretation, therefore, is a particular *conception* of interpretation, which

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<sup>263</sup> In the interests of completeness in the following chapters, which will aim to understand the interpretation of the court, both French and English dictionaries will be considered where dictionary meanings are referred to, given that both are official languages of the Convention. This was the practice of the Court in the case of *Luedicke, Belkacem, and Koç v. Germany* to confirm the ordinary meaning of a word (no. 6210/73, 6877/75, 7132/75, judgment of 28 November 1978, Series A, no. 29, para. 40). Note that dictionary meanings have on occasion been referred to in separate opinions of judges in which only one language is considered; e.g. Judge Fitzmaurice in *Golder v. UK*, no. 4451/70, judgment of 21 February 1975, Series A, no. 18, para. 5 separate opinion.

<sup>264</sup> Dworkin takes for granted that legal texts are interpreted (Dworkin, Ronald (1985), *A Matter of Principle* (Oxford: Clarendon Press), at 146), as does Raz, who recognises that interpretation is accepted as an integral part of law (Raz (1996) at 349). In the international law context, one can find several examples of the work of the ECtHR being explicitly referred to as interpretation; e.g. Bernhardt, Rudolf (1988), 'Thoughts on the Interpretation of human-rights treaties', in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension, Protection des droits de l'homme: la dimension européenne* (Köln: Carl Heymans Verlag KG), 65-71; Letsas, George (2007), *A Theory of Interpretation of the European Court of Human Rights* (Oxford: Oxford University Press).

<sup>265</sup> Barak (2005) at 9, 30.

<sup>266</sup> 'Techniques' is the term used by Maurer to describe the means, methods and methodological rules relied upon by the interpreting body; (1999) at 212.

posits a preferred approach to arriving at an interpretive outcome.<sup>267</sup> It establishes criteria for finding the legal meaning of a text.<sup>268</sup> The ECHR is recognised as being interpreted within one dominant system of interpretation and recognition of this system is an important element of the necessary framework for understanding the prohibition of degrading treatment.

### Interpretation guided by purpose

As an international treaty, interpretation of the ECHR is guided by the general rules of interpretation in international law as codified in the Vienna Convention on the Law of Treaties.<sup>269</sup> Article 31 stipulates that a ‘treaty 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.’ The idea of ordinary meaning in Article 31 has been described by Ulf Linderfalk as the meaning of the terms in conventional language. ‘Ordinary’ refers to a very basic sense of being in line with the conventions of the language; that is, in line with the lexicon and the system of rules underlying the language (including rules about how ‘phrases and sentences are put together’, and ‘how linguistic expressions are used in certain kinds of situations’; in this connection, Linderfalk gives the example of Article 5(2) ECHR – we know that ‘arrested’ describes a past event, that the reference to he or his refers to everyone, etc).<sup>270</sup> Ordinary meaning, therefore, is not synonymous with common meaning. The context of the treaty includes principally the text, preambles and annexes<sup>271</sup>; Ost writes that: ‘The relevant legal

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<sup>267</sup> This can be seen in Dworkin’s discussion of one particular objection to his central thesis that the concept of interpretation is essentially political, i.e. that insufficient importance is given to the role of author’s intentions in law. Dworkin counters this by ascribing this objection the character of a particular conception of interpretation which does not detract from the general political hypothesis about interpretation in law; he prefers to see ‘the author’s intention theory [...] as a conception rather than an explication of the concept of legal interpretation.’; see Dworkin (1985) at 163.

<sup>268</sup> Barak (2005) at xiii.

<sup>269</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.

<sup>270</sup> Linderfalk, Ulf (2007), *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer) at 62. For further discussion, including on the everyday and technical varieties of language as included within ‘ordinary meaning’, see also 63-73.

<sup>271</sup> Article 31(1); See also Article 31(3). Note that the ECtHR recognises that the Convention rights must be read in light of the Convention as a whole; see, e.g., *Soering v. UK*, para. 103; *Abdulaziz, Cabales and Balkandali v. UK*, para. 60.

context is without precise boundaries.<sup>272</sup> The terms ‘object’ and ‘purpose’ are understood to be synonymous. Maarten Bos argues that object and purpose are best viewed as a unitary expression ‘reflecting two closely interrelated aspects of a single idea.’<sup>273</sup> Linderfalk also argues, having considered the understanding of the drafters of the Vienna Convention as well as evidence of the terms’ use, that the phrase is best understood as ‘a single lexical unit’ meaning ‘those reasons for which the treaty exists’; in other words: ‘[...] the state-of-affairs (or states-of-affairs), which the parties to the treaty expect to attain through applying the treaty’, or the treaty’s ‘telos’.<sup>274</sup> Barak, using the single term ‘purpose’, describes this as ‘the values, goals, interests, policies, and aims that the text is designed to actualize.’<sup>275</sup> Purpose is viewed as the ‘context in whose light the text should be given meaning’; the ‘substance that gives meaning to the form.’<sup>276</sup>

The European Court (and Commission) have acknowledged the relevance of the Vienna Convention rules whilst at the same time holding that the ECHR is not a standard international law treaty. In the early case of *Golder v. UK*, the Court was asked to determine whether a right of access to a Court, not stated in ‘express terms’ in the text, was guaranteed by Article 6 (‘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 [...]’). *Golder*, a prison inmate, was denied permission from the Home Secretary to consult a solicitor with the intention of initiating a civil action against a prison officer. The Court acknowledged that its interpretation was to be guided by Articles 31-33 of the Vienna Convention.<sup>277</sup> The Court followed the approach of the Commission, whose

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<sup>272</sup> Ost, François (1992), ‘The Original Canons of Interpretation of the European Court of Human Rights’, in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights – International Protection versus National Restrictions* (Dordrecht: Martinus Nijhoff Publishers), 283-318, at 290.

<sup>273</sup> Bos, Maarten (1984), *A Methodology of International Law* (Amsterdam: Elsevier Science Publishers) at 153-54.

<sup>274</sup> Linderfalk (2007) at 204-10.

<sup>275</sup> Barak (2005) at 89.

<sup>276</sup> Barak (2005) at 93.

<sup>277</sup> *Golder v. UK*, para. 28-29. Although the Vienna Convention was not in force in 1950 when the ECHR was adopted and is not retroactive, the Court nevertheless recognised the rules therein as accepted principles of international law.

report in this case provides further insight; notably in the Commission's express recognition of the Convention as different from an ordinary international treaty:

*[...] Whatever may be the case as regards an ordinary international treaty, both the Commission and the Court, wherever they have expressed an opinion on this general point, have stated that the provisions of the Convention should not be interpreted restrictively so as to prevent its aims and objects being achieved [...]*<sup>278</sup>

As Jacobs notes, there is no presumption in relation to the ECHR that the provisions should be interpreted in a restrictive sense in order to defer to state sovereignty, and this is in line with the Vienna Convention's rule on interpretation in light of object and purpose of the particular treaty.<sup>279</sup>

That the ECtHR views object and purpose as central to its interpretation of the Convention can be seen in the following extract:

*In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective [...] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" [...]*<sup>280</sup>

The purpose of the Convention as a human rights treaty directs its interpretation.<sup>281</sup>

Therefore, due to the 'normative nature' of the Convention, the determining factor in its interpretation is recourse to the Convention's purpose<sup>282</sup> – something that is recognised

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<sup>278</sup> *Golder v. UK*, no. 4451/70, Commission Report of 1 June 1973, Series B, no. 16, at 25.

<sup>279</sup> Jacobs, Francis G. (1975), *The European Convention on Human Rights* (Oxford: Clarendon Press) at 17; see also Merrills, John G. (1993), *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press) at 70.

<sup>280</sup> *Soering v. UK*, para. 87.

<sup>281</sup> Bernhardt (1988) at 65-66. François Ost describes the Convention as having a special nature which derives from its establishment of 'an institutional community'; see Ost (1992) at 288. See also *Wemhoff v. Germany*, no. 2122/64, judgment of 27 June 1968, Series A, no. 7, para. 8, subsection 'As to the Law'; and Maurer (1999) at 219-22.

<sup>282</sup> Ost (1992) at 311. See also Maurer (1999) at 219, stating that the nature of the treaty means that purpose is seen as a privileged method of interpretation.

as central to human rights conventions in general.<sup>283</sup> This approach, centrally characterised by recourse to object and purpose<sup>284</sup>, can be described as a ‘teleological’ interpretive method.<sup>285</sup> As Ost notes: ‘The teleological method goes to the heart of the Court’s reasoning.’<sup>286</sup> This is the dominant approach of the ECtHR; its dominant system of interpretation.

As an integral part of this system of interpretation, the Court relies upon what are normally referred to as a number of ‘doctrines’, including the practical and effective doctrine and the living instrument doctrine. Such doctrines have been labelled methods<sup>287</sup> or techniques<sup>288</sup> of interpretation. Arguably, a more specific characterisation as either *an element of object and purpose* of the Convention or as *an approach to determining object and purpose* is more accurate. Such doctrines derive from and are a necessary part of the Convention’s *system* of teleological interpretation. A brief examination of these doctrines will demonstrate support for the identification of one dominant system of interpretation in relation to the ECHR and support for the characterisation of this system as essentially teleological.

The practical and effective doctrine can be seen as *a purpose* of the Convention. The need for effective protection is explained by Harris et al. as ‘assisting’ the realisation of object and purpose.<sup>289</sup> Arguably it does not merely assist but is more accurately viewed as an element of object and purpose itself. The Court’s well-known statement in the case

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<sup>283</sup> Orakhelashvili, Alexander (2003), ‘Restrictive Interpretation of Human Rights Treaties in Recent Jurisprudence of the European Court of Human Rights’, *European Journal of International Law*, 14 (3), 529-68, at 535.

<sup>284</sup> Object and purpose refers to the object and purpose of the particular provision being interpreted or to the object and purpose of the Convention as a whole; Ost (1992) at 293. See also Barak, who notes that a text may have several purposes from the specific to the abstract – ranging from very specific ‘localised’ aims to general values that may constitute part of the purpose of many other texts; purpose can operate at different ‘levels of abstraction’; (2005) at 90, 113-15.

<sup>285</sup> Harris et al. (1995) at 6; Maurer (1999) at 209; Aust, Anthony (2005), *Handbook of International Law* (Cambridge: Cambridge University Press) at 89. Ovey and White note that the legitimacy of teleological interpretation of the Convention in the eyes of the States Parties is reinforced given that the same method is accepted by the European Court of Justice in the interpretation of the EC Treaty; see Ovey and White (2006) at 54.

<sup>286</sup> Ost (1992) at 292; See also Ovey and White (2006) at 40.

<sup>287</sup> Mowbray (2005) at 60-61, 73.

<sup>288</sup> Maurer (1999) at 223, 225.

<sup>289</sup> Harris et al. (1995) at 15.

of *Airey v. Ireland* demonstrates this point: ‘The Convention *is intended to guarantee* not rights that are theoretical or illusory but rights that are *practical and effective* [...]’.<sup>290</sup> Practical and effective protection is thereby formulated as an aim. This is also suggested in the extract from *Soering* above, although in a less explicit manner.<sup>291</sup> In the *Golder* case, in a section entitled ‘The context, object and purpose’, the European Commission stated that: ‘[...] the role of the Convention and the function of its interpretation is to make the protection of the individual effective.’<sup>292</sup> This view is confirmed by Ost, who identifies one of the purposes of the Convention as the protection of rights that are practical and effective.<sup>293</sup>

The living instrument doctrine concerns the determination of this purpose of rendering rights practical and effective. This doctrine, also called evolutive<sup>294</sup> or dynamic interpretation<sup>295</sup>, was first made explicit by the Court in the Article 3 case of *Tyrer v. UK*, in which the Convention was described as a ‘living instrument’.<sup>296</sup> In order to adapt to social change, the Convention must be interpreted in light of present day conditions.<sup>297</sup> Harris et al. state that the need for dynamic interpretation is *closely linked* to object and purpose.<sup>298</sup> Ost, however, takes a subtly different, more specific approach and places the need for dynamic interpretation within the context of the *determination of purpose*; purpose that is not ‘static or rooted in the past’.<sup>299</sup> Ost’s statement is the more accurate one: recognition of effective protection as a purpose of the Convention leads also to recognition of a need for dynamic interpretation if the purpose is to have any value. In order for rights to be protected in a practical and effective way, the rights must be interpreted in a dynamic way, i.e. they must be able to adapt to current conditions rather

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<sup>290</sup> *Airey v. Ireland*, para. 24 (emphasis added).

<sup>291</sup> For further examples of practical and effective protection being construed as an element of purpose see, e.g., *Artico v. Italy*, judgment of 13 May 1980, Series A, no. 37, para. 33; *Broniowski v. Poland*, no. 31443/96, ECHR 2004-V, para. 151.

<sup>292</sup> *Golder v. UK*, Commission Report at 31.

<sup>293</sup> Ost (1992) at 294.

<sup>294</sup> E.g. *Soering v. UK*, para. 103; *Vo v. France*, no. 53924/00, ECHR 2004-VIII, para. 82.

<sup>295</sup> E.g. *Pretty v. UK*, para. 54; *Khamidov v. Russia*, no. 72118/01, 15 November 2007, para. 131.

<sup>296</sup> *Tyrer v. UK*, para. 31.

<sup>297</sup> See Prebensen (2000) at 1123-37.

<sup>298</sup> Harris et al. (1995) at 7 (emphasis added).

<sup>299</sup> Ost (1992) at 302.

than remain ‘ossified’ in the past.<sup>300</sup> To say that the rights have to adapt is to say that the rights must be made to adapt; that is, they must be interpreted in such a way that allows them to remain effective. What amounts to practical and effective protection of an individual’s rights must be determined by considering present day conditions and not the society that existed at the time the Convention was drafted. This can be seen in the Commission Report in *Golder*, where the need to interpret the Convention ‘objectively’ rather than based on how it was understood at the time of ratification was emphasised.<sup>301</sup> The essence of evolutive interpretation, therefore, can be seen to lie in fulfilling an element of the Convention’s purpose.

Mowbray describes the living instrument doctrine and the practical and effective doctrine as ‘creative’ approaches to interpretation. These are indeed creative, but they are also *necessary* within a framework of interpretation that has teleology at its ‘heart’.<sup>302</sup> They can be seen as creative in the sense that formulating an aim of the Convention as the practical and effective protection of rights also *necessitates* changes in interpretation over time if the aim is not to become redundant. Through this interpretive approach the Convention organs have made flexibility not only possible but a requirement. This accords with Barak’s description of interpretation as ‘a legitimate and crucial tool’ to achieve change: It is ‘[t]hrough interpretation, [that] a judge gives a legal norm, created in the past, the breadth and content it needs to respond to contemporary needs.’<sup>303</sup> It is suggested that the practical and effective, and living instrument elements of the jurisprudence should be understood as integral parts of a system of interpretation that seeks to realise the purpose of the Convention and its provisions.

The Court’s system of interpretation, therefore, can be seen primarily as teleological. It has been necessary to discuss the ECtHR’s approach to interpretation, firstly, to demonstrate that there is such a system of interpretation (prominent ‘methods’ of interpretation, often seen simply as an ensemble of principles, have been repositioned as part of this unified system). And secondly, since the nature of the dominant system of interpretation impacts upon the meaning of the right, as will be discussed below. A

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<sup>300</sup> Grosz et al. (2000) at 167, para. C0-08.

<sup>301</sup> *Golder v. UK*, Commission Report at 25.

<sup>302</sup> Ost (1992) at 292.

<sup>303</sup> Barak (2005) at 41-42.

central element has been to highlight the importance of the idea of purpose within this system of interpretation. Significantly, the purposes of the text act as a guiding force in choosing the legal meaning of the Convention provision.<sup>304</sup> The protection of human dignity can be shown to be one such purpose of Article 3. It will be argued that the concept of human dignity plays a fundamental role in the Court's teleological interpretation of the prohibition of degrading treatment. Consequently, the meaning of dignity in the context of Article 3 should be taken into consideration when clarifying and substantiating that interpretation. The reason for the inclusion of human dignity within this framework of understanding stems from references to the concept in degrading treatment case-law.

The relevance of human dignity in the context of the prohibition of degrading treatment

The importance of human dignity to the framework of international human rights law in general is clear. Post-World War II, human dignity was placed centre stage in the Preamble of the Charter of the United Nations in 1945, affirming faith in fundamental human rights and in the 'dignity and worth of the human person.'<sup>305</sup> The Preamble of the seminal UDHR of 1948 recognises the 'inherent dignity [...] of all members of the human family' and the Declaration's first substantive Article declares that: 'All human beings are born free and equal in dignity and rights.'<sup>306</sup> From here, references continued to multiply. Both the ICCPR and the ICESCR of 1966 contain reference to 'inherent human dignity' in their Preambles as well as in substantive Articles.<sup>307</sup> Reference to dignity is found in numerous other instruments, both international and regional. At the international level these include the Convention on the Elimination of All Forms of Racial Discrimination<sup>308</sup>, the Convention on the Elimination of All Forms of

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<sup>304</sup> It is important to stress that a particular text has the potential for multiple purposes; Barak construes this as a presumption. See (2005) at 113.

<sup>305</sup> Para. 2.

<sup>306</sup> Furthermore, two references are made to dignity in Articles 22 (right to social security) and 23 (employment remuneration). In general, see Dicke, Klaus (2003), 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International), 111-20.

<sup>307</sup> Article 10 ICCPR (treatment of persons deprived of liberty) and Article 13 ICESCR (right to education).

<sup>308</sup> (1965) Preamble.

Discrimination against Women<sup>309</sup>, the Convention on the Rights of the Child<sup>310</sup>, and the list continues.<sup>311</sup> References are equally found in the American Declaration and Convention on Human Rights<sup>312</sup> and in the African Charter on Human and Peoples' Rights.<sup>313</sup> In contrast, the ECHR does not count the word dignity amongst its terms (neither in the foundational sense in which it is found in the major international instruments, nor in Article 3, unlike Article 5 of the African Charter, for example<sup>314</sup>). As we shall see, however, besides an intuitive negative association between Article 3 – in particular the concept of degradation – and human dignity, it is clear from the case-law, and from the view of scholars, that the concept of human dignity is nevertheless centrally relevant to the understanding of degrading treatment in the ECHR.

An inventory of the use of the term dignity in degrading treatment cases before the European Court indicates that the Court clearly sees dignity and degrading treatment as intimately related. In *Pretty v. UK*, *Iwanczuk v. Poland*, and *Valasinas v. Lithuania* respectively, the following statements were made:

*Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading [...]*<sup>315</sup>

*[The treatment] in the Court's view, showed a lack of respect for the applicant's human dignity [...] the Court is of the view that in the present case such behaviour*

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<sup>309</sup> (1979) Preamble.

<sup>310</sup> (1989) Preamble, Articles 37 (treatment of children deprived of liberty), 39 (promotion of recovery of child victims), and 40 (treatment of children charged with a criminal offence).

<sup>311</sup> Further examples include: Vienna Declaration and Programme of Action (1993) Preamble, Parts I and II; and UN Universal Declaration on the Human Genome and Human Rights (1997) Preamble, Articles 1, 2, 6, 10, and 12.

<sup>312</sup> American Declaration of the Rights and Duties of Man (1948) Preamble and Article XXIII (right to property); American Convention on Human Rights (1969) Articles 5 (right to humane treatment), 6 (freedom from slavery) and 11 (right to privacy).

<sup>313</sup> (1981) Preamble and Article 5 (respect for dignity, recognition of legal status, prohibition of slavery, torture, inhuman or degrading punishment and treatment).

<sup>314</sup> Which makes reference to the 'dignity inherent in a human being'.

<sup>315</sup> *Pretty v. UK*, para. 52. The Court has stated in several cases that treatment 'diminished the applicant's human dignity'; see *Peers v. Greece*, para. 75. See also *Kalashnikov v. Russia*, para. 101; *Yankov v. Bulgaria*, para. 114.

*which humiliated and debased the applicant, amounted to degrading treatment contrary to Article 3.*<sup>316</sup>

*[The treatment] showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The Court concludes, therefore, that the [behaviour complained of] amounted to degrading treatment [...]*<sup>317</sup>

These statements are illuminative in that they clearly show an understanding of degrading treatment that is tied to harm to human dignity. Further examples can be given: the Court has stated that: ‘[...] treatment [...] may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity [...]’.<sup>318</sup> The following statement has been made numerous times: ‘[...] in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right [...]’.<sup>319</sup> Again, in numerous cases: ‘[...] the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity [...]’.<sup>320</sup> In slight variations it has been stated that treatment has ‘undermined’ dignity<sup>321</sup>, and that degrading treatment can occur where an individual feels ‘hurt in his dignity’.<sup>322</sup>

From these examples it is undeniable that human dignity is a relevant consideration in some form. The Court clearly points towards respect for human dignity, and harm to dignity, as significant in relation to the prohibition of degrading treatment. Indeed, it appears to be perceived as being in an oppositional relationship with degrading treatment. The notion of degradation comes across as a conceptual opposite of human dignity: ‘Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity [...] it may be characterised as degrading

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<sup>316</sup> *Iwanczuk v. Poland*, no. 25196/94, 15 November 2001, para. 59.

<sup>317</sup> *Valasinas v. Lithuania*, para. 117.

<sup>318</sup> *Keenan v. UK*, para. 113.

<sup>319</sup> *Ribitsch v. Austria*, judgment of 04 December 1995, Series A, no. 336, para. 38. Other cases include *Selmouni v. France*, para. 99 and *Afanasyev v. Ukraine*, para. 60.

<sup>320</sup> *Karalevicius v. Lithuania*, no. 53254/99, 7 April 2005, para. 34. Again, see also *Valasinas v. Lithuania*, para. 102.

<sup>321</sup> *Mouisel v. France*, para. 48. Similar wording is found in *Mayzit v. Russia*, para. 42.

<sup>322</sup> *Yankov v. Bulgaria*, para. 113.

[...]; degrading treatment as a result of an individual feeling ‘hurt in his dignity’; and so on as outlined above. Degradation can be seen to express and encompass a violation of human dignity. The above statements thereby suggest that the Court sees a violation of human dignity as a *requirement of the existence of degrading treatment*. One author has described dignity and the term degrading in the ECHR as ‘two sides of the same coin’.<sup>323</sup>

The precise impact, however, of such considerations on the *meaning or scope of application* of the right not to be subjected to degrading treatment is not yet clear. It is in a reference by the Court to the *purpose* of Article 3 that a clearer picture begins to emerge. In the early case of *Tyrer v. UK*, the protection of human dignity was unequivocally identified as ‘one of the main purposes of Article 3’:

*[...] his punishment [...] constituted an assault on precisely that which it is one of the main purposes of Article 3 [...] to protect, namely a person’s dignity and physical integrity.*<sup>324</sup>

Further clear evidence of the link between human dignity and purpose can be found in a report of the EComHR where it is stated that the purpose of Article 3 is to: ‘[...] prevent interferences with the dignity of man [...]’.<sup>325</sup> There is also evidence that respect for human dignity is viewed not only as a purpose of Article 3, but as a purpose of the Convention as a whole. In the case of *S.W. v. UK*, the facts of which concerned marital rape, the concept of dignity was referred to in the following context:

*[...] the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.*<sup>326</sup>

This reference to respect for human dignity as the ‘essence’ of the Convention supports an understanding of dignity as part of what the Court intends the Convention to achieve;

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<sup>323</sup> Millns, Susan (2002), ‘Death, Dignity and Discrimination: The case of *Pretty v. United Kingdom*’, *German Law Journal*, 3 (10), para. 5.

<sup>324</sup> *Tyrer v. UK*, para. 33.

<sup>325</sup> *East African Asians v. UK*, Commission Report, at 55, para. 189.

<sup>326</sup> *S.W. v. UK*, no. 20166/92, judgment of 22 November 1995, Series A, no. 335-B, para. 44.

the Convention's *telos*.<sup>327</sup> The identification of a link between dignity and purpose finds a coherent place within the ECHR system of teleological interpretation.

Dignity is also viewed as absolutely central (in some sense) to the prohibition of degrading treatment by several scholars. Feldman, for example, argues that the right not to be subjected to inhuman or degrading treatment has 'a particularly prominent role in upholding human dignity'.<sup>328</sup> Cassese states that human dignity underpins Article 3<sup>329</sup>, while Frowein writes that: '[...] it would seem impossible to interpret [Article 3] without taking into account what human dignity requires.'<sup>330</sup> The relevance of human dignity to our understanding of the prohibition of degrading treatment is supported by such references in the literature, and degrading treatment case-law clearly shows that human dignity is a relevant consideration in the Court's interpretation of degrading treatment. However, on none of these occasions is the meaning of the concept elaborated upon in degrading treatment case-law. We must know more about the meaning of human dignity itself within the context of Article 3 if we are to gain a clearer picture of how the concept of human dignity influences the meaning of degrading treatment.

The meaning of human dignity in the context of the prohibition of degrading treatment

This question – what is the meaning of human dignity? – may appear to be a rather daunting one. This is a concept that has been described as a 'mystery'<sup>331</sup> and its origins have been traced back to the Stoics.<sup>332</sup> The etymological root of the word dignity is in the

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<sup>327</sup> This resembles the approach taken by Maurer, who argues that the principle of respect for human dignity does not only underlie the ECHR, but constitutes its entire purpose, or *raison d'être* ('la finalité'); (1999) at 250.

<sup>328</sup> Feldman, David (1999), 'Human Dignity as a Legal Value: Part 1', *Public Law*, Win, 682-702, at 690.

<sup>329</sup> Cassese (1991) at 143.

<sup>330</sup> Frowein, Joshen A. (2002), 'Human Dignity in International Law', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International) at 124.

<sup>331</sup> Tinder, Glenn (2003), 'Facets of Personal Dignity', in R. P. Kraynak and G. Tinder (eds.), *In Defense of Human Dignity – Essays for Our Times* (Indiana: University of Notre Dame Press), 237-45 at 245; Maurer (1999) at 7.

<sup>332</sup> Cancik, Hubert (2002), "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107", in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International), 19-39. For a succinct but

Latin *dignitas*, meaning worth.<sup>333</sup> Indisputably, human dignity is intimately linked to the question of what it means to be a human being. Although it was accorded a foundational place in relation to post-World War II international human rights, underpinning this entire regime's creation, there is no express statement of the content of human dignity in the text of the international instruments, nor in the ECHR, nor by the Convention's control organs. Schachter believes that neither international nor national law (in which dignity is often given constitutional significance<sup>334</sup>) has provided an explicit definition: 'Its intrinsic meaning has been left to intuitive understanding [...]'.<sup>335</sup> Pinpointing the meaning of human dignity then, is potentially a challenging task.

The key to addressing the meaning of human dignity in the context of degrading treatment is to be directed by the ECHR case-law. This is linked to the objective of the thesis, which is to elucidate and develop an understanding of the prohibition of degrading treatment that fits with its current ECHR application. The meaning of the concept of human dignity, as it is understood in the ECHR context, is not made *explicit* in the Convention or by the Court. It is only *implicit*. This implicit understanding of dignity can be identified by examining the content of degrading treatment case-law. This case-law, as has been suggested, tells us that degrading treatment constitutes a violation of human dignity in the eyes of the Convention protection organs. Thus, the principal aspect of the meaning of dignity that can be identified in degrading treatment case-law is, logically, its negative substance; i.e. the way in which dignity can be *violated*.

Clearly, this does not exhaust the challenging question of the 'meaning' of human dignity. This question is a complex, multi-faceted one. The way of international human rights law has been to accept the existence of human dignity and to proceed to try to ensure its protection in practice, without addressing the meaning of the concept in an holistic way. Therefore, it is logical in the present chapter to focus on elaborating the meaning of human dignity as it is seen to be violated, which is the perspective that can

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comprehensive overview of the historical journey of the concept of human dignity, see McCrudden (2008) at 656-63.

<sup>333</sup> Schachter (1983) at 849; Margalit, Avishai (1996), *The Decent Society* (Cambridge: Harvard University Press) at 43.

<sup>334</sup> For a summary of human dignity references in national constitutional law, see McCrudden (2008) at 664-65.

<sup>335</sup> Schachter (1983) at 849.

be unearthed from degrading treatment jurisprudence.<sup>336</sup> This will render the question manageable for present purposes. It is, indeed, also common in literature on human dignity to deal with limited aspects of the broader question of the concept's 'meaning' in a more comprehensive sense.<sup>337</sup>

The meaning of dignity that shall be linked to the meaning of degrading treatment will essentially encompass the meaning of dignity as it is understood to be violated. Based on the basic relationship identified between degrading treatment and human dignity, it is possible to consider the meaning of 'human dignity violated' by analysing cases that have resulted in a finding of degrading treatment. The cases that will be drawn upon in order to elucidate this meaning in the following discussion are those in which there was a *finding of a violation* in order to ensure that conclusions can be drawn as to the way in

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<sup>336</sup> That is not to say that the lack of an explicit, holistic approach to the concept of human dignity in human rights discourse is necessarily the preferable approach, but the objective of the thesis is to develop the meaning and scope of degrading treatment within a framework that is immediately relevant; not to engage in a critique of the merits of the current approach.

<sup>337</sup> A number of different perspectives on dignity can be identified whilst reading between the lines of a range of literature. Literature can be seen to respond to the question of the 'meaning' of human dignity from a number of different angles; by addressing one (or more) limited questions within the broader question of 'meaning': what *is* dignity?; what is the *source* of dignity?; what does its protection *demand*?; how is dignity *violated*?; and how is dignity *manifested*? The most basic aspect of the question is what *is* human dignity? This is in fact rarely discussed in human dignity literature; perhaps because this is one element of the concept's meaning on which there is agreement. The others are the four principal perspectives that can be identified in dignity literature. Authors tend not to state expressly that one or more limited perspectives on the meaning of dignity are being addressed. Conor Gearty's work has suggested all four perspectives. Gearty has stated that: '[...] our dignity, rooted in wonder at the brute fact of our achievement, demands that we each of us be given the chance to do the best we can, to thrive, to flourish [...]' (Gearty, Conor A. (2006), *Can human rights survive?* (Hamlyn lectures; 57th series; Cambridge: Cambridge University Press) at 49). In the same work the author writes that respect for dignity 'demands both an end to cruelty and humiliation on the one hand and a commitment to human flourishing on the other [...]'. Furthermore, dignity is argued to be 'manifested in acts of compassion towards the other.' (Gearty (2006) at 102, 140 respectively). Four perspectives are identifiable: firstly, where dignity derives from, or its source (the fact of human existence); secondly, what protection of dignity demands (a commitment to human flourishing); thirdly, how human dignity can be violated (by cruelty and humiliation); and finally, how human dignity is manifested (in acts of compassion). Gearty's work is an exception; it is more common to find implicit reference to one or more but not all of these perspectives on the meaning of dignity. For example, Beyleveld and Brownsword view the *source* of dignity in the capacity of agents for existential anxiety and in the vulnerability of human agents (Beyleveld and Brownsword (2001) at 112). The demands stemming from the possession of human dignity are also referred to: dignity demands recognition of the capacity of agents for purposive action and the making of informed choices – of the empowerment of the individual (Beyleveld and Brownsword (2001) at 218). The purpose of these examples is to demonstrate that scholarship addresses questions involving human dignity in a number of ways, focusing on one or more perspectives. This supports the assertion that the question of the 'meaning' of human dignity is in fact often broken down into more limited aspects.

which dignity is understood to be *violated*.<sup>338</sup> From examining the content of relevant degrading treatment case-law, a picture will emerge as to how dignity is understood to be violated, which will in turn enrich our understanding of the meaning and scope of the prohibition of degrading treatment.

The ECtHR has found the following to amount to treatment that is degrading and a violation of Article 3<sup>339</sup>: detention conditions (detention conditions are generally a combination of factors that combine to become degrading. For example, overcrowding, inadequate sanitary conditions, lack of ventilation, presence of vermin or insects, etc)<sup>340</sup>, corporal punishment<sup>341</sup>, physical injury<sup>342</sup>, a strip search<sup>343</sup>, lack of adequate medical care<sup>344</sup>, anguish caused as a result of treatment of a loved one<sup>345</sup>, and shaving of a prisoner's head.<sup>346</sup> Discrimination can confidently be added to this list; the Court has explicitly accepted that discrimination could potentially be considered as degrading were the minimum level of severity to be reached:

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<sup>338</sup> It is reasonable to expect, based on what we know about the three forms of ill-treatment in Article 3, and the special stigma attached to torture, etc, that treatment (or punishment) that is degrading violates human dignity to a different degree than treatment that is inhuman or amounts to torture. The existence of three forms of ill-treatment in itself suggests this. This does not imply, however, that different meanings of dignity are associated with each form of ill-treatment. Since the prohibition of degrading treatment forms one part of a coherent right, it can be assumed that this is not the case. Based on this assumption, it would have been possible to examine, not only cases in which a violation was found specifically on the basis of degrading treatment, but also cases that have resulted in a finding of inhuman and degrading treatment, or where the precise element (inhuman/degrading) of Article 3 that has been violated is not specified. However, the case-law analysis within the thesis focuses primarily on degrading treatment and, therefore, for the purpose of understanding the meaning of dignity relevant to degrading treatment, the cases to be examined will be those resulting in a violation based on that specific element of Article 3.

<sup>339</sup> The following cases were included in the overview given in Chapter Two.

<sup>340</sup> E.g. *Kalashnikov v Russia*.

<sup>341</sup> *Tyrer v. UK*.

<sup>342</sup> *Barbu Anghelescu v. Romania*.

<sup>343</sup> *Valasinas v. Lithuania*.

<sup>344</sup> *Nevmerzhitsky v. Ukraine*.

<sup>345</sup> *Akkum and Others v. Turkey*.

<sup>346</sup> *Yankov v. Bulgaria*.

*[...] the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority [...] could, in principle, fall within the scope of Article 3 [...]*<sup>347</sup>

In terms of the Court's underlying understanding of human dignity and how dignity is violated, it is illuminating to look closely at these judgments and the reasoning as to *why* each of these situations amounted to degrading treatment. Examples from the several cases concerning detention conditions can be given: In *Kalashnikov v. Russia*, the conditions complained of consisted of severe overcrowding leading to sleep deprivation by having to take turns to use a bed, constant lighting, each prisoner being in view of everyone when using the toilet, having to eat in the cell close to the toilet, lack of proper ventilation and the cell being overrun with insects. The Court condemned the 'heavy physical and psychological burden on the applicant', emphasising that the conditions in themselves were unacceptable and that there was a detrimental effect on the applicant's 'health and wellbeing'.<sup>348</sup> In the case of *Peers v. Greece* the applicant was:

*[...] for the best part of the period when the cell door was locked [...] confined to his bed. Moreover, there was no ventilation in the cell, there being no opening other than a peephole in the door. The Court also notes that [...] the cells in the segregation unit were exceedingly hot [...]*<sup>349</sup>

The Court also referred to unacceptable sanitary arrangements.<sup>350</sup> The Court condemned the failure of the authorities to take steps to improve the unacceptable conditions, which it saw as denoting 'lack of respect for the applicant'.<sup>351</sup> This implies that the applicant as a person should have been respected. In *Price v. UK*, the Court found fault in the lack of action taken to remove the applicant, a 'four-limb-deficient thalidomide victim with numerous health problems including defective kidneys' to a more suitable place of detention.<sup>352</sup> It found that:

*[...] to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is*

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<sup>347</sup> *Smith and Grady v. UK*, para. 121. This position has also been adopted by the EComHR; see *East African Asians Case*, at 62, para. 207-09.

<sup>348</sup> *Kalashnikov v. Russia*, para. 97-102.

<sup>349</sup> *Peers v. Greece*, para. 72.

<sup>350</sup> *Peers v. Greece*, para. 73.

<sup>351</sup> *Peers v. Greece*, para. 75.

<sup>352</sup> *Price v. UK*, para. 25, 27.

*unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.*<sup>353</sup>

Therefore, physical suffering is a significant factor that can lead to a violation of human dignity, and again we see the Court placing importance on the fact that arrangements for the applicant to use the toilet were unacceptable. In these detention cases an aspect of human dignity is involved that is concerned simply with what is proper and, conversely, what is unacceptable for a human being to endure – the emphasis on sanitary conditions is indicative, as is the need for ventilation, movement and sleep.

The *Tyler* case concerning corporal punishment is particularly informative. The Court appears to articulate how it understands Article 3 to be violated:

*[...] his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 [...] to protect, namely a person's dignity and physical integrity.*<sup>354</sup>

Maurer suggests that this case epitomises the meaning of the violation of dignity in relation to Article 3, which she believes prohibits treating a human being like an animal or an object.<sup>355</sup> The statement in *Tyler* is certainly the most explicit that one encounters in degrading treatment jurisprudence. And again, mental suffering ('mental anguish' of anticipating the violence for several weeks whilst awaiting the punishment) is indicative of dignity violated, along with physical suffering (despite the fact that 'the applicant did not suffer any severe or long-lasting physical effects').<sup>356</sup>

In a case concerning physical injury such as *Barbu Anghelescu v. Romania*, it is simply the use by state agents of physical force that was not made necessary by the behaviour of the applicant that propelled the Court to arrive at a finding of degrading treatment. It was of no great importance that the injuries did not cause long-term problems and did not have serious consequences.<sup>357</sup> *Valasinas v. Romania*, a case in which the manner of conducting a strip search was found to amount to degrading treatment, indicates that it is

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<sup>353</sup> *Price v. UK*, para. 30.

<sup>354</sup> *Tyler v. UK*, para. 33.

<sup>355</sup> Maurer (1999) at 287-88.

<sup>356</sup> *Tyler v. UK*, para. 33.

<sup>357</sup> *Barbu Anghelescu v. Romania*, para. 55-56, 58, 60.

a lack of respect for the person himself that is seen to be harmful to dignity (which is similar to the Court's approach in *Peers v. Greece* above):

*Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity.*<sup>358</sup>

*Nevmerzhitsky v. Ukraine*, a case concerning a lack of adequate medical care, shows very simply that dignity is violated by a lack of respect for health and well-being, which was not respected in this case and led to a finding of degrading treatment.<sup>359</sup> The case of *Akkum and Others v. Turkey* concerned the attitude of state officials towards an applicant whose son had suffered grave rights violations. The applicant's son was murdered by security forces and his mutilated body was received by Mr. Akkum. At issue here was the severe psychological suffering of Mr. Akkum; 'anguish' was the word used by the Court. The Court does not explicitly mention a lack of respect for the applicant, but there is the impression that this is the reproachable treatment.<sup>360</sup>

A final example is the forced shaving of a prisoner's hair. In *Yankov v. Bulgaria*, the Court made some revealing remarks:

*A particular characteristic of the treatment complained of, the forced shaving off of a prisoner's hair, is that it consists in a forced change of the person's appearance by the removal of his hair. The person undergoing that treatment is very likely to experience a feeling of inferiority as his physical appearance is changed against his will.*

*Furthermore, for at least a certain period of time a prisoner whose hair has been shaved off carries a mark of the treatment he has undergone. The mark is immediately visible to others [...] The person concerned is very likely to feel hurt in his dignity by the fact that he carries a visible physical mark.*<sup>361</sup>

A central element is clearly the fact that it was *forced* shaving of the prisoner's hair *against his will*. This was compounded by the fact that there was a visual public statement of the subjugation.<sup>362</sup>

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<sup>358</sup> *Valasinas v. Lithuania*, para. 117.

<sup>359</sup> *Nevmerzhitsky v. Ukraine*, para. 100-06.

<sup>360</sup> *Akkum and others v. Turkey*, para. 252-59.

<sup>361</sup> *Yankov v. Bulgaria*, para. 112-13.

<sup>362</sup> *Yankov v. Bulgaria*, para. 117.

Significant insight into the meaning of human dignity violated can be gained from the approach of the Court in these cases, given that the Court has positioned degrading treatment as involving a violation of human dignity, and this will impact upon conclusions on the substantive scope of the prohibition of degrading treatment. It is clear from cases concerning corporal punishment/physical injury that attacks on physical integrity are centrally significant. Dignity can also be violated, however, through degrading treatment as a result of mental suffering. Cases concerning a lack of adequate medical care and mental anguish suggest that dignity is violated when a person's life, in terms of her or his physical, mental and emotional health, is not recognised as having value. In the detention conditions cases, one can detect an assertion that certain conditions are simply not acceptable for a human being – note the earlier reference to particular weight placed by the Court on the need for sanitary conditions that conform to the dignity of an individual. And the *Tyler* case suggests that treatment of a person as an object signifies a violation of dignity. These cases indicate that dignity is violated if the person, as an entity, is not respected. It seems that the violation of dignity is directed towards the quality of being human in some fundamental sense. This remains somewhat vague but it is of particular significance that a consistent picture emerges. It is not the case that dignity comes across as being understood to be violated in diverse ways in these judgments. Rather, the ways in which dignity is seen to be violated all appear to be connected to the same core qualities, i.e. to the value of a *human being* as a person with physical and mental integrity; as a *valuable entity* demanding respect. Dignity appears to be violated when a person is treated in a way that is inconsistent with her fundamental status as a person. (It can reasonably be assumed that dignity has this meaning in the context of, not only degrading treatment but Article 3 as a whole, although presently this is a marginal point). This indication of the substance of human dignity violated in the Court's degrading treatment judgments is only one aspect of the broader question of the 'meaning' of human dignity; an answer is not provided to the question of why human beings have such a fundamental status and of what protection of this status demands precisely. Consequently, it might be argued that degrading treatment case-law provides limited insight. This is unavoidable as this case-law only paints an implicit picture of the dimension of the *violation* of dignity. Crucially, the meaning of dignity that can be identified is sufficient to guide an enriched understanding of the substantive scope of concern of the right not to be subjected to degrading treatment.

An interesting question concerns whether we can assume that the way in which dignity is seen to be violated in the Article 3 context is representative of a wider conception of dignity underlying the ECHR as a whole<sup>363</sup>, or whether it might represent only one aspect of a wider conception of dignity underlying the ECHR? It is not presently necessary, nor indeed possible, to enter into this question in any depth. It is interesting to note, however, that literature is identifiable that supports the latter perspective. For example, Maurer describes the concept of human dignity as having two dimensions – ‘fundamental’ (fondamentale) and ‘practical’ (actuée) – arguing that Article 3 is concerned with only one of those dimensions, i.e. fundamental dignity, rather than practical dignity (practical dignity is something that is realised in interaction with external forces and is dynamic and relative amongst individuals).<sup>364</sup> The work of Beyleveld and Brownsword also points to the possibility of dignity having two different ‘aspects’ – which they call dignity as ‘empowerment’ and dignity as ‘constraint’<sup>365</sup> – as does that of Birnbacher who works on the basis of a ‘core’ meaning of dignity and an ‘extended’ meaning.<sup>366</sup> In a similar vein in the context of the UNESCO Declaration of the Human Genome and Human Rights, Andorno adopts Birnbacher’s two meanings of dignity, both of which he sees as reflected in the Declaration, with certain provisions concerned with basic dignity and others with extended dignity.<sup>367</sup> Kass, in the bioethics context, has made a distinction between two interdependent forms of dignity: the ‘dignity of human being’ and the ‘dignity of being human’; the first referring to equal human worth and equal potential, and the latter to human activities and relationships.<sup>368</sup>

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<sup>363</sup> It is universally accepted that international human rights instruments such as the UDHR, ICCPR and ICESCR, place dignity as the foundation of *all* rights. In the ECHR context, dignity is therefore not only relevant to Article 3, but can be seen as underlying all of the Convention rights. See, e.g., Tinder (2003) at 242.

<sup>364</sup> Maurer (1999); see, e.g., 52.

<sup>365</sup> Beyleveld and Brownsword (2001); see Chapters 1 and 2.

<sup>366</sup> Birnbacher, Dieter (1996), ‘Ambiguities in the Concept of Menschenwürde’, in K. Bayertz (ed.), *Sanctity of Life and Human Dignity* (Dordrecht: Kluwer Academic Publishers), 107-22, in particular at 114-17.

<sup>367</sup> Andorno, Roberto (2005), ‘Dignity of the Person in Light of International Biomedical Law’, *Medicina e Morale*, 1, 91-105 at 103-04.

<sup>368</sup> Kass, Leon, ‘Defending Human Dignity’, Bradley Lecture, American Enterprise Institute (2007), available at [http://www.aei.org/docLib/20070206\\_DefendingHumanDignity1.pdf](http://www.aei.org/docLib/20070206_DefendingHumanDignity1.pdf).

The particular prominence of references to human dignity in the Article 3 context<sup>369</sup>, the structure of the Convention (beginning with the right to life, the prohibition of torture and the prohibition of slavery – arguably the rights that most strongly symbolise the centrality of protecting human dignity), and indeed the range of rights within the Convention (from the right to life and the right not to be subjected to torture, inhuman or degrading treatment or punishment to the right to respect for private and family life and the right to marry), all support a view of dignity as having more than one ‘meaning’. The simple fact that there exists a whole range of rights – all conceived of as springing from human dignity in some sense, as is suggested in the international law instruments – directed towards protection of different facets of the human person and the person’s participation in society, suggests that the relationship between dignity and rights is not one-dimensional.<sup>370</sup> It is entirely plausible to understand the range of rights within the Convention as linked to different facets of human dignity in different ways. For example, in addition to being concerned with protecting against *violations* of dignity (as in Article 3), the Convention is arguably also concerned with protecting what can be described as *manifestations* of dignity or expressions of one’s dignity (identifiable perhaps in the Article 12 right to marry and found a family, for example).<sup>371</sup> This may also help to explain why certain ‘wrongs’, sometimes associated with human dignity, but which are excluded from the protection of Article 3 if this right is concerned only with attacks on the fundamental status of human persons, are not consequently labelled as entirely insignificant in the scheme of human rights protection; e.g. ‘restrictions on

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<sup>369</sup> See Maurer (1999) at 268.

<sup>370</sup> It is even conceivable that one single right might entertain more than one relationship with dignity, although there is no evidence of this in relation to the prohibition of degrading treatment. It would also be possible to argue that the view of dignity as the foundation underlying all human rights should itself be questioned. This is based on recognition of dignity being treated in domestic jurisdictions as a right in itself rather than the basis of human rights; see McCrudden (2008) at 680-81. This does not detract in any way from recognition of the position undeniably enshrined in international human rights law instruments, that human rights ‘derive from the inherent dignity of the human person’ (ICCPR and ICESCR Preambles), i.e. that all human rights derive from human dignity. McCrudden suggests that the prominent approach in judicial decisions that he considers is one that views human rights as ‘built’ on human dignity (at 681).

<sup>371</sup> See footnote 337 above. The seeming paradox in which dignity comes across in case-law as particularly relevant to the prohibition of torture, inhuman or degrading treatment or punishment whilst being recognised as underpinning all human rights in the international regime more generally, is illuminated on this view. Certain rights can be argued to be concerned with protecting against violations of dignity and others with protecting the manifestation of dignity. See, e.g., the case of *Lingens v. Austria* concerning freedom of expression, in which the Court refers to the importance of this right in protecting an individual’s ‘self-fulfilment’ which may express a similar idea to the manifestation of dignity; no. 9815/82, judgment of 8 July 1986, Series A, no. 103, para. 41.

opportunities and means to maintain family life', or 'medical treatment or hospital care insensitive to individual choice'.<sup>372</sup> It is extremely likely that dignity in various dimensions forms different relationships with the different ECHR rights. Verification of this would involve an examination of the Convention case-law on a wider scale.

As a final point of clarification concerning the meaning of dignity, it is suggested that it is not possible to describe the ECtHR as adopting one particular theoretical approach to this concept. It might be argued that this could indeed be helpful, particularly if such a conception was one that encompassed not only the question of how dignity is violated, but also other dimensions of the 'meaning' of the concept. This would present a more rounded picture of the 'meaning' of dignity in the context of the right not to be subjected to degrading treatment; it would entail a more complete set of tools to work with. But it is not necessary to associate the Court's approach with one particular theoretical model for present purposes. Notably, despite the fact that the meaning of dignity that has been suggested above refers to the violation of dignity through being treated as less than human, we are able to make significant progress in understanding degradation without having identified a single theoretical approach that would also tell us how the ECtHR might understand what it means to be human in a *positive* sense. For the purpose of gaining a better understanding than the one that we have presently of the meaning of degrading treatment, the above outline of the meaning of dignity in this context has been directed towards elucidating only the *violation* of dignity, which is the indispensable element for understanding degrading treatment.

The Court, it can be presumed, does rely upon a more holistic understanding of human dignity, even if only the dimension of its violation is visible in degrading treatment case-law. To try to decipher and label a general ECHR approach would involve a continuation of the exercise undertaken above in relation to degrading treatment, extended to the entire Convention and encompassing the meaning of the concept of human dignity in a more rounded way. This would be an interesting question for a self-standing research project. One could, of course, speculate about the nature of a more holistic account upon which the Court might be thought to rely, if this was deemed to be a valuable exercise. A defensible choice of label for a general theoretical approach might be 'Kantian', for

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<sup>372</sup> Schachter (1983) at 852.

example, although it would undoubtedly be a simplistic one. It would be an easy option – in the words of Glenn Tinder, this is the ‘most powerful modern affirmation of human dignity’.<sup>373</sup> It has been described as: ‘[...] the best-known articulation of the idea of intrinsic human dignity [...]’; Beyleveld and Brownsword identify in Kant’s approach the conception of human dignity in the sense in which it influenced the post-World War II human rights movement and international HRs documents.<sup>374</sup> The consistent picture of the way in which dignity is violated by degrading treatment does invoke associations with the Kantian conception of dignity as it is commonly perceived. The explicit statement in *Tyrer* that to treat the applicant as an object entailed a violation of his dignity is particularly striking – treating a person as an end in her- or himself and not as a mere means is what is commonly thought of as the core of a Kantian conception.<sup>375</sup> In that sense, it would be feasible to argue, building upon this point, that the understanding of dignity underlying the prohibition of degrading treatment is a predominantly Kantian conception. Maurer points towards parallels between a Kantian approach and her understanding of the Article 3 context (which are in line with the above findings from the case-law): That the violation of dignity relates to the *human being* as such and does not appear to point to a concern with what a *person becomes* through her/his acts or the acts of others.<sup>376</sup> And that violating someone’s dignity in the Article 3 context is to consider that person as less than human. These features are consistent with a classic Kantian account, which would also add that dignity is not held in relative measures in relation to other people, but rather is equal amongst persons, is static, and absolute.<sup>377</sup> Dignity is seen to concern intrinsic human worth and value, and to demand respect for persons as beings with unconditional and incomparable worth. Such a view certainly accords with the fact that Article 3 permits of no exceptions or derogations. ‘Kantian’, therefore, would be a justifiable label.

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<sup>373</sup> Tinder (2003) at 240.

<sup>374</sup> Beyleveld and Brownsword (2001) at 52, 11.

<sup>375</sup> Schachter, for example, invokes ‘the Kantian injunction to treat every human being as an end, not as a means. Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others.’; (1983) at 849.

<sup>376</sup> Maurer (1999) discusses Article 3 ECHR rather than degrading treatment specifically; her findings support the conclusions reached based on degrading treatment case-law.

<sup>377</sup> Maurer (1999) at 51, 58.

However, to attempt to attach an all-encompassing label, Kantian or otherwise, to the ECHR approach to human dignity would be incomplete and would lack a significant degree of nuance. Firstly, and notably, it would be difficult to draw convincing support from the case-law to argue that a particular approach to understanding what is special about being human, or the question of why human beings have dignity, is accepted and relied upon by the Court. It is doubtful that anything conclusive could be identified regarding the ECHR understanding of the meaning of human dignity in this dimension. As noted above, no one view is explicitly put forward or accepted in international human rights law as to what it is about human beings that has led us to attribute to ourselves the quality that we call human dignity<sup>378</sup>, and this finds echo in the ECHR. The question of the source of dignity is indeed the hub of controversy and diverging opinions.<sup>379</sup> This is the perspective that goes to the heart of what it means to be human and is a question to which numerous answers have been proposed since the first use of the concept of dignity: including, for example, reference to the nature of human beings as creations in the image of God or as having a unique status in the world<sup>380</sup> or with reference, in various forms, to the possession by human beings of reason as expressed in Enlightenment philosophy.<sup>381</sup>

Secondly (and a related point), if such a label were argued for, it would fail to acknowledge the complex conceptual evolution of the idea of dignity, which has developed in a number of overlapping contexts (McCrudden gives a helpful insight into the historical evolution of the use of the concept).<sup>382</sup> To continue with the example of a Kantian approach: various elements of this account of human dignity have been

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<sup>378</sup> See Dicke (2002) at 117.

<sup>379</sup> See, e.g., Tinder (2003) at 238. For a useful summary, see McCrudden (2008) at 656-63.

<sup>380</sup> See, e.g., Arieli, Yehoshua (2002), 'On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International), 1-17 at 10; Shannon, Thomas A. (2004), 'Grounding Human Dignity', *Dialog: A Journal Of Theology*, 43 (2), 113-17, at 114.

<sup>381</sup> Dicke (2002) at 113). There are a number of variations within approaches that view reason as the essential quality bestowing dignity, e.g. a classic Stoic perspective (See Cancik (2002) at 19-39), a Kantian perspective (for an overview, see Shell, Susan M. (2003), 'Kant on Human Dignity', in R. P. Kraynak and G. Tinder (eds.), *In Defense of Human Dignity – Essays for Our Times* (Indiana: University of Notre Dame Press), 53-80), or a contemporary approach such as that advanced by Beylveeld and Brownsword (See (2001), in particular Chapter 6). See also below for further discussion.

<sup>382</sup> McCrudden (2008) at 656-63.

consistently challenged, although components of a traditional Kantian approach have undoubtedly become embedded in a complex picture of the meaning of human dignity. For example, a re-working of a Kantian approach is undertaken by Beyleveld and Brownsword in *Human Dignity in Bioethics and Biolaw*. This account, which like the classic Kantian one is a capacity-based account of the source of human dignity (rooting human dignity in a particular ability or property of persons), points to the significance of the capacity of agents for existential anxiety, deriving from the interplay of two characteristics of human beings: consciousness and being present in physical space and time.<sup>383</sup> The complex evolution of responses to the broad question of the meaning of dignity is apparent in such examples. James Griffin advocates a different capacity-based approach founded on the concept of ‘personhood’, and highlights humans’ capacity to reflect, choose and pursue conceptions of the good life.<sup>384</sup> Ronald Dworkin points to the intrinsic value of human life as the ‘basis’ of dignity, deriving from its embodiment of artistic creation – the creativity produced by humans – and the creativity of nature.<sup>385</sup> Other approaches reject, or view as insufficient, property- or capacity-based accounts of the source of human dignity. Joel Feinberg’s suggestion that dignity derives from the capacity of human beings to assert claims against others would fall within this category.<sup>386</sup> Other ‘relational’ accounts argue that the source of dignity is found in ‘intersubjective’ relationships between moral beings in society, or as rooted in the desire for recognition, based in Hegelian thought. Certain approaches additionally highlight the corporeal dimension – the embodied nature of human persons – suggesting that this dimension should form part of our understanding of human dignity if we are to be able to respond adequately to the impact of physical pain upon the person.<sup>387</sup> The reality of the concept of human dignity is a complex one. Our understanding of it demands more than a one-dimensional perspective.

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<sup>383</sup> Beyleveld and Brownsword (2001) at 115.

<sup>384</sup> Griffin, James (2001), ‘First Steps in an Account of Human Rights’ *European Journal of Philosophy*, 9, 306-27, at 310-11.

<sup>385</sup> Dworkin, Ronald (1993), *Life’s Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (New York: Vintage Books) and in particular at 71-84; Dworkin (2006a) at 10.

<sup>386</sup> Feinberg, Joel (1970), ‘The Nature and Value of Rights’, *The Journal of Value Inquiry*, 4, 243-57, at 252.

<sup>387</sup> For discussion and examples of such approaches, see respectively Maier, Andreas (forthcoming), ‘Torture’, Kuch, Hannes (forthcoming), ‘The Rituality of Humiliation: Exploring symbolic vulnerability’, and Oliver, Sophie, (forthcoming), ‘Dehumanization: Perceiving the body as (in)human’, in P. Kaufman, H. Kuch, C. Neuhäuser, E. Webster (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer).

Thirdly, to try to label the ECHR approach to the meaning of human dignity in its fullest sense (whether that be Kantian, Dworkinian, or relational, etc) would be to attach a label to the way in which the meaning of dignity is understood in society generally, since the Court must derive its impression of this from the society in which it operates. As Dworkin states, referring specifically to human dignity, this concept has a ‘life’ in ‘political rhetoric and debates of the time.’ Dworkin’s imaginary judge Hercules is able to identify the substance of dignity by considering this ‘life’, and by relying upon his own perceptions of this as a member of the community in which the concept plays a role.<sup>388</sup> This suggests, on the one hand, that it is impossible, in the absence of an explicit articulation by the European Court, to know in any meaningful sense how the judges constituting the Court approach the holistic question of the ‘meaning’ of dignity in its various dimensions. As part of the process of interpretation, the judges can be seen to fuse their own perceptions of that ‘life’ with what Dworkin terms the ‘community morality’ – the moral convictions and traditions of the community.<sup>389</sup> One might speculate upon how the Court as a whole might perceive this question in the context of the community of Council of Europe states, but ultimately conclusions would not be able to guide application of the right not to be subjected to degrading treatment (the aim of guiding practical application, manifested in the approach that will be taken in subsequent chapters to exploring the meaning of degrading treatment, is discussed further below). On the other hand, the reference to the ‘life’ of the concept of dignity in rhetoric and debate reminds us that the attempted articulation of an holistic account of what it means to be human and what this status demands is a long-standing and ongoing intellectual project of considerable proportion; an unsettled question of fundamental moral concern.

To conclude: these observations on the meaning of human dignity, and in particular the meaning of the *violation* of dignity, are necessary in order to gain a richer understanding of degrading treatment and, thereby, the scope of application of the right. The assumption is that the meaning of dignity violated will inform the meaning of degrading treatment. The focus lies on the way in which dignity is seen to be violated, inferred via

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<sup>388</sup> Dworkin, Ronald (1977), *Taking Rights Seriously* (London: Duckworth) at 127.

<sup>389</sup> Dworkin (1977) at 123-30. For further discussion see Dworkin, Ronald (2003), ‘The Secular Papacy’, in R. Badinter and S. Breyer (eds.), *Judges in Contemporary Democracy: An International Conversation* (New York: NYU Press), 67-111, and in the context of a brief discussion of Rawls’ doctrine of public reason see Dworkin, Ronald (2006b), *Justice in Robes* (Cambridge: The Belknap Press) at 251-54.

the pronouncements in the case-law, and the cases coherently indicate that a violation of dignity is a violation of the person; a violation of human status in some sense. The way in which dignity seems to be violated, given that degrading treatment is positioned as a violation of dignity, begins to indicate where the substantive parameters of the meaning of degrading treatment will lie. The important point is that examination of degrading treatment case-law, in light of literature on human dignity (which points towards the multi-faceted nature of the question of the ‘meaning’ of dignity) suggests that the prohibition of degrading treatment is concerned with the violation of ‘fundamental’ dignity. The conclusions that can be drawn in this regard are simple and yet extremely significant: if degrading treatment can be seen to concern attacks on the human person in a fundamental sense, as concerning a failure to recognise an elevated status of human persons, the meaning of degrading treatment is consequently limited to attacks on this aspect of the person. The crucial implication of this is that degrading treatment is *not* concerned with other forms of harm that might commonly be associated with human dignity. These conclusions will guide further exploration of the right’s meaning when combined with a more transparent understanding of the role played by dignity in the interpretation of Article 3.

#### The role of human dignity in teleological interpretation of degrading treatment

Enquiring into the role played by human dignity will involve reaching more precise conclusions on the form taken and the function exercised by this concept in relation to the prohibition of degrading treatment. The starting point is to recognise a characterisation of human dignity that may explain and is consistent with the connection between dignity and purpose that emerged from consideration of case-law references to human dignity; namely, to understand the protection of human dignity as a *fundamental value* within the ECHR system, in the knowledge that fundamental values have been argued to express elements of purpose.

One finds a number of examples of protection of, or respect for<sup>390</sup>, human dignity being described as a fundamental value or principle (which is distinguishable from the idea of

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<sup>390</sup> Although the terms ‘protection of’ and ‘respect for’ dignity are understood to be interchangeable, the term ‘protection of’ rather than ‘respect for’ is presently favoured as a better expression of the proactive approach to human rights required by States Parties to the Convention through the development of

general principles in international law).<sup>391</sup> Fundamental values are ‘goods’<sup>392</sup> that underlie and constitute the background of a legal context. The assertion is simply that the protection of human dignity is a basic tenet of the ECHR value system. In discussing constitutional interpretation, Barak views human dignity in the form of a fundamental value.<sup>393</sup> Barak understands fundamental values as the equivalent of Dworkinian principles<sup>394</sup> – ‘principles, policies and other sorts of standards’ that Dworkin distinguishes from legal rules.<sup>395</sup> Values would fall within this category for Dworkin, who uses the term principles generically. Such standards or principles provide reasons that argue in a particular *direction* in the context of a decision, rather than pointing towards one particular outcome.<sup>396</sup> In some cases there may be overlap between rules and principles<sup>397</sup>; notably, Dworkin suggests, in the sense that rules may contain language that entails references to principles (the word degrading could be added to this list):

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positive obligations in addition to negative obligations; the latter often being associated with ‘respect’ in the sense of non-interference.

<sup>391</sup> Maurer raises this point concerning general principles of international law, which are designated in the Statute of the International Court of Justice (UN Charter 1945) as a source of international law; Article 38(1)(c). A commonly cited example is the principle *pacta sunt servanda*; see Thirlway, Hugh (2006), ‘The Sources of International Law’, in M. D. Evans (ed.), *International Law* (2<sup>nd</sup> edn.; Oxford: Oxford University Press), 116-40, at 128; Parry, Clive (1965), *The Sources and Evidences of International Law* (Manchester: Manchester University Press) at 85. Unlike a general principle of law, Maurer argues, a fundamental principle is not a source of law; rather, the function of such principles is to underpin the judicial order and to play a role principally in terms of interpretation ((1999) at 144). Boyle and Chinkin also suggest a category of standards distinct from general principles of international law, citing judicial statements of Judge Rosalyn Higgins that point towards the underlying importance of values that international law seeks to promote; Boyle, Alan and Chinkin, Christine (2007), *The Making of International Law* (Oxford: Oxford University Press) at 289; also 11-12. See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 08 July 1996, Advisory Opinion, Dissenting Opinion Judge Higgins, at 370-71, para. 41, available at: <http://www.icj-cij.org/docket/files/95/7525.pdf>. Protection of human dignity falls into the ‘fundamental principle’ or ‘value’ category and is therefore distinguished from general principles familiar in international law.

<sup>392</sup> Tsagourias, Nikolaos K. (2000), *Jurisprudence of International Law: The humanitarian dimension* (Manchester: Manchester University Press) at 91. In the list of such ‘goods’ in the international law context, Tsagourias includes human dignity.

<sup>393</sup> Barak (2005) at 381.

<sup>394</sup> See Barak (2005) at 164-65.

<sup>395</sup> Dworkin (1977) at 22.

<sup>396</sup> See Dworkin (1977) at 26.

<sup>397</sup> Dworkin (1977) at 27.

*Words like ‘reasonable’, ‘negligent’, ‘unjust’, and ‘significant’ often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule [...]*<sup>398</sup>

In the context of international human rights law, Jerzy Zajadlo argues that the principle of protection of human dignity can be seen as the ‘axiological goal for the whole international system of human rights protection [...]’.<sup>399</sup> Maurer refers to the principle of respect for human dignity as a fundamental principle, specifically in the context of ECHR case-law.<sup>400</sup> She concludes that the Strasbourg protection organs have used the principle of respect for human dignity in this sense of a fundamental principle, despite the fact that they have not characterised it explicitly as such.<sup>401</sup> In the degrading treatment case-law that has been examined above, that certainly appears to be the case. One key point that can be added to support Maurer’s analysis, oft-repeated in the degrading treatment case-law, is that ‘Article 3 enshrines one of the most fundamental values’ of society; this arguably contains an understanding of human dignity in the form of a fundamental value, given the intimate relationship that exists between Article 3 and the protection of human dignity.<sup>402</sup>

Viewing dignity as relevant in the form of a fundamental value or principle allows a clear link to be made between *dignity* and *purpose* in interpretation. This rests on viewing fundamental values as capable of expression of purpose. As aforementioned, purpose has been described as ‘the values, goals, interests, policies, and aims that the text is designed to actualize.’<sup>403</sup> Barak states explicitly that fundamental values can form part of the purpose of a text<sup>404</sup>, in light of which interpretation takes place. Similarly, Maurer views human dignity in the form of a fundamental value used by the ECtHR to guide teleological interpretation of the Convention rights.<sup>405</sup> Respect for human dignity

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<sup>398</sup> Dworkin (1977) at 28.

<sup>399</sup> Zajadlo, Jerzy (1999), ‘Human Dignity and Human Rights’, in R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights – A Textbook* (2<sup>nd</sup> edn.; Abo: Institute for Human Rights Abo Akademi University), 15-24, at 21-22.

<sup>400</sup> See Maurer (1999) at 86-141.

<sup>401</sup> Maurer (1999) at 190-92.

<sup>402</sup> This point is generally reiterated in Article 3 cases. See, e.g., *Selmouni v. France*, para. 95; *Soering v. UK*, para. 88.

<sup>403</sup> (2005) at 89.

<sup>404</sup> (2005) at 381, 154.

<sup>405</sup> Maurer (1999) at 192.

as a fundamental value acts as a ‘principe materiel d’interprétation’ – a substantive principle of interpretation<sup>406</sup> – which is used to add content to the right in accordance with the ‘essence’ of the instrument being interpreted. Maurer captures the link between protection of human dignity and teleological interpretation – *interpretation should be directed towards protection of human dignity*. Frowein, in reference to the declaratory tradition in international law in which leading principles are given at the outset of a document as a guide to interpretation of the document as a whole, makes a similar allusion: that human dignity, as one such principle, acts as a guide to interpretation.<sup>407</sup> This allows us to specify that dignity adopts the role of a fundamental value constituting an element of the purpose of Article 3 and within that, of the prohibition of degrading treatment.<sup>408</sup> And it is in this capacity that human dignity can be seen to influence the meaning of degrading treatment.

It has been demonstrated that human dignity is a significant consideration in the jurisprudence on degrading treatment. It has been argued that human dignity is violated by attacks on the fundamental status of human persons. It has also been argued that a purpose of the prohibition of degrading treatment is to protect against violations of human dignity. Taken together, this implies that the meaning of degrading treatment mirrors the meaning of human dignity as it is understood to be violated. This link to the meaning of human dignity via teleological interpretation effectively imposes limits upon the meaning of degrading treatment (in line with the meaning of human dignity violated), in the sense that it is apparently *not* concerned with, for example, personal preferences or freedom of choice, or with one’s opportunities to have a fulfilling life. This allows us to exclude the possibility that degrading treatment in the context of Article 3 could mean a range of things sometimes associated negatively with dignity in

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<sup>406</sup> Maurer (1999) at 197. Thanks to Professor Bas de Gaay Fortman, Utrecht University, for the translation of the term ‘principe materiel d’interprétation’.

<sup>407</sup> Frowein (2002) at 114-15.

<sup>408</sup> It is also interesting to note that viewing dignity in the form of a fundamental value confirms the logical idea that the underlying concept of dignity is reflected in the language of degrading treatment. Barak notes that: ‘[...] fundamental values are embodied in the words [...] that require interpretation as well as the objective purpose guiding the interpretation.’ (Although Barak is here referring to constitutional statutes, his conclusion is nevertheless apt; (2005) at 381). The idea that the concept of dignity is reflected in the language of the prohibition is shown to be consistent with the characteristics of a fundamental value in a teleological system of interpretation.

some form.<sup>409</sup> It can be concluded that the conceptual boundaries of degrading treatment are framed by the negative substance of human dignity that has been identified in the case-law.

### **Interpretation as analysis – A teleological exploration of the meaning of degrading treatment**

Within these boundaries, there remains significant scope to encompass within the ambit of degrading treatment a range of situations that have not before been considered in these terms.<sup>410</sup> Certain doors may close, therefore, whilst others may open. This provides a backdrop against which already-existing jurisprudential decisions and the relevance of new situations to the degrading treatment context can be understood and judged. A common reaction to the examination of the scope of this right is that the range of things that could be considered as degrading is potentially vast and there are concerns about the boundaries being excessively wide. Conversely, a common reaction is also that treatment must presumably have a narrow meaning. If the purpose of the right is to protect against the violation of dignity, and dignity is understood by the Court to be violated in a particular way, this places a limit upon the scope of meaning of the right. At the same time, this link to the meaning of human dignity provides a starting point for considering avenues that have not yet been explored or would benefit from further exploration.<sup>411</sup> Drawing inspiration from Kelsen, Barak notes that interpretation gives meaning to a particular ‘picture’ whose ‘frame’ is constituted by the language of the text being interpreted.<sup>412</sup> A similar analogy is helpful when considering the impact of the meaning of human dignity – the meaning of dignity ‘frames’ the meaning of degrading treatment and constrains which situations may or may not enter into the ‘picture’.

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<sup>409</sup> As suggested in the previous sub-section, these are perhaps examples that would be more appropriately associated with other rights to which a different facet of the concept of dignity is relevant, e.g. rights protecting the expression of one’s dignity.

<sup>410</sup> Maurer describes the ‘fundamental’ dimension of dignity associated with Article 3 as flexible: ‘Le principe de respect de la dignité humaine, même dans sa dimension fondamentale, est d’une grande « souplesse » [...]’ (1999) at 267.

<sup>411</sup> Maurer considers extreme poverty and potential protection that may be offered to unborn humans via Article 3; see (1999) at 351-58.

<sup>412</sup> Barak (2005) at 20.

The pivotal impact of the concept of human dignity, in this sense of framing the meaning of degrading treatment, will be preserved in the case-law interpretation carried out in Chapters Five and Six of the thesis. This process will effectively aim to mirror the approach of the ECtHR. The meaning of degrading treatment will be *developed* in a way that aims to actualise the purpose behind the right. Conclusions will be guided by acknowledgment of the Court's objective of protecting human dignity through its interpretation and application of the right not to be subjected to degrading treatment.

Working towards such an interpretation in the thesis is ultimately linked to the aim of considering the boundaries of the right in the current legal context, in a framework capable of guiding practical application in the here and now. The objective is to arrive at an understanding that could be viewed as, or at least convincingly argued to be, realistically acceptable within the context of the ECHR. The nature of this exercise can be illustrated by Dworkin's metaphor of the chain novel – an analogy that can be used to illuminate all 'creative' interpretation.<sup>413</sup> The central point in the analogy is that each author who writes a chapter to be added to a previous one sees their own role as 'adding a chapter to the novel rather than beginning a new one'.<sup>414</sup> Each contributor:

*[...] must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew.*<sup>415</sup>

The 'inescapable' tension in interpretation between looking backwards and looking forwards (between conservation and innovation), identified by Raz as an element of *all* interpretation, also finds echo here.<sup>416</sup>

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<sup>413</sup> Dworkin (1986) at 228. Although Dworkin goes on to consider the position of judges as participants in the 'chain of law', this model of 'literary interpretation' is presented as a general model 'for the central method of legal analysis.'; (1985) at 158-60.

<sup>414</sup> (1985) at 158. There does not necessarily have to be an assumption that the interpretation of the right not to be subjected to degrading treatment has been conducted in the way of the chain novel so far (which Dworkin would argue), although this could likely be demonstrated with case-law evidence. This point is not determinative of the usefulness of the chain novel analogy in its demonstration of the process and outcome of such an interpretive analysis.

<sup>415</sup> (1986) at 230.

<sup>416</sup> For Raz, the conservative attitude is rooted in respect for authority and continuity, which motivate interpretation, and the innovative element in the need for equity and recognition of the development of law by courts, which influence how interpretation is undertaken; (1996) at 359-61, 363. *The Stanford Encyclopedia of Philosophy* notes that recognition of both a backward- and forward-looking element to interpretation is one central element on which there is wide agreement amongst legal theorists; Dickson,

The related ‘analytical devices’ of the dimensions of fit and substance, described by Dworkin as helpful for understanding a particular interpretation (or for testing an interpretation<sup>417</sup>) can serve to further illustrate the process that will be undertaken in subsequent chapters of the thesis. Analysis of degrading treatment will strive for conclusions that *tie in* to the existing stage of development of the law. The understanding aimed for must first of all be of sufficient ‘fit’ if it is to count as a potential interpretation<sup>418</sup>, and, secondly, the interpretation will entail judgments on ‘substance’, i.e. on the content of the possible interpretations (that ‘fit’) in order to arrive at what is believed to be the best interpretation.<sup>419</sup> One person’s ‘best’ interpretation will differ from another’s.<sup>420</sup> As Stephen Guest remarks in his profile of Dworkin’s work, the basic idea behind this is sufficiently abstract that it should be amenable to widespread acceptance.<sup>421</sup> Guest suggests that the idea of aiming to arrive at the best interpretation possible is a simple, logical idea (and one that appeals to practising lawyers); its basic essence is ‘simply that you make the best of what you have before you.’<sup>422</sup> This captures the present aim of elucidating the best possible interpretation of the jurisprudence.

Given that analysis within the thesis is viewed as interpretation in this sense, this entails that the understanding of degrading treatment that will emerge should not be taken as a normative judgement or as an argument for how the right ought to be understood. In the Dworkinian sense, interpretation does not necessarily involve a positive normative statement that a particular interpretation is commensurate with what the law ought to be.<sup>423</sup> This can be clarified by citing an example given by Guest: having interpreted the

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Julie, ‘Interpretation and Coherence in Legal Reasoning’, at para. 2.2, available at <http://plato.stanford.edu/entries/legal-reas-interpret/>.

<sup>417</sup> (1986) at 230-31.

<sup>418</sup> (1986) at 230. An example given is an interpretation of a law that included a ‘general principle of private law requiring the rich to share their wealth with the poor’ (at 255). The interpretation must be plausible, although it is not required to ‘fit every bit of the text’ (at 230).

<sup>419</sup> (1986) at 231, 233.

<sup>420</sup> Dworkin (1986) at 63.

<sup>421</sup> The idea of arriving at the ‘best’ interpretation is linked in Dworkin’s wider theory to the idea of ‘moral sense’, which, for him, leads to the best possible sense; see Guest, Stephen (1997), *Ronald Dworkin* (Edinburgh: Edinburgh University Press) at 8.

<sup>422</sup> Guest (1997) at 8.

<sup>423</sup> Guest (1997) at 22.

law, it is subsequently possible to argue that the law ought to be different. In other words, even the best interpretation that can be arrived at may not be the most normatively desirable outcome.<sup>424</sup> This is because one's judgment about the best interpretation, thinking back to the chain novel analogy, is perceived of as not totally free, nor totally constrained.<sup>425</sup> This is a useful distinction to avoid confusion concerning the basic objective of the thesis. The conclusions as to what the law *is* on the prohibition of degrading treatment will be a combination of *description* and *evaluation* of 'legal history'.<sup>426</sup> That is, it will include elements of description of what has occurred to date, as well as elements of evaluation of preferable options, but which remain linked to what has come before.<sup>427</sup>

## Chapter summary

This chapter has been structured around the idea of interpretation, which has been posited as the core of a framework for understanding the meaning of degrading treatment. Firstly, the idea of interpretation provides a basic backdrop to understanding, by outlining how meaning is derived from a text and more specifically, how legal meaning is derived from the text of the Convention and from the judgments of the Court. It also constitutes the groundwork for coherent and convincing meanings of degrading treatment that will be the outcome of the interpretive analysis undertaken in the thesis.

Secondly, recognising the teleological interpretive system central to the ECHR brings into focus the relevance, substance, and role of the concept of human dignity. Analysis of case-law has led to the conclusion that human dignity in the context of the prohibition of degrading treatment can be shown to have an identifiable (negative) substance; common concerns about the impossibility of pinpointing a meaning of human dignity have been allayed by breaking down the question of the 'meaning' of dignity, and by drawing conclusions about the way in which dignity is understood to be violated by degrading treatment. The discussion of human dignity has been purely instrumental in

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<sup>424</sup> Guest (1997) at 22.

<sup>425</sup> Dworkin (1986) at 234.

<sup>426</sup> Dworkin (1985) at 146-47.

<sup>427</sup> Dworkin (1985) at 146-48.

setting the scene for understanding degrading treatment – and it is an indispensable part of that scene. It has been argued that the protection of human dignity acts as a fundamental value expressing a purpose of the prohibition within a teleological system. Based on this function, and on the understanding of dignity identified, the meaning of degrading treatment can be seen as conceptually bounded by the aim of protecting against violation of the fundamental, valuable status of human persons.

Finally, judicial interpretation of the right not to be subjected to degrading treatment will be explored *in light of this purpose* of protecting human dignity. Interpretation, therefore, also acts as a lens through which to view the process of case-law analysis. In the exploration of the meaning of degrading treatment in Chapters Five and Six, it will be demonstrated that the case-law principles, including humiliation, debasement, being driven to act against will and conscience, and so on, as well as the meaning of treatment, can be explored against the backdrop of this sense in which dignity is relevant to the prohibition of degrading treatment. The meaning and scope of application of the prohibition is bounded by the substance of human dignity that it is directed towards protecting. Within these ‘limits’, exploration of meaning and scope will consider the Court’s interpretation of the prohibition of degrading treatment in the fullest possible sense. Barak writes that the ‘interpreter’s job is to extract from the text all that it contains’.<sup>428</sup> Applied to the thesis, the aim is to extract from the case-law all that it contains. This will be achieved by ‘conserving’ the case-law developments that have occurred to date and by being ‘innovative’ within the boundaries that have been set in order to arrive at an understanding that makes the ‘best possible sense’ of the jurisprudence; that presents a picture of the scope of application of the right that favours the possibility of practical and plausible application.

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<sup>428</sup> Barak (2005) at 57.

## CHAPTER FIVE

### THE MEANING OF DEGRADING

#### **Chapter introduction**

This chapter will analyse the term degrading within Article 3. The Court's interpretation will be clarified and elaborated upon, guided by the framework discussed in the previous chapter. For example, dictionary meanings will be drawn upon where this is helpful to identify the range of semantic meanings, amongst which the legal meaning of particular terms can be pinpointed. The interpretation of the Court will be our starting point and in this way the 'novel' will be continued rather than begun anew. The objective is to elucidate, and elaborate upon, the Court's interpretation. When considering the meaning of degrading within Article 3, we will move forward in the understanding that the Court interprets the prohibition of degrading treatment against the backdrop of the purpose of that prohibition. As has been argued in Chapter Four, a central purpose is protection of human dignity, violated when a person is treated as less than human. The key point in relation to teleological interpretation thus far has been to argue that, although human dignity may be associated in different contexts and in various dimensions of its meaning with a whole range of wrongs or forms of expression, aspects that go beyond the very basic wrong of attacking the fundamental status of persons are not the concern of the prohibition of degrading treatment. This point is significant since it establishes our general parameters – understanding dignity to be of immediate relevance in only this one dimension will lend direction to our analysis of the conceptual substance of degradation.

As demonstrated in Chapter Two, the ECtHR's interpretation of the concept of degradation revolves around the existence of certain points of reference that the Court deems indicative of an individual having suffered degradation: feelings of fear, anguish and inferiority capable of causing humiliation, debasement, breaking of physical or moral resistance, being driven to act against one's will or conscience, and suffering

contempt or lack of respect for one's personality. In the Court's reasoning as to whether an individual has been humiliated or debased, etc, there is no elaboration and no account is given of what the terms mean conceptually. Legal human rights literature pertaining to the characteristics of degrading treatment, as aforementioned, tends not to provide greater insight. For example, Harris et al. simply state that degrading 'has its ordinary dictionary meaning. Degrading treatment, therefore, is treatment that humiliates or debases.'<sup>429</sup> In Cooper's *Cruelty – An Analysis of Article 3*, under a sub-paragraph on 'Humiliation', no comment is made concerning the meaning of the concept of humiliation; nor in Chapter 2, 'Proving Violations of Article 3', in which a sub-paragraph entitled 'Whether the object is to humiliate and debase' makes no reference to the scope of either humiliation or debasement.<sup>430</sup>

The jurisprudence provides a framework of reference points, but within this there is space to further substantiate the meaning of degrading. If conceptual substance is not visible to a greater degree, the scope of the prohibition of degrading treatment will remain hazy. This chapter will look closely at the meaning of degradation by examining its constitutive concepts found in the case-law. It will propose particular substantive readings of these concepts in light of the human dignity-centered purpose of the prohibition. These readings will also aim to provide an explanation of principles that have developed alongside the Court's points of reference; notably, that a person can be humiliated in her own eyes only.

The territory of the concept of degradation, and the related concepts used by the Court to judge the existence of degradation, is one of human emotion and social interaction that exceeds legal academic disciplinary boundaries. A different exercise would have been to adopt a comparative approach, to consider what courts in national jurisdictions have suggested about the meaning of degrading. For the reasons stated in Chapter One, however, conceptual analysis of the terms themselves has been preferred. Literature in the spheres of politics, philosophy, psychology, history and cognitive and social analysis (which itself includes insights from various domains, from psychology to the realm of

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<sup>429</sup> Harris et al. (1995) at 80.

<sup>430</sup> Cooper (2003) at 22, para. 1-33; 30, para. 2-07.

fiction<sup>431</sup>) will be called upon to enrich the elaborated understanding of the term degrading that will be put forward in this chapter. A particular dimension of the concept of humiliation will be argued to be present within the prohibition of degrading treatment; humiliation will be described as erosion of one's self-respect as a result of profound powerlessness to live up to standards befitting of a human person and exclusion from the human community. The breaking of physical or moral resistance will be read as the destruction of a person's ability to oppose such exclusion. Being driven to act against one's will or conscience will be tied to a particular dimension of the concept of autonomy, and personality in the context of degradation will be read as a reference to human status.

Two points must be borne in mind: Firstly, that the aim is to present a valuable substantive understanding of degradation that can better explain the scope of application of the right; it is to ask what more can be said, on the basis of the Court's degrading treatment judgments, about the meaning of degradation. Questions will inevitably remain about *why* the particular wrongs that are detailed constitute degradation and a violation of human dignity. The objective is to ask *what* is the substance of degradation, rather than *why* degradation is construed as it is. The reason for this is that only the 'what' question can be answered on the basis of the case-law. As discussed in the previous chapter, a response to the question of the meaning of human dignity that goes further than the dimension of its violation cannot be derived from the ECtHR's degrading treatment case-law. Secondly, it must be borne in mind that the conceptual understandings that will be elucidated in this chapter are not isolated understandings – they are arrived at from the perspective of Article 3, they will be viewed alongside the meanings of treatment to be illuminated in Chapter Six, and degrading and treatment taken together must be linked to the responsibility of the state.

### Feelings of fear, anguish and inferiority

The Court introduces the core concepts contained within degradation by reference to *feelings of fear, anguish and inferiority capable of leading to humiliation and*

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<sup>431</sup> E.g. Klein, Donald C. (1991), 'The Humiliation Dynamic: An Overview', *The Journal of Primary Prevention*, 12 (2), 93-121, at 94.

debasement. It is perhaps significant to note that it does not appear necessary for *all* of these feelings to be present. Whereas, for example, the Court in *Ireland* uses the phrase ‘fear, anguish *and* inferiority’, in the case of *Pretty v. UK*, the Court’s exigencies change to ‘fear, anguish *or* inferiority’.<sup>432</sup> The reference to ‘capable of’ is significant. A useful way to understand this is as a reference to the distinction between feelings of fear, anguish and inferiority that may be associated with treatment that is capable of engaging – i.e. of sufficient gravity to engage – Article 3, and feelings of fear, anguish and inferiority that are unpleasant but not capable of engaging Article 3, i.e. do not lead to, humiliation and debasement, etc.<sup>433</sup> This can be seen as a reference to the severity threshold that must be crossed for something to pass from the domain of the unpleasant to the domain of the degrading (to be discussed further below). There is also, simply, recognition here that degradation does induce feelings of fear, feelings of anguish and feelings of inferiority, which points towards the emotional aspects of degradation internal to the victim. The reasons for feeling fear, anguish and inferiority specifically, as opposed to say, agony or worry or embarrassment, will become clearer as we delve deeper into the meaning of degradation.

## Humiliation and debasement

In terms of what the Court sees as the components of degradation, the first reference point to which the Court refers is humiliation and/or debasement.<sup>434</sup> Humiliation and debasement are therefore presented as being closely related; as a unit. Dictionary meanings as an indication of etymology and of the semantic meanings accorded to the terms humiliation and debasement are a helpful starting point.

Debase derives from the proposition ‘de’, meaning from, down from, off, etc, and ‘base’, meaning the lowest point, the most important element, or a fundamental starting point. To debase is defined in the *Oxford English Dictionary* as to lower in position, rank or

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<sup>432</sup> *Ireland v. UK*, para. 167; *Pretty v. UK*, para. 52 (emphasis added).

<sup>433</sup> See, e.g., *Guzzardi v. Italy*, judgment of 6 Nov 1980, Series A, no. 39, para. 107. For further discussion see sub-section below on judging the existence of degradation.

<sup>434</sup> In *Ireland v. UK*, para. 167, the ‘and’ conjunction is used, whereas in *Campbell and Cosans v. UK*, ‘or’ is used; see para. 28.

dignity; to lower in estimation, to decry; to lower in quality, value or character, to make base, to degrade. Debasement is the action of debasing, the state of being debased, lowering or degradation.<sup>435</sup> A direct link between degradation and debasement is present (in another dictionary, we find debasement defined simply as degradation).<sup>436</sup> The common point amongst these varying senses of the term is the centrality of the idea of ‘lowering’. This remains a constant feature whilst the object of lowering differs slightly – rank/dignity, estimation, value/character.

To humiliate is defined in the same *Oxford* dictionary as to make low or humble, or to lower or depress the dignity or self-respect of. And humiliation as the action of humiliating or the condition of being humiliated.<sup>437</sup> The relevance, or otherwise, of humbling as a relevant semantic meaning should become clearer as this chapter progresses, although even at this stage it is clear that if the notion of humbling is relevant it is not in the sense of a positive personal quality that it may have in common usage; it is unnecessary to point out that degradation in Article 3 clearly concerns a negative experience. A link is made to the concept of self-respect (itself demanding enquiry into its meaning), as well as to dignity, whilst the notion of ‘lowering’ remains central. This is shown to be key in the etymology of humiliate, which lies in the Latin ‘humus’, meaning earth. Evelin Gerda Lindner highlights the centrality of ‘lowering’ with reference to the idea of ‘orientational metaphors’: ‘Spatially, it entails a downward orientation, literally a ‘de-gradation’; she continues: ‘To humiliate is [...] to strike *down*, put *down* or take *down*.’<sup>438</sup> The most fundamental common point between debasement and humiliation is the idea of ‘lowering’.

We therefore have an initial indication of the parameters within which we will likely find the relevant legal meaning of humiliation and debasement within Article 3. Crucially, everything that the jurisprudence tells us about the understanding of these terms must be

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<sup>435</sup> *The Compact Edition of the Oxford English Dictionary* (Oxford: Clarendon Press).

<sup>436</sup> *The Chambers English Dictionary* (Cambridge: Chambers). French language dictionary meanings also point to both degradation (‘avilissement’ and ‘dégradation’) and the idea of lowering (‘ravalier’); *Le Nouveau Petit Robert* (Paris: Dictionnaires le Robert).

<sup>437</sup> *The Compact Edition of the Oxford English Dictionary*. *Le Nouveau Petit Robert* also includes reference to humbling, as well as the ideas of lowering and dignity (‘abaisser d’une manière outrageante ou avilissante, atteindre dans sa fierté, sa dignité’).

<sup>438</sup> Lindner, Evelin Gerda (2001), ‘Humiliation and the Human Condition: Mapping a Minefield’, *Human Rights Review*, 2 (2), 46-63, at 51.

added to the equation. Several important points are indeed evident in case-law as outlined in Chapter Two: An intention to humiliate or debase is not necessary for a finding of degrading treatment; the person/institution responsible for the alleged degradation need not have intended to humiliate or debase the individual. Intention remains significant and it should be assessed whether the object of the treatment was indeed to humiliate and/or debase<sup>439</sup>, and if so, this would be an important factor in the Court's consideration. In several cases, nevertheless, the ECtHR has explicitly accepted that the humiliator in question did not intend to humiliate, debase or cause suffering to the applicant, but stressed that a finding of degrading treatment was possible nevertheless.<sup>440</sup> Interestingly, the ECtHR has even come to a finding of degrading treatment in a case concerning detention where the applicant acknowledged, not only that the authorities did not intend to cause him suffering, but that they had made considerable efforts to help him.<sup>441</sup>

We can recall that the European Court has also stipulated that it is sufficient that an individual is humiliated in his/her own eyes, even if not in the eyes of others.<sup>442</sup> The *Tyrer* case also tells us that it may be relevant to the judgment as to whether degrading treatment has occurred that the treatment was carried out in public, but that this is not decisive.<sup>443</sup> This was reiterated in *Raninen v. Finland*:

*[...] the public nature of the punishment or treatment may be a relevant factor. At the same time, it should be recalled, the absence of publicity will not necessarily prevent a given treatment from falling into that category: it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others [...]*<sup>444</sup>

The precise scope of these principles (in particular the latter) is not immediately clear from the case-law. Some brief consideration of their significance has taken place in the literature, for example by Evans and Morgan, who conclude that:

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<sup>439</sup> *Raninen v. Finland*, para. 55.

<sup>440</sup> See, e.g., *T. v. UK*, para. 69; *Price v. UK*, para. 30; *Mayzit v. Russia*, para. 42.

<sup>441</sup> *Farbtuhs v. Latvia*, para. 58.

<sup>442</sup> *Tyrer v. UK*, para. 32.

<sup>443</sup> *Tyrer v. UK*, para. 32.

<sup>444</sup> *Raninen v. Finland*, para. 55; *Berktaş v. Turkey*, no. 22493/93, 01 March 2001, para. 175.

*[...] what is taken to be degrading treatment depends not only on whether a particular act was in fact degrading, either in the eyes of the applicant or in the eyes of others, but often turns on whether a particular practice is deemed to be degrading, irrespective of the particular circumstances [...]*<sup>445</sup>

It is not clear from this what the meaning of ‘in fact’ might be, or what weight is given by the Court to the perception of treatment as humiliating, and ultimately degrading, on the part of the applicant, nor how these elements combine to direct the Court’s conclusion. The principles created by the Court will be unravelled and will be central to arriving at a more developed understanding of humiliation.

In relation to humiliation, one finds a not extensive but nevertheless significant literature. The same cannot be said of debasement. Based on the parameters indicated by dictionary meaning and etymology of the term debasement, as well as the common coupling of the two terms in Court judgments, however, both debasement and humiliation appear to invoke the same core notion of ‘lowering’. It is reasonable to accept debasement as a concept whose presence essentially reinforces that of humiliation. Based on the semantic meanings outlined and the lack of attention in case-law, it is suggested that what is added by the presence of the term debasement is essentially a strong link to the concept of degradation, perhaps more apparent in the language of debasement than in the language of humiliation, which, as we will see, has a rather prominent common usage that can be distinguished from its Article 3 sense; it can be seen as a clarifying and reinforcing presence. The following sections will consider the ECtHR’s understanding of humiliation in light of relevant literature.

The relevant dimension of the concept of humiliation

Humiliation is a concept that is more familiar in common usage than debasement, which therefore makes it more likely that humiliation would be assumed to have an Article 3 meaning that accords with the domains to which it is applied in familiar everyday experience. The meaning may well accord, but not necessarily so (in line with the understanding of interpretation as pinpointing a legal meaning amongst the available range of semantic meanings). The legal meaning requires clarification as in the context

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<sup>445</sup> Evans and Morgan (1998) at 91.

of degradation within Article 3 it can be said to take on a familiar but perhaps less natural meaning than it has in common usage.

William Ian Miller, in his book *Humiliation*<sup>446</sup>, starts from an understanding of humiliation as something that is a normal part of everyday social interaction. That is not to say that it is a pleasant experience. The undesirability and indeed fear of feeling humiliation pervades the study; this is particularly evident in Miller's description of the physical impact of feeling humiliation – felt in the 'deepest center' of the body<sup>447</sup> – and of the painfulness of recounting memories of moments of humiliation.<sup>448</sup> Nevertheless, humiliation is viewed by Miller as 'commonplace'<sup>449</sup> ('Humiliation inheres in every nook and cranny of the normal').<sup>450</sup> One example of commonplace humiliation suggested by Miller is found in Robert Burns' poem *To A Louse*.<sup>451</sup> It resides in the combination of a portrayal of elevated social status within a mixed social setting and the obliviousness of the 'fine' lady in the poem to the crawling louse upon her.<sup>452</sup> Another example that can be placed in this category is that given by Anthony Quinton, of a woman who accepts congratulations by her dinner guests on the meal only for her husband to later reveal that she had bought the food ready-made.<sup>453</sup> Humiliation is understood as the

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<sup>446</sup> Miller, William Ian (1993), *Humiliation – And Other Essays on Honor, Social Discomfort and Violence* (Ithaca: Cornell University Press).

<sup>447</sup> Miller (1993) at 160-61.

<sup>448</sup> Miller (1993) at 152. This is in the context of distinguishing humiliation from embarrassment; a point to which we will return.

<sup>449</sup> Miller (1993) at 165.

<sup>450</sup> Miller (1993) at 10.

<sup>451</sup> Miller (1993) at 136-37.

<sup>452</sup> Burns, Robert, 'To A Louse', in Carol McGuirk (1993) (ed.), *Robert Burns: Selected Poems* (London: Penguin), 85-86: 'Ha! whare ye gaun, ye crowlan ferlie!/Your impudence protects you sairly/I canna say but ye strut rarely/Owre *gawze* and *lace*/Tho' faith, I fear ye dine but sparely/On sic a place.

Ye ugly, creepan, blastet wonner/Detested, shunn'd, by saunt an' sinner/How daur ye set your fit upon her/Sae fine a *Lady*!/Gae somewhere else and seek your dinner/On some poor body.

[...]

I wad na been surpriz'd to spy/You on an auld wife's *flainen toy*/Or aiblins some bit duddie boy/On's *wylecoat*/But Miss's fine Lunardi, fye!/How daur ye do't?

*O Jenny* dinna toss your head/An' set your beauties a' abroad!/Ye little ken what cursed speed/The blastie's makin/Thae *winks* and *finger-ends*, I dread/Are notice takin!

O wad some Pow'r the giftie gie us/*To see oursels as others see us!*/It wad frae monie a blunder free us/An' foolish notion/What airs in dress an' gait wad lea'e us/An' ev'n Devotion!

<sup>453</sup> Quinton, Anthony (1997), 'Humiliation', *Social Research*, 64 (1), 77-89, at 80.

‘unmasking of pretension’ and the feeling one has when pretensions are discovered; when one is ‘caught inappropriately crossing group boundaries into territory one has no business being in.’<sup>454</sup>

Is this the humiliation that lies within the domain of the prohibition of degrading treatment? The examples Miller gives appear overly ‘trivial’ to be relevant to Article 3.<sup>455</sup> The answer would seem to lie in a contrasting class of humiliation: what Silver et al. term ‘grave’ humiliation and what Miller terms ‘humiliation with a big *H*’.<sup>456</sup> This Miller describes as a ‘perversion’ of ‘normal’ humiliation: an act of *Humiliation* that, instead of bringing one down from an unjustified social status, brings one down from a wholly justified status, i.e. one’s status as a member of humanity.<sup>457</sup> Miller describes the locus of *Humiliation* as the torture chamber and the concentration camp and the same allusion is made by Silver et al.<sup>458</sup> The idea is that there are greater and lesser humiliations<sup>459</sup>; humiliation with a big *H* is intended to describe those greater humiliations. This element is marginal in Miller’s study, which is intended to focus on ‘[d]ay-to-day humiliation [which] operates by reaffirming and confirming social norms and is the very stuff of normal social interaction.’<sup>460</sup> Despite very little discussion of this dimension of humiliation by Miller, the distinction can be a useful starting point.

Although our immediate association here would perhaps be with the prohibition of torture within Article 3 rather than with degrading treatment (given Miller’s association with the torture chamber, concentration camp, sadism and brutal cruelty<sup>461</sup>), the relevance to degrading treatment is nevertheless directly suggested in the reference to the status of being a human person, given that we have established that attacks on the

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<sup>454</sup> Miller (1993) at 144, 10, 145.

<sup>455</sup> ‘Trivial’ is the term used by Silver et al. to refer to humiliation ‘provoked by the trivia of everyday life’; Silver, Maury, Conte, Rosaria, Miceli, Maria and Poggi, Isabella (1986), ‘Humiliation: Feeling, Social Control and Construction of Identity’, *Journal for the Theory of Social Behaviour*, 16 (3), 269-83, at 269.

<sup>456</sup> Silver et al. (1986) at 269; Miller (1993) at 165.

<sup>457</sup> Miller (1993) at 165-67.

<sup>458</sup> Miller (1993) at 165; Silver et al (1986) at 269.

<sup>459</sup> Miller (1993) at 151.

<sup>460</sup> Miller (1993) at 167.

<sup>461</sup> Miller (1993) at 165.

fundamental status of the human person are the objects of concern of the right not to be subjected to degrading treatment. Miller's category of humiliation with a big *H* can be seen as firmly in line with the understanding of how dignity is violated within Article 3 as expressed in the concept of degradation. The sense of humiliation relevant to the understanding of degradation will be discussed further below. What is significant presently is that a differentiation between 'normal' humiliation and 'perverse' humiliation helpfully allows us to recognise that humiliation may be understood as entirely normal in one sense, and in this normal sense it does not suggest the existence of degradation in the Article 3 context. Rather, we can consider degradation here, if it involves humiliation, as involving humiliation that revolves around a lack of recognition of a person's fundamental human status. Or to use the terminology of interpretation, we can clarify that the legal meaning of humiliation as used in the jurisprudential characterisation of degrading treatment is best understood as humiliation in its perverse manifestation, as Miller describes it; or as that class of humiliation that impacts upon the core of human being.

#### The feeling and the state of humiliation

A further distinction, which will be indispensable in understanding degradation, is between the *feeling* of humiliation and the *state* of humiliation. As stated above, a principle that has emerged from the case-law in relation to humiliation and debasement is that a person can be humiliated in the absence of an intention to humiliate on the part of a particular person or institution. Why is this so? A possible response is that the Court rejects the claim of the alleged perpetrator that there was no intention to cause humiliation on the basis that the perpetrator *must have known* that his actions would likely do so. In other words, the claim of non-intentionality is rejected since the Court believes that humiliation was reasonably foreseeable by the perpetrator. The notion of reasonable foreseeability, however, does not feature in the Court's assessment; rather, the non-requisite nature of intention is dependent upon the conceptual substance of humiliation itself. It can be illuminated by drawing upon a distinction evident in the literature between *feeling* humiliated and being in a *state* of humiliation.

A person can *feel* humiliated, i.e. experience the *emotion* of humiliation, and a person can be placed in a *state* of humiliation, i.e. be subjected to a humiliating *act*. Miller uses

the terms ‘the feeling’ and ‘the state’.<sup>462</sup> Waldron, in a review of Miller’s book, uses the language of ‘emotional experience’ and ‘social situation’.<sup>463</sup> Similarly, Silver et al. refer to the ‘emotion’ and the ‘social fact’ of humiliation.<sup>464</sup> Margalit relies upon one notion – that of *having sound reasons for feeling humiliated*<sup>465</sup> – which can be seen to encompass both dimensions: recognition of the emotional dimension integrated with the idea of the social fact of humiliation, or describing the latter differently, of being subjected to circumstances that could reasonably (soundly) be considered humiliating (the soundness of reasons for feeling humiliated is linked to the perspectives that are relevant to the Court’s judgment as to whether humiliation and debasement has ‘in fact’ occurred, to be discussed below).

The distinction between the *feeling* and the *state* of humiliation can inform our understanding of the non-necessity of an intention to humiliate. The Convention protection system, based on individual complaints, generally presumes an alleged victim who has *felt* himself to be humiliated and/or debased and on this basis alleges a violation of Article 3; therefore, the Court can be understood as stipulating that an intention to humiliate is not necessary for the applicant to have *felt* humiliated. In addition, however, the Court is stipulating that an intention to humiliate is not necessary to create a *social situation* or *state* of humiliation. Recognising the independence of a *state* of humiliation from the *emotion* of humiliation<sup>466</sup> clarifies that ‘intention to humiliate’ is an intention to place a person in a *state* of humiliation, rather than as an intention to make the person *feel* humiliation as such. This is simply due to the nature of the distinction between *state* and *feeling* itself: a person can *be* humiliated without *feeling* humiliated.<sup>467</sup> Judge Fitzmaurice can be read as suggesting such an approach in his dissenting opinion in *Ireland v. UK*, in his statement that degradation lies in the character of the treatment; not in the results.<sup>468</sup> This is clear in a statement by Miller relating to humiliation with a big

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<sup>462</sup> Miller (1993) at 146.

<sup>463</sup> Waldron, Jeremy (1995), ‘On Humiliation’, *Michigan Law Review*, 93 (6), 1787-1804, at 1794, footnote 14.

<sup>464</sup> Silver et al. (1986) at 273.

<sup>465</sup> Margalit (1996) at 9.

<sup>466</sup> Note that Miller specifies that the feeling of humiliation seems to presuppose a personal belief that one is in a state of humiliation; Miller (1993) at 151.

<sup>467</sup> Miller (1993) at 146.

<sup>468</sup> *Ireland v. UK*, para. 28.

*H*: ‘Does the torturer suppose that he is making the victim actually feel humiliation? This he cannot know. He can only know that the victim is humiliated as a social fact [...].’<sup>469</sup> Conversely, a person can *feel* humiliated but, as Miller argues, ‘the subject’s judgment might not be confirmed by real observers.’<sup>470</sup> In this sense, the *feeling* and the *state* are independent.

Incidentally, this sheds light upon a common sentiment about humiliation, debasement and degradation generally – that a situation that is humiliating, etc, for one person, may not be humiliating for another. We can understand this upon recognition that a situation can *be* humiliating as a *social fact* independently of whether the victim actually experiences or does not experience feelings of humiliation. The significance of the *state* of humiliation becomes clear. Furthermore, if we accept that the perpetrator, or source of degradation, cannot know whether a person will or will not actually *feel the emotion* of humiliation (although, as noted, in the ECHR context, the individual experience can generally be presumed to exist)<sup>471</sup>, the significance of the *state* of humiliation is reinforced.

This allows for the possibility that a person can be humiliated as a social fact by a perpetrator that intended to create just that situation (for example, as in *Iwanczuk v. Poland* concerning a strip search)<sup>472</sup>, as well as the possibility that a person can be humiliated as a social fact even where the perpetrator did not intend to place the person in a state of humiliation (for example, *Price v. UK* concerning the police detention of a severely disabled woman)<sup>473</sup>; or even where a perpetrator tried to avoid the state of humiliation for the person concerned (for example, *Farbtuhs v. Latvia* concerning detention in prison of an aged person of ill-health).<sup>474</sup>

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<sup>469</sup> Miller (1993) at 166.

<sup>470</sup> Miller (1993) at 151. See also Waldron (1995) at 1800; and Silver et al. (1986) at 273.

<sup>471</sup> The emotion/state distinction raises the interesting possibility of an individual claiming that s/he had been degraded by particular treatment even if s/he did not experience an emotion of humiliation.

<sup>472</sup> *Iwanczuk v. Poland*, no. 25196/94, 15 November 2001, para. 59.

<sup>473</sup> *Price v. UK*, para. 30.

<sup>474</sup> *Farbtuhs v. Latvia*, para. 58, 61.

## The public dimension

This distinction between the feeling and the state of humiliation is also helpful background in the context of the public, or social, dimension; i.e. in relation to the other significant case-law principle in this area – humiliation in one’s own eyes, even if not in the eyes of others. This *distinction* between feeling and state in fact also highlights a *connection* between the individual and her social environment. Social perceptions are central to the existence of a state of humiliation. If we recall the Court’s stipulation that the public nature of treatment is relevant to the Court’s view as to whether humiliation has occurred, this implicitly suggests an understanding on the part of the ECtHR of a public dimension as being significant to the feeling and, importantly, the state of humiliation. At the same time, the Court also accepts that although a public dimension is significant, it is not indispensable.

Our labelling and understanding of acts of humiliation and of feeling humiliated depends upon what Silver et al. call the ‘social base’. What we consider to be humiliating (in both senses) is determined by the standards of behaviour that society accepts as appropriate for people and on what ‘counts as an inability to live up to the standards’.<sup>475</sup> Silver et al. argue that humiliation does not require a public audience but highlight why they believe that a public is ‘typically involved’:

*Humiliation may not necessarily be public but the people who put the stocks in the main square of the village were acting upon an important insight [...] The experience of humiliation is so intensely unpleasant that on our own we might rewrite our story, reinterpret it, or, perhaps, just forget it. Of course, we still would be humiliated [...] but it would be easier not to feel it. Knowing that a public knows your humiliation makes the story harder to reinterpret or forget.*<sup>476</sup>

Donald C. Klein uses the term ‘humiliation dynamic’ to describe the relational nature of the concept of humiliation that involves a social interplay. The prototype of the dynamic involves a humiliator, a victim and a witness and is labelled by Klein as the ‘triangle of humiliation’.<sup>477</sup>

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<sup>475</sup> Silver et al. (1986) at 275-77.

<sup>476</sup> Silver et al. (1986) at 278, 279.

<sup>477</sup> Klein (1991) at 101.

This illuminates the reason for the significant but non-requisite nature of a public dimension as stated in *Tyrer* and noted in Chapter Two:

*Publicity may be a relevant factor in assessing whether a punishment is “degrading” within the meaning of Article 3 [...] but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.*<sup>478</sup>

A case that highlights the Court’s view that ‘publicity may be a relevant factor’ is *Yankov v. Bulgaria*. Concerning forced shaving of a prisoner’s hair, this case involves Klein’s prototypical triangle – the prison guards, Yankov himself, and onlookers with whom he came into contact:

*[...] a prisoner whose hair has been shaved off carries a mark of the treatment he has undergone. The mark is immediately visible to others, including prison staff, co-detainees and visitors or the public, if the prisoner is released or brought into a public place soon thereafter. The person concerned is very likely to feel hurt in his dignity by the fact that he carries a visible physical mark.*<sup>479</sup>

This case highlights the relevance of treatment having a public dimension; in this case, treatment that was not carried out in public, but the imprint of which was publically visible.

The instruction in *Tyrer* that ‘it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others’ has been confirmed in cases such as *Raninen v. Finland*<sup>480</sup>, *Smith and Grady v. UK*<sup>481</sup> and *D.G. v. Ireland*.<sup>482</sup> The statement in *Tyrer* and these post-*Tyrer* cases was made in the context of publicity. We can therefore infer that the relevant ‘others’ are not those inflicting the treatment (this is consistent with the non-necessity of an intention to humiliate), but potential bystanders; the public as the third component of Klein’s ‘triangle of humiliation’. The principle that ‘it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others’ can be accurately paraphrased as follows: something can fall into the category of degrading

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<sup>478</sup> *Tyrer v. UK*, para. 32.

<sup>479</sup> *Yankov v. Bulgaria*, para. 113.

<sup>480</sup> *Raninen v. Finland*, para. 55.

<sup>481</sup> *Smith and Grady v. UK*, para. 120.

<sup>482</sup> *D.G. v. Ireland*, no. 39474/98, ECHR 2002-III, para. 95.

treatment, in the judgment of the Court, even if the victim felt humiliated and was humiliated by treatment carried out or experienced without the presence of onlookers.

#### Judging the existence of humiliation

The principle that it is sufficient that one is humiliated in one's own eyes even if not in the eyes of others might be subject to another interpretation than that offered above. It might alternatively be interpreted as suggesting that a person can *be* humiliated *as a social fact* only in his own eyes. This could be inferred from a phrase such as that of Evans and Morgan, that treatment can be '*in fact*' degrading '*either* in the eyes of the applicant *or* in the eyes of others.'<sup>483</sup> Such an interpretation would move us away from the context of the non-necessity of a public audience towards a statement about the Court's judging of the existence of humiliation and debasement. That is, it would say something about the relevant considerations in the Court's acceptance or rejection of an applicant's claim that she was humiliated and debased, and about how this in turn impacts upon the acceptance or rejection of treatment as degrading. One post-*Tyrer* case that invokes the principle in a somewhat different formulation, bringing to the fore this alternative interpretation, is *Campbell and Cosans v. UK*:

*[...] it follows from [Tyrer] that "treatment" itself will not be "degrading" unless the person concerned has undergone – either in the eyes of others or in his own eyes [...] – humiliation or debasement attaining a minimum level of severity.*<sup>484</sup>

If to 'undergo' humiliation is understood as feeling, but also being recognised to have *been* humiliated, this statement could be seen to suggest the possibility of recognising a state of humiliation on the basis of it being perceived to exist *only* in the eyes of others or *only* in one's own eyes.

To suggest that humiliation can be accepted as existing on the basis that it is perceived to exist *only* in the eyes of others would be to say that a person can be humiliated (perceived as a social fact in the eyes of others) without personally feeling humiliated. This is the point that we have come across already: a person must be seen to have sound

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<sup>483</sup> Evans and Morgan (1998) at 91 (emphasis added).

<sup>484</sup> *Campbell and Cosans v. UK*, para. 28 (emphasis added).

reasons for feeling humiliated, to use Margalit's term.<sup>485</sup> However, to suggest that humiliation can be recognised on the basis that it is perceived to exist *only* in one's own eyes, would introduce a new dimension to our understanding of this principle: this would be to say that a person could *be* humiliated *wholly* as a result of the fact that she perceives herself to have been humiliated, which in turn might suggest the possibility of the applicant's subjective feelings being the last word on whether she should be recognised by the Court as having been humiliated. Given that the existence of humiliation and debasement is a significant part of the Court's judgment as to whether the applicant has been subjected to treatment that is degrading, it might be presumed that the judgment as to whether certain treatment is degrading also relies heavily on feelings of humiliation simply proclaimed by the applicant. This is not the case. The principle that it is sufficient that one is humiliated in one's own eyes even if not in the eyes of others should not be understood to imply that subjective feelings and perceptions of the applicant are of decisive importance.

Subjective feelings of humiliation do appear to be given a prominent place in case-law references. In *Yankov v. Bulgaria*, in which the applicant argued that he had *felt* 'painfully' humiliated and a finding of degrading treatment was reached, the significance of the personal emotion of humiliation is prominent:

*The Court thus considers that even if it was not intended to humiliate, the removal of the applicant's hair without specific justification contained in itself an arbitrary punitive element and was therefore likely to appear in his eyes to be aimed at debasing and/or subduing him.*<sup>486</sup>

This statement appears, not only to recognise the emotional dimension of humiliation, but to accord it substantial weight. This should not be taken to suggest, however, that the Court's conclusion is primarily directed by the subjective emotional experience of the

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<sup>485</sup> To require that a person must have sound reasons for feeling humiliated is a subtly different proposition from suggesting that a person's *emotional experience* must be reasonable in order to recognise that humiliation has occurred. To identify sound reasons for feeling humiliated is to recognise a state of humiliation rather than a reasonable feeling of humiliation; a person can have sound reasons for feeling humiliated whether he does in fact feel humiliated or not. This is because, as we have seen, the emotion/state distinction detaches the question of the existence of a state of humiliation from the emotions of the individual; it entails that a person does not even have to have actually felt humiliated to be recognised as having been humiliated.

<sup>486</sup> Para. 101, 117 (emphasis added).

victim. Similar points have indeed been recognised in human rights literature.<sup>487</sup> Recognising and highlighting the emotion/state distinction contributes an *explanation* of this approach.

Even in this statement from *Yankov*, in which references to feelings of humiliation are indeed implicit, so too are references to *being* humiliated underlying. In *Kehayov v. Bulgaria* the impression is clearly given that the Court has evaluated the existence of a *state* of humiliation:

*While the Court does not accept the applicant's contention that the detention conditions were intended to degrade or humiliate him, there is little doubt that certain aspects of the stringent regime could be seen as humiliating.*<sup>488</sup>

As with judging the existence of degrading treatment more generally (see below), the Court's own evaluation of whether the applicant has been placed in a state of humiliation is more significant than the emotional experience claimed by the applicant. To use Margalit's terminology: the Court must ask whether the applicant had sound reasons for feeling humiliated/degraded. In this sense, the act of humiliation takes precedence over the feeling. This is of course a logical conclusion – it is the role of the Court to make its own assessment of whether an applicant has *been* humiliated.

The reference to the need for humiliation or debasement to attain a minimum level of severity, also in the above-cited statement in *Campbell and Cosans*, is significant in this respect – in the sense that it indicates that a person might feel humiliated, but not all humiliation will be deemed by the Court to be severe enough to entail degradation (this is linked to the above argument that 'commonplace' humiliation is not relevant to Article 3 in line with the relevant understanding of human dignity). The subjective feeling of humiliation is not sufficient in itself to conclude that degradation has therefore occurred. This can be seen in the following statement by the Court:

*[...] while the legal rules at issue probably present aspects which the applicants may feel to be humiliating, they do not constitute degrading treatment coming within the ambit of Article 3 [...]*<sup>489</sup>

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<sup>487</sup> E.g. Duffy (1983) at 319: 'It thus seems that in deciding whether treatment degrades an applicant in his eyes, an entirely subjective test is not to be used.'

<sup>488</sup> *Kehayov v. Bulgaria*, no. 41035/98, 18 January 2005, para. 70 (emphasis added); see also *Iovchev v. Bulgaria*, no. 41211/98, 02 February 2006, para. 135.

A situation might have been humiliating but not severe enough to violate Article 3. Also, it is standard for the Court to acknowledge, in cases concerning legal punishment, that some humiliation is normal and inevitable in the case of lawful sanctions:

*The Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.*<sup>490</sup>

Humiliation as erosion of self-respect

Why is humiliation a *negative* act and experience? Why does Margalit describe humiliation as mental cruelty?<sup>491</sup> Margalit's own answer is a convincing one: humiliation stems from an erosion of self-respect. That may seem to be a somewhat trivial standard for one that is capable of leading to a violation of Article 3. Would an infinite host of attitudes, behaviours and events not be capable of damaging an individual's self-respect, if indeed self-respect can be seen as a universal attitude? In order to clarify such questions, which will contribute to our comprehension of the term degrading, the relevant understanding of self-respect itself must first be clarified.

As expressed by Margalit: '[...] self-respect is the honor persons bestow upon themselves by virtue of their own humanity.'<sup>492</sup> The reason that injury to self-respect has grave consequences – consequences capable of engaging Article 3 – is that self-respect is intimately tied to one's fundamental status as a human person. Self-respect must be distinguished from self-esteem, also following Margalit. Self-esteem concerns valuing oneself on the basis of one's achievements in life and one's ability to achieve. Self-respect concerns valuing one's membership of humanity. Respect implies equality, whilst esteem can justify ranking on the basis of achievements.<sup>493</sup> As Gabriele Taylor argues, self-respect and self-esteem are not interchangeable concepts.<sup>494</sup> Given that self-

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<sup>489</sup> *Marckx v. Belgium*, para. 66.

<sup>490</sup> *Yankov v. Bulgaria*, para. 107.

<sup>491</sup> Margalit (1996) at 85 (Margalit clarifies that humiliation can involve also physical cruelty).

<sup>492</sup> Margalit (1996) at 24.

<sup>493</sup> Margalit (1996) at 44-48. Margalit makes a very brief incursion into the question of 'selfhood' in relation to the distinction between self-respect and self-esteem. For details, see 47.

<sup>494</sup> Taylor suggests that self-esteem entails holding a 'favourable' view of oneself. Taylor, however, describes her view of humiliation as more closely linked to self-esteem than self-respect, which is very

respect is taken to be the relevant notion within Article 3, this is important since it indicates that degradation is not concerned with injury to self-esteem.

Self-respect is not a uniquely internal, individual attitude. If this were the case, one might pose the question as to why, if self-respect is an attitude bestowed upon oneself by oneself, injury can be caused to self-respect by other people<sup>495</sup> (which is the equivalent of asking why humiliation can be induced by other persons or public interaction). The social dimension of humiliation is also significant in relation to self-respect. Klein, who recognises that feeling humiliated involves damage to one's 'identity and sense of self'<sup>496</sup>, which we can approximate to self-respect as we understand it, writes:

*Our personal sense of self, self-worth, self-importance, and self-ideal are all internalized deposits of thousands upon thousands of interactions with real and imagined others.*<sup>497</sup>

This suggests that self-respect – valuing one's worth as a human person – is an element of one's attitudes towards oneself that develop and are sustained in the social environment. As Isaiah Berlin (an author to whom we shall return below) writes:

*When I ask myself what I am, and answer: an Englishman, a Chinese, a merchant, a man of no importance [...] I find upon analysis that to possess these attributes entails being recognized as belonging to a particular group or class by other persons in my society [...] It is not only that my material life depends upon interaction with other men [...] but that some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of the social network in which I am [...] an element.*<sup>498</sup>

In Margalit's words: 'self-respect, although based on one's human worth in one's own eyes, implicitly assumes the need for other respectful human beings.'<sup>499</sup> Commenting on

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different to Margalit's approach (note that she does not say that self-respect is irrelevant to humiliation and her understanding of self-respect appears to be compatible with self-respect as tied to one's membership of humanity (see 161)). It is likely that the divergence lies in Taylor's understanding of humiliation: 'When feeling humiliated, a person realizes that her good opinion of herself is unfounded [...]' (174); this invokes associations with Miller's everyday humiliation as opposed to big *H* humiliation; See Taylor, Gabriele (1995), 'Shame, Integrity, and Self-Respect', in R. S. Dillon (ed.), *Dignity, Character and Self-Respect* (New York: Routledge), 157-78, at 158-61, 174.

<sup>495</sup> Or other institutions, as Margalit points out in this respect; see Margalit (1996) at 24.

<sup>496</sup> Klein (1991) at 97.

<sup>497</sup> Klein (1991) at 105.

<sup>498</sup> Berlin, Isaiah (1969), *Four Essays on Liberty* (Oxford: Oxford University Press) at 155.

<sup>499</sup> Margalit (1996) at 126.

this aspect of Margalit's *The Decent Society*, Axel Honneth recognises that self-respect: 'represents a phenomenon that [...] is tied to the presupposition of intersubjective communication [...].'<sup>500</sup> The social dimension is centrally significant.

Margalit's approach to humiliation and self-respect is wholly compatible with the understanding of how human dignity is violated via degrading treatment discussed in Chapter Four. Support for this view is also found in other scholarship; for example, Robin S. Dillon describes self-respect as involving 'perceiving and valuing oneself as a being of genuine worth'.<sup>501</sup> Approaches that characterise self-respect more broadly (as John Rawls does<sup>502</sup>), or differentiate between 'kinds' or 'senses' of self-respect (as Stephen L. Darwell and Thomas E. Hill do respectively<sup>503</sup>), nevertheless include, in some form, self-respect as recognition of one's worth purely because of one's status as a person. After tracing major philosophical contributions to the concept<sup>504</sup>, Dillon provides a useful overview of contemporary philosophical discussion in the area of self-respect.<sup>505</sup> He notes: 'Nearly all accounts agree [...] that the heart of self-respect is the sense of one's worth.'<sup>506</sup>

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<sup>500</sup> Honneth, Axel (1997), 'A Society Without Humiliation?', *European Journal of Philosophy*, 5 (3), 306-24, at 311. Honneth recognises this understanding as being linked to a history of scholarship on the 'linguistic character of the human self-relation'; for further details see 311.

<sup>501</sup> Dillon, Robin S. (1995), 'Introduction', in R. S. Dillon (ed.), *Dignity, Character and Self-Respect* (New York: Routledge), 1-49, at 18.

<sup>502</sup> Rawls' conception of self-respect/self-esteem – used interchangeably – can perhaps be understood as a loose combination of both self-respect and self-esteem in the senses we have identified, in that Rawls describes self-respect/self-esteem as having two aspects: a person's sense of his own worth (at 126), and a person's confidence in his ability to fulfil his worthy intentions (at 125); see Rawls, John (1971), *A Theory of Justice*, Chapter VII, section 67, reprinted as (1995), 'Self-Respect, Excellences, and Shame', in R. S. Dillon (ed.), *Dignity, Character and Self-Respect* (New York: Routledge), 125-32.

<sup>503</sup> Darwell, Stephen L. (1995), 'Two Kinds of Respect', in R. S. Dillon (ed.), *Dignity, Character and Self-Respect* (New York: Routledge), 181-97; Hill, Jr., Thomas E. (1991), *Autonomy and Self-Respect* (Cambridge: Cambridge University Press); see, e.g., 134, footnote 6, referring to various senses in which Hill uses the term.

<sup>504</sup> Including that of Kant, which he describes as particularly influential; Dillon (1995) at 7-18.

<sup>505</sup> See generally Dillon (1995). E.g., Dillon highlights distinctions in perspective, which lead to a range of accounts of the basis and forms, etc, of self-respect; including viewing self-respect as due on the basis of importance or as due on the basis of quality or goodness. Dillon notes that much can also be said about the characteristics of one's *attitude* of self-respect; those capacities that constitute and shape one's sense of self-respect; for an overview of such points see Dillon (1995) at 19-21.

<sup>506</sup> Dillon (1995) at 19.

Significantly, the language of self-respect is common. As Dillon suggests, the term may seem more focused on merit and development of one's character than on inherent worth.<sup>507</sup> If this is the case – and the everyday meaning he suggests is indeed familiar, as well as being familiar to a number of different philosophical understandings of self-respect, as has been noted – it is necessary to clarify that such a meaning does not translate to the domain of humiliation within Article 3.<sup>508</sup> It is suggested that the particular conception of self-respect captured in Margalit's approach is the most helpful in delineating the area of concern of Article 3, and is central to understanding humiliation in the context of degrading treatment.

Erosion of self-respect: powerlessness and exclusion

This section will address the practices via which injury to self-respect occurs. The question is: what behaviours or situations lead to humiliation? This will add further substance to the concept of humiliation. Two prominent, but closely related categories stand out in the literature; both in accord with the Court's understanding of human dignity in relation to degradation. The first category we can term powerlessness; the second exclusion. Significantly, we will also gain a better understanding of the breaking of physical or moral resistance, being driven to act against will or conscience, and the showing of contempt for one's personality to be discussed further below.

Silver et al. describe a core aspect of states of humiliation as powerlessness. In arriving at this conclusion, the authors draw upon the extreme example of 'excremental assault' – when one is placed in a situation in which physical contact with excrement is unavoidable. It is valuable to recount this example since, as we have seen, the ECtHR places great weight on sanitary conditions, which this example may help to explain. Silver et al. cite concentration camp survivor narratives, recounting forced contact with faeces. In contrast, by considering hypothetical examples, including that of a surgeon carrying out an intestinal operation, who they presume is disgusted by the faecal contact

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<sup>507</sup> Dillon (1995) at 25-26.

<sup>508</sup> One could make an argument that if self-respect, as linked to a sense of inherent value, is less common in everyday usage it is because this meaning would tend to come into focus primarily when humiliation with a big *H* occurs; the kind of treatment that would potentially engage Article 3 and not necessarily common in everyday use.

but inappropriately understood as humiliated by it, they argue that it is powerlessness to remove oneself from the situation that induces humiliation.<sup>509</sup> Disgust and revulsion, they argue, is significant in that:

*Faeces [...] are the sort of thing that everyone would avoid if they could. Since this is the case, and we know that everyone knows that is the case, faecal contact is a powerful symbol for a profound, basic, powerlessness, i.e. “[...] If they lack control even over that what area could they control?”*<sup>510</sup>

Central to this is that such contact *symbolises* powerlessness.<sup>511</sup>

It might be objected that powerlessness is surely a common feature across a wide spectrum of life situations. For example, there is a sense in which one could describe as powerless those deprived of liberty. On this basis one might question why a further demonstration of powerlessness in the form of, for example, unacceptable sanitary conditions, might lead to unacceptable humiliation when deprivation of liberty as such does not. The ECtHR indeed recognises that deprivation of liberty inevitably involves an ‘element of suffering or humiliation’ but would only consider the situation to involve degradation where some additional element pertains.<sup>512</sup> This is in line with Margalit’s discussion of punishment in which he maintains that imprisonment has no inherent connection to humiliation. Rather, imprisonment is accepted as an ‘unpleasant situatio[n] involving lack of privacy, constant supervision, and absolute lack of autonomy’, and as a situation which, although not inherently humiliating, has the potential to be so.<sup>513</sup> The notion of powerlessness in relation to humiliation is not at all assimilated in the literature with a lack of physical liberty. It is helpful to note the reference by Silver et al. to ‘profound’ powerlessness – they suggest that self-respect is eroded by powerlessness in respect of one’s fundamental ability to live up to standards, or conduct oneself, in a way that is compatible with one’s status as a human person.

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<sup>509</sup> Silver et al. (1986) at 270-72.

<sup>510</sup> Silver et al. (1986) at 272.

<sup>511</sup> On the importance of symbolism, see Kuch (forthcoming), arguing that humiliation, which is expressed through symbolism, in essence symbolises a lack of respect for, or recognition of, a person.

<sup>512</sup> See, e.g., *Yankov v. Bulgaria*, para 107. John Vorhaus reminds us also of the obvious point that Article 3 prohibits not punishment, but *inhuman and degrading* punishment, clearly implying that there is a distinction; (2003) at 67.

<sup>513</sup> Margalit (1996) at 268.

Silver et al. further link powerlessness to the notion of choice. Lack of *real choice* is seen as a manifestation of powerlessness and can be seen as a significant element of our understanding of what it is to be humiliated:

*Imagine a coprophage who not only enjoys but affirms the virtues of his diet – he chooses to be a coprophage. He does not feel humiliated, yet society would still say that he is humiliated. Why? Consider, is it easy for you to believe that the coprophage really chooses to be a coprophage, his claim notwithstanding? Aren't you tempted to "deep" explanations? Insofar as we believe these deep accounts we see him as humiliated – either by discovering that he really chooses not to indulge his diet but can't help it, or just that he is crazy and insanity is typically seen as precluding real choice.<sup>514</sup>*

Violation of personal boundaries – another factor potentially causing humiliation that is identified in the literature – can also be subsumed under the heading of powerlessness. Klein describes this as 'invasion of the Self'.<sup>515</sup> Such invasion may be physical and/or symbolic.<sup>516</sup> Margalit might simply call it invasion of one's private spaces. Why might this be humiliating? Since: 'Inability to protect one's private zones is a sign of absolute helplessness in defending one's basic interests.'<sup>517</sup> Severe loss of control over one's 'vital interests' is understood by Margalit to constitute a reason for feeling humiliated.<sup>518</sup> Such loss of control is seen as entailing a loss of 'autarchy'.<sup>519</sup> It is utter loss of control over one's fate and complete helplessness; it is 'fear of impotence in protecting vital interests' and fear of 'living a life unworthy of a human being.'<sup>520</sup>

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<sup>514</sup> Silver et al. (1986) at 273. Where a person does engage in something we would consider as humiliating through real choice, we view this not as humiliation, the authors assert, but as 'something quite different: as evil or alien'.

<sup>515</sup> Klein (1991) at 98.

<sup>516</sup> Klein associates this with an image of public humiliation; (1991) at 98; see also Margalit (1996) at 211.

<sup>517</sup> Margalit (1996) at 211.

<sup>518</sup> Margalit (1996) at 115-19.

<sup>519</sup> Margalit (1996) at 116. Margalit gives little detail on this point, but relates it to 'acting on the basis of reasons and not only on the basis of causes and motives.' He suggests that much humiliation demonstrates to the victim that they are subject to the will of their 'tormentor', and therefore humiliation aims at preventing the victim from acting on the basis of his own reasons. He proceeds to discuss Sartre's notion of 'humanness' to elucidate the link between lack of autarchy and rejection from the human commonwealth.

<sup>520</sup> Margalit (1996) at 116, 122.

Margalit's approach to loss of control in turn allows us to further develop a sense in which this is humiliating. Humiliation as loss of control, otherwise described as loss of freedom<sup>521</sup>, is understood as contained within the idea of humiliation as rejection. Discussing the Sartrean link between freedom and humanness, Margalit argues that it is necessary to see human beings, not only as bodies, but also as agents who are capable of freedom to make decisions shaping their lives, since human lives as we know them are not understood as determined by external causes independent of human control.<sup>522</sup> It is drawn from this that when a person's capacity to be free in this sense is removed, this may amount to the rejection of humanness, or human status.<sup>523</sup> In this way, Margalit links both forms of reason for feeling humiliated – powerlessness and exclusion.

The idea of exclusion, or rejection, is key to Margalit's understanding of humiliation: rejection from what he calls 'the human commonwealth'<sup>524</sup>, i.e. the community of human beings.<sup>525</sup> Such rejection takes the form of treating a human being as if s/he were nonhuman, or treating a human being as subhuman. Margalit describes four senses in which a human being can be treated as nonhuman; that is, as excluded from the human community: when treated as if one were an object, as if one were a machine, as if one were an animal, or as subhuman (which, Margalit specifies, includes an adult being treated as a child).<sup>526</sup> Margalit notes (with connotations of the Kantian Formula of Humanity): 'Human beings are obviously also objects and animals, and even machines, but they are not merely objects or merely animals, and they are certainly not merely

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<sup>521</sup> Margalit (1996) at 115, 117.

<sup>522</sup> This argument is foundational in Isaiah Berlin's writings on freedom and historical determinism; see Berlin (1969), 'Introduction' and 'Two Concepts of Liberty'; Margalit (1996) at 117.

<sup>523</sup> Margalit (1996) at 117-19.

<sup>524</sup> Margalit (1996) at 112.

<sup>525</sup> This should not be equated with the idea of social exclusion (in the sense of exclusion from participation in society), although the relationship between these forms of exclusion would be interesting to explore. For a brief overview of forms of social exclusion and discussion of a form of social exclusion that can be seen to entail an attack on fundamental dignity, see Herrmann, Steffen K. (forthcoming), 'Social Exclusion: Practices of misrecognition', in P. Kaufman, H. Kuch, C. Neuhäuser, E. Webster (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer).

<sup>526</sup> Margalit (1996) at 89. Margalit discusses whether it is possible (other than in pathological cases) to see persons *as* animals, or machines, etc, and suggests that this is not possible: 'Treating persons *as if* they were not human is treating them *as if* they were objects or animals.' (emphasis added). The only sense in which it is possible to see a human *as* nonhuman is to see a human as subhuman – i.e. as an inferior human species; Margalit (1996) at 108.

machines.<sup>527</sup> Through the lens of a human rights-based society<sup>528</sup>, Lindner also links humiliation and exclusion. In such societies, which proclaim respect for equal human dignity as a core value, humiliation of a person entails or symbolises exclusion from humanity. Such exclusion is characterised as ‘a deeply destructive and devastating experience that attacks the core of a person’s humanity and dignity.’<sup>529</sup> Klein also explicitly refers to the notion of exclusion: ‘To be humiliated is to be excluded and made less.’<sup>530</sup>

### Embarrassment and shame distinguished

It has been suggested that humiliation within Article 3 is constituted by injury to an individual’s sense of worth as a human being and that humiliation can occur when one is rendered profoundly powerless and treated as if one were less than human. Some final distinctions can now briefly be made. Humiliation does not concern negative harms that are better characterised as embarrassment or shame; two concepts that appear in scholarship in this field. Both of these deserve acknowledgment since, like humiliation, they are familiar, common terms that might be viewed as covering similar ground to humiliation.<sup>531</sup>

Having now elucidated the core meaning of humiliation, embarrassment seems quite clearly irrelevant in any significant sense. It is, however, often associated with humiliation in everyday language and it is worthwhile to distinguish it expressly. Embarrassment is insightfully distinguished from the darker concept of humiliation by Miller, who does recognise both as being related.<sup>532</sup> The emotional context is significant. Miller associates embarrassment with friendship and good humour, whether induced by

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<sup>527</sup> Margalit (1996) at 91.

<sup>528</sup> Contrasted with honour-based societies. See Lindner, Evelin Gerda (2003), ‘The Theory of Humiliation: A Summary’, unpublished manuscript, available at <http://www.humiliationstudies.org/documents/evelin/HumiliationTheorySummary.pdf>, at 23-26; for background, see in particular 9-13.

<sup>529</sup> Lindner (2003) at 25-26.

<sup>530</sup> Klein (1991) at 97.

<sup>531</sup> Nussbaum explicitly discusses the relationship between shame, embarrassment and humiliation; Nussbaum (2004) at 203-06.

<sup>532</sup> Miller notes that it is possible that particularly intense feelings of embarrassment could increase on an ‘intensity scale’ to become feelings of humiliation; Miller (1993) at 152.

teasing or praise, whereas humiliation is invariably experienced and relived as painful.<sup>533</sup> As Nussbaum writes, embarrassment concerns undesirable social awkwardness, but is not closely tied to important values and need not involve any sense of ‘defect’. She gives the example, as does Miller, of embarrassment invoked by public praise.<sup>534</sup>

Shame can be said to have a somewhat more intimate connection with humiliation, although it is nevertheless distinct. The literature, however, is somewhat unclear as to the nature of this distinction. Klein argues:

*Shame is what one feels when one has failed to live up to one’s ideals for what constitutes suitable behaviour in one’s own eyes as well as the eyes of others. Humiliation is what one feels when one is ridiculed, scorned, held in contempt, or otherwise disparaged for what one is rather than what one does.*<sup>535</sup>

Aaron Ben-Ze’ev links shame to the failure to live up to certain standards resulting in a painful feeling towards oneself that one is a bad person<sup>536</sup>, which if read in terms of Klein’s understanding, seems to collapse the distinction between humiliation and shame. Such differences stem, at a basic level, from different uses of the terms shame, humiliation, self-respect and self-esteem. Support for the basic maintenance of a distinction between humiliation and shame can be deduced from the account given by Gabriele Taylor (despite Taylor using the range of relevant terms differently without suggesting a convincing argument as to the way in which they differ).<sup>537</sup> The distinction is also identified by Nussbaum, although she touches only very briefly on its nature – humiliation is linked to damage to human dignity and it is suggested that severe shaming *can* involve an act of humiliation. The core of shame, which has several forms, is a feeling of a failure to live up to ideals. In general, shame is a broader notion, including the possibility of a constructive role, unlike humiliation.<sup>538</sup> John Deigh, whose approach

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<sup>533</sup> Miller (1993) at 157, 152-53.

<sup>534</sup> Nussbaum (2004) at 204-06.

<sup>535</sup> Klein (1991) at 105.

<sup>536</sup> Ben-Ze’ev, Aaron (2000), *The Subtlety of Emotions* (Cambridge, Massachusetts: MIT Press) at 512-13.

<sup>537</sup> Taylor argues that shame is an injury to self-respect – ‘a sense of one’s own value’ – which would suggest that shame is similar to humiliation. However, as noted above, her understanding of humiliation differs, notably in that she views it as tied to self-esteem; see Taylor (1995) at 159-61.

<sup>538</sup> Nussbaum (2004) at 203-04. Nussbaum focuses on shame in a fundamental manifestation – ‘primitive shame’ – which occurs in the face of human vulnerability, need and impotence (in particular,

also suggests that shame is linked to humiliation in the sense that both involve injury to one's sense of worth, makes an illuminating distinction between *sources of worth* that can aid in unravelling confusions. He argues that shame results from an injury to that worth which derives from one's status as a member of particular social groups.<sup>539</sup> Humiliation is helpfully understood then as an injury to one's worth that derives from one's status simply as a member of the human group. Bringing together the arguments of Deigh and Margalit, we can recognise a cross-over where one's worth as a human being is understood to encompass 'morally legitimate' belonging to a group ('[s]haming a person for legitimate identity traits is an act of humiliation'<sup>540</sup>), whilst nevertheless recognising a distinction between the concepts of shame and humiliation.

### Breaking of physical or moral resistance

The breaking of physical or moral resistance as a component of degradation has been present since *Ireland v. UK*. It has been referred to often, but not invariably in the case-law. It is perhaps noticeable in its general absence from certain classes of case, notably concerning detention conditions and expulsion.<sup>541</sup> This may suggest that the risk of the breaking of a person's resistance is perceived to be present only in certain kinds of situation that might be considered under Article 3. However, there is no particular pattern as to when it *is* referred to – from *Smith and Grady v. UK*, concerning a complaint based on expulsion of two homosexual members of the armed forces, to *Keenan v. UK*, concerning a lack of adequate medical care for a detainee who committed suicide.<sup>542</sup> Furthermore, in cases concerning ill-treatment in detention, there is evidence of both references to the statement and its absence.<sup>543</sup> No pattern is identifiable. The

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see 189-93). Note that, despite recognition of shame's constructive possibility, Nussbaum argues squarely against a constructive role for shame in the law of liberal societies (see generally chapter 5).

<sup>539</sup> Deigh, John (1995), 'Shame and Self-Esteem – A Critique', in R. S. Dillon (ed.), *Dignity, Character and Self-Respect* (New York: Routledge), 133-56, at 149-51.

<sup>540</sup> Margalit continues: 'Shaming a person for achievement aspects of his identity [...] may be an insult, but it does not constitute humiliation.'; Margalit (1996) at 133; see generally 132-35.

<sup>541</sup> See, e.g., *Dougoz v. Greece*; *Price v. UK*; *Kalashnikov v. Russia*; *Nevmerzhtsky v. Ukraine*; *Ahmed v. Austria*.

<sup>542</sup> See also, e.g., *Soering v. UK*; *Peers v. Greece*.

<sup>543</sup> E.g. *Büyükdag v. Turkey*, no. 28340/95, 21 December 2000; *Ribitsch v. Austria*.

roots of this component of degradation can be seen in the Commission Report in the *Ireland* case, in which it was suggested that the will to resist interrogation was broken by ill-treatment.<sup>544</sup> In its judgment, the Court referred to the breaking of physical or moral resistance as an element of degrading treatment. Unlike in relation to humiliation (but as with acting against will or conscience and adverse effect on one's personality), no further case-law principles have emerged in this respect.

Inclusion of both *physical* and *moral* resistance highlights the relevance of both forms of harm to Article 3. Beyond this, what might this component of degradation be referring to? Resistance is undoubtedly tied to the idea of strength and in the context of the harm that the prohibition of degrading treatment protects against, it can be understood as the strength or ability to resist or oppose some harmful practice. It invokes associations with control, since to be able to resist, one must be in control; if one's ability to resist is broken, control is lost. This is consistent with the powerlessness that provides a reason for humiliation. Little is evident in dignity or humiliation literature as to the significance of physical and moral resistance. One interesting comment is, however, made by Silver et al., which can shed some light upon this. They note:

*In so far as your history, your status, even your being a woman or a man offers you some point of pride, of comfort, and especially a source of standards for what you ought to do, what you must resist, persistent humiliation robs you of the vantage point for rebellion.*<sup>545</sup>

This is linked in Silver et al. to the ability to conduct oneself in ways appropriate for a human being (itself linked, as suggested above, to power and a profound lack of power as a reason for humiliation). If one is unable to conduct oneself so, it is as if one is not really a proper human being<sup>546</sup> (which we can see as linked to the idea of exclusion in humiliation). Humiliation can render a person powerless and exclude him from the human community, and in doing so, humiliation destroys the source of those standards that influence how a person should or should not conduct himself. It influences the kinds of behaviour that he should resist if he is to maintain self-respect. This is why, as Silver et al. elegantly describe it, 'humiliation robs you of the vantage point for rebellion';

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<sup>544</sup> *Ireland v. UK*, no. 5310/71, Commission Report of 25 January 1976, Series B, no. 23, at 402.

<sup>545</sup> Silver et al. (1986) at 280.

<sup>546</sup> Silver et al. (1986) at 280.

rebellion against being stripped of one's ability to act in a way that is fitting for a human person.

This clearly demonstrates, in the first instance, that the idea of resistance is not out of place in relation to humiliation and supports the consistency of this particular component being included in the ECHR understanding of degradation, alongside humiliation and debasement. It also suggests a way of understanding the substance of the idea of breaking of physical or moral resistance that is not immediately obvious from the case-law, and which fits with the understanding of the violation of human dignity contained within the prohibition of degrading treatment. Article 3 treatment that breaks a person's physical or moral resistance can be understood as treatment that destroys a person's strength (physical or moral) to stand up against the stripping of human status that the treatment entails.

The idea of breaking of resistance is also consistent with that of being driven to act against will or conscience. The words of the European Commission in its Report in *Ireland*, referred to above, clearly suggest such a link. In the context of discussing the impact on the victims of the 'five techniques', it is stated:

*The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.*<sup>547</sup>

### Driving the victim to act against will or conscience

This hint given by the Commission in *Ireland* is a rare example of an indication of the meaning of being driven to act against one's will or conscience. Being driven to act against one's will or conscience was in fact the original understanding of degrading treatment given by the Commission in 1969.<sup>548</sup> As stated in Chapter Two, this element has been used less frequently than humiliation and debasement, etc, but it does continue

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<sup>547</sup> *Ireland v. UK*, Commission Report, at 402.

<sup>548</sup> *Greek Case*, Commission Report, 5 November 1969, Yearbook 12 (1969), Chapter IV, section A(2), at 186.

to be used. And as is evident in the *Keenan* judgment, which provides a recent example, being driven to act against will or conscience does not have to be in conjunction with fear, anguish, inferiority, etc:

*[...] treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance [...], or as driving the victim to act against his will or conscience [...]*<sup>549</sup>

Being driven to act against will or conscience has not been subject to any particular elaboration in the Court's degrading treatment case-law; the Commission's reference in *Ireland* provides the most helpful insight to date in its reference to *independence* of will.

As a preliminary, it is helpful to outline the meaning of the terms 'will' and 'conscience' themselves. At a basic level, the will is understood as the mental faculty of choice and decision that directs our chosen actions.<sup>550</sup> Philosophical controversy has long surrounded this notion, particularly when integrated with the concept of freedom.<sup>551</sup> Traditionally, it has been argued to be the core faculty that distinguishes humans from nonhuman animals and objects.<sup>552</sup> The notion of free will is, as Berlin reminds us, 'at least as old as the Stoics' and since then 'it has tormented ordinary men as well as professional philosophers'.<sup>553</sup> Indeed, much discussion could also be had on the (various dimensions of the) notion of conscience.<sup>554</sup> At its core, 'conscience' designates a sense of what is morally right and what is morally wrong.<sup>555</sup> The reference to 'conscience' in particular immediately recalls those qualities that human beings are declared to possess in the first Article of the UDHR – all human beings are 'endowed with reason and

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<sup>549</sup> *Keenan v. UK*, para. 110.

<sup>550</sup> See Pink, Thomas (2005), 'Will', in E. Craig (ed.), *The Shorter Routledge Encyclopaedia of Philosophy* (London: Routledge), 1055-56; Weatherford, Roy C. (2005), 'Will', in T. Honderich (ed.), *The Oxford Companion to Philosophy* (2<sup>nd</sup> edn.; Oxford: Oxford University Press), 957-58.

<sup>551</sup> Freedom is tied to the will since the will is understood to permit us to exercise control over our own choice of actions; Pink (2005) at 1055.

<sup>552</sup> Weatherford (2005) at 957; Pink (2005) at 1055.

<sup>553</sup> Berlin (1969) at xi.

<sup>554</sup> Hill Jr., Thomas E. (1998), 'Four Conceptions of Conscience', in I. Shapiro and R. Adams (eds.), *Integrity and Conscience* (New York: New York University Press), 13-52. See also Chapters 3 and 4 for an example of discussions of the idea of conscience.

<sup>555</sup> Foot, Philippa (2005), 'Conscience', in T. Honderich (ed.), *The Oxford Companion to Philosophy* (2<sup>nd</sup> edn.; Oxford: Oxford University Press) at 160.

conscience'. The objective of the remainder of this section is to consider, not what these concepts mean in a detached sense, but what it means to be *driven to act against* will or conscience.

There is perhaps a source of potential confusion about the meaning of acting against will or conscience, which lies in the association it might invoke with the concept of autonomy (or restriction of autonomy), in its allusion to being forced to do something that one does not want to do. It will be argued that autonomy can indeed be seen as relevant to understanding degradation within Article 3, and that degradation can be seen to encompass a restriction of autonomy in one specific, limited dimension. In order to promote clarity concerning the scope of application of the prohibition of degrading treatment, this relevant sense of autonomy must be clarified. Autonomy is a complex concept used in different fields in numerous ways.<sup>556</sup> It is associated notably with the liberal principle of freedom of choice.<sup>557</sup> It is also often invoked in relation to human dignity. Different conceptions of autonomy are visible and often prominent in a substantial range of literature and debate, from bioethics<sup>558</sup> to political philosophy.<sup>559</sup> All such conceptions, whilst differing in their perspective and understanding of the value of autonomy and its implications in the political and personal realms, are rooted in the core idea of self-rule<sup>560</sup>, which is directly tied to the etymology of the word itself.<sup>561</sup> Gerald Dworkin identifies three broad categories of autonomy: moral, political and social. Raz refers to personal autonomy, which can be seen as distinct from autonomy in the moral, political and social senses, but can also be seen as related in that behind the ideals of moral, political and social autonomy lie ideals of personal autonomy. Within the category of personal autonomy, one finds the idea of the *capacity for autonomy* – it is in this basic dimension that autonomy will be argued to be relevant to understanding degradation within Article 3.

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<sup>556</sup> See, e.g., Dworkin, Gerald (1988), *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press), at 6-7.

<sup>557</sup> Dan-Cohen, Meir (1992), 'Conceptions of Choice and Conceptions of Autonomy', *Ethics*, 102 (2), 221-43, at 221.

<sup>558</sup> See, e.g., O'Neill, Onora (2002), *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press).

<sup>559</sup> A notable example is the work of Joseph Raz, which will be discussed further below.

<sup>560</sup> See, e.g., Dan-Cohen (1992) at 232.

<sup>561</sup> From *autos* (self or own) and *nomos* (law); *The Compact Edition of the Oxford English Dictionary*.

As a moral ideal, Gerald Dworkin describes autonomy as concerning the ‘necessity or desirability of individuals choosing or willing or accepting their own moral code’; that is, of giving pre-eminence to their own principles based on ‘individual conscience’ rather than ‘authority and tradition’.<sup>562</sup> Raz views moral autonomy as intended to be a comprehensive doctrine about the nature of morality.<sup>563</sup> Moral autonomy is the category into which the classic Kantian conception of autonomy falls, as part of Kant’s integrated metaphysical theory. Autonomy in the moral sense goes beyond something that might indicate the meaning of acting against will or conscience in the context of degradation in Article 3. If relevant, it would seem to point towards more comprehensive questions about the content of a doctrine of morality that might be argued to underpin the ECHR. Autonomy as a moral ideal might indeed contain reference to the concept of dignity but it is not immediately relevant for understanding the meaning of acting against will or conscience as a violation of dignity.

It is in other potential understandings of autonomy that the most significant confusion about the scope of degrading treatment potentially lies. As noted, Gerald Dworkin suggests two additional functions, or spheres of relevance, of the concept of autonomy: political and social.<sup>564</sup> In its political function, autonomy is notably used to oppose paternalistic approaches – that government should not impose a set of ends or values upon citizens. Social autonomy refers to how individuals might mould their own conception of the good life in society.<sup>565</sup> Raz highlights personal autonomy, which he views as a conception of individual well-being; one that values the idea of people ‘fashioning’ their own destinies. To have personal autonomy is to have achieved (in varying degrees) an autonomous life.<sup>566</sup> We know that will or conscience as an element of degradation can be viewed as related to a very basic sense of human dignity. Acting

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<sup>562</sup> G. Dworkin (1988) at 10-11.

<sup>563</sup> Raz, Joseph (1986), *The Morality of Freedom* (Oxford: Clarendon Press) at 370, footnote 2; see also Christman, John, ‘Autonomy in Moral and Political Philosophy’, in *Stanford Encyclopaedia of Philosophy*, available at <http://plato.stanford.edu/entries/autonomy-moral/>, at section 1.1

<sup>564</sup> Other categorisations also exist. For example, Fallon makes a distinction between descriptive and ascriptive autonomy; Fallon, Richard H. Jr. (1994), ‘Two Senses of Autonomy’, *Stanford Law Review*, 46 (4), 875-905.

<sup>565</sup> G. Dworkin (1988) at 10-11.

<sup>566</sup> Raz (1986) at 369, 204. See also Buss, Sarah, ‘Personal Autonomy’, in *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/personal-autonomy/>.

against will or conscience, it is suggested, is best understood as entailing an attack on a person's fundamental human dignity. Political and social autonomy seem to go significantly beyond this fundamental, personal sphere of human being. Nor does personal autonomy appear to be relevant. This is particularly clear in the following elaboration of personal autonomy given by Raz:

*[...] autonomy is possible only if various collective goods are available. The opportunity to form a family of one kind or another, to forge friendships, to pursue many of the skills, professions and occupations, to enjoy fiction, poetry, and the arts, to engage in many of the common leisure activities [...]*<sup>567</sup>

This suggests that the realisation of personal autonomy extends into these various areas, and it is clear that this is beyond the fundamental concerns of the prohibition of degrading treatment, based on what has been argued in this respect so far.

However, as noted above, autonomy has another sense in *The Morality of Freedom*; one that precedes personal autonomy. This is what Raz broadly calls a capacity for autonomy, or conditions of autonomy. Personal autonomy requires a capacity for, as well as the realisation of, an autonomous life; a capacity for autonomy is a precondition of achieving personal autonomy.<sup>568</sup> This is also expressed in terms of being an agent with a capacity for autonomy on the one hand, and leading a significantly autonomous life on the other hand.<sup>569</sup> A distinction is helpfully drawn in the *Stanford Encyclopaedia of Philosophy* between 'ideal' and 'basic' autonomy: Ideal autonomy is an 'achievement' (the same description used by Raz in his discussion of the realisation of personal autonomy). Basic autonomy is 'the minimal status of being responsible, independent and able to speak for oneself'.<sup>570</sup> This is the sense in which autonomy can be seen as relevant to understanding the meaning of degradation within Article 3.

In *The Morality of Freedom* Raz makes a number of comments relating to acting against one's will and even to being treated as subhuman that it is interesting to enquire into further. This is in the context of discussion of the political use of coercion and the 'moral

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<sup>567</sup> Raz (1986) at 247.

<sup>568</sup> Raz (1986) at 204.

<sup>569</sup> Raz (1986) at 154.

<sup>570</sup> Christman at section 1.1.

significance' of coercion.<sup>571</sup> Raz uses the term coercion in the sense of a threat, which is most relevant for his purposes, although he recognises that this is only one form that coercion might take (a point to which we shall return below). It is stated categorically that coercion violates autonomy, and this is explicitly linked to the will:

*A person who forces another to act in a certain way, and therefore one who coerces another, makes him act against his will. He subjects the will of another to his own and thereby invades that person's autonomy.*<sup>572</sup>

A link between coercion, acting against one's will, and autonomy is evident. Furthermore, a link is apparent between invasion of autonomy and being treated as if one were not human (an interesting element of symbolism is also highlighted here):

*He is being treated as a non-autonomous agent, an animal, a baby, or an imbecile. Often coercion is wrong primarily because it is an affront or an insult and not so much because of its more tangible consequences, which may not be very grave.*<sup>573</sup>

Raz's discussion of coercion and manipulation in the context of one condition of autonomy that he identifies – independence – also supports the significance of fundamental human status in this respect. In addition, it brings us back to the notion of independence, which is the only significant indication of the meaning of acting against will or conscience given by the Convention organs. Raz points to the importance of independence:

*It attests to the fact that autonomy is in part a social ideal. It designates one aspect of the proper relations between people. Coercion and manipulation subject the will of one person to that of another.*<sup>574</sup>

Raz asks why it is common to say that a person who has been manipulated and coerced has been treated 'as an object rather than an autonomous person' and, in response, points to the significance of a symbolic dimension over and above the consequences of the treatment. This symbolic dimension expresses 'disregard or even contempt'.<sup>575</sup> It has already been suggested that humiliation can lead to degradation when a person is

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<sup>571</sup> Raz (1986) at 148.

<sup>572</sup> Raz (1986) at 154.

<sup>573</sup> Raz (1986) at 156.

<sup>574</sup> Raz (1986) at 378.

<sup>575</sup> Raz (1986) at 378.

rejected from the human family. Raz adds the undermining of the capacity for autonomy (via coercion) to humiliation as something that involves rejection and denial of basic human status. Connections are therefore reinforced between being forced to act against one's will, the social and symbolic dimension, an invasion of basic autonomy, and fundamental human dignity.

The elements of will and conscience alongside the idea of subjection, as well as being treated as subhuman, are most strikingly captured in Isaiah Berlin's account of positive freedom.<sup>576</sup> To have positive freedom is to be one's 'own master'.<sup>577</sup> In his description of one's consciousness of positive freedom, he writes:

*I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them [...] I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.*<sup>578</sup>

This statement encapsulates the severity and impact of being driven to act against will or conscience, and in its link to the human and the subhuman it highlights that we are concerned with fundamental human status, violations of which are the concern of the prohibition of degrading treatment. Berlin uses the language of means and ends; to coerce persons is to use them as means, not ends in themselves: to 'behave as if [other persons'] ends are less ultimate and sacred than my own' is to treat them as 'sub-human'.<sup>579</sup> In fact, we also find in Berlin an explicit reference to the concept of

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<sup>576</sup> It should be clarified that it is not suggested, by pointing to similarities between the approaches of Berlin and Raz, that freedom and autonomy generally refer to the same quality, but Berlin's notion of positive freedom unquestionably resembles autonomy, if autonomy is characterised in the sense of a basic capacity to lead an autonomous life. Referring to positive freedom, see Raz (1986) at 408-09. The similarity between Berlin's characterisation of positive freedom and autonomy is also recognised by Christman, *Stanford Encyclopaedia of Philosophy*, section 1.1. (On divergences between the approaches of Raz and Berlin, see Gray, John (1995), *Isaiah Berlin* (London: HarperCollins), at 28-37).

<sup>577</sup> Berlin (1969) at 131.

<sup>578</sup> Berlin (1969) at 131.

<sup>579</sup> Berlin (1969) at 137.

degradation, linked to human status and positive freedom: to manipulate human persons, even with a beneficent motive, is ‘to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them.’<sup>580</sup>

So far, discussion has focused on understanding the substantive scope of acting against will or conscience. It is important also to consider the meaning of *being driven* to act, which has been implicit in above references to coercion. Two aspects of this question can be identified: *who or what* drives one to act? And what does it mean to be *driven* to act? As shall be seen, the answer to the second question, of the meaning of being driven to act, can in fact be seen as dependent upon the answer to the first question.

It is helpful to begin with the following, which emerges from the literature: is subjection to the *will of another person* a necessary ingredient for a person to be *driven* to act against her will or conscience? Raz in particular suggests that a person is *driven* to act against will or conscience when she is *subjected to the will of another person* (which can also be understood to include institutions, or rather those persons representing such institutions). An inverse relationship seems to be suggested, in the sense that acting against one’s own will appears to mean that one is acting as a *result of* another’s will or intention (because of the centrality of the will, and the idea of a contrary individual will battling against one’s own, this point is highlighted more here than in relation to humiliation, etc). At the same time, however, a possibility is suggested in the literature that the *driving force* behind one’s behaviour might stem from societal conditions that are not the making of one person or institution. Such a possibility is detectable in the above statement by Berlin, in those references to, not only the wills of other men, but also to the undermining of freedom as a result of ‘external’ causes or nature. Raz also notes that: ‘Persons may be forced to act in a certain way by circumstances that are of nobody’s making, or they may be forced by another’s action which created the circumstances that forced them to act as they did.’<sup>581</sup> He suggests that this is not

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<sup>580</sup> Berlin (1969) at 137.

<sup>581</sup> Raz (1986) at 154. See also 156: ‘[...] harsh natural conditions can reduce the degree of autonomy of a person to a bare minimum just as effectively as systematic coercive intervention. Moreover, non-coercive interferences with a person’s life and fortunes may also reduce his autonomy in the same way as coercive interventions do. The only differences are that all coercive interventions invade autonomy and they do so intentionally, whereas only some non-coercive interventions do so and usually as a by-product of their intended results. They are not direct assaults on the autonomy of persons.’

coercion. Rather, it can be seen as another form of influence that drives a person to act. This statement nevertheless supports a conclusion that one can be *driven* to act against one's will or conscience *by* 'circumstances that are of nobody's making' or circumstances unintentionally created. Margalit's view of the source of humiliation can be seen to be applicable here: the harm must nevertheless have a human source.<sup>582</sup>

In the Article 3 context of being driven to act against will or conscience, the *form of influence* upon the individual can be read as equating to the form that treatment takes. For example, is it an action towards the individual? Is it an omission? And the question of who or what forced the individual to act against will or conscience is also tied to the meaning of treatment; more specifically, to the question of the source of treatment – whether treatment stems from the state or a private individual, for example. Both of these dimensions of the meaning of treatment will be the focus of Chapter Six.

Therefore, asking who or what can drive a person to act against will or conscience in the context of Article 3 asks *who* or *what* can cause degradation. For the moment it suffices to note that there is no reason to confine the source of degradation, in the form of being driven to act against will or conscience, to an identifiable malevolent will.

To move to the second question of what it means to be *driven* to act, this is answered to a significant degree by the clarification concerning who or what drives one to act. It should nevertheless be noted in the interests of completeness that the term 'driven' in itself can be understood to possess its common meaning, defined in the dictionary as 'to impel forcibly into action, or into some state'<sup>583</sup>; there is no suggestion to the contrary in the available case-law. The idea of being forced to act encompasses the idea of coercion, but should not necessarily be understood as limited in this sense. Raz, having delineated the term for the purposes of his discussion, notes that coercion, and within that coercive threats (on which Raz focuses), is only one form of being *forced* to act.<sup>584</sup> Therefore, being *forced* to act can capture the meaning of being driven to act. Taking both points

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<sup>582</sup> Margalit (1996) at 9-10. See also Berlin (1969) at 122-23, where it is argued that coercion is deliberate interference; inability to do something is only a lack of freedom when you are prevented from doing it by other human beings: 'The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly in frustrating my wishes.'

<sup>583</sup> *The Compact Edition of the Oxford English Dictionary*. See also *Le Nouveau Petit Robert*: 'pousser'.

<sup>584</sup> Raz (1986) at 154.

together, to be driven to act can be read as being forced to act by external influences: by other persons, institutions, societal conditions.

To summarise: If a person is driven to act against his will or conscience, this can appropriately be understood to imply that he is forced to act in a way that disrespects his independence of will and conscience. It can be concluded that injury to personal autonomy, in its basic sense, is relevant to the meaning of degradation within Article 3. This is tied to recognition of the relevance of a particular understanding of the violation of human dignity in the interpretation of degradation. The insights from Berlin and Raz suggest that to be driven to act against will or conscience entails a violation of fundamental dignity; to be coerced to act in this way includes a denial of one's worth as a human person, which sheds light upon its place as an element of degradation. Furthermore, a significant degree of affinity is evident between the meaning of acting against will or conscience and the conclusions reached thus far on the other elements of degradation. To highlight an example: Raz's notion of the capacity for autonomy is not unlike the notion of autarchy, which is referred to by Margalit in discussing the impact of humiliation. In a brief reference to the use of the concept of autarchy by S.I. Benn<sup>585</sup>, Raz suggests an affinity between what he calls basic autonomy and what Benn calls autarchy:

*The autonomous man is not merely capable of deciding for himself, he does so; he is not merely capable of considering reasons, he does consider them, and he acts on them. He is therefore the man who realizes what the autarchic man has merely in potentiality.*<sup>586</sup>

For Benn, autarchy is the basic capacity to self-govern.<sup>587</sup> The idea of self-mastery contained within Berlin's positive freedom also finds echo here. This brings us back to Margalit on humiliation, who, as noted above, links autarchy to a loss of a capacity for freedom and a loss of control.

If the prohibition of degrading treatment aims to protect human beings against being treated as if they were non-human entities, and if autonomy is relevant to the

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<sup>585</sup> Raz (1986) at 371, in particular footnote 2.

<sup>586</sup> Benn, S. I. (1975), 'Autonomy and the Concept of a Person', *Proceedings of the Aristotelian Society*, 76, 109-30, at 124.

<sup>587</sup> Benn (1976) at 112-13, 123.

understanding of will and conscience, it is also in a basic sense of the core of autonomy as self-rule, autarchy, or the capacity for autonomy. Being driven to act against will or conscience then, can be understood as the breakdown of self-mastery.<sup>588</sup>

### Adverse effect on one's personality

The final element of the Court's case-law characterisation of degradation to consider is that of treatment having an adverse effect on one's personality or treatment showing contempt or lack of respect for one's personality.<sup>589</sup> These two elements are linked in that 'adverse' effect refers to an impact upon one's personality that is 'incompatible' with Article 3, where incompatible is used by the Court to indicate that treatment shows contempt or lack of respect for personality. The reference to adverse effect is referred to in terms of consequences and is generally referred to in conjunction with consideration of the purpose of the treatment:

*[...] in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 [...]*<sup>590</sup>

A significant question is clearly, what can we understand by personality in this context? Which facet of persons is this particular element of the prohibition of degrading treatment intended to protect? It is not immediately clear. Like some of the other concepts that have been considered it is one that is commonly employed. In everyday language, personality ordinarily refers to public image.<sup>591</sup> As Peter Goldie writes: 'Politeness, being fidgety, cheerfulness, irascibility, being quick-witted, being a book-lover, kindness, vanity: these examples bring out the diverse nature of personality traits

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<sup>588</sup> This is, of course, not to suggest that a wider understanding of autonomy is not relevant within the wider context of the ECHR.

<sup>589</sup> *Albert and Le Compte v. Belgium*, para. 22; *Abdulaziz, Cabales and Balkandali v. UK*, para. 91.

<sup>590</sup> *Raninen v. Finland*, para. 55; see also *Ahmet Ozkan and others v. Turkey*, para. 336; *Nazarenko v. Ukraine*, no. 39483/98, 29 April 2003, para. 125; *Rohde v. Denmark*, no 69332/01, 21 July 2005, para. 90.

<sup>591</sup> Engler, Barbara (1999), *Personality Theories: An Introduction* (5<sup>th</sup> edn.; Boston: Houghton Mifflin Company) at 2; Lazarus, Richard S. and Monat, Alan (1979), *Personality* (3<sup>rd</sup> edn.; New Jersey: Prentice-Hall) at 1.

[...].<sup>592</sup> Bearing in mind that a public dimension is clearly relevant to the existence of degrading treatment, is it a person's personality in this sense that is to be protected by the prohibition of degrading treatment? In academia as well as practice in various fields the concept of personality certainly has meanings beyond this most familiar one. Understandably it is prominent in the field of psychology, and within this one field, the definition of the term 'personality' is recognised as being the subject of debate.<sup>593</sup> Psychologist Gordon W. Allport, in discussing the definition of the term personality, traces the history of the term and identifies no less than fifty uses of the term 'persona' that include accepted meanings of personality.<sup>594</sup> The modern usage of the term is recognised as being only one of these.

Within this range of meanings of the term Allport suggests that the essential core is a combination of concern with a person's image that is portrayed to the world as well as with the internal aspect of the person. The fifty uses of the term 'persona' are viewed by Allport as situated along a continuum of meanings from the external to the internal self: 'This double and contradictory reference is the outstanding characteristic of the term *persona*, and of the contemporary term *personality* [...].'<sup>595</sup>

Arguably, the Article 3 meaning of personality sits halfway along this continuum. Using the language of external/internal, the concept of personality might be thought of as capturing both one's core quality as a person, or inner character, and the outward display of this character. A hint of this notion is visible in psychology literature on personality: 'A significant element of our understanding of personality is the recognition that all people are alike yet also uniquely individual.'<sup>596</sup> Personality in relation to degradation can best be seen as concerned with the *person* as an entity. The State Party's understanding of personality in the *Raninen* case in fact provides a clue as to this understanding: the treatment complained of, it was argued, 'in no way denoted contempt

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<sup>592</sup> Goldie, Peter (2004), *On Personality* (London: Routledge) at 16.

<sup>593</sup> Engler (1999) at 2-3.

<sup>594</sup> Allport, Gordon W. (1937), *Personality: A Psychological Interpretation* (New York: Henry Holt and Company) at Chapter 2.

<sup>595</sup> Allport (1937) at 29.

<sup>596</sup> Phares, E. Jerry and Chaplin, William F. (1997), *Introduction to Personality* (4<sup>th</sup> edn.; New York: Longman) at 3, 8.

or lack of respect for the applicant *as a person*.<sup>597</sup> Allport's own approach to personality, which he terms 'biophysical', seems relevant: he suggests notably that the existence of personality is equal amongst human beings, in contrast to 'popular' usage where personality is a mark of difference and distinction. Furthermore, it includes the psychological as well as physical aspects of personality.<sup>598</sup> Allport, in recognising the roots of the juristic meaning of the term personality in the Roman Code, notes that a person was an individual who had legal status, which excluded those who were viewed as *less than persons* – slaves who were not born free.<sup>599</sup> This reading of personality as referring to one's status as a person makes sense in relation to the little that we know from the case-law: that personality can be debased, it can be disrespected and it can be shown contempt.<sup>600</sup>

### Judging the existence of degradation in Article 3

The Court, clearly, must judge whether a situation entails degradation. A distinction between *feeling* and *state/social fact*, discussed above in the context of humiliation, can be seen as applicable in understanding degradation more broadly. It is suggested that this distinction is an extremely useful conceptual tool that can be transposed from the level of humiliation to that of degradation. A person can *feel* degraded and be recognised as having *been* degraded. That a person can *feel* degraded is contrary to the approach by John Vorhaus in his discussion of the idea of hierarchies of suffering in Article 3. He asserts that degradation is not a feeling, and in support writes:

*An intimate bodily search may cause intense humiliation in one case, though in another, much less humiliation and instead a clear and detached recognition that the treatment endured is incompatible with human dignity. Both cases have a claim to be considered as instances of degrading treatment.*<sup>601</sup>

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<sup>597</sup> *Raninen v. Finland*, para. 54 (emphasis added).

<sup>598</sup> Allport (1937) at 41, 48.

<sup>599</sup> Allport (1937) at 35.

<sup>600</sup> In describing 'personalistic' philosophical doctrines, Allport includes reference to the common acceptance that the personality has 'supreme value' and that 'persons are to be distinguished metaphysically from things'; (1937) at 33.

<sup>601</sup> Vorhaus (2002) at 380; see generally Part 1.

Vorhaus appears to state that because the constitutive ideas of degradation can be experienced differently by different victims, degradation is something that is accompanied by feelings that ‘may contribute to the sense we have of being degraded’, rather than being itself a feeling.<sup>602</sup> It is possible, however, and more helpful, to understand degradation as a *feeling and a state*. Note that in the context of Vorhaus’ example of the bodily search, the conclusions reached are the same – it is entirely possible that both cases might indeed be found by the Court to entail degradation. However, accepting the nature of degradation as both a *feeling* and a *state* existing in a social dimension provides, it is suggested, a clearer way of understanding the nature of degradation and of how the Court engages with the determination of whether degradation has or has not taken place.

In determining whether a state of degradation has existed, the emotional experience claimed by the applicant is significant (an applicant will in the majority of cases undoubtedly *feel* degraded, to reiterate the point made earlier in relation to humiliation). What is more significant, however, is the Court’s own evaluation of whether the applicant has been placed in a *state* of degradation (along with judging whether the degradation can be understood as treatment within the meaning of Article 3 and whether the state can be held responsible). In this sense, the act of degradation takes precedence over the individual experience. Vorhaus indirectly supports this approach in recognising that the ‘extent to which victims experience their plight’ cannot necessarily lead to a conclusion that prohibited treatment has or has not taken place.<sup>603</sup>

This is a logical conclusion. It is the role of the Court to make its own assessment of whether an applicant has been subjected to degradation as a *social fact*, on the basis of how the Court understands degradation to be manifested. To recall Margalit’s terminology again, the Court must ask: did the applicant have sound reasons for feeling degraded?<sup>604</sup> This determination as to whether sound reasons for feeling degraded can be identified involves engagement by the Court with the social norms of the society in

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<sup>602</sup> Vorhaus (2002) at 380.

<sup>603</sup> Vorhaus (2002) at 381.

<sup>604</sup> Note the point made above that it is impossible to know whether a person did actually *feel* humiliated or not. This is consistent with understanding the role of the Court as asking whether a person had *sound reasons* for feeling degraded, as opposed to addressing the question of whether the person actually *felt* degraded.

which it operates.<sup>605</sup> The interpretive process as it is characterised by Dworkin highlights this idea of judicial recourse to ‘community morality’, referred to briefly in the previous chapter. That is, judicial identification of, and engagement with, the community’s moral and political traditions<sup>606</sup> (in the ECHR context, with the moral and political traditions of the Council of Europe states as these traditions are perceived by the judges of the Court). Our answer to the question of whether a person has been subjected to a state of degradation will depend on our interpretation of the substance of this community morality. Of course in the ECHR context the authoritative decision belongs to the Court. When confronted with an argument that certain treatment amounted to degrading treatment, the Court can either agree or disagree that the treatment was degrading.

The distinction between *feeling* and *state* and the idea of sound reasons explains assertions in the case-law that the applicant *must have felt* degraded. In *Mayzit v. Russia*, the Court stated that the conditions of detention complained of ‘must have’ undermined the applicant’s human dignity and aroused feelings of humiliation and debasement.<sup>607</sup> It also explains why the Court views certain things as *in principle* amounting to degrading treatment. An example is found in *Yankov*:

*The Court thus considers that the forced shaving off of detainees’ hair is in principle an act which may have the effect of diminishing their human dignity or may arouse in them feelings of inferiority capable of humiliating and debasing them.*<sup>608</sup>

The common statement in relation to physical violence towards people in detention is another example:

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<sup>605</sup> It is helpful to clarify the relevance of the familiar reasonable person test in this connection and its link to societal norms. If the test of the Court can be likened to the reasonable person standard, it is in the sense of asking whether a reasonable person would agree that the applicant had *been* degraded, rather than in the sense of asking whether a reasonable person would have *felt* degraded in the circumstances, which is subtly different and possibly misleading as suggested in the previous footnote. The reasonable person metaphor in the first sense is expressed in Patrick Devlin’s 1959 Maccabaeian lecture on *The Enforcement of Morals* in response to the question of how ‘the moral judgments of society are to be ascertained?’ Devlin invokes the standard of the reasonable man (‘[...] to use an archaism familiar to all lawyers – the man in the Clapham omnibus’) and ties this to judicial identification of the ‘public’ or ‘common’ morality (‘political ideas’ and ‘ideas about the way its members should behave and govern their lives’); Devlin, Patrick (1959), *The Enforcement of Morals, Maccabaeian Lecture in Jurisprudence of the British Academy* (London: Oxford University Press) at 10-12, 15-16.

<sup>606</sup> Dworkin (1977) at 123-30.

<sup>607</sup> *Mayzit v. Russia*, para. 42; see also *Farbtuhs v. Latvia*, para. 61.

<sup>608</sup> *Yankov v Bulgaria*, para. 114.

*The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right [...]*<sup>609</sup>

Without denying the significant personal, emotional dimension of degradation then, the Court must consider whether an applicant *was* degraded; whether he had sound reasons for feeling degraded. If this is the case, it essentially entails that the threshold of severity has been reached.

The evaluation of the minimum level of severity is integrated into the evaluation of whether or not a situation can be called degrading (as opposed to distressing, or unpleasant, etc). This is consistent with the Court's statements that 'ill-treatment must attain a minimum level of severity'.<sup>610</sup> That is, *ill-treatment must amount to degradation*. This can be seen in the following statements:

*Certain aspects of the situation complained of were undoubtedly unpleasant or even irksome [...] however, having regard to all the circumstances, it did not attain the level of severity above which treatment falls within the scope of Article 3 [...]*<sup>611</sup>

*The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3 [...]*<sup>612</sup>

*Whether or not the minimum threshold of severity is reached and, consequently, whether or not the treatment complained of constitutes degrading treatment contrary to Article 3 of the Convention will depend on the particular facts of the case [...]*<sup>613</sup>

The meaning and scope of the term degrading is tied to the minimum level of severity. If treatment is not degrading, it will not cross the threshold; if it is accepted that an applicant did have sound reasons for feeling degraded, then it will.

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<sup>609</sup> *Ribitsch v. Austria*, para. 38; see also *Tekin v. Turkey*, judgment of 09 June 1998, *Reports* 1998-IV, para. 53.

<sup>610</sup> *Ireland v. UK*, para. 162; see also *Soering v. UK*, para. 89.

<sup>611</sup> *Guzzardi v. Italy*, para. 107.

<sup>612</sup> *López Ostra v. Spain*, para. 60.

<sup>613</sup> *Yankov v. Bulgaria*, para. 114.

If something is degrading (when it is also treatment and the state is held responsible), it constitutes a violation of Article 3. If the Court views a situation as falling within the meaning of degrading treatment, then it is absolutely prohibited; Article 3 permits no exceptions. Where allegations of degrading treatment are rejected, it is because the Court deems that such situations being complained of do not amount to degrading treatment; it is not because they are degrading treatment but not severe enough degrading treatment to breach the Article 3 severity threshold. It is therefore inaccurate to say that degrading treatment must meet a minimum level of severity; it is, rather, accurate to say that a particular situation complained of must meet a minimum level of severity before it will be accepted as degrading.<sup>614</sup>

## Chapter summary

Beginning from the ECtHR's interpretation of the prohibition of degrading treatment that is visible in its jurisprudence, this chapter has aimed to explore the substantive meaning of the term degrading, as it can be understood in the Article 3 context. The resultant understanding of degradation is linked to the human dignity-centred purpose of the prohibition of degrading treatment argued for in the previous chapter. The essence of degradation, and thereby the substantive parameters of the prohibition of degrading treatment, emerges from the exploration and clarification of the key concepts: of humiliation as a lack of recognition of a person's valuable human status linked to powerlessness, exclusion and loss of self-respect; the breaking of physical or moral resistance as treatment that destroys a person's physical or moral strength to oppose an abuse of human status; being driven to act against will or conscience as injury to a person's capacity for autonomy or self-mastery, which includes a denial of one's human worth; and the suffering of an adverse effect on one's status as a person.

This exploration constitutes an addition to the chain novel, to the Court's story so far. By postulating this particular content of the additional chapter in the interpretation of degradation – content that has evolved from a reading of the story that is visible in the

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<sup>614</sup> This is supported by, e.g., Duffy, Cooper, and Harris et al., who respectively state that 'conduct', 'ill-treatment' or 'humiliation or debasement' must attain the severity threshold; Duffy (1983) at 320; Cooper (2003) at 27, para. 2-01; Harris et al. (2005) at 80.

case-law, and the place of the concept of human dignity within that – other possible content has logically been excluded: from the ideas of everyday humiliation and embarrassment, to those of freedom of choice and the protection of an autonomous life. A clearer idea of what the right is or is not concerned with in this sense aims to offer clearer boundaries for the contours of the right. The intention, therefore, has been to present a more detailed picture of the proper scope of the term degrading within Article 3.

Within this elaborated picture of what degradation should be understood as encompassing, a further step is unavoidably required at the moment of application of this interpretation to concrete individuals and their situations. We might make a well-informed guess as to whether the ECtHR would consider a particular case as having involved degradation, which would be a guess as to the Court's reading of the 'community morality'; of whether, for example, detention of an elderly person in an unventilated cell with inadequate sanitary facilities for twenty hours per day entails that the individual has been degraded or not, or whether a young person in a ventilated cell with inadequate sanitary facilities, and overrun with vermin, for sixteen hours per day has been degraded or not, and so on. Answers in this respect cannot form part of an elaborated understanding of the meaning of degradation. We cannot know how the Court will interpret the demands of what it sees as the Council of Europe's community morality in a particular situation; therefore, there is no inflexible formula for identifying wrongs that are severe enough to amount to degradation in the context of particular individuals in particular circumstances. Rather, this chapter can be seen as adding a degree of substance to the void between the case-law statements and the final judgment of the Court in respect of degradation. It is suggested that this elaborated reading can provide, not a formula for the Court's decision, but a better understanding of what is relevant and important in arriving at that decision. As stressed in this chapter's introduction, this picture of the meaning of degradation must be read against the backdrop of the content of state obligations and the indispensable trigger of state responsibility, and equally, degradation must take the form of treatment.

## CHAPTER SIX

### THE MEANING OF TREATMENT

#### Chapter introduction

In the present thesis, on the basis of its exploratory objective and with the aim of understanding as fully as possible the extent of the prohibition, the terms degrading and treatment have been deliberately separated, in contradistinction to the common approach. Chapter Five has explored the meaning of degrading; i.e. the *substantive nature* of the treatment in question. The meaning of treatment itself is extremely important since Article 3 is not a prohibition of degradation; the scope of the term treatment must equally be explored. In fact, the way in which treatment is interpreted has as substantial an impact on our understanding of the scope of the right as does the way in which degrading is interpreted. If treatment is interpreted narrowly, then the scope of the right is clearly limited, and if interpreted broadly the scope of the right expands. This chapter will consider in-depth the *forms* that substantive degradation may take.

The framework discussed in Chapter Four, with the protection of human dignity at its core and revolving around ideas of interpretation, may appear to be of less obvious significance in asking what the term treatment may encompass than it was in relation to the meaning of degrading. In fact, very similar points carry across: meanings will not be ‘invented’; the core of the analysis is the case-law of the Court, which will be clarified and elaborated upon. An interesting question relates to how the protection of human dignity as an element of purpose within the ECtHR’s system of teleological interpretation might be relevant to elaborating upon the meaning of treatment. This will be relevant in analysis of the potential sources of treatment in this chapter. It is also significant to recall that the legal meaning of the term treatment may, but need not necessarily accord with the way the term is used in everyday language; the meaning may

be its everyday one or it may be a special one, and both are legitimate.<sup>615</sup> Again, dictionary meanings can be considered, to give an impression of the possible range of semantic meanings of the term treatment.

An overview of dictionary meanings will be the first port of call, to provide a backdrop against which references to the idea of treatment in human rights literature can then be considered. The range of instances of treatment in the case-law will be discussed in detail and it will become clear that the meaning accorded to the term is not as one-dimensional as may be assumed and that this meaning does in fact require attention. The focus of analysis in this chapter will differ considerably from analysis of the meaning of degradation in the previous chapter. This is inevitable; simply because the object of analysis in the present chapter is of a different nature, and because there is no explicit indication of the meaning of treatment in the Court's judgments to use as a starting point for exploration. This implies, firstly, that there will not be the same degree of reliance upon non-legal literature to illuminate this term. Given the very different nature of the term treatment, in contrast to degradation (which invokes concepts such as humiliation and autonomy), philosophical or other non-legal literature clearly does not make an analogous contribution to understanding its meaning. And secondly, this implies that it will be necessary to focus on extracting from the case-law understandings of the scope of the term treatment that are only implicit. This is unlike the term degrading, in relation to which several points of reference are clearly established in the jurisprudence.

Consequently, the focus in this chapter shall remain on the case-law. There will be a shift here from cases dealing exclusively with degrading treatment to include both inhuman treatment and inhuman and degrading treatment, since we are concerned solely with the interpretation of the term treatment. It is assumed that treatment will have the same meanings whether it is attached to inhuman and/or degrading (or at least that such meanings could plausibly be argued to carry over from one to the other). In order to identify the meanings accorded to the term treatment, patterns in the jurisprudence will be highlighted, recurring themes will be unpacked, and it will be argued that four forms of treatment are identifiable: treatment as an action, behaviour or conduct; as a situation or set of circumstances; as a failure to act; and as a manner or attitude. In addition, the question of the potential sources of treatment will be highlighted, and six will be

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<sup>615</sup> Recall that everyday and special meaning, following from Chapter Four, can both be encompassed within the idea of ordinary meaning.

identified: the State Party, another state, non-state institutions, private persons, no one identifiable actor or institution, and the applicant him- or herself. This unpacking also aims to clarify the relationship between treatment and the responsibility of the state. For a finding of a human rights violation, there must always, of course, be a link to the state, but it should become clear in this chapter that this link does not necessarily lie in the idea of treatment.

### Treatment in the dictionary

On first encounter, the notion of treatment may appear limited to denoting an action towards someone. Behind this might lie two entirely reasonable assumptions: The first would likely derive from the close association between degrading treatment and torture; torture might be seen to epitomise intentional *action – active ill-treatment* – by an identifiable actor towards an individual. Given that degrading treatment is part of the prohibition of torture, this might support the perception of the term treatment as simply designating an action towards someone.

The second assumption might be that treatment, as a commonly used word, has its everyday meaning and in this case that meaning seems clear. In everyday use treatment tends to refer to an act towards someone. This is the first definition given in the dictionary: conduct, behaviour, and action towards a person. At the same time, the dictionary reminds us that the word treatment is also used in other ways, listing entertainment, management in the application of remedies, subjection to a chemical agent, the act or manner of dealing with something in literature or art, and negotiation.<sup>616</sup> An alternative dictionary meaning indicates that treatment includes the act or manner of dealing with, handling, discussing, behaving towards, acting upon and subjecting to a process.<sup>617</sup> French dictionary definitions of ‘traitement’ point to the same range of meanings.<sup>618</sup> This overview can provide a useful indication of ways in which the term might be used.

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<sup>616</sup> *Compact Edition of the Oxford English Dictionary.*

<sup>617</sup> *Chambers English Dictionary.*

<sup>618</sup> *Le Nouveau Petit Robert.*

## Treatment in legal literature

There is a gaping lack of analysis of the notion of treatment in literature pertaining to Article 3. What the term can actually encompass is generally glossed over. Clayton and Tomlinson consider degrading treatment and degrading punishment separately, as they do with inhuman treatment and punishment, but neither treatment nor punishment is considered in depth (for example, in relation to degrading treatment the authors state that: ‘Degrading treatment is treatment that humiliates or debases’, and proceed to consider the case-law).<sup>619</sup> Harris et al. take a very similar approach.<sup>620</sup> The focus of Evans and Morgan’s discussion of the terms within Article 3 is on questioning the relationship ‘between ‘torture’ and ‘inhuman’ and ‘degrading’[...].’<sup>621</sup> Detail is then given on each element of the right, but sections on degrading treatment and inhuman treatment revolve around the case-law on degrading and inhuman.<sup>622</sup> The case-law, as shall be seen below, has generally not made any explicit remarks about the term treatment, contrary to the meaning of degrading; this is subtly visible in Evan and Morgan’s statement that: ‘The question of what is meant by ‘degrading’ treatment or punishment has received extensive examination.’<sup>623</sup> A similarly subtle indication of this is identifiable in Cassese’s point that ‘it is particularly difficult to pinpoint the exact scope and meaning of the bans enshrined in Article 3 regarding the notion of ‘inhuman’ and ‘degrading’ treatment or punishment.’<sup>624</sup> The focus of literature is overwhelmingly on what has been said about the *degrading (or inhuman) nature* of the treatment, rather than about treatment in its own right. It is generally stated simply that treatment must display the established signs of degradation and that treatment must reach a minimum level of severity.<sup>625</sup> The greatest degree of information on treatment is given by Ovey and White: in a sub-section on ‘Distinguishing Treatment and Punishment’, the authors state that it is not normally

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<sup>619</sup> Clayton and Tomlinson (2000) at 394, para. 8.32; 392-96, para. 8.27-8.38.

<sup>620</sup> Harris et al. (1995) at 55-89.

<sup>621</sup> Evans and Morgan (1998) at 76.

<sup>622</sup> Evans and Morgan (1998) at 73-98 in general.

<sup>623</sup> Evans and Morgan (1998) at 87.

<sup>624</sup> Cassese, Antonio (1993), ‘Prohibition of Torture, Inhuman or Degrading Treatment or Punishment’, in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff), 225-61, at 225.

<sup>625</sup> For examples see Cooper (2003) at 20, para. 1-26; 22, para. 1-31; Reid, Karen (2008), *A Practitioner’s Guide to the European Convention on Human Rights* (3<sup>rd</sup> edn.; London: Sweet and Maxwell) at 575, 577; Lester and Pannick (2004) at 137.

necessary to distinguish between the two, noting that punishment would generally involve treatment and therefore both can be considered together.<sup>626</sup>

There seems to be an assumption that the meaning of treatment is clear. The paucity of discussion is also likely due to the fact that, in general, the potential extent of Article 3 has very rarely been examined; as has already been noted in earlier chapters, discussion of the range of Article 3 situations tends to be limited to a classification of important cases that have been decided so far and an outline of principles that have developed without further probing. The lack of analysis may also be due to the fact that the meaning accorded to treatment in the case-law is often difficult to decipher, as will be discussed more fully below. The meaning of treatment in any particular case has very rarely been made explicit – the recent *Pretty* case appears to have been the first occasion on which the Court has been obliged to consider the notion of treatment in its own right. It is perhaps not surprising, therefore, that the literature offers little insight into the meaning of the term. However, as noted in previous chapters, case-law suggests that the meaning of treatment is not as unproblematic as the literature would imply; its meaning in fact appears to be liable to some confusion. In addition, case-law suggests that treatment has a *wider* meaning than that which is implied in the literature. The scope of the term, which it will be argued is in fact rather complex, merits the discussion that will follow in the present chapter.

### Treatment in case-law

It will be helpful, before moving to the detail, to provide an overview of those situations, based on a close reading of the case-law, that have been accepted as amounting to treatment. The following are in no particular order: abuse by police and private persons; the conduct of a strip-search; destruction of property by security forces; conditions of detention; the death row phenomenon; conditions of inadequate medical treatment and social care; failure to provide adequate medical care; the attitude of state authorities; sexual assault; a policy, investigation and dismissal from employment; discrimination; suspension of a child from school; polluted living conditions; removal of children from

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<sup>626</sup> Ovey and White (2006) at 84.

the care of their parents; threat of corporal punishment; and legal rules. These cases can all be seen to include acceptance of a particular understanding of treatment.

Examples of cases falling within each of these categories will now be outlined for further discussion in order to demonstrate as transparently as possible the meaning of treatment. Some less obvious interpretations will require more extensive discussion. Whether a violation was or was not found in all of the cases to be discussed is not the principal concern – there are clearly cases in which the proposed meaning of treatment is accepted by the Court but which culminate in a finding of no violation for other reasons. This includes cases in which the inhuman/degrading treatment claim is not considered at length (for example, in *López Ostra*, to be referred to below, the Court focused on the Article 8 claim and found a violation in this respect; it was then concluded, with little discussion, that Article 3 had not been violated). Only conclusions about accepted meanings of treatment that can nevertheless be asserted with confidence will be sustained. Discussion will also include the *Pretty* case as an interesting example of the Court engaging with the meaning of treatment, where a particular meaning of treatment was argued but expressly rejected.

#### Abuse/violence

This is treatment in its most obvious sense – active insult and abuse by an identifiable actor towards an individual. The case of *Ribitsch v. Austria* concerned assault by a police officer, in which the applicant, arrested on suspicion of drug-trafficking, alleged that he had been insulted and physically assaulted by the police officers questioning him. Finding that the allegations of the applicant had been substantiated, the Court concluded that the applicant had been subjected to violence that amounted to inhuman and degrading treatment. Physical injury inflicted by a police officer was similarly in cause in the case of *Barbu Anghelescu v. Romania*.<sup>627</sup>

At issue in *Ireland v. UK* were interrogation methods used during the period of internment of suspected terrorists in Northern Ireland. The meaning of treatment in this

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<sup>627</sup> *Barbu Anghelescu v. Romania*, para. 60.

case was a combination of techniques.<sup>628</sup> This combination – of ‘wall-standing’, ‘hooding’, ‘subjection to noise’, ‘deprivation of sleep’, and ‘deprivation of food and drink’<sup>629</sup> – was found by the Court to amount to inhuman and degrading treatment. This interpretation of treatment as action directed towards a number of individuals is similar to that in *Ribitsch*. The possibility of treatment referring to a number of actions in combination is highlighted in *Ireland*, due to the number of factors involved and the relatively widespread nature of the ill-treatment; treatment is not confined to describing a single act.

The following statement from *Z. and others v. UK* demonstrates, as do cases concerning ill-treatment by state officials, that abuse can indeed equal treatment, including where this is committed by a non-state actor: ‘There is no dispute in the present case that the *neglect and abuse suffered* by the four applicant children reached the threshold of inhuman and degrading treatment [...]’.<sup>630</sup> Similarly in *E. and others v. UK*, treatment refers to the abuse inflicted on the applicants by their stepfather:

*The Court recalls that the four applicants allege that they suffered sexual and physical abuse from W.H. over a long period of time. There is no doubt that the treatment described [...] falls within the scope of Article 3 of the Convention as inhuman and degrading treatment.*<sup>631</sup>

In this case, the failure of the state to properly investigate and deal with the allegations engaged its responsibility and amounted to a breach of a positive obligation to protect the applicants from prohibited treatment.

The conduct of a strip-search

In the case of *Valasinas v. Lithuania*, the detained applicant underwent a search in which he was forced to strip naked in front of a female officer and was subjected to intrusive

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<sup>628</sup> *Ireland v. UK*, para. 167.

<sup>629</sup> *Ireland v. UK*, para. 96.

<sup>630</sup> *Z. and Others v. UK*, para. 74 (emphasis added).

<sup>631</sup> *E. and Others v. UK*, para. 89.

searches by guards not wearing gloves. The conduct of the strip-search is seen as the treatment in this case, which was said to have shown a clear lack of respect.<sup>632</sup>

### Destruction of property

After a Commission finding of inhuman and degrading treatment in the case of *Selçuk and Asker v. Turkey*, the Court agreed and found a breach of Article 3. The treatment in question was the burning of the applicants' homes.<sup>633</sup> As with abuse by police, the meaning of treatment in this case accords with the most obvious meaning of the term – action towards individuals by identifiable actors.

### Conditions of detention

The case of *Peers v. Greece* is a clear example of a case in which detention conditions have been found to be within the meaning of treatment. More than one factor combined to result in the unacceptable conditions. The treatment is summarised as follows:

*[...] for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention [...] amounted to degrading treatment within the meaning of Article 3 of the Convention.*<sup>634</sup>

Treatment refers to the conditions that the applicant had to endure. It might be argued that treatment refers to the actions of the prison authorities, or that treatment equates to the placing of the individual in the complained-of conditions. These are obvious associations, but ones which are shown to be inaccurate on a close reading of the case-law, as is evident in the above citation: it is the 'prison conditions' themselves that

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<sup>632</sup> *Valasinas v. Lithuania*, para. 117.

<sup>633</sup> *Selçuk and Asker v. Turkey*, para. 74, 80.

<sup>634</sup> *Peers v. Greece*, para. 75.

‘diminished the applicant’s human dignity’; it is those conditions that amounted to degrading treatment. The question of who or what caused those conditions is a question that relates to the engagement of the responsibility of the state rather than the meaning of the term treatment. As noted earlier, such state responsibility is vital but it will not serve the exploration of the meaning of treatment to confuse the characterisation of treatment in such cases.

Many similar cases can also be cited. In *Dougoz v. Greece*, for example, it is stated explicitly that: ‘The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment.’<sup>635</sup> Similarly, in *Nevmerzhitsky v. Ukraine*<sup>636</sup>, and also in *Mayzit v. Russia*: ‘[...] the Court finds that the applicant’s conditions of detention, in particular the overcrowded environment and the length of time the applicant was detained in such conditions, amounted to a degrading treatment.’<sup>637</sup> Treatment is also considered as detention conditions in *Price v. UK*, in which a disabled woman was detained in a police cell in extreme cold with an unreachable, unsuitable bed and inadequate hygiene arrangements.<sup>638</sup>

#### The death row phenomenon

The judgment in *Soering v. UK* was the first case in which the Court established the principle that a Contracting State could be responsible for a breach of Article 3 by extraditing an individual to another state in which there was a real risk that s/he would suffer torture, inhuman or degrading treatment or punishment. *Soering*, a German national, was detained in the UK pending extradition to the United States on murder charges. The applicant argued that there was a serious likelihood that he would be sentenced to death if extradited. He argued that he would be subjected to inhuman and degrading treatment and punishment, in particular by being placed on death row.<sup>639</sup> In its deliberation, the Court confirmed that:

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<sup>635</sup> *Dougoz v. Greece*, para. 46.

<sup>636</sup> *Nevmerzhitsky v. Ukraine*, para. 87.

<sup>637</sup> *Mayzit v. Russia*, para. 42.

<sup>638</sup> *Price v. UK*, para. 30.

<sup>639</sup> *Soering v. UK*, para. 76.

*The alleged breach derives from the applicant's exposure to the so-called "death row phenomenon". This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.*

In clarifying the position in relation to extradition cases, it was stated that:

*The applicant likewise submitted that Article 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[...] 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.<sup>640</sup>*

The Court, in highlighting the objective of practical and effective protection in accordance with the spirit of the Convention, and the fundamental character of the right enshrined in Article 3, concluded that it would be incompatible with the Convention's underlying values to surrender an individual to a state where there were grounds for believing that s/he would be subjected to torture, or to inhuman or degrading treatment or punishment.<sup>641</sup> The death row phenomenon was described as the 'source of the alleged inhuman and degrading treatment or punishment [...].'<sup>642</sup> As shall be argued also in the following section, the proposed act of expulsion in this case was not the treatment, but rather the factor that demonstrated the responsibility of the state for a violation of Article 3. The content of the Court's considerations make it extremely clear that it is the situation to which the applicant would be exposed in the United States that would potentially be inhuman or degrading:

*[...] having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 [...].<sup>643</sup>*

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<sup>640</sup> *Soering v. UK*, para. 81-82 respectively.

<sup>641</sup> *Soering v. UK*, para. 87-88.

<sup>642</sup> *Soering v. UK*, para. 92.

<sup>643</sup> *Soering v. UK*, para. 111.

In terms of deducing the interpretation of treatment then, this clearly points to an understanding of treatment as a combination of those particular factors that combined to produce the death row phenomenon.

#### Conditions of inadequate medical treatment and social care

The case of *D. v. UK* demonstrates that treatment has been accepted as meaning *conditions* of inadequate medical treatment and social care. The applicant had been convicted of drug offences in the UK. During his imprisonment he was diagnosed as suffering from AIDS. After his release, he was to be sent back to his native St Kitts and the applicant argued that removal to St Kitts would ‘expose him to inhuman and degrading treatment’.<sup>644</sup> It would leave him to die in pain, suffering and destitute. He had no relatives, no accommodation, and no access to social support. The withdrawal of the medical care he was receiving in the UK would hasten his death since similar care would not be available and the harsh physical environment would lead to attacks on his immune system. It was argued that his death would not only be accelerated but would take place in circumstances that would be inhuman and degrading. The Government ‘requested the Court to find that the applicant had no valid claim under Article 3 [...] in the circumstances of the case since he would not be exposed in the receiving country to any form of treatment which breached the standards of Article 3 [...]’.<sup>645</sup> It was argued that the hardship he would suffer stemmed from his illness. The Court acknowledged its established case law in which it is clear that it is the responsibility of a Contracting State not to expel an alien under its jurisdiction to a country where there is a real risk that s/he would suffer torture, inhuman or degrading treatment or punishment.<sup>646</sup>

It will be helpful at this point to mention some authorities concerning expulsion and a real risk of torture, inhuman or degrading treatment in order to demonstrate as clearly as possible the understanding of treatment that they display. That the state can be responsible for a breach of Article 3 if an individual would suffer torture, inhuman or

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<sup>644</sup> *D. v. UK*, para. 39.

<sup>645</sup> *D. v. UK*, para. 42.

<sup>646</sup> *D. v. UK*, para. 46-48, 50.

degrading treatment or punishment in another state concerns a positive state obligation – to take measures to *protect* an individual from suffering proscribed treatment.

In the Court’s original formulation, the risk of Article 3 prohibited treatment was the risk of treatment *inflicted by the receiving state or state agents*. In *Soering v. UK*, the ‘alleged breach derives from the applicant’s exposure’ to the death row phenomenon, which would have been imposed by the US authorities.<sup>647</sup> The principle has also been held to apply to prohibited treatment that risks being *inflicted by non-state agents* in the receiving state. In *H.L.R. v. France*, in which a real risk of inhuman or degrading treatment was argued to stem from drug dealers in the receiving state, the Court made the following statement, confirming that treatment in this case would refer to the actions by non-state actors in Colombia:

*In the present case the source of the risk on which the applicant relies is not the public authorities. According to the applicant, it consists in the threat of reprisals by drug traffickers, who may seek revenge because of certain statements that he made to the French police, coupled with the fact that the Colombian State is, he claims, incapable of protecting him from attacks by such persons.*

*[...] Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention [...] may also apply where the danger emanates from persons or groups of persons who are not public officials.*<sup>648</sup>

To return to *D. v. UK*: the Court takes this reasoning one step further and holds that treatment may stem from ‘factors’ for which the state is not directly or indirectly responsible:

*It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection [...].*

*Aside from these situations and given the fundamental importance of Article 3 [...] in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article [...] in other contexts which might arise. It is not therefore prevented from scrutinising an applicant’s claim under Article 3 [...] where the source of the risk of proscribed treatment in the receiving country*

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<sup>647</sup> *Soering v. UK*, para. 81.

<sup>648</sup> *H.L.R. v. France*, para. 39-40.

*stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article[...]. To limit the application of Article 3 [...] in this manner would be to undermine the absolute character of its protection.*<sup>649</sup>

A progression is therefore clearly visible; this is simply one more step in the development of the case-law on expulsion. What also seems consequently clear, is that it is the situation to which the applicant in *D.* would have been exposed that would have been inhuman: The Court notes that the applicant is in the advanced stages of terminal illness and that there is a serious risk that ‘the conditions of adversity which await him in St Kitts’ would further reduce his life expectancy and would ‘subject him to acute mental and physical suffering.’<sup>650</sup> His lack of shelter and proper diet would be coupled with exposure to poor health and sanitation conditions and a lack of any moral or social support.<sup>651</sup> There are two related, essential points that can be derived from what has been said so far about the risk of proscribed treatment in expulsion cases for the interpretation of the term treatment as used in *D.*: firstly, treatment does not equate to the act of expulsion. Secondly, treatment is interpreted as a situation or set of circumstances.

As suggested in the introduction to the present chapter, because treatment is readily associated with an action by the state, the treatment element of the prohibition in expulsion and extradition cases is often understood as the act of expulsion. Yet this is a far from insignificant distinction. In exploring the meaning of the term treatment, this point must be clarified. To give examples from the literature: James A. Sweeney, in referring to the *Chahal* case and making a point concerning the ‘mutually supportive’ nature of negative and positive obligations, suggests that the expulsion was the treatment by the state and engaged a negative obligation as well as a positive obligation to protect.<sup>652</sup> The essential point being made is a valid one and, as has been discussed in Chapter Three, the line between negative and positive obligations is not always clear cut, but it is nevertheless unhelpful to consider the expulsion as the potential treatment. P. J. Duffy, in an early article and in the context of deliberating whether expulsion could raise

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<sup>649</sup> *D. v. UK*, para. 49.

<sup>650</sup> *D. v. UK*, para. 52.

<sup>651</sup> *D. v. UK*, para. 52.

<sup>652</sup> Sweeney, James A. (2008), ‘The Human Rights of Failed Asylum Seekers in the United Kingdom’, *Public Law*, Sum, 277-301, at 297-98.

an issue under Article 3 if the risk of prohibited treatment would stem from private individuals, expresses the view that the ‘theoretical basis for applying Article 3 to expulsion cases is that the act of expulsion itself in all the circumstances constitutes inhuman and degrading treatment.’<sup>653</sup>

It is no less than crystal clear, in cases such as *Soering* and *H.L.R.*, that treatment is not equated with the act of expulsion. Surprisingly, however, the Court itself has subsequently displayed a significant lack of clarity in this respect. Although this has been rare, it seems to have been sufficient to engender some confusion as to the identification of treatment in such cases. Undoubtedly a blurring of the distinction between forms of state obligation is reflected in such confusion but this does not in any way detract from the paramount need to clarify the forms that treatment can actually take. In the *Pretty* case, it was clearly suggested by the Court that treatment in *D. v. UK* referred to the state’s act of expelling the individual.<sup>654</sup> And statements of the Court in *D. v. UK* indeed seem to suggest this. For example:

*In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant’s fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 [...].*<sup>655</sup>

This is preceded, however, by the statement, already cited, in relation to the source of the risk of prohibited treatment; to recall, the Court, referring to its authorities on the expulsion of aliens, held that, although this situation was different in that the risk of ill-treatment did not stem from public authorities in the third state, the Court:

*[...] is not [...] prevented from scrutinising an applicant’s claim under Article 3 [...] where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country [...]*<sup>656</sup>

It is undeniable that the treatment is the proscribed treatment that takes place within the receiving country. And as has been shown, this is *entirely* in line with the general

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<sup>653</sup> Duffy (1983) at 339.

<sup>654</sup> *Pretty v. UK*, para. 53.

<sup>655</sup> *D. v. UK*, para. 53.

<sup>656</sup> *D. v. UK*, para. 49.

approach of the Court. Furthermore, post-*Pretty* expulsion cases, such as *Said v. the Netherlands*, have ‘reverted’ to treatment as that which would be potentially inflicted in the receiving State as opposed to the act of expulsion, as evidenced in the following statements:

*[...] the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.*

*[...] whether it has been shown that the applicant runs a real risk, if expelled to Eritrea, of suffering treatment proscribed by Article 3 [...].*

*The question remains whether the applicant is at risk of ill-treatment if he returns home.*<sup>657</sup>

*Chahal v. United Kingdom*, cited by Sweeney in support of treatment as the act of expulsion, can in fact be cited to refute this conclusion. That the inhuman or degrading treatment in such cases does not refer to the act of expulsion is demonstrated extremely clearly (note in particular the reference to engagement of responsibility of the state via expulsion):

*[...] it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 [...], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 [...] in the receiving country. In these circumstances, Article 3 [...] implies the obligation not to expel the person in question to that country [...].*

*Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 [...] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...].*<sup>658</sup>

The Court then goes on to consider in this case whether a real risk of prohibited treatment does in fact exist in India, the receiving state, and in respect of the applicant. The applicant argued that he would, as a prominent Sikh militant, *be in danger of*

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<sup>657</sup> *Said v. the Netherlands*, no. 2345/02, 05 July 2005, para. 46, 49, 54.

<sup>658</sup> *Chahal v. UK*, para. 74, 80.

*persecution at the hands of security forces*. A number of his relatives had been detained and *ill-treated* because of their connections to him, which suggested that he was also at risk.<sup>659</sup> The UK government submitted that, due to the high profile of the case, the Indian government would be very careful *not to allow any ill-treatment to be inflicted* on the applicant.<sup>660</sup> It is not, therefore, the act of expulsion that constitutes the potential proscribed treatment.

Confirmation of this reading can also be found in the literature. In the words of Harris et al.: ‘Most strikingly, Article 3 has been interpreted as controlling extradition or deportation *to face ill-treatment abroad*.’<sup>661</sup> It is confirmed also (for the most part implicitly) in an article by Alleweldt dealing exclusively with expulsion under Article 3; to take one direct example from his introduction: ‘[...] Article 3 prohibits the extradition of a person *who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country*.’<sup>662</sup> This is supported by Palmer, who describes a real risk of prohibited treatment on expulsion as involving a positive obligation to protect from, or deter, the suffering of proscribed treatment by state or non-state agents<sup>663</sup>, suggesting that the state has to protect against the treatment; not that the state would inflict the treatment.<sup>664</sup>

On the basis of the case-law analysis, which finds support in this human rights literature, it is submitted that the Court’s original understanding of treatment as that which would be inflicted in the receiving state is the most logical. The alternative explanation is untenable: this would be that there is no confusion, but rather that treatment can be used simultaneously in either, or both, senses, which would suggest some interesting (non)linkages between degrading and treatment. It would logically lead to the possibility

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<sup>659</sup> *Chahal v. UK*, para 93-94.

<sup>660</sup> *Chahal v. UK*, para 92.

<sup>661</sup> Harris et al. (1995) at 88 (emphasis added).

<sup>662</sup> Alleweldt, Ralf (1993), ‘Protection Against Expulsion Under Article 3 of the European Convention on Human Rights’, *European Journal of International Law*, 4 (1), 360-76, at 360 (emphasis added).

<sup>663</sup> Palmer (2006) at 441.

<sup>664</sup> See also the following practitioner’s guide, in which this form of obligation is placed within the category of positive obligations: Kelly, Mark (2005), ‘The Right not to be Ill-treated: A Practical Guide to the European Convention on Human Rights’ (Belfast: Northern Ireland Human Rights Commission), at 21; available at:

<http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/12/RightNot2BIllTreated.pdf>

of what could be called ‘double degradation’ – where treatment would itself be degrading because it caused degrading treatment. The applicant would then in effect have been subjected to degrading treatment twice. In fact, what we see in references to *D. v. UK* is an idea of treatment itself being degrading simply because it causes a person to suffer ‘something’ degrading; it would not have to be degrading *treatment* that is suffered by the individual. This interpretation appears to be used in a UK Court of Appeal case in which treatment in *D. v. UK* is accepted by Lord Phillips as the act of expulsion, leading to inhuman or degrading *consequences*.<sup>665</sup> This distorts the text of the Convention and the process of interpretation by creating a disjunction between degrading and treatment, and it heavily blurs the distinction between positive and negative obligations. And this is an unnecessary distortion. As has already been stressed, it is by no means the norm in expulsion cases to equate the act of expulsion with the treatment that must be identified in the case. This is best viewed as simple confusion. It appears to be essentially due to the prominent role of the state in expulsion cases, which seems to lead to confusion concerning the state’s obligations. This confusion is avoided by the argument in Chapter Three for a conceptual separation between the issue of responsibility of the state and the content of state obligations. The act of expulsion is the element that engages the responsibility of the state in a situation invoking a positive obligation, and does not equate to treatment.

The distinction also has important consequences in terms of the source of treatment and shall be returned to for further discussion below. The aspect that is of present interest is clarification that treatment in cases such as *D.* can refer to a situation rather than an action. This can also be described as a set of circumstances, which perhaps captures better the plurality of factors at play that cumulatively combine to constitute the treatment. *D. v. UK* is a good example of this amalgamation of factors; of the combined set of circumstances – lack of family support combined with lack of social support, combined with lack of accommodation, combined with a lack of medical care. In *Soering*, as can be seen in the extract from the judgment cited above, it was also a set of circumstances that was considered as treatment: the length of time, plus the anguish of execution, plus the age of the applicant, etc. The central point, therefore, which becomes

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<sup>665</sup> *R (Q. and others) v. Secretary of State for the Home Department*, para. 54.

visible when treatment is distinguished from the act of the state party in question, is that treatment has been interpreted as a situation or a set of circumstances.

#### Failure to provide adequate medical care

Cases involving a failure to do something perhaps fall slightly uncomfortably within the scope of treatment. That treatment can be interpreted in such a way, however, indeed seems to be the case. For example, in *Nevmerzhitsky v. Ukraine* this point is made rather explicit:

*[...] there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment.*<sup>666</sup>

This suggests that treatment can mean a lack of action, or an omission or series of omissions.

Defects in the provision of medical care constituted inhuman and degrading treatment in *Keenan v. UK*.<sup>667</sup> The Court reiterated that state authorities have an obligation to protect the health of detainees. After agreeing with the Commission that it was not possible to know with certainty the extent to which Mark Keenan's medical symptoms had been caused by his conditions of detention, the Court nevertheless held that the state had an obligation to protect the detainee from treatment or punishment contrary to Article 3.<sup>668</sup> A lack of effective monitoring of his condition, including a lack of medical notes and of specialised psychiatric care, demonstrated defects in the medical care that was provided to a detainee who was known to be suffering from a chronic mental illness.<sup>669</sup> Treatment, therefore, entailed a *failure* to provide proper care.

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<sup>666</sup> *Nevmerzhitsky v. Ukraine*, para. 106.

<sup>667</sup> *Keenan v. UK*. This case also involved the inappropriate imposition of a severe disciplinary punishment, which in conjunction with the lack of adequate medical care amounted to a finding of inhuman and degrading treatment and punishment.

<sup>668</sup> *Keenan v. UK*, para. 112-13.

<sup>669</sup> *Keenan v. UK*, para. 116.

## Attitude of state authorities

In the case of *Akkum and Others v. Turkey*, treatment refers to an attitude of disrespect. This case is interesting because there is an obvious action that is imputable to the state authorities and that could perhaps be too quickly identified as the treatment in question. Mr. Akkum, the first applicant in this case, was the father of a man whom he alleged had been killed by security forces. The court found the Turkish authorities to be responsible for the killing of Mr. Akkum's son since they failed to account for his death (and that of the relatives of the two other applicants) within an area under the control of the security forces. A specific complaint was made under Article 3 by Mr. Akkum since his son's body had also been severely mutilated. This applicant:

*[...] argued that the mutilation of his son Mehmet Akkum represented inhuman treatment contrary to Article 3 of the Convention in relation to him, and that the mutilation of a body was offensive to a Muslim, given that he had had to bury an incomplete and mutilated body.*<sup>670</sup>

The Turkish government did not address the issue. The Court confirmed that it was possible in certain circumstances for a family member of a disappeared person to be 'a victim of treatment contrary to Article 3'. It states that this may derive from the attitudes and reactions of the authorities when the situation is brought to their attention, and it is especially in such circumstances that the relative can be seen to be a direct victim of the authorities 'conduct'.<sup>671</sup> The final paragraph is as follows:

*In the same vein, the Court considers that Zülfi Akkum, as a father who was presented with the mutilated body of his son, can legitimately claim to be a victim within the meaning of Article 34 of the Convention. Furthermore, the Court has no doubts that the anguish caused to Mr Akkum as a result of the mutilation of the body of his son amounts to degrading treatment contrary to Article 3 of the Convention.*<sup>672</sup>

The treatment in this case is the response of the authorities to the applicant. The way that the applicant's son's body was treated stands out as an obvious example of treatment that could violate Article 3, and it is tempting to identify this as the treatment in question. The Court's statement that the anguish caused to Mr Akkum *as a result of* the mutilation

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<sup>670</sup> *Akkum and Others v. Turkey*, para. 253.

<sup>671</sup> *Akkum and Others v. Turkey*, para. 258.

<sup>672</sup> *Akkum and Others v. Turkey*, para. 259.

of the body of his son amounted to prohibited treatment is perhaps confusing. But the applicant argued that the mutilation of his son's body *represented* inhuman treatment *in relation to himself* – the suggestion is that it is the impact on the applicant of the whole situation (including the harm to his son's body) that amounted to treatment, rather than the mutilation of the body, which was of course in relation to his son rather than the applicant. In this sense, the applicant argued that he was treated in an inhuman way when the authorities (in the words of the Court) 'presented' him with a mutilated body. This is supported by his assertion that he had been caused offence in that he had been given an incomplete body for burial. In turn, this is supported by the Court's statement that the *anguish caused* to the applicant amounted to degrading *treatment*. The treatment that was degrading, therefore, is most accurately described as an attitude, or a lack of concern (which was callous and disrespectful to such a degree as to be considered degrading).

The Court states that Article 3 may be breached in such cases particularly where the attitudes or reactions of the authorities in response to requests for information about a family member constitute prohibited treatment in themselves, directly towards the relative. In *Akkum*, however, it is not the reactions of the authorities in response to enquiries about the whereabouts of a disappeared person that is the subject of the complaint. The Court seems to see the situation in *Akkum* as nevertheless being 'in the same vein'.<sup>673</sup> In an earlier case against Turkey, the Court referred to the applicant, a mother requesting information about her son who had disappeared, as a victim of the 'complacency' of state authorities in response to her anguish and distress. The Court found that the applicant had been subjected to prohibited treatment.<sup>674</sup> Treatment, therefore, describes an attitude characterised by a lack of concern. In the later case of *Timurtas v. Turkey*, complete disregard shown by state authorities in response to a father's concerns about the whereabouts of his son, who had been taken into custody and disappeared, also constituted treatment.<sup>675</sup> The Court stated that officials showed a

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<sup>673</sup> *Akkum and Others v. Turkey*, para. 259.

<sup>674</sup> *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, para. 130-34.

<sup>675</sup> *Timurtas v. Turkey*, no. 23531/94, ECHR 2000-VI.

‘callous disregard for the applicant’s concerns’.<sup>676</sup> In the case of *Ucar v. Turkey*, the Court reiterated that:

*The essence of such a violation does not so much lie in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention [...].*<sup>677</sup>

In reaching a conclusion of no violation in this case, the Court made reference to the *manner* of the authorities’ response:

*In the instant case, the Court observes that there is nothing in the content or tone of the authorities’ replies to the enquiries made by the applicant that could be described as inhuman or degrading treatment.*<sup>678</sup>

It is an attitude or manner that is subsumed under the heading of treatment.

### Sexual assault

The applicant *Y.* in the case of *X. and Y. v. the Netherlands* was a mentally disabled teenage girl who had been raped. Discussion of the inhuman and degrading treatment complaint by the Court was brief and ended in a decision not to examine the case under Article 3 after having found an Article 8 violation. Regardless, the construal of treatment as the suffering of *Y.* ‘at the hands of’ her attacker<sup>679</sup> would without question be an acceptable meaning of treatment as an example of action and behaviour towards the applicant.

### A policy, investigation and dismissal from service

The case of *Smith and Grady* concerned a British government policy of exclusion of homosexuals from the armed forces. The army authorities were informed that the applicants, employed in the Air Force, were homosexual, after which they were interviewed and discharged. The applicants challenged the conduct of the investigations

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<sup>676</sup> *Timurtas v. Turkey*, para. 97.

<sup>677</sup> *Ucar v. Turkey*, no. 52392/99, 11 April 2006, para. 109.

<sup>678</sup> *Ucar v. Turkey*, para. 110.

<sup>679</sup> *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A, no. 91, para. 33.

and subsequent discharge under Article 3.<sup>680</sup> They also challenged the policy itself: a Ministry of Defence policy whose position was that homosexuality was incompatible with service in the armed forces.<sup>681</sup> The first element of their argument was that the existence of such a policy amounted to degrading treatment; the government argued that the policy could not be categorised as degrading.<sup>682</sup> In response, the Court stated that:

*[...] while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.*<sup>683</sup>

The implication is that treatment refers to the policy together with the action pursuant to the policy. There is a combination of factors, therefore; a situation.

The investigation and dismissal are essentially actions; is the policy also considered as an action towards the applicants? The applicants' argument included reference to the Ministry of Defence policy, as did the Court. It is interesting as an aside to consider whether the policy alone, if it had not been implemented, would have amounted to treatment. Hypothetically, there is no reason to doubt that a policy could be understood as treatment (as a situation), but the applicant would be required to show that it was degrading or inhuman towards her- or himself. The only clear conclusion that can be drawn from this case is that treatment is again shown to be a situation or set of circumstances.

## Discrimination

The initial question for consideration in the *East African Asians Case* (reported on by the European Commission and not examined by the Court but an important and prominent case) was whether the British government's refusal to allow the applicants – UK citizens

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<sup>680</sup> The complaint invoked Article 3 alone or in conjunction with Article 14, and the policy was also argued to be contrary to Article 10 ECHR. The investigation and discharge was also complained of in relation to Article 8 alone and in conjunction with Article 14. See *Smith and Grady v. UK*, para. 69, 117, 124.

<sup>681</sup> *Smith and Grady v. UK*, para. 49.

<sup>682</sup> *Smith and Grady v. UK*, para. 117-18.

<sup>683</sup> *Smith and Grady v. UK*, para. 122.

with no other state to go to – to enter and/or remain permanently in the UK amounted to degrading treatment.<sup>684</sup> One element to be examined was whether the immigration legislation that had been applied to the applicants discriminated against them. The applicants argued that the refusal to admit them to the UK ‘reduced them to the status of second-class citizens’ and that this was based on their race.<sup>685</sup> The Commission went on to confirm the view expressed in its admissibility decision that discrimination based on race could, in certain circumstances, amount to degrading treatment in itself.<sup>686</sup> Treatment, therefore, in the opinion of the Commission, was capable of being understood as discrimination (the degrading nature of the discrimination was due to it being racist).<sup>687</sup>

Since the issue concerns legislation, however, is it possible that the application of legislation could be identified as the treatment? It is perhaps a subtle distinction, but one which it is nevertheless necessary to address in the process of seeking clarity about the range of meanings that have been accorded to treatment. In the *East African Asians Case*, however, it is clear that the treatment is understood as the discrimination:

*The Commission has stated above [...] that the legislation applied in the present case discriminated against the applicants on the grounds of their colour or race. It has also confirmed the view [...] that discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention [...].*

*[...] differential treatment on the basis of race might therefore be capable of constituting degrading treatment [...].*<sup>688</sup>

It appears that this question is not dissimilar to that which arises in several other cases that have been outlined, and relates essentially to the distinction between the element that constitutes treatment and the factor that points towards the responsibility of the state. The application of the legislation in this case arguably constitutes the link to state responsibility. As an hypothetical example, it is possible to imagine a situation where the state itself did not inflict the discrimination; the applicant might have argued that the

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<sup>684</sup> *East African Asians Case*, Commission Report, at 52, para. 178-80.

<sup>685</sup> *East African Asians Case*, Commission Report, at 53, para. 180-82.

<sup>686</sup> *East African Asians Case*, Commission Report, at 57, para. 196.

<sup>687</sup> *East African Asians Case*, Commission Report, at 62, para. 207.

<sup>688</sup> *East African Asians Case*, Commission Report, at 62, para. 207.

state had an obligation to protect against discrimination stemming from a non-state actor. In order to hold the state to account for suffering caused by the degrading discrimination, the applicant would have to show that there was a link to the state in order to hold the state responsible for a violation. This shows that the role of the state is *not necessarily* as the inflictor of the treatment; the view of treatment as discrimination remains intact.

Treatment as discrimination is implicitly confirmed by the ECtHR in *Abdulaziz, Cabales and Balkandali v. UK*. Firstly, in that the Court describes discrimination (on the grounds of sex, race and in relation to one applicant, birth) as a ‘difference of treatment’.<sup>689</sup> Secondly, in that the Court finds that the discrimination did not humiliate or debase, etc, suggesting that discrimination is the treatment that could potentially have been degrading.<sup>690</sup> Referring to *Abdulaziz, Cabales and Balkandali*, the Court in *Smith and Grady* extended the possibility of degrading treatment encompassing discrimination, this time on the basis of sexual orientation:

*Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 [...].*<sup>691</sup>

This confirms the acceptance of treatment being interpreted as discrimination.

#### Suspension of a child from school

Treatment in the case of *Valsamis* refers to the suspension of a child from school.<sup>692</sup> This is evident despite the fact that the applicant did not give any detail on the alleged breach of Article 3 or which element of Article 3 was felt to be in question. The Court suggested that the seriousness of the complaint was blatantly below the minimum level of severity. The act of suspension from school is a clear, identifiable action and, therefore, one can anticipate that this could unproblematically be classified as treatment.

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<sup>689</sup> *Abdulaziz, Cabales and Balkandali v. UK*, para. 91.

<sup>690</sup> *Abdulaziz, Cabales and Balkandali v. UK*, para. 91.

<sup>691</sup> *Smith and Grady v. UK*, para. 121.

<sup>692</sup> *Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI.

## Polluted living conditions

The claim that polluted living conditions amounted to prohibited treatment in *López Ostra v. Spain* was not examined in detail. It is possible to deduce, nevertheless, even from the finding of no violation, that living conditions could constitute treatment. The way in which the Court phrases its conclusion leads to this assumption. The applicant claimed that she was the victim of degrading treatment caused by pollution from a waste treatment plant situated metres from her home, which caused severe distress.<sup>693</sup> The Court agreed with the Commission that there had been no violation of Article 3:

*The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3 [...].*<sup>694</sup>

This indicates that the reason for a finding of no violation was that the *nature* of the applicant's living conditions did not cross the minimum threshold of severity in order to be described as degrading. At the same time, the judgment also suggests that *living conditions*, if considered severe enough to involve degradation (or to be inhuman), could fall within the meaning of treatment.

## Removal of children from their parents

In the case of *Olsson v. Sweden (No. 1)* concerning the removal of three children from their parents, the Court agreed with the Commission that allegations of prohibited treatment were unsubstantiated. The Court simply stated that the removal of the children did not constitute inhuman treatment.<sup>695</sup> Unlike cases such as *López Ostra*, there is no discussion of the level of severity, making it more difficult to draw conclusions as to whether the removal of children from their parents is an accepted meaning of treatment. It can nevertheless be assumed that such a meaning is entirely plausible, given that it consists in identifiable actions towards identifiable individuals, and in that sense conforms to the most obvious meaning of the term.

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<sup>693</sup> *López Ostra v. Spain*, para. 59.

<sup>694</sup> *López Ostra v. Spain*, para. 60.

<sup>695</sup> *Olsson v. Sweden (No. 1)*, judgment of 24 March 1988, Series A, no. 130, para. 85-87.

## Threat of corporal punishment

In *Campbell and Cosans v. UK*, two mothers argued that the use of corporal punishment in their sons' schools amounted to a violation of their children's rights under Article 3. Discussion is based on treatment as no punishment had actually been inflicted on either child.<sup>696</sup> Furthermore, it was the *threat* of prohibited treatment that was the subject of consideration:

*[...] provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 [...] may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least "inhuman treatment".*<sup>697</sup>

The Court's brief examination of the complaint referred primarily to the level of severity, rather than to the meaning of the term treatment. Nevertheless, the following statement implicitly illustrates that the reason for a finding of no violation of the right not to be subjected to degrading treatment was that the nature of the treatment was not sufficiently severe to be accepted as degradation; there is no indication that the meaning of treatment itself was problematic:

*[...] Jeffrey Cosans may well have experienced feelings of apprehension or disquiet when he came close to an infliction of the tawse [...] but such feelings are not sufficient to amount to degrading treatment [...].*<sup>698</sup>

This suggests that, had the apprehension reached the necessary level of severity, the threat of corporal punishment could potentially have led to a finding of degrading treatment. Logically, therefore, the *threat of conduct* would constitute treatment.

## Legal rules

In *Marckx v. Belgium*, the applicant argued that the law relating to the rights of illegitimate children in relation to inheritance subjected her daughter and herself to degrading treatment. Before the Commission, it had been argued that the applicant's

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<sup>696</sup> *Campbell and Cosans v. UK*, para. 28.

<sup>697</sup> *Campbell and Cosans v. UK*, para. 26.

<sup>698</sup> *Campbell and Cosans v. UK*, para. 30.

child was a victim of a loss of legal rights, which was incompatible with Article 3.<sup>699</sup> These two arguments appear to be subtly different. In the first, it seems that the existence of the law itself could constitute treatment; in the second, it seems that the treatment equated to, not the law itself, but the application of the law and the consequent loss of rights inflicted. There is a sense in which this is a false distinction, in that the law necessarily embodies the loss of rights. Nevertheless, a difference is visible if it is accepted that the law may have particular consequences when *applied* to a particular individual. (This has affinities with the point raised earlier in relation to the policy at issue in *Smith and Grady*).

The Article 3 claim was not examined in detail. The Court's short statement suggests that it is the existence of the legal rules that is at issue, but ultimately it is unclear:

*In the Court's judgment, while the legal rules at issue probably present aspects which the applicants may feel to be humiliating, they do not constitute degrading treatment coming within the ambit of Article 3 [...].*<sup>700</sup>

The Court dismissed the claim that the set of legal rules in question, resulting in reduced inheritance rights, amounted to degrading treatment. It is the level of severity that is being referred to in this statement, rather than the meaning of the term treatment itself. Legal rules as treatment is not an obvious meaning of the term; or certainly less obvious than identifiable actions towards identifiable persons. It is not possible to conclude from the judgment in this case whether the existence of the legal rules is accepted to fall within the meaning of treatment, or whether it is the application of those rules and the corresponding consequences.

Treatment in *Pretty v. UK*

That suffering as a result of a naturally-occurring disease could constitute treatment was the argument in the case of *Pretty v. UK*.<sup>701</sup> As aforementioned, this case was the first 'analysis' of treatment that occurred in the Court. The applicant's postulated

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<sup>699</sup> *Marckx v. Belgium*, Commission Decision of 29 September 1975, Decisions and Reports 3, at 124, para. 1.

<sup>700</sup> *Marckx v. Belgium*, para. 66 (emphasis added).

<sup>701</sup> *Pretty v. UK*.

interpretation of treatment was rejected. It is as interesting for present purposes to understand what treatment has not been accepted as meaning, as it is to understand its accepted meanings.

The applicant, Diane Pretty, suffered from a progressive neuro-degenerative disease, which had resulted in paralysis and which would lead to death through a failure of the respiratory muscles. Mrs. Pretty's mental capacities were unaffected. Her argument was that the UK state would be responsible for a violation of Article 3 if it failed to protect her from the suffering caused by the disease. It was further argued that the state could protect against the suffering by undertaking not to prosecute Mrs. Pretty's husband if he assisted her to commit suicide. Several interesting points emerged in the course of this discussion, including the Court's understanding of the relationship between treatment and state obligations. The significant point for present purposes is that the applicant alleged that the *suffering* faced as a result of her illness amounted to degrading treatment. The Court rejected the claim partly on the basis that it placed: 'a new and extended construction on the concept of treatment, which [...] goes beyond the ordinary meaning of the word'.<sup>702</sup> It went on to stress that the complaint was not about ill-treatment stemming from 'public bodies or private individuals', nor about ill-treatment in the context of inadequate conditions of care.<sup>703</sup> This suggests an important factor in relation to the ordinary meaning of the word treatment – the requirement that treatment must stem from human or institutional sources (recall Margalit on the source of humiliation).<sup>704</sup> It seems it must be the result of some form of human agency, intentional or unintentional. The treatment being alleged here stemmed from an illness and it was, it seems, too far a stretch, certainly of the everyday, and even of the potential special meaning of the word treatment to accept that its source could be found in a natural occurrence.

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<sup>702</sup> *Pretty v. UK*, para. 54. The Court also noted that Article 3 must be construed in harmony with protection of the right to life in Article 2. Accepting the argument of degrading treatment could have entailed a fundamental clash in this respect.

<sup>703</sup> *Pretty v. UK*, para. 55.

<sup>704</sup> Margalit (1996) at 9-10.

## Four meanings of treatment

Based on the pattern that emerges from the case-law insights above, the meaning of the term treatment can be seen to fall into four main categories, which will be summarised below. In some cases, because of ambiguity in the judgments, conclusions cannot be made confidently.<sup>705</sup> The four clear categories that can be asserted are treatment as an action, behaviour or conduct; as a situation or set of circumstances; as a failure to act; and as a manner or attitude.

### Treatment as an action, behaviour or conduct

As expected in accordance with the most evident meaning of the term, treatment has been used to refer to (an) action(s), behaviour or conduct. This tends to include some form of act by an identifiable person or institution towards an identifiable subject. The clearest examples of treatment as behaviour or conduct can be found in those cases concerning abuse/violence (including interrogation, assault, etc), whether by state agents or third parties. Treatment in this sense is present in the majority of the cases that have been examined. As well as direct violent abuse, behaviour or conduct encompasses the conduct of a strip search, the destruction of property, sexual assault, an investigation, a dismissal, suspension from school and removal of children from their parents. Discrimination can also be included in this category (this could perhaps be categorised as an attitude, but it is also more than that; it entails a certain form of conduct towards an individual). Treatment as an action, behaviour or conduct is the most common interpretation of the term.

### Treatment as a situation or set of circumstances

The term treatment has been applied not only to action, but also to conditions; a set of circumstances or a situation, as is evidenced in the cases that have been outlined. This is true of all cases concerning conditions of detention. Also included here is *Soering*, concerning the death row phenomenon; a term used to refer to the various elements of

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<sup>705</sup> E.g., in relation to whether legal rules/policies, or the application of such rules/policies, should be identified as a meaning of treatment. The categories that will be specified below, however, are able to encompass such potential meanings (within one, or simultaneously more than one category).

the conditions of detention that combined to form the treatment. Treatment as a set of circumstances has also applied beyond the sphere of conditions of detention to, as we have seen, conditions of inadequate care, as in *D. v. UK*. The potential treatment in that case referred to the ‘conditions of adversity’ in St Kitts with which the acutely terminally-ill applicant would be faced, therefore amounting to a set of circumstances that was seen to constitute treatment.<sup>706</sup> It has also been suggested that living conditions can be interpreted as treatment on the basis of *López Ostra* – the Court rejected the allegation that the living conditions of the applicant amounted to prohibited treatment but, within this rejection, the meaning of treatment as conditions/a situation is nevertheless clear.

#### Treatment as a failure to act

Perhaps a less obvious meaning of the term is treatment as an omission, as can be seen from the cases concerning a failure to provide adequate medical care. In addition, similar to the possibility of a number of factors combining to create a situation, treatment can refer to a combination of omissions. The case of *Keenan v. UK* can be recalled, in which the UK was held responsible for a violation of Article 3 as a result of a failure to provide adequate care to the applicant who had committed suicide and who had been known to suffer from mental illness. The omissions included a lack of effective monitoring of his condition, a lack of adequate medical notes, and a lack of psychiatric care.<sup>707</sup> In *Nevmerzhitsky v. Ukraine*, the Court found two instances of degrading treatment, one of which was a lack of adequate medical care<sup>708</sup>, providing another example of an omission being understood to fall within the scope of the term treatment.

#### Treatment as an attitude/manner

This categorisation is based on cases concerning the response of state authorities. It was the attitude of the state authorities towards the father in *Akkum and Others v. Turkey* that was reprimanded, and it was the nature of that attitude that rendered it degrading. The

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<sup>706</sup> *D. v. UK*, para. 52.

<sup>707</sup> *Keenan v. UK*, para. 116.

<sup>708</sup> *Nevmerzhitsky v. Ukraine*, para. 106.

treatment (the attitude or manner adopted towards Mr. Akkum) was degrading because it induced in him feelings of anguish, etc, that amounted to degradation. In *Timurtas v. Turkey*, paraphrasing the applicant's argument, the Court stated that: '[...] he suffered severe mental distress and anguish *as a result* of the way in which *the authorities responded and treated him* in relation to his enquiries'.<sup>709</sup> We know that treatment can be degrading when it *causes* anguish, etc, attaining a minimum level of severity. The treatment here can be nothing other than the way, or manner in which, the authorities responded. It might be objected that the use of both 'response' and 'treatment' by the Court in this statement suggests that they are not seen as one and the same; but it can also be read as reinforcing this association. The Court found that the authorities had essentially lied to the applicant; they had displayed 'callous disregard for the applicant's concerns by denying, to the applicant's face and contrary to the truth, that his son had been taken into custody'.<sup>710</sup> Therefore, it was not a failure to act as such that was degrading; rather, it was the manner in which the authorities regarded the applicant.

A case such as *Campbell and Cosans* concerning corporal punishment, which was cited above as suggesting that treatment can be understood as a threat (of particular action), can also arguably fit into this category of treatment as an attitude. To recall, the Court suggested that:

*[...] provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 [...] may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least "inhuman treatment".*

It continued: '[...] "treatment" itself will not be "degrading" unless the person concerned has undergone [...] humiliation or debasement attaining a minimum level of severity'.<sup>711</sup> For the Court to say that a threat of prohibited treatment could potentially itself equal prohibited treatment is to imply that *a threat* can be understood as *treatment*. The crucial point is that the degradation must take some 'form'<sup>712</sup>, and in this case, it is in the form

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<sup>709</sup> *Timurtas v. Turkey*, para. 92 (emphasis added).

<sup>710</sup> *Timurtas v. Turkey*, para. 97.

<sup>711</sup> *Campbell and Cosans v. UK*, para. 26, 28.

<sup>712</sup> Note the point made above concerning 'double degradation' in discussion of conditions of inadequate medical treatment and social care.

of a threat. It is the threat that would lead to feelings of fear, capable of humiliating, breaking moral resistance, etc.

It could be argued that a threat causing such a degree of anguish, etc, to entail degradation, is indistinguishable from *conduct or behaviour* towards an individual. The same objection might be made to the idea of the response of the state authorities in the Turkish cases. *Treatment* as an attitude is indeed closely related to conduct towards someone; it does suggest a form of behaviour, albeit a non-physical one. The Court in *Timurtas* in fact refers to the ‘conduct’ of the authorities.<sup>713</sup> It is deemed to be preferable, however, bearing in mind the objective of considering the scope of meaning of treatment, and for reasons of clarity, to consider this as a distinct meaning. This is because, not only can treatment as an attitude be related to conduct and behaviour, but also to a failure to act, which has been identified as a category of meaning in its own right; this is visible in *Kurt v. Turkey*:

*[...] the applicant approached the public prosecutor in the days following her son’s disappearance in the definite belief that he had been taken into custody [...]. However, the public prosecutor gave no serious consideration to her complaint [...]. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate.*<sup>714</sup>

The applicant was described as a victim of the complacency of the authorities, suggesting that the authorities should have done more. To assimilate treatment to conduct would not do justice to the element of omission that is involved here. Therefore, treatment in such cases is justifiably viewed as a manner or attitude towards an individual.

The meaning of treatment has been distinguished in terms of these categories of action, situation, failure to act, and manner/attitude since they are deemed to be sufficiently different to merit being understood as different meanings. The bottom line, however, is that in terms of level of detail in the categorisation, it is essentially a matter of judgment. It is equally important to note that, in any particular case, more than one form of treatment might be identifiable and it is not excluded that there might indeed be

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<sup>713</sup> *Timurtas v. Turkey*, para. 96.

<sup>714</sup> *Kurt v. Turkey*, para. 133.

overlaps. In *Valasinas v. Lithuania*, the applicant alleged that his conditions of detention amounted to degrading treatment and that during his detention he was subjected to a strip search that amounted to degrading treatment. The crux of the issue, in looking at the scope of the term treatment, concerns identification of *at least one* form of treatment; it is not problematic if more than one form is present.

What has this categorisation, and the process leading towards it, revealed about the meaning of the term treatment? Are these four meanings surprising in any way? The most evident meaning of treatment, both in everyday language and in relation to Article 3, is an action, conduct or behaviour. Whilst this remains the most common interpretation, treatment has been shown to mean significantly more than behaviour towards someone. If we presume that the Strasbourg organs interpret on the basis of the ordinary meaning of the word in context and guided by the purpose of the right, then the other three meanings that have been identified in the case-law can be seen to be within that ordinary meaning. It is helpful here to recall that ordinary meaning does not equate to everyday meaning. The reference to dictionary meanings of treatment in this chapter's introduction reminds us that the range of semantic possibilities is wider than is suggested by the most common, everyday usage. Interestingly, if we were to situate these four meanings of treatment within the semantic range indicated by the dictionary, the only accommodating category would appear to be that of an act or behaviour. All would likely be seen as variations, but essentially falling within this category. However, dictionary meanings, as we know, simply indicate a range of semantic meanings; the presence or absence of a meaning in the dictionary is not determinative of its legitimacy as a legal meaning. Special meanings within the ordinary meaning may have been accorded to the term. Bearing this in mind, as well as the case-law provenance of these meanings, they need not be surprising in any way.

### **The sources of treatment**

An important point must be made in relation to the sources of treatment, which will be pivotal in understanding the meanings of treatment and in tying those meanings to the role of the state in the overall equation. *Sources* refers to *who or what can inflict or bring about* the treatment; a question that is not normally isolated. It has been argued

that treatment can mean an action, a set of circumstances, an omission, and an attitude – from where can such action, sets of circumstances, omissions and attitudes stem? Who or what acted? What created the situation? Who omitted to do something? Who displayed the attitude in question? For there to be an eventual finding of a violation of the right not to be subjected to degrading treatment, in all instances responsibility for the suffering of an individual must be imputable to the state as the bearer of the international obligations under the ECHR to secure the Convention rights. What is crucial to clarify, as has been strongly suggested already in discussing the meanings of treatment, is that the term treatment alone should not be seen to embody this link or imputation of responsibility.

#### The state party to the Convention

The state party to the Convention is the most obvious and most frequent source of degrading treatment. Examples are *Valasinas v. Lithuania* concerning a strip search and *Nevmerzhitsky v. Ukraine* concerning a lack of medical care, both in detention; *Ribitsch v. Austria* concerning assault by a police officer; Turkish cases concerning the state security forces; etc. But the state is only one potential source of treatment; treatment does not need to be inflicted by the State itself.

#### Another state

Expulsion and extradition cases demonstrate that treatment can be inflicted by another state. In *Soering v. UK*, for example, the death row phenomenon stemmed directly from an institution of the state, but not the state party to the Convention; in this case, it was the United States government. In *Chahal*, the risk of prohibited Article 3 ill-treatment would have stemmed from the Indian security forces. The treatment would have been inflicted by the state in the receiving country had the individuals been returned.

#### Non-state institutions

Prohibited Article 3 treatment can stem from non-state institutions. This is evident in *Costello-Roberts v. UK*, concerning a complaint of ill-treatment inflicted in a private

school: '[...] the Court agrees [...] that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals [...]'.<sup>715</sup>

#### Private persons/groups of persons

This is an extension of the possibility of prohibited treatment being inflicted by a non-state institution; here the source of the treatment is a private person or group of persons. Prohibited treatment by a private person can be seen in *E. and others v. UK* concerning the abuse (degrading treatment) of children by their step-father. An example of treatment by a group of persons is found in the case of *Pantea v. Romania*, in which the applicant was subjected to physical violence by fellow prison inmates, found by the Court to amount to inhuman or degrading treatment.<sup>716</sup> Another is found in *H.L.R. v. France*, where the applicant feared inhuman or degrading treatment at the hands of drug dealers in Colombia. To restate the approach of the Court, already cited above:

*In the present case the source of the risk on which the applicant relies is not the public authorities. According to the applicant, it consists in the threat of reprisals by drug traffickers, who may seek revenge [...] Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention [...] may also apply where the danger emanates from persons or groups of persons who are not public officials.*<sup>717</sup>

#### No one identifiable actor or institution

The Court in *D. v. UK* stated that an applicant's claim could be scrutinised even where the proscribed treatment in the receiving country stemmed from no one actor or institution in particular. The conditions of adversity in the receiving country, given the applicant's particular circumstances, constituted the treatment in this case. The root of these conditions, of this treatment, was said to be found in 'factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country [...]'.<sup>718</sup> That is to say that the receiving state could not be held responsible for inflicting prohibited treatment – it was not at the source of the lack of family support, and it could

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<sup>715</sup> *Costello-Roberts v. UK*, para. 7.

<sup>716</sup> *Pantea v. Romania*.

<sup>717</sup> *H.L.R. v. France*, para. 39-40.

<sup>718</sup> *D. v. UK*, para. 49.

not be held responsible if it was unable to provide accommodation or medical care equivalent to that which the applicant had been receiving in the UK. The conditions of adversity that would await the applicant were nobody's fault as such; no one actor or institution could be said to have caused them. As demonstrated in the series of citations above in relation to *D. v. UK*, and clarification of the nature of the treatment in expulsion cases, the Court has moved over time from the application of Article 3 where ill-treatment stems from a state, to having its source in non-state actors, to this meaning of treatment visible in *D.*; i.e. treatment that stems from no one identifiable actor or institution in particular. An indispensable requirement, as aforementioned, is that treatment must find its source, not in natural causes, but in some form of human agency.

### The applicant

In isolating the basic question of the *source* of treatment and in the process of clarifying what those potential sources are, an interesting possibility arises – one that has not been considered before the Court. It is a point that is important to consider given that the objective of the thesis is to explore as fully as possible the meaning of the terms within the right. This concerns the possibility of the alleged victim himself as the source of the treatment (that he would argue to be degrading). This will be argued to be a plausible interpretation of the term (in line with Dworkin's chain novel metaphor) based on the sources of treatment that are visible in the Court's existing case-law. The influence of the human dignity-centred purpose of the prohibition on this interpretation will also be discussed. Elaboration of the meaning of treatment in this sense, therefore, will take into account that degrading treatment is interpreted in a way that privileges the realisation of the protection of human dignity as a purpose of the provision, and that the violation of human dignity can be seen to possess a particular meaning in relation to the right.

If one considers the basic logic of the proposition that the alleged victim himself can be the source of the treatment, it is first of all stating that persons can act in a certain way towards themselves, can put themselves in a certain situation, can fail to carry out certain behaviour towards themselves and can adopt particular attitudes towards themselves. This is not a controversial reading of the term treatment. Even in everyday usage of the term it is reasonable to describe persons as having treated themselves in a particular manner. An individual who abuses his body, through substance abuse, for example, can

be said to treat himself badly. Self-abuse or self-harm is essentially to treat oneself and one's body in a particular way. It is easier to conceive of self-inflicted treatment in terms of certain meanings of treatment over others; it is perhaps easier to accept the possibility of adopting an attitude towards oneself than it is to accept the possibility of omitting to act towards oneself in a particular way. But, ultimately, there is nothing here to suggest that such understandings of treatment could be said to go beyond the everyday usage of the word, let alone its ordinary meaning (which can include even special meanings).

That cannot be the last word, however. In order to make this argument, it is necessary to take the suggestion one step further since treatment in the Article 3 context is not an isolated word; it is adjoined to the concept of degradation. It is important then to consider what is really being said when the notion of self-inflicted treatment is argued to be possible: that is, that *degrading* treatment can be self-inflicted. For this reason, it is important to consider the possibility of self-inflicted *degrading treatment*, rather than just the possibility of self-regarding *treatment*. As with the possibility of treating oneself in a certain way, the expression to degrade oneself is also a familiar one. Alan Gewirth in fact notes the familiarity of this particular expression in his discussion of the idea of owing duties to oneself.<sup>719</sup> The notion of self-inflicted degradation is not an alien one, but it will nevertheless be helpful to explore this, in light of the link to human dignity, in some further detail.<sup>720</sup>

The question of whether degrading treatment can find its source in the applicant can be developed further by considering the so-called French 'dwarf throwing' case that progressed to the UN Human Rights Committee, in which some parallels are found, and which sets in motion similarly interesting questions. It is also a good example since it will bring us to the issue of protection of human dignity, and the link to dignity will form the crux of the question about self-inflicted degrading treatment. The 'dwarf throwing' case involved an entertainment event in which a man suffering from dwarfism was paid to be thrown onto an air bed. The show was prohibited from taking place by the town's mayor, relying on his public order powers. In concurring with the mayor, the Conseil

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<sup>719</sup> Gewirth, Alan (1978), *Reason and Morality* (Chicago: University of Chicago Press) at 336.

<sup>720</sup> It might be objected that the question of self-inflicted degradation should have been discussed in the context of the meaning of degradation. It is a reasonable objection but it is only now, having considered what treatment means and the sources of treatment, that it is possible to address this issue.

d'Etat stated that the throwing of a dwarf by paying spectators effectively entailed the exploitation of a physical handicap in order to use a person as a human projectile, and in its essence, such a spectacle was an attack on the dignity of the human person.<sup>721</sup> In a final appeal by the individual involved, a Mr. Wackenheim, before the UN Human Rights Committee, the French government argued that the ban ensured that the author's dignity was respected, whilst the author argued that he was a victim of a violation of several rights including the right to recognition as a person before the law, the right to respect for private life, and the right not to be discriminated against.<sup>722</sup> In examining the question on the merits only in relation to non-discrimination (in respect of which it found there had been no violation), the Committee was of the (brief) opinion that the action taken on the basis of human dignity considerations was 'compatible with the objectives' of the ICCPR.<sup>723</sup> Dominique Rousseau points out that in consequence, the principle of respect for dignity can be seen as protecting people against themselves.<sup>724</sup> This example is presently interesting simply in terms of the *possibility* of harming one's own dignity. And it is not an isolated example: the German 'peep-show' decision can also be highlighted in this vein, in which public morals were interpreted in light of the constitutional value of human dignity and a prohibition that had been imposed on the activity in question, which involved paying spectators viewing a naked woman in a cubicle on a revolving stage, was upheld; the human dignity of the women was violated since they were treated as objects, despite the voluntary nature of participation by the women involved.<sup>725</sup> Interesting questions therefore come into view, although the (at least

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<sup>721</sup> 'Le fait de faire lancer un nain par des spectateurs conduit à utiliser comme projectile une personne affectée d'un handicap physique et présentée comme telle. Par son objet même, une telle attraction porte atteinte à la dignité de la personne humaine'; Conseil d'Etat, *Commune de Morsang-sur-Orge*, 27 October 1995, Recueil des Décisions du Conseil d'Etat (Recueil Lebon) at 373.

<sup>722</sup> *Wackenheim v. France*, (854/1999), views adopted on 26 July 2002, para. 3.

<sup>723</sup> *Wackenheim v. France*, para. 7.4.

<sup>724</sup> Rousseau, Dominique (1998), *Les libertés individuelles et la dignité humaine – Préparation au C.R.F.P.A., Libertés et droits fondamentaux* (Paris: Editions Montchrestien) at 67.

<sup>725</sup> BVerwGE 64, 274 *Sittenwidrigkeit von Peep-Shows* (1981), para. 12: 'Diese Verletzung der Menschenwürde wird nicht dadurch ausgeräumt oder gerechtfertigt, daß die in einer Peep-Show auftretende Frau freiwillig handelt. Die Würde des Menschen ist ein objektiver, unverfügbarer Wert..., auf dessen Beachtung der einzelne nicht wirksam verzichten kann...'. For a brief summary of this decision see Klein, Eckhart (2002), 'Human Dignity in German Law', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International), 145-159. See also the 2004 *Omega* judgment of the European Court of Justice, in which a prohibition order placed upon *Omega* was accepted by the European Court of Justice and found not to be contrary to Community law on freedom to provide services. The company had wished to operate a 'laserdrome' in Germany, which was prohibited by the authorities on the grounds that the activity,

implicit) acceptance here is of the possibility of self-regarding violations of *human dignity* rather than the possibility of self-regarding *degrading treatment* as such. Nevertheless, this example incites the taking of a closer look, in light of the argument that protection of human dignity is key to the Court's system of teleological interpretation as applied to Article 3, and in light of the argument that the violation of human dignity is understood to possess a particular meaning in this context. Two questions must be addressed: Firstly, is self-inflicted degradation conceptually possible? Secondly, would acceptance of self-inflicted degradation via a teleological interpretation of Article 3 promote the protection of human dignity?

In order to arrive at a response to the first question – is self-inflicted degradation conceptually possible? – the starting point will be to suggest, in line with the examples given above, that self-regarding violations of *dignity* are possible. To say that it is conceptually possible for an individual to abuse her own fundamental human dignity, is to say that she can degrade herself, since degradation expresses a violation of fundamental dignity. In terms of literature that identifies the possibility of self-regarding violations of human dignity, Kant and the Formula of Humanity is unquestionably the most obvious and influential example. The Formula of Humanity is often invoked as a statement of the meaning of human dignity, simplified as: human dignity means that persons should be treated not as mere means but also as ends in themselves.<sup>726</sup> The Formula of Humanity as expressed by Kant, however, makes clear that a person must also refrain from *treating his own humanity* as a mere means: 'Act so that you treat humanity, whether in your own person or in that of others, always as an end and never as a means only.'<sup>727</sup> This derives from Kant's preceding statement that persons are not things with a price, but are ends in themselves (the example of suicide is given in this connection). H.J. Paton, in a statement that highlights clearly the possibility of self-regarding treatment in the context of Kant's approach to duties to oneself, reiterates that

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involving simulated killing of human beings, was incompatible with respect for human dignity in the German constitution; C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (2004).

<sup>726</sup> E.g. Schachter, who invokes 'the Kantian injunction to treat every human being as an end, not as a means. Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others.' (1983) at 849.

<sup>727</sup> Wolff, Robert P. (1969), *Kant: Foundations of the Metaphysics of Morals, with Critical Essays* (Indiana: The Bobbs-Merill Company) at 'Groundwork of the Metaphysics of Morals', Second Section, 54.

the Formula of Humanity ‘applies to the agent’s treatment of himself as well as of others.’<sup>728</sup>

Beyleveld and Brownsword’s interpretation of Kantian dignity also highlights duties to oneself, and specifically the duty not to ‘compromise’ one’s own dignity:

*[...] for Kant, the will operates autonomously only where it directs action in such a way as is compatible with respect for the human dignity of both others and oneself. In this version of what we have called ‘human dignity as constraint’, and in line with the Kantian scheme, we find ‘free’ action (as it would be characterized under human dignity as empowerment) distinctively limited by reference to the duty not to compromise one’s own dignity.*<sup>729</sup>

As is visible in this statement (and as noted in Chapter Four), the authors identify two substantive conceptions of dignity – what they term dignity as constraint and dignity as empowerment. The need to refrain from ‘compromising’ one’s own dignity is linked to one of these particular conceptions: dignity as constraint. Although dignity as constraint, as described by Beyleveld and Brownsword, cannot be aligned as such to the conception that has been argued to exist in the context of degrading treatment<sup>730</sup>, this nevertheless highlights the importance of considering whether it is accurate to talk of dignity in a most general sense as being capable of self-violation, or whether self-violation is possible only in relation to a particular conception of dignity. In Maurer’s approach, fundamental dignity is contrasted with another ‘dimension’ of dignity (this was noted in Chapter Four in illustrating the likelihood that more than one conception of dignity is relevant to the ECHR). The significant point is that the particular sense of dignity that Maurer perceives to be capable of self-violation – fundamental dignity rather than practical dignity – is in line with the sense in which dignity has been identified in degrading treatment case-law. These points from the literature lend support to the possibility of self-regarding violations of fundamental human status. For Maurer, fundamental dignity is about the human being, not about personality; it is the dimension

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<sup>728</sup> Paton, H.J. (1965), *The Categorical Imperative: A Study in Kant’s Moral Philosophy* (London: Hutchinson & Co) at 165. The significance in the present context does not lie in duties as such, but in the possibility of self-regarding attacks on dignity.

<sup>729</sup> Beyleveld and Brownsword (2001) at 52-53, 65.

<sup>730</sup> See Beyleveld and Brownsword (2001) at Chapters One and Two for discussion of the meaning of dignity as constraint.

in which dignity is absolute and cannot be lost.<sup>731</sup> She suggests that fundamental dignity is not subjective, cannot be renounced by an individual, and denotes (in the Kantian sense) that persons must respect their own dignity.<sup>732</sup> Inherent in this account is the possibility of abusing one's own fundamental human status. As noted above, since degradation has been taken to mean abuse of fundamental human status, to say that self-regarding abuse of fundamental human status is conceptually possible is to say that self-regarding degradation is possible.

The response to the second question – would acceptance of self-inflicted degradation contribute to the protection of human dignity? – can only be a straightforward one: if it is a purpose of the prohibition of degrading treatment to protect human dignity, then presumably the right will aim simply to protect against violations of fundamental human dignity; there is nothing to suggest, if the abuse of dignity were to stem from the individual applicant herself, that this would preclude the need for protection. There are two major conditions in play in the application of the right: the state must be capable of being held responsible for a violation of the right, and the harm complained of must fall within the scope of the right. Once the meanings of treatment and the interplay with state obligations is clarified neither of these conditions appears to be an obstacle to the recognition of *self-inflicted* degradation. Quite the opposite: if the purpose is to protect human dignity then there is no reason why it should not follow that one should be protected equally from self-abuse.

To return to the judicial context, it is suggested that it would not be a departure from the degrading treatment 'novel' as it has been written so far if the ECtHR were to contemplate degrading treatment being inflicted by the applicant himself. Despite the fact that this precise question has never been examined in detail before the Court, this does not entail that the question would be entirely alien. The 2007 case of *Tremblay v. France* is an illuminating example. The applicant, who had been working as a prostitute, argued that she was essentially forced into prostitution, from which she had been trying to extricate herself for many years, in order to repay a debt – social security contributions that were being claimed by the state authorities. By demanding the

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<sup>731</sup> Maurer (1999) at 51, 58.

<sup>732</sup> Maurer (1999) at 55. For Maurer, fundamental dignity is top of a dimensions-of-dignity hierarchy: 'practical' dignity can be limited by the need to respect 'fundamental' dignity; at 416.

repayment of this debt, the applicant argued that the government had obliged her to continue as a prostitute, and that being essentially forced to do this amounted to degrading treatment. The Court clarified that the applicant was arguing that the degrading treatment was in the state's 'obliging' her to continue working as a prostitute; not that the prostitution in itself was inhuman or degrading. The Court, therefore, was not required to consider in detail whether the prostitution in which the woman was engaged could be understood as degrading treatment (but the Court nevertheless remarked that there seemed to be no European consensus on the approach to prostitution and stressed clearly that it judged forced prostitution to be incompatible with human rights and the dignity of the human person).<sup>733</sup> The French government, in fact, was of the opinion that it was difficult to disagree that prostitution *itself* constituted degrading treatment.<sup>734</sup> If the applicant had argued that prostitution itself was degrading treatment, this judgement subtly suggests that this would have been entertained by the Court. Had the possibility of self-inflicted degrading treatment been visible, the argument could indeed have been that the prostitution in which the applicant was engaged was degrading treatment (which the French state itself did not dispute). The treatment would have been the situation in which the applicant placed herself. This would have been argued to be degrading and the role of the state in demanding the repayment of the debt would have been the link to state responsibility for a breach of a positive obligation to protect. The issue of prostitution is a prime example of a situation in which treatment could be argued to find its source in the applicant herself.<sup>735</sup>

*Tremblay* also provides a good example of the possible implication of the state in such a scenario. The state must be in *some way* implicated. The argument is that treatment

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<sup>733</sup> *Tremblay v. France*, para. 24-25.

<sup>734</sup> *Tremblay v. France*, para. 21.

<sup>735</sup> To pre-empt a possible (although admittedly tangential) criticism: there need be no immediate concern, if the Court were to accept that a person could violate his own dignity and by extension, treat himself in a degrading way, that this would lead to the Court finding that people had been subjected to degrading treatment contrary to their opinion or without them realising it. It can be presumed that a person arguing a violation of Article 3 on the basis of self-inflicted degrading treatment would be arguing that the situation did involve degrading treatment (for which the state was responsible) – quite the opposite of the situation in the 'dwarf-throwing' case where Mr. Wackenheim, had an Article 3 link been made, would have been arguing that he had *not* suffered degrading treatment. (This would be a more problematic situation but, although the point cannot be argued here, it is worth briefly suggesting that it would not be inconsistent with conclusions from Chapter Five on the Court's approach to judging the existence of degradation to accept the possibility of the Court finding that a person had suffered degrading treatment when the person himself did not agree that this was the case).

could be self-inflicted *and* the state could be argued to be responsible. This is only possible on the basis of the range of meanings of treatment that have been identified from the case-law. Clearly, responsibility must be attributed to the state; it would of course be nonsensical to suggest that Article 3 protect against self-inflicted abuse in this sense where no link to the human rights obligations of the state can be made. The distinction between treatment and responsibility for a violation of the right is paramount here to avoid confusion.

References to situations such as prostitution, in which a potential applicant would clearly have played an active role in the initiation and continuation of the situation that might be argued to be degrading, raise a question of individual responsibility versus state responsibility. It could be argued that the individual is solely responsible for the degrading treatment in that she chose to engage in it; the individual's active perpetuation of the degrading treatment could be argued to essentially *negate* any form of state responsibility. In response, an applicant might contend that the choice to engage in the activity was not a real or meaningful choice and, therefore, that she should not be seen as wholly responsible. A satisfactory response to this question would demand an analysis of concepts of individual responsibility and agency, which is beyond the scope of the present thesis.<sup>736</sup> It is perhaps useful to make one clarification, nevertheless, in relation to degradation in the form of being driven to act against one's will or conscience discussed in Chapter Five. It is interesting to mention this one particular form of degradation as it is one that might be seen as having special resonance in such a situation concerning self-inflicted degradation and one that raises the question of individual responsibility for harm suffered.

If the idea of being *driven to act* were used to justify how degrading treatment came about, this would be an argument about responsibility. This would be a subtly different argument to one in which treatment was argued to be *degrading because* it drove an

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<sup>736</sup> One approach, which would be interesting to explore, is Raz's idea of justifiable or excusable choices in the context of coercion. Coercion is argued to entail particular consequences in terms of the nature of the resultant actions – these actions are 'justifiable' or 'excusable'. An action is *justified*, Raz suggests: '[...] if the reasons for it, including the threat of harm it if it is not undertaken, defeat the reasons against it [...]', and Raz suggests that: '[...] persons are excused where they acted in order to preserve the life they have or have embarked upon [...]'; (1986) at 152. Arguments in this vein would form part of the argument about the way in which the state might be seen to be responsible for degrading treatment. On the concept of responsibility more generally, see Cane, Peter (2002), *Responsibility in Law and Morality* (Oxford: Hart).

individual to act against will or conscience. Although very subtle, this is an important distinction. The idea of being driven to act against will or conscience, as a conceptual component of degradation in the case-law, is about the nature of the treatment. It might indeed be possible to make an argument in this vein; however, due to the potential prominence of the idea of being *driven to act* in a self-inflicted situation in which self-responsibility would be argued to be mitigated, there would be the risk of confusion between these two subtly different arguments, leading to incoherence. The coherence of an argument that treatment was *degrading because* it drove an individual to act against will or conscience would depend on maintaining the necessary link between the two components of the prohibition: degrading and treatment. There would be a risk of disjunction between degrading and treatment if being forced to act against one's will or conscience was relied upon, not as an explanation of the *nature* of the treatment itself, but rather as an explanation of the *existence* of the treatment (which could be degrading because it was humiliating, for example); as an explanation of the *existence* of the treatment, it would be an additional step in the argument about responsibility as noted above. In order to avoid disjunction and be coherent then, such an argument, in a situation of active agency, would require to be that the individual had suffered treatment (for example, a situation) that was degrading because it drove the individual to act against his will or conscience.

To reiterate: where treatment is argued to be self-inflicted, the state must be argued to be implicated in some way. The way in which the state might be implicated, and whether it could be held responsible, would be an argument to be had before the Court since it is not possible to specify in the abstract how the state might be implicated in particular, individual, concrete situations. More generally, the possibility of degrading treatment stemming from the applicant, and how this would play out in a particular situation, would have to be tested by the Court. The proposition here is that this is a reading of the term treatment that constitutes a plausible addition to the chain-novel.

## Chapter summary

All that the jurisprudence reveals explicitly about the scope of treatment is that it must be interpreted in accordance with the ordinary meaning of the word. That treatment has

not been given more explicit attention by the Court is surprising given that the meaning accorded to the term goes beyond what could be seen as its obvious meaning. Is it possible that the Court itself has not seriously considered, or has not recognised, the logical consequences of its judgments for the meaning of the notion of treatment? Certainly, as has been suggested above, the Court has not been entirely immune from a lack of clarity in relation to the precise meaning of treatment. As the objective of this chapter has been to explore the potential scope of the term, having identified its already accepted meanings, it has not been preoccupied with whether treatment has been interpreted too broadly. Rather the concern of this chapter has been to begin from an interpretation of the case-law and to progress within the spirit of that jurisprudence.

It is important that the meanings accorded to treatment are transparent. If treatment is understood to include only actions of the state, then situations concerning conditions, circumstances or omissions, could be seen to fall outside its scope of meaning. Yet such meanings are identifiable on the basis of a close reading of the relevant case-law. Breaking down the right into its component parts to be analysed separately is an important step towards achieving greater clarity of understanding of the scope of meaning of treatment and, consequently, the scope of application of the right not to be subjected to degrading treatment. The conclusions reached can provide tools for assessing whether particular facts can be interpreted as treatment.

Clarification of the distinction between treatment and the element of a situation that may engage the responsibility of the state has also emerged as extremely significant. Otherwise, the full range of meanings of treatment cannot be understood. For example: if in the case of *D. v. UK*, the act of expulsion by the state authorities is wrongly identified as the treatment, then the more accurate meaning of treatment as a situation/conditions would be lost, consequently narrowing the perceived range of meanings of the term. This would then also be linked to a failure to perceive that treatment (in the form of an action, a set of circumstances, an omission, an attitude) can stem from different sources and that a number of 'actors' can cause degrading treatment; not only the state. Those 'actors' beyond the state have been summarised as states not party to the Convention, non-state institutions, private persons, no one identifiable actor, and the possibility of the applicant as the inflictor of self-regarding degrading treatment has been discussed with reference to the role and meaning of human dignity within Article 3. The latter interpretation,

although not having occurred in a case before the Court, has been identified as a consistent and plausible step in the clear progression from infliction of treatment by the state, to non-state actors, and so on. Exploration of the meaning of treatment corresponds to the final element of the degrading treatment picture.

## CHAPTER SEVEN

### CONCLUSION

#### **Chapter introduction**

This study has aimed to provide a conceptual reading of degrading treatment, embedded within the nexus of state obligations, in order to gain a richer appreciation of the scope of application of the right. It has taken the narrative already composed by the ECtHR as the point of departure, and it has built upon this, rather than engage in a detached form of normative critique. The objective has been to facilitate identification of situations that may properly be described as potential instances of degrading treatment. Its aim has been to offer, as a result of a focused and systematic study, conceptual depth, but at the same time a practically-applicable depiction of the right.

This concluding chapter will begin with a summary of the key points to have emerged from the research. It will then consider how these conclusions translate to the sphere of application of the right. A practical application chart is included in order to facilitate this process. As well as providing a visual impression of the relationships between conclusions drawn from the different chapters, this chart will also summarise and highlight the key points that should be addressed when considering whether a situation might fall within the ambit of the right and be appropriately argued to entail a violation. The conclusion will be put forward that clarification of applicable forms of state obligation, combined with conceptual exploration of the terms degrading and treatment within the thesis, allows for a deeper, more informed understanding of the right's proper area of concern. Finally, this chapter will suggest directions for subsequent research.

## Summary of key points

The questions posed in the first chapter of the thesis were what does degrading treatment mean, and in what circumstances can the state be held responsible for a violation of the right not to be subjected to degrading treatment? The body of jurisprudence that has developed on the right not to be subjected to degrading treatment has been the focal point of the study. This has been accompanied by reference to additional cases where appropriate and a survey of literature on degrading treatment, Article 3, and the ECHR. This survey of relevant literature did not identify any significant degree of focused, conceptual analysis of the prohibition of degrading treatment. To explore the right in this way, the thesis has engaged with a range of theoretical literature, including on the concept of interpretation and interpretive approaches and systems, on human dignity from a range of perspectives, on the concepts of humiliation, self-respect, and autonomy. Each chapter has aimed to contribute to a response to those questions posed in the introductory chapter, with the aim of guiding our understanding of the substantive boundaries of the right.

The content of the relevant jurisprudence of the ECtHR relating to degrading treatment as a discrete component of Article 3 was expounded in Chapter Two, in order to highlight the principles that would be significant for understanding the scope of application of the right; namely, the absolute nature of the right, the inherent scope for evolution, and the practice of the relative assessment of the minimum level of severity. The approach of the ECtHR to the conceptual content of the right was detailed – encapsulated in feelings of fear, anguish or inferiority capable of humiliating or debasing the victim, breaking the victim's physical or moral resistance, driving the victim to act against will or conscience, or as treatment having an adverse effect on the victim's personality. A vital objective of the case-law survey was to stress that these concepts invited conceptual enquiry.

The nexus to state responsibility has been emphasised from the outset of the research in order to stress that the subsequent interpretation of degrading and treatment is inseparable from the obligations of the state; an essential element in relation to all of the ECHR rights. These obligations have been discussed in Chapter Three in terms of the negative/positive obligation dichotomy, with positive obligations grouped into three

categories on the basis of a systematic study of degrading treatment case-law: to take measures to protect against the suffering of degrading treatment by agents of the state; to take measures to protect against the suffering of degrading treatment by, for example, a private person or another state; and to conduct an effective investigation into allegations of degrading treatment. The aim has been to provide a succinct picture of those obligations relevant specifically to the prohibition of degrading treatment. A key point in this chapter was reference to state obligations in terms of their content and breach, in order to highlight that the nature of state obligations is conceptually distinct from the question of whether or not the state can be argued to be responsible as a result of having breached its obligations. Although it will likely be unnecessary in practice to explicitly separate these two dimensions, particularly in cases where the state is obviously responsible for a violation, it has been argued that it is nevertheless crucial to highlight this conceptual distinction in order to facilitate understanding of both the content of the obligations upon the state as well as the meaning of treatment (which is not to be equated to the trigger of state responsibility).

Given the absolute nature of the Article 3 guarantee, it has also been clarified on the basis of an examination of degrading treatment case-law, and by reference to secondary literature, that the margin of appreciation and the principle of proportionality, both of which might limit the extent of the guarantee, should not be applied in the degrading treatment context. An important point that merits to be highlighted in this connection is that a legitimate limit on the scope of application of a positive obligation, in the form of what is practically reasonable to expect of the state, is applicable in the context of only one form of positive obligation – the obligation to take measures to protect against the suffering of prohibited treatment where the source of the treatment is outside the state that is argued to be responsible. Even limited in this sense to one particular form of obligation, the test of what Palmer calls ‘reasonable expectation’ is a significant one. The protection of human rights cannot demand that impossible burdens be placed on the state. It is also important to stress, however, that the threshold of ‘reasonableness’ here indeed seems to be a high one – it ensures that the state cannot be asked to do things that are excessive, intolerable or impossible; rather than inconvenient, for example. We can also recall here the impact of the absolute nature of the right as suggested by Addo and Grief, which was raised in Chapter Two: that there is an expectation that the right will be subject to the most rigorous protection possible; that the benefit of any doubt concerning

the scope of the right must be given to the alleged victim; that the state should have only limited discretion; and that redress must be ensured if a violation is established.<sup>737</sup> These connotations of the ‘absolute’ label can be seen as reflected in the breadth of the state’s obligations in respect of the prohibition of degrading treatment. It is fundamental, in drawing conclusions about the boundaries of the right, to maintain the tie to the holder of obligations under the ECHR system and to recognise the scope of those obligations.

Having addressed this fundamental question of state obligations, Chapter Four aimed to provide the theoretical foundations for the next stage of the thesis by bringing to the fore the concept of interpretation. In the first instance, a number of basic but extremely significant points were highlighted: notably, that *legal* meaning, as a meaning that must be derived from the text (of the Convention and of the case-law) need not be synonymous with, or limited to, common meaning. Equally, the idea of *ordinary* meaning in interpretation was distinguished from the idea of most common meaning. Such points form a counter-argument to potential criticism of the meanings of the terms degrading and treatment put forward in Chapters Five and Six, by placing common and uncommon meanings under the same umbrella of legitimate ordinary meaning. Alongside these basic epistemological insights, it has been argued that interpretation is the core idea for understanding the judicial interpretation of degrading treatment, and the key concept underpinning the framework within which analysis of the case-law would proceed in the following chapters.

Highlighting the teleological nature of the ECtHR’s interpretation of the Convention was the first step towards articulating the relevance of human dignity in understanding degrading treatment; a concept that has been shown to occupy a significant place in the Court’s jurisprudence. Human dignity has been positioned by the ECtHR as a purpose of the text; in Barak’s succinct description, the purpose is the ‘substance that gives meaning to the form’.<sup>738</sup> In order to pinpoint a substantive content of the concept of human dignity that would illuminate the meaning of degrading treatment, the relevant perspective (of the multi-faceted question of the meaning of dignity) was identified as that of its violation; logically so in the context of degradation. The substance of the idea of the

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<sup>737</sup> Addo and Grief (1998) at 516.

<sup>738</sup> Barak (2005) at 93.

violation of dignity, not explicit in the case-law, was derived through consideration of the circumstances in which this idea has been used by the Court. It has been suggested that a consistent, general impression of what dignity refers to is identifiable – the violation of dignity entails harm to the fundamental status of human persons. The objective here has not been to conduct an in-depth exploration of the ECtHR’s understanding of the concept of dignity in all its complexity. Rather, the objective has been to focus on delineating those general parameters that are necessary to guide identification of plausible conceptual meanings of degrading and treatment.

It has been argued that the protection of human dignity acts as a fundamental value underlying Article 3, and in this capacity, as a principle of interpretation that expresses an element of the purpose of the prohibition within this teleological system. This central premise provided an indication of appropriate subsequent additions to the ‘chain novel’ of degrading treatment. The relevant meaning of human dignity in this capacity as a fundamental value within teleological interpretation has been used in Chapters Five and Six to direct the possible interpretations of degrading treatment and has placed a limit upon the kinds of things that can be argued to fall within the boundaries of the right. Dworkin’s chain novel metaphor has been the essential guide for the analysis of the Court’s case-law; one of description of ‘legal history’ as well as its evaluation. This also reflects the aim of arriving at an elaborated reading of the Court’s approach that is amenable to practical application.

The meaning of degrading treatment has as its conceptual core the idea of degradation; the subject of Chapter Five. For treatment to be degrading it has been maintained that it should fall into one of the reference categories that encapsulate the ECtHR’s understanding of degradation. The thesis has engaged in analysis of these points of reference, based on the case-law and drawing upon a varied range of literature, in order to provide substance that is not otherwise visible. These have been elaborated upon as follows: Debasement, read in conjunction with humiliation, essentially reinforces the meaning of humiliation and its link to degradation. The meaning of humiliation does not necessarily accord with the way it is used in everyday language (its meaning is perhaps familiar but not common). An argument that degrading treatment has occurred on the basis of a situation better described as ‘commonplace’ humiliation has no place in the context of the prohibition. Nor is humiliation a proxy for embarrassment or shame –

these are not of concern in this context. The proper scope of humiliation in the degrading treatment context, following Miller, is what has been termed humiliation with a big *H*, characterised by powerlessness and/or exclusion that is capable of causing an erosion of self-respect – one’s impression of one’s own worth as a human person. The principles developed in the jurisprudence relating to humiliation (of the non-necessity of an intention to humiliate and the possibility of humiliation in one’s own eyes only) have also been elucidated. It has been argued that an applicant’s personal feelings of humiliation and degradation are significant but are not accorded definitive weight by the Court in its judgment as to whether degradation has occurred. This, it has been suggested, explains not only those principles developed in the jurisprudence but also why it is possible for the Court to have deemed certain forms of treatment to be always degrading ‘in principle’.

Alongside humiliation, clarification and elaboration of the meaning of being driven to act against will or conscience has aimed to clarify the relevance of the concept of autonomy. Restriction of autonomy has been shown to be relevant to the understanding of degradation, but only in one very specific sense. This conclusion, as is the case with humiliation, impacts directly upon the perceived scope of application of the right by excluding the relevance of other areas of life that might be commonly associated with the concept of autonomy – Article 3 is not intended to protect freedom of choice; it is not intended to guarantee living in society in accord with one’s own conception of the good life; it is not intended to guarantee an autonomous life, and so on. Rather, being driven to act against will or conscience violates one’s basic capacity for self-mastery. It protects one’s status as an agent with, as Raz describes it, the capacity to go on to achieve a fully autonomous life.

The breaking of physical or moral resistance has been argued to entail damage to a person’s ability to stand up against being treated as if s/he were less than human. Although with little material to work with in the degrading treatment jurisprudence, this interpretation in terms of the violation of fundamental human status has been identified as the key connotation. This has been made possible by articulation of the place occupied by dignity in teleological interpretation. Similarly, little is evident in the jurisprudence in relation to contempt or lack of respect for one’s personality. This required clarification since the reference to personality, a commonly used term, might

erroneously suggest concern with the full development of one's personality. To recall the various dimensions of the meaning of human dignity outlined in Chapter Four, the development or flourishing of personality is perhaps appropriately related to another dimension of the 'meaning' of human dignity, and is arguably related to other rights within the Convention. It has been suggested that this reference to personality in degrading treatment case-law should instead be read as a reference to 'biophysical' personality; as concern for the alleged victim *as a person*.

These understandings of the degradation reference points are seen to be consistent with the purpose of the prohibition of degrading treatment in the protection of human dignity. They are deemed to fill gaps in a picture of degradation that was previously limited to reference points without an articulated substance. Furthermore, in addition to filling gaps, articulating the conceptual core of degradation allows us to join dots; that is, to better understand *why* certain situations have fallen within the ambit of the prohibition of degrading treatment; a question that would have been difficult to answer at the outset of the research. Why has discrimination on the basis of race or sexual orientation been suggested to be potentially degrading? What was it about leaving a severely disabled woman in a cell with inadequate provisions for sanitary hygiene that rendered the situation degrading? Such questions can now be addressed with reference to protection against violation of human dignity; against violation of one's fundamental human status as a purpose of the prohibition of degrading treatment, which is reflected in the elaborated meanings of humiliation, acting against will or conscience, breaking of physical or moral resistance and contempt for personality.

Who or what inflicts degradation (i.e. who or what places one in a state of profound powerlessness, destroys one's strength to protect oneself, removes the possibility for self-mastery, and so on) is linked to the question of treatment. Article 3 prohibits degrading *treatment*, not simply degradation, and, therefore, clarification of the meaning and potential sources of treatment has been an equally central objective of the thesis. Four forms of treatment have been argued for in Chapter Six, which moves us beyond the perhaps common perception of treatment as limited to behaviour or direct conduct inflicted on the applicant by another person or institution. The four-part classification also includes a failure to act as well as treatment as a situation rather than an action, and treatment in a distinctly non-physical dimension as an attitude. The novel distinction

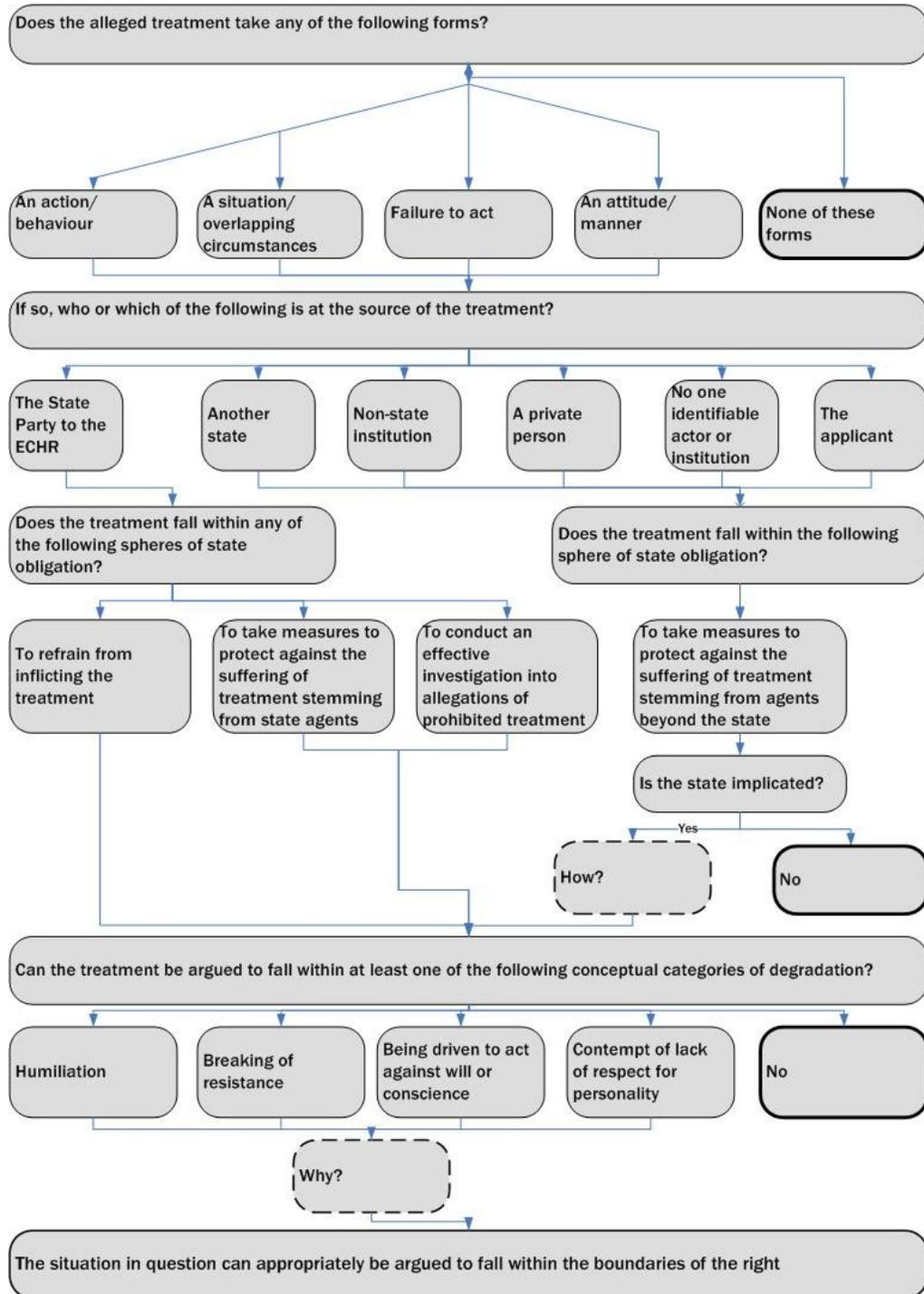
relating to the source of treatment is viewed as an indispensable aid to understanding the meaning of treatment as well as the content of state obligations and the breach of those obligations. This chapter aimed to present a degree of depth to the idea of treatment that was not previously evident. The conclusions suggest the contours of what must be identified in a particular situation in order to argue that there has been some form of treatment. In conjunction with deeper understandings of the degradation points of reference, the aim has been to complete a suggested substantive picture of the prohibition.

## **Application**

From the outset, the thesis has been motivated by a practical concern. The focus on interpretation, rather than critique of the degrading treatment jurisprudence, has been tied to the objective of arriving at a plausible, and it is hoped useable framework. In order to further facilitate application of the right, the key points outlined above have been consolidated in diagrammatic form. The sequence of questions in the application chart below begins from what is deemed to be the most helpful point of departure, although they could be addressed in any order. The chart begins from identification of treatment, which is simply judged to be the most concrete element of the process, progressing to identification of whether there is a relevant corresponding state obligation, and finally moving to the question of whether the situation complained of might appropriately be described as degrading. This section of the chapter will provide an analysis of the application process depicted in the chart, drawing attention to the significant conclusions that emerge from this assembling of the research outcomes.

The application chart provides a series of questions, and simultaneously highlights that in-depth analysis of the right is indispensable as a background to, and foundation of, effective practical application. For example, the possibility of treatment as a combination of overlapping circumstances relies upon clarification and exploration of the meaning of treatment; the possibility of treatment finding its source in the applicant himself relies upon clarifying the question of the content and breach of state obligations; understanding the substance of humiliation as erosion of self-respect, and being driven to

# Application Chart



act against will or conscience as a restriction of self-mastery, relies upon the conceptual analysis that has been undertaken in the thesis.

In relation to treatment, the point at which the chart begins, and in terms of the relationship between the modes and sources of treatment, it is helpful to note that certain forms of treatment are either likely or unlikely to emanate from particular sources. Action or behaviour, a failure to act, and an attitude could perhaps not plausibly be argued to emanate from no one identifiable actor or institution, whereas treatment in the form of a situation might be argued to emanate from any of the potential sources. This also points to the breadth of combinations that are possible, including, potentially, an attitude towards oneself, or the failure to act of a private person, and so on. Of course, the treatment must be degrading and, crucially, a form of state responsibility must be identified and ultimately engaged.

Of the six possibilities that have been identified as sources of treatment, the majority should be unsurprising – the state, a third state, private institutions, and private persons. If the other two were found to be surprising it would likely be due to a misperception of the meaning of treatment as limited to an instance of behaviour by one person/institution towards the applicant, and confusion between the identification of treatment in a particular situation and the trigger of state responsibility. Treatment as emanating from no one identifiable actor or institution and from the applicant her- or himself opens the door to significant possibilities in terms of the forms of harm that could consequently fall within the scope of the prohibition of degrading treatment. For example, as suggested in Chapter Six, in a case such as *Tremblay*, this opens the door to the possibility of the applicant recognising that the degrading treatment was self-inflicted, whilst arguing that the state was responsible in some way (in *Tremblay*, through the weight of the state's demands to pay tax contributions). There is only one significant 'restriction' in relation to the source of degrading treatment that has been highlighted in the thesis, and which is implicit in the application chart: the fact that degradation must stem from a human source. This emerged from the examination of treatment in the case-law (reflected in the point made in *Pretty v. UK* that treatment stemming from an illness was beyond the possible meanings of treatment), and also in the course of exploring

degradation (reflected in Margalit's point that humiliation does not have to be intentional, but it can only be caused by humans and not naturally occurring situations).

In terms of treatment emanating from the state, the chart suggests that there is no difference in process applicable to negative and positive obligations. This is where potential overlap would occur, and a blurring of the negative/positive dichotomy as noted in Chapter Three. It is entirely possible in such a situation to argue that both a negative and a positive obligation are in play. The difference in the process of application depending upon whether the complained-of treatment derives from the state or from another source is also represented in the chart. Where the state is at the source of the treatment, the next step is to consider whether the treatment can be argued to be degrading. Where the state is *not* at the source of the treatment, further questions require to be answered. In the case of a negative obligation, a positive obligation to take measures to protect individuals from degrading treatment at the hands of the state itself, and a positive procedural obligation to conduct an effective investigation, it is not necessary to separately ask whether the state was implicated in some way in the alleged degrading treatment, since the responsibility of the state is inherent in the obligation – it is the state that must take steps to protect those whom it has itself deprived of liberty, for example, and it is the state that has a duty to conduct an investigation. The question of whether the state was implicated is only required where degrading treatment does not emanate from the state. The obligation to take measures to protect against the suffering of degrading treatment that emanates from a private person or another state, and so on, is a positive obligation that is only breached if the state itself can be seen as responsible in some way.

The trigger of state responsibility has been treated as a distinct question, which has allowed us to arrive at the conclusions presented in Chapter Six. Again, this question of whether the state can be held responsible for a violation of the right is implicitly answered in the affirmative where the state inflicts the degrading treatment or where the state breaches one (or indeed both) of the positive obligations concerning protection from its own agents and an effective investigation. Where the obligation is argued to be one of protecting the applicant against degrading treatment emanating from a source other than the State Party itself, the question of when state responsibility is triggered cannot be greeted with a straightforward answer; there is no set formula for the nature of

the state's involvement in any particular situation that might be complained of. It could conceivably relate to the existence of particular laws or policies; it might concern a failure of the state to respond to an individual's situation. The reasonable expectation test would apply since the source of the treatment would in this case lie outside the state. The possibilities cannot be specified in advance.

In terms of the conceptual categories of degradation, the final step represented in the chart, it might be objected that the exploration of the concept of degradation simply replaces the Court's reference points with another, perhaps slightly more specific, but nevertheless abstract layer of concepts. In a sense it does, with notions such as positive freedom or the capacity for personal autonomy. The intention has been to render these ideas as clear as possible, whilst recognising that they are ultimately complex concepts. Humiliation, for example, has been said to involve erosion of self-respect, and this has been accompanied by an exploration of both the concept of humiliation more widely and the concept of self-respect itself. Aiming to clarify what such concepts mean in an accessible and usable way has been a basic goal of this exercise of conceptual analysis. The outcomes have been presented in the least abstract formulation possible, be it by reference to being placed in a state of powerlessness to live up to basic standards, or by reference to the idea of self-mastery rather than positive freedom. Inevitably, however, given the nature of such concepts, that complexity can be rendered more lucid, but it cannot be described away. Furthermore, over-simplifying this essence risks negating the value of the concepts themselves. It is submitted that the conclusions presented are valuable, despite the inevitable degree of abstraction that remains. A deeper understanding of *why* certain things can fall into the degrading treatment category comes into view and the elaborated readings allow us to comprehend and evaluate why certain situations that have not been considered by the Court in terms of degrading treatment might be likely or unlikely to successfully engage the right in future.

An advantage of the diagrammatic representation of the application process is a visualisation of these relationships between the different elements of the right. Another advantage is that three key junctures stand out, any of which if met with a negative response signal the end of the road. These are: can treatment be identified? Is the state implicated? Can the treatment of the alleged victim be seen to fall within one of the categories, or forms, of degradation? The application chart also depicts those points at

which ready answers and conclusions cannot be given. Two are evident: Firstly, as noted above, *how* is the responsibility of the state actually engaged in a situation founded upon a positive obligation to take measures to protect against the suffering of degrading treatment stemming from sources outside the state? Beyond stressing that the state must be *implicated in some way*, it is an open question as to the form that this might take. Secondly, *can* treatment be placed within one of the categories of degradation? This is simply an argument that needs to be made. The conceptual exploration of the right that has taken place has aimed to furnish a helpful set of tools to do so – including detail such as distinguishing humiliation from shame, distinguishing self-respect from self-esteem, closing doors on several dimensions of the concept of autonomy, and so on. The detail laid out in Chapter Five can be drawn upon in assessing the characterisation of particular situations. For example, in what sense might it be significant that a potential applicant feels that he has no control over certain aspects of his life? Is the fact that a person has been permitted no choice in a situation being complained of a relevant indicator of being driven to act against will or conscience? Or is it necessary that a person be humiliated as well as shown contempt for her personality? This exploration has aimed to bring to light what it means to be humiliated, to have one's physical or moral resistance broken, to be driven to act against one's will or conscience and/or to be shown a lack of respect for one's personality. Whether a particular applicant has suffered degradation will be determined by the Court on the basis of its own reading of whether an individual has been, for example, humiliated or driven to act against will or conscience. This determination can be seen as one made on the basis of the judges' assessment of 'community morality' in the Dworkinian sense, as suggested in Chapter Five.

The question of the relative assessment of the minimum level of severity, which is absolutely key to the application of the right not to be subjected to degrading treatment, is relevant in this respect. The place of this assessment has not been extensively discussed within the thesis but rather has been integrated into the exploration of the meaning of degradation. Nor is it visible in the application chart, since it is an aspect that is ultimately in the hands of the Court. The minimum level of severity is used by the Court as a filter between forms of treatment that are degrading and forms of treatment that do not cross the threshold into the sphere of degradation in the eyes of the Court. The Court's judgment as to the existence of degradation is the point at which the relative assessment comes into play. Whether treatment meets the level of severity to be accepted

as degrading in a particular case will depend on an assessment of the circumstances of that particular case. Even where a situation is suggested to be degrading ‘in principle’ (i.e. that an individual will ‘in principle’ be accepted as having sound reasons for feeling degraded by such a situation), it must be determined whether the situation was (in social fact) degrading for that particular applicant in those particular circumstances. Where the Court asks whether a particular applicant has been degraded, then the particular circumstances of the case come into play and this judgment is the responsibility of the Court.

The sense in which treatment is degrading, and the question of whether state responsibility has been engaged (if this is not immediately evident), results in the lack of a ready response to the final element of the application process suggested in the chart: an argument has also to be made that the situation being complained of merits the finding of a violation of the right. Again, it is the Court that is, of course, endowed with the authority to make a final judgment on this question. Armed with the understanding of degrading treatment that has been presented in the thesis, we are in a better position to understand the factors that are significant in that judgment, and therefore in a better position to judge whether something might be convincingly argued to fall within the scope of application of the right.

### **Moving forward**

The outcomes of the thesis suggest two major directions for further research. The first concerns the concept of human dignity. The question of the role played by respect for human dignity in interpretation would benefit from further enquiry. It is clear from the case-law references that protection of dignity as an element of purpose applies generally to Article 3. This cements the coherence of the elements housed in Article 3 and also begins to highlight why torture, inhuman and degrading treatment and punishment form part of one integrated right. The precise relationship between human dignity and the other elements of Article 3 would be an interesting point to explore further. Beyond Article 3, the question is what role does dignity play, and what meaning(s) does it assume in relation to the other Convention rights.

As suggested in Chapter Four, it is possible that different rights might be aligned with human dignity in different ways. For example, certain rights might be aligned with the manifestation of human dignity, which might include development of one's personality in a sense that is not encompassed within the Article 3 substance of personality. An exploration of the nature and impact of relationships between human dignity and specific rights could be a significant contribution to improving and guiding our understanding of the substance of the entire range of ECHR rights and their interrelationships. If certain rights were suggested to have no identifiable relationship with human dignity, this in itself would be an interesting contribution to a theoretical understanding of human rights as they are embodied in the current protection regime; if certain rights were found to have a particularly significant relationship with human dignity, again, this would be a constructive element in the articulation of broader questions and conclusions.

A further direction for research concerns the fundamental, long-standing question of the source of human dignity in human persons. This is, of course, clearly not an avenue that emerges uniquely or directly from the present research, but it is nevertheless a point that is raised in the thesis, which in isolating the dimension of the violation of dignity has drawn attention to the question of its source; elaborating upon the substance of degradation indirectly emphasises the question of what it means to have human dignity and why degradation is wrong at all. It might be argued that there is ultimately a piece of the conceptual jigsaw missing since we do not know precisely why, in the eyes of the Court, human beings are seen as meriting the attribution of human dignity in the first place. It is, however, not clear that this would necessarily further clarify our understanding of the right's scope of application. The thesis has progressed on the basis that we can nevertheless valuably rely upon the concept of human dignity to provide *parameters and direction* to the substance of the prohibition of degrading treatment; not having a definitive answer to the question of why human persons are accorded dignity has not been viewed here as a barrier to a fuller understanding of what it means for a person to be treated in a degrading way. The question of what it is about human beings that merits the attribution of dignity is incontestably one that will be the subject of continued analysis; a question that has been posed since the concept itself came into existence and to which no clear, comprehensive answer has yet been recognised. As well as being an enduring philosophical question, it is of immediate relevance for the solidity of the discourse of human rights, in which dignity has been assigned a foundational

place despite the question of its source being unaddressed in the ECHR and international human rights law more generally.

The second major direction would be to test the value of the present conclusions through practical instances of application. In the introduction to the present research a number of examples were highlighted as situations that it would be potentially interesting to consider from the perspective of degrading treatment – treatment of the elderly, prostitution, and begging. Nothing in the research has negated the appropriateness of these examples. In fact, these emerge as not just appropriate, but as particularly valuable examples, which would bring to the fore, and challenge, many of the newly clarified and elaborated interpretations.

Questions in connection with treatment of the elderly might relate, for example, to issues of personal care; to treatment as an attitude – well-meaning, perhaps, but nevertheless, potentially degrading?; to the possible nature of degradation – lack of respect for a person’s human status through being treated like an infant? Undoubtedly, there would be questions concerning the role of the state, in particular where state responsibility might arguably be engaged despite treatment being inflicted by relatives or private care homes. Both prostitution and begging are intriguing sites of analysis as generally frowned-upon negative practices that society aims to manage (perhaps even criminalise), but which are accepted as age-old and inevitable and have become normalised. In which form might treatment be identified in such a situation? On the basis of the research findings, it might be argued to stem not only from the state or a non-state actor, but potentially from no one identifiable actor or institution, or from the applicant her- or himself. Crucial questions of state responsibility would require to be addressed, particularly in the context of a positive obligation of protection. And on what grounds might begging, for example, be degrading? Margalit points specifically to humiliation as a result of powerlessness to secure one’s basic needs, arguing that there is a sense that being poor is the result of total failure to secure the minimum necessary for existence and suggests failure of a person’s ability to live a life that is worthwhile in his or her own eyes.<sup>739</sup> Furthermore, an interesting question relates to the peculiarly public display of need, perhaps lending begging particular characteristics over and above poverty and the related issue of

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<sup>739</sup> Margalit (1996) at 229-31.

homelessness. People who beg have made reference to being treated like a ‘nobody’.<sup>740</sup> If a person were to make such a complaint, is it likely that a social fact to this effect could be identified? Is destruction of self-mastery in play? What might be the relevance of being driven to act against will or conscience? And how would one address the question of responsibility of the actor versus responsibility of the state – absolutely key to considering begging as well as prostitution. As aforementioned, *Tremblay v. France* suggests that the ECtHR would not be unwilling to consider prostitution in Article 3 terms. Both prostitution and begging would also present an important opportunity to confront cultural dimensions of degradation, beyond the states of the Council of Europe. Critical nuances and tensions – nuances in relation to state responsibility and the application of the concept of degradation in concrete cases, and the tensions between the individual and the wider social and economic context, as well as different cultural environments – would come to light, moving the study of degrading treatment forward through engagement with such examples of current and commonly-occurring situations.

It might be objected that standards within the ECHR would be diluted if the scope of application of the right not to be subjected to degrading treatment were ‘stretched’ to include such new situations. Judge Fitzmaurice, in his separate opinion in *Ireland*, argued that the system would become discredited if the terms of the Convention were watered down, by enlarging them to include ‘concepts and notions that lie outside their just and normal scope’.<sup>741</sup> However, to include new situations, even if they may be regarded as novel, is not to dilute standards of protection or distort the meaning of the right; rather, it is to recognise the right’s proper scope of concern.

### Concluding remarks

The right not to be subjected to degrading treatment, interpreted purposively with protection of human dignity at its core, has been argued to be substantively-bounded and at the same time receptive to the inclusion of new, and perhaps even ‘surprising’

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<sup>740</sup> Lynch, Philip, ‘We Want Change – Public Policy Responses to Begging in Melbourne’, Homeless Persons’ Legal Clinic, June 2005, at 29-30; available at: [http://www.pilch.org.au/Assets/Files/Submission\\_on\\_Begging\\_We\\_Want\\_Change%20\\_2005.pdf](http://www.pilch.org.au/Assets/Files/Submission_on_Begging_We_Want_Change%20_2005.pdf)

<sup>741</sup> *Ireland v. UK*, para. 36.

situations. On the one hand, the meaning of treatment that has been unearthed is somewhat broader than was expected at the outset of the research when there was little to base an assessment on, given the lack of analysis of the term in both case-law and literature. The aim has been to demonstrate that this was a question worthy of investigation, and to provide effective insight into the boundaries of the right's scope of application when read alongside the clarified nature of state obligations and in light of the distinguishable question of the engagement of state responsibility.

On the other hand, the meaning of degradation could perhaps be seen as narrower than expected, in that it excludes, for example, the most common understanding of humiliation and also the most common understanding of respect for autonomy as respect for freedom of choice. Despite the inevitability of continued reliance on certain abstract ideas, the intention has been to provide a clearer demarcation of the coverage of the term degrading, in order to assist in the construction of strong and conceptually-informed arguments. It is submitted that the elaborated meaning of degradation also allows us to make more coherent sense of the content of the case-law to date.

The thesis has aimed to provide the essential foundations for understanding why, and identifying, situations that could properly be viewed as potential violations of the right not to be subjected to degrading treatment in future. This does not imply that there will be a formulaic answer to the question of whether degrading treatment has occurred resulting in a violation of Article 3. The particular circumstances of the case will play a decisive role and the Court must ultimately be persuaded by the arguments put forward. The understanding of the right presented in the thesis should mean, not that the answer becomes obvious in every situation, but that we now have a clearer idea of what we are looking for. A key part of this process has been to provide a better understanding of the essence of the right – ultimately, protection against violation of human dignity in a fundamental sense. This follows from the teleological interpretation of the right identified in the practice of the Court and carried through in the analysis of degrading treatment. The simple, yet fundamental conclusion is that the meaning of the right embodies its purpose. The need to protect human dignity is conveyed 'through the looking glass'; its violation reflected in the substance of degrading treatment.

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## APPENDIX – LIST OF CASES

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