

Protection of Rights of Minor Victims of Torture, Inhuman or Degrading Treatment, or Punishment under the European Convention on Human Rights

The author presents research to analyze the particular protection of under-aged victims of torture and ill-treatment under the European Convention on Human Rights (ECHR). This particularly vulnerable group is entitled to special protection due to its status and susceptibility to various types of abuse. ECHR had the opportunity to analyze the applications concerning violations of the prohibition of torture, inhuman or degrading treatment or punishment concerning minors, among other things, domestic violence^[1], migration^[2], corporal punishment^[3], or sexual abuse^[4]. The states parties have particular obligations in this respect due to the nature of the violation and the specific vulnerability of the victim. The purpose of the Article is to focus on minor victims of torture in the context of their particular vulnerability and protection of their respective rights under the ECHR system.

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¹ ECHR judgment *Z. and others v. The United Kingdom*, 10.05.2001, appl. no 29392/95.

² ECHR judgment *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12.10.2006, appl. no 13178/03.

³ ECHR judgment *Tyrer v. The United Kingdom*, 25.04.1978, appl. no 5856/72.

⁴ ECHR judgment *M.C. v. Bulgaria*, 4.12.2003, appl. no 39272/98.

1 | Introduction

Article 3 of the European Convention on Human Rights (ECHR) enshrines the prohibition of torture, inhuman and degrading treatment, or punishment. Under Art. 15, this is a non-derogable right which, together with Art. 2 (right to life), guarantees the most fundamental basis of a democratic society: the right to life and freedom from torture. According to Judge J.P. Costa, these two Articles express the most fundamental values of human civilization, the right to life, and the absolute protection of the physical and mental integrity of the person. Therefore, in these two areas, the case law has gone furthest in clarifying the State's positive obligations^[5].

The precise construction of the state's positive obligations under Art. 3 is a consequence of the fact that this guarantee constitutes an absolute right and protects one of the most important values enshrined in the Convention. The Court divides the state's positive obligation in this respect into those deriving from substantive and procedural aspects^[6] of the ECHR, which causes the ECtHR to somewhat „overlook” the particular character of institutional obligations^[7]. However, elements of the institutional obligations may be found within the ambit of substantive and procedural limbs of the Art. 3^[8].

The prohibition of torture requires the parties to contract certain positive obligations. On the one hand, these entail legislative and preventive obligations, which aim to provide a legislative framework and prevent acts of ill-treatment from materializing^[9]. On the other hand, these refer to procedural obligations, which require conducting adequate and effective official investigations of violations that have already occurred. The ECtHR clearly stated that the authorities' positive obligations under Article 3 of the Convention comprise, first, an obligation to put in place a legislative

⁵ Jean-Paul Costa, „The European Court of Human Rights: consistency of its case-law and positive obligations. Speech at Leiden University” *Netherlands Quarterly of Human Rights*, No. 3 (2008): 452–453.

⁶ E.g.: ECtHR judgment *X. and Others v. Bulgaria*: 02.02.2021, appl. no. 22457/16. § 178–192.

⁷ *Mutatis mutandis* in relations to institutional obligations deriving from Art. 2: Jakub Czepek, *Standard skutecznego śledztwa w sferze ochrony prawa do życia w systemie Europejskiej Konwencji Praw Człowieka* (Warszawa: Wydawnictwo Naukowe UKSW, 2021), 135–137.

⁸ *Ibidem*.

⁹ ECtHR judgment *Beganović v. Croatia*: 25.06.2009, appl. no. 46423/06. § 71.

and regulatory framework of protection; second, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as “substantive”, while the third aspect corresponds to the State’s positive “procedural” obligation^[10].

Substantive obligations are mainly put in place to prevent any risk of torture from materializing, whereas procedural obligations come into play after an incident of torture already took place. Procedural obligations require an effective investigation of allegations of torture and ill-treatment.

As it was already stressed, due to the paramount importance of its subject matter, prohibition of torture is an absolute and nonderogable right which guarantees the protection of all individuals from torture, inhumane or degrading treatment, or punishment. This protection becomes particularly important with respect to minors. Even though the text of the ECHR does not refer particularly to the protection of children, it is clear that most of^[11] the Convention rights are directly applicable to them. Art. 3 states that “no one” shall be subjected to torture or inhuman or degrading treatment or punishment^[12]. This provision should be understood as guaranteeing this protection to children and adults.

The Convention does not refer to or define a child on many occasions. However, according to the Convention on the Rights of the Child (CRC), it is clear that a child means „every human being below the age of eighteen years unless under the law applicable to the child, the majority is attained earlier”^[13]. Due to their vulnerability, children require specific protection and assistance to fully assume their responsibilities within the community^[14]. This is the reason why the child benefits from specific protection under international law of human rights. This concept was stressed in Art. 3 of the CRC, which states that in all actions concerning children, the

¹⁰ X. and Others v. Bulgaria. § 178.

¹¹ The exception to this rule is e.g. Art. 12 of the ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights). 4 November 1950; which guarantees the right to marry and found a family.

¹² ECHR, Art. 3.

¹³ Convention on the Rights of the Child. 20 November 1989, Art. 1.

¹⁴ Ibidem, Preamble.

best interests of the child shall be a primary consideration^[15]. The notion of a child's best interest is, in fact, a general rule of the CRC and guarantees the prevailing character of a child's interest. A similar approach was taken in the EU Charter on Fundamental Rights^[16]. This notion is also applicable in the ECtHR case law^[17]; however, the Court does not refer to it in the cases concerning the prohibition of torture and other forms of ill-treatment.

The Court took up the issue of protecting children regarding the prohibition of torture in several cases. These concerned questions of corporal punishment, domestic violence, guarantees of care for migrant minors, sexual abuse, and protection of children in youth care. It is important to focus on each of those issues separately.

2 | Corporal punishment

The Court addressed the issue of corporal punishment in the case *Tyrer v. United Kingdom*. The ECtHR examined the application concerning the caning (birching) of a 15-year-old, which took place in 1972. The applicant was sentenced to three strokes of the birch in accordance with existing domestic legislation^[18].

The ECtHR at that time analyzed whether the corporal punishment inflicted on this particular case could be classified as „degrading treatment”. It is worth mentioning that currently, the ECtHR does not specify whether a specific form of ill-treatment constitutes degrading treatment, inhuman treatment, or torture. Even in cases concerning torture, the most severe forms of ill-treatment under Art. 3, the Court considers that the additional characterization is not necessary in the circumstances of the case. It is important to determine whether the ill-treatment in question

¹⁵ Ibidem, Art. 3 para 1.

¹⁶ Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01, Art. 24 para 2.

¹⁷ ECtHR judgment *X. v. Latvia*: 26.11.2013, appl. no. 27853/09. § 100; ECtHR judgment *Krisztián Barnabás Tóth v. Hungary*: 12.02.2013, appl. no. 48494/06. § 32; ECtHR judgment *Görgülü v. Germany*: 26.02.2004, appl. no 74969/01. § 41.

¹⁸ ECtHR judgment *Tyrer v. United Kingdom*: 25.04.1978, appl. no. 5856/72. § 9.

attained the necessary threshold of severity to fall within the scope of Article 3 of the ECHR^[19].

The Court in *Tyrer v. UK* stressed that judicial corporal punishment involves one person inflicting physical violence on another^[20]. Even though the applicant did not suffer any severe or long-lasting physical effects, his punishment constituted an assault on precisely that which is one of the main purposes of the Art. 3 to protect, that is, the dignity and physical integrity of a person. It cannot be excluded that the punishment may have had adverse psychological effects. The Court also noted that there had been several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Consequently, in addition to the physical pain he experienced, the applicant was subjected to mental anguish over the anticipation of the violence he was to have inflicted on him^[21].

All above mentioned led the Court to conclude that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of „degrading punishment”^[22]. Although the ECtHR decided that corporal punishment amounted to degrading punishment and constituted a violation of Art. 3, it did not refer in any way to the special status of an individual who was a minor at the time of the punishment.

In *Campbell and Cosans v. In the United Kingdom*, the Court analyzed the threat of minors being subjected to corporal punishment. The ECtHR stated that, provided it is sufficiently accurate and immediate, it is a mere threat of conduct prohibited by Art. 3 may itself conflict with that provision. Thus, threats to an individual with torture might, in some circumstances, constitute at least „inhuman treatment”^[23]. The Court referred to the *Tyrer* judgment, which stressed that no „punishment” has been inflicted in this case. The ill-treatment would not be “degrading” unless the person concerned has undergone it^[24]. Since none of the minors was

¹⁹ E.g. ECtHR judgment *Tunikova and Others v. Russia*: 14.12.2021, appl. no. 55974/16, 53118/17, 27484/18, 28011/19. § 77.

²⁰ *Tyrer v. United Kingdom*. § 33.

²¹ *Ibidem*.

²² *Ibidem*, § 35.

²³ ECtHR judgment *Campbell and Cosans v. United Kingdom*: 25.02.1982, appl. no. 7511/76, 7743/76. § 26.

²⁴ *Ibidem*, § 28.

subjected to ill-treatment, the Court decided that there was no violation of Art. 3 could be established^[25].

It is worth mentioning that the ECtHR refers to relevant international standards concerning minors in detention or corporal punishment. The Court stresses the importance of both CoE and UN standards^[26]. According to the Committee of Ministers (CM) Recommendation (2008)11, it is prohibited to apply collective punishment, corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman and degrading punishment^[27]. A similar standard was provided within the framework of the CRC. This concerns in particular Art. 37, which prohibits torture, cruel, inhuman, or degrading treatment or punishment of children^[28] and guarantees that „every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his or her age”^[29].

3 | Domestic violence

Due to the particular vulnerability of children, domestic violence puts them in danger. Effectively addressing this problem requires the realization of the state’s positive obligations in this respect, therefore implies primarily preventing domestic violence by completing substantive obligations.

The Court stressed this aspect in the judgment of *Z. and Others v. United Kingdom*. The case concerned four siblings who were severely neglected and abused. The children were, among other things, dirty, hungry, and often locked up by their parents. Due to the extreme cases of neglect, they developed mental problems. The child psychiatrist who examined the children stated that they had been deprived of affection and physical care. She described their experiences as „horrific” and added that the case was the worst neglect and emotional abuse she had seen in her professional

²⁵ Ibidem, § 31.

²⁶ ECtHR judgment *Blohin v. Russia*: 23.03.2016, appl. no 47152/06, § 77–88.

²⁷ Recommendation CM/Rec (2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008. § 95.2.

²⁸ Convention on the Rights of the Child, Art. 37 a).

²⁹ Ibidem, 37 c).

career. Some of the children also showed signs of PTSD^[30]. Children were also showing signs of bruises and other forms of abuse^[31].

The ECtHR analyzed the alleged violation of Art. 3 in this case. The Court stated that there was a positive obligation on the Government to protect children from treatment contrary to this provision. The authorities had been aware of the severe ill-treatment and neglect suffered by the four children over the years at the hands of their parents and failed, despite the means reasonably available to them, to take any effective steps to end it^[32]. It is worth mentioning that the State Party did not contest the Commission's finding that the treatment suffered by the four applicants reached the level of severity prohibited by Art. 3 and that the State failed in its positive obligation, under Article 3 of the Convention, to provide the applicants with adequate protection against inhuman and degrading treatment^[33].

It was stressed that domestic authorities had a positive obligation to protect children and had various powers available, including removing them from their homes. During the intervening period of four and a half years, the children had been subjected in their home to what the consultant child psychiatrist who examined them called horrific experiences^[34]. The Court concluded that there had been a violation of Art. 3 in this case^[35].

Additionally, the ECtHR also analyzed the procedural aspect of this case. It was done under Art. 13. The Court recalls its previous case law, which stated that where a provision as fundamental as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Art. 13 requires, in addition to the payment of compensation (where appropriate), a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure^[36]. In the Court's opinion, the applicants did not have an appropriate means of obtaining a determination of their allegations. The local authority did not protect them from inhuman and degrading treatment and the possibility of receiving

³⁰ ECtHR judgment *Z. and Others v. United Kingdom*: 10.05.2001, appl. no 29392/95, § 40.

³¹ *Ibidem*, § 17–40.

³² *Ibidem*, § 70.

³³ *Ibidem*, § 72.

³⁴ *Ibidem*, § 74.

³⁵ *Ibidem*, § 75.

³⁶ *Ibidem*, § 109; also: ECtHR judgment *Kaya v. Turkey*: 19.02.1998, appl. no 22729/93, § 107.

an enforceable compensation award for the damage suffered. Consequently, they were not provided with an effective remedy for breach of Art. 3, which led to violation Art. 13 of the Convention^[37].

It is worth mentioning that the Court also examined a case in which the lack of realization of preventive obligations caused the death of minor children of the applicant. However, the issue was analyzed under Art. 2 of the ECHR. The case *Kontrová v. Slovakia* concerned an applicant who suffered long physical and psychological abuse by her husband. The applicant's husband also threatened to kill himself and his children. Despite the long history of domestic violence, the authorities did not take preventive actions. Eventually, the applicant's husband killed their children and committed suicide afterward^[38].

The Court referred to its previous case law^[39] and reiterated that – in addition to negative obligations – Art. 2 also requires the implementation of positive preventive actions. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The scope of this positive obligation must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities^[40]. Despite the clearly established positive obligations of the state in this respect, the authorities in *Kontrová v. Slovakia* failed to ensure compliance with them. These failures directly led to the death of the applicant's children^[41].

This case also entailed violation of procedural aspect of Art. 2, examined under Art. 2 and Art.13. The Court reminded that Art. 13 requires the possibility of compensation for nonpecuniary damage. As the ECtHR already found, in the event of a breach of Art. 2 and 3 of the Convention, which

³⁷ Ibidem, § 111.

³⁸ ECHR judgment *Kontrová v. Slovakia*: 31.05.2007, appl. no 7510/04, § 7-14.

³⁹ ECHR judgment *Osman v. United Kingdom*: 28.10.1998, appl. no 23452/94, § 115-116; ECHR judgment *L.C.B. v. United Kingdom*: 09.06.1998, appl. no 23413/94, § 36.

⁴⁰ *Kontrová v. Slovakia*, § 50; *Osman v. United Kingdom*, § 116; Alastair R. Mowbray, *The Development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford–Portland–Oregon: Bloomsbury Publishing, 2004), 16.

⁴¹ *Kontrová v. Slovakia*, § 52-55.

rank as the most fundamental provisions of the Convention, compensation for non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies^[42].

Kontrová v. The Slovakia case does not concern freedom from torture; however, it is worth mentioning here for at least two reasons. Firstly, it shows the genuine and natural connection between the right to life and freedom from torture. This might be easily observed by the similarity of the positive obligations derived from these two rights. Despite these similarities, it should be noted that the right to life has a „dominating” position over freedom from torture in this respect. In many ECtHR judgments, after finding a violation of positive obligation deriving from Art. 2, the Court decides there is no necessity to further analyze Art. 3 in this respect^[43]. Secondly, in extreme circumstances where state authorities have failed and incidents of domestic violence caused the death of a minor, Art. 2 will be applicable^[44]. Regarding both rights, it is crucial to satisfy both substantive obligations (e.g., by implementing provisions of the criminal law and preventive actions) and procedural obligations (including effective investigation and compensation).

4 | Protection of a foreign minor

In recent years, the issues concerning migration and the protection of the rights of migrants have become more and more pressing. The case law of the ECtHR also reflects this tendency. The Court analyzed numerous cases concerning violation of Art. 4 of the Protocol 4^[45] (prohibition of collective expulsion of aliens), Article 3 concerning, among other things,

⁴² Ibidem, § 64.

⁴³ E.g. ECtHR judgment *Ognyanova and Choban v. Bulgaria*: 23.02.2006, appl. no 46317/99, § 124; ECtHR judgment *Anguelova v. Bulgaria*: 13.06.2002, appl. no 38361/97, § 149–150; Czepek, *Standard*, 312.

⁴⁴ E.g. ECtHR judgment: *Association Innocence en Danger v. France and Association Enfance and Partage v. France*: 04.06.2020, appl. no 15343/15, 16806/15, § 159–176.

⁴⁵ ECtHR judgment *Čonka v. Belgium*, 05.02.2002, appl. no 51564/99; ECtHR judgment *Sharifi and Others v. Italy and Greece*: 21.10.2014, appl. no 16643/09; ECtHR judgment *Khlaifia and Others v. Italy*: 15.12.2016, appl. no 16483/12.

conditions of detention^[46], or Article 13 (right to an effective remedy)^[47]. The issues related to migration concern not only adults but also children. Due to the particular vulnerability of minors, the realization of Convention guarantees in their respect is important. The issue of minor migrants, especially those unaccompanied, had been addressed within the EU system (e.g., under the EU Directive on standard procedures for granting and withdrawing international protection^[48]). On many occasions, the ECtHR has examined the problems related to child migrants. Those cases mostly concern detention conditions, which may be particularly dire, unsafe for children, or lengthy.

In most recent cases concerning accompanied minors in immigration detention in the context of the alleged violation of Art. 3, the Court had regard to several elements, including the age of the children involved, the length of their detention, the material conditions in the detention facilities and their appropriateness for accommodating children; the particular vulnerability of children caused by previous stressful events and the effects of detention on the children's psychological condition^[49].

Recently, in *MH and Others v. Croatia*, the ECtHR stated that the detention of children in an institution with prison-type elements, where the material conditions were satisfactory but the level of police surveillance was high. There were no activities structuring the children's time, which would perhaps not be sufficient to attain the threshold of severity required to engage in Art. 3, where the confinement was for a short duration, depending on the circumstances of the case. However, in the case of a prolonged period, such an environment would necessarily have harmful consequences for children, exceeding the threshold of Art. 3^[50].

⁴⁶ E.g. ECtHR judgment *M.K. and Others v. Poland*: 23.07.2020, appl. no 40503/17, 42902/17, 43643/17.

⁴⁷ *Khlaifia and Others v. Italy*; ECtHR judgment *Moustahi v. France*: 25.06.2020, appl. no 9347/14.

⁴⁸ Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection. 26.06.2013, Art. 25; Laurens Lavrysen, „European asylum law and the ECHR: an uneasy co-existence” *Goettingen Journal of International Law*, 1 (2012): 216.

⁴⁹ ECtHR judgment *S.F. and Others v. Bulgaria*: 07.12.2017, appl. no 8138/16, 79–83; ECtHR judgment *G.B. and Others v. Turkey*: 17.10.2019, appl. no 4633/15, § 102–117; ECtHR judgment *R.R. and Others v. Hungary*: 02.03.2021, appl. no 36037/17, § 58–65.

⁵⁰ ECtHR judgment *M.H. and Others v. Croatia*: 18.11.2021, appl. no 15670/18, 43115/18, § 199.

Similarly, in the case *Muskhadzhiyeva and Others v. Belgium*, The Court stressed the extreme vulnerability of a child and the necessity of taking reasonable steps to prevent the child from ill-treatment. ECtHR noted that the children were not separated from their mother, but that did not exempt the authorities from their obligation to protect them. Children had been held for more than a month in a closed center that was not designed to house minors, but adults. The children also showed signs of PTSD^[51].

According to the ECtHR, the state's obligations concerning the protection of migrant minors may be different depending on whether they are accompanied or not^[52]. Regarding unaccompanied minor migrants, the Court also focuses on the detention conditions in such facilities. On certain occasions, it was decided that the conditions of his detention undermined the essence of human dignity and that they could be regarded in themselves, without considering the length of detention, as degrading treatment in breach of Art. 3 of the Convention^[53].

In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR examined an application concerning the detention of a five-year-old girl (Congolese national) detained for nearly two months at an adult transit center. The center was run by the Aliens Office near Brussels airport. The girl was traveling to Canada to join her mother, who had obtained refugee status there. After detention, the minor was returned to her country of origin. The applicants (mother and daughter) stated that the detention of the child had constituted a violation of the Art. 3 of the ECHR^[54].

The Court noted that a five-year-old applicant was in the same conditions as adults. She was detained in a center designed for adults; although she was unaccompanied by her parents, no one had been assigned to care for her. No measures were taken to ensure that she received adequate educational and counseling assistance from specially mandated qualified personnel. This situation lasted two months. The authorities have acknowledged that the place of detention was not adapted to her needs and that there were no adequate structures at the time^[55].

⁵¹ ECtHR judgment *Muskhadzhiyeva and Others v. Belgium*: 19.01.2010, appl. no 41442/07, 55-63.

⁵² ECtHR judgment *Rahimi v. Greece*: 05.04.2011, appl. no. 8687/08, § 63.

⁵³ ECtHR judgment *Abdullahi Elmi and Aweys Abubakar v. Malta*: 22.11.2016, appl. no 25794/13, 28151/13, § 112.

⁵⁴ ECtHR judgment *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*: 12.10.2006, appl. no 13178/03, § 8-37.

⁵⁵ *Ibidem*, § 50.

The Belgian authorities took several measures, including informing the mother of the situation, giving her a telephone number to reach her daughter, appointing a lawyer to assist the second applicant, and liaising with the Canadian authorities and the Belgian Embassy. The ECtHR stated that these measures were insufficient to fulfill the State's obligation to provide care for the applicant and that the State had an array of means at its disposal. The conditions of the applicant's detention caused considerable distress. They demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment and led to a violation of the Art. 3^[56].

The above findings stress the necessity of fulfilling preventive obligations of the States-Parties to the ECHR. It is crucial not only to prevent minor migrants from violence or any form of abuse, but also to guarantee proper conditions. The places to house minor migrants should be safe and appropriate for children, including the requirements of material conditions. The ECtHR case law, in this respect, clearly stresses the importance of the realization of substantive positive obligations and notes that inappropriate detention conditions may lead to a violation of Art. 3 and lead to psychological trauma of a child.

5 | Sexual abuse

Any form of sexual violence or abuse is particularly dangerous to its victim. Due to the exceptional vulnerability of children, the consequences of such acts are even more severe for them. Such crimes also require a domestic legal framework and particular diligence during investigations and proceedings.

In *MC v. Bulgaria*, the Court analyzed the case in which the applicant (who was 14 at the time) alleged a rape. The ECtHR noticed that the authorities could be criticized for attaching little weight to the particular vulnerability of young people and the special psychological factors involved in cases concerning rape of minors.

In respect of investigation and proceedings, the Court considered that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, the authorities must nevertheless

⁵⁶ Ibidem, § 58–59.

explore all the facts and decide based on an assessment of all the surrounding circumstances. The investigation and its conclusions must be centered on the issue of nonconsent. In the case of the applicant, the authorities failed to investigate the surrounding circumstances sufficiently. That resulted from their undue emphasis on “direct” proof of rape^[57]. The investigation was also subject to significant delays^[58].

ECTHR noted that the approach taken by the investigator and the prosecutors did not fulfill the requirements inherent in the States’ positive (substantive) obligations. In particular, the authorities failed to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse^[59]. The Court also stressed that effective protection against rape and sexual abuse requires measures of a criminal-law nature^[60].

This approach stresses the importance of positive preventive obligations regarding the sexual abuse of minors. In this sense, states should put effective criminal law provisions that align with „modern standards in comparative and international law”^[61]. It is also vital to effectively punish such crimes which requires the realization of procedural obligations and the conduct of an effective investigation. This necessity was stressed in *IC v. Romania*, where the Court stated that the investigation of the applicant’s case fell short of the requirements inherent in the State’s positive obligations to apply effectively a criminal law system punishing all forms of rape and sexual abuse^[62].

It should be added that the Court also focused on the issue of attempted child pornography. ECTHR referred to this issue within the ambit of Art. 8^[63]. Even though the Court’s case law in this regard is somewhat modest, Judge Pinto de Albuquerque stressed that, given the broad consensus and constant practice, the criminalization of child pornography is now part of international customary law, binding on all States^[64].

⁵⁷ *Ibidem*, § 181–182.

⁵⁸ *Ibidem*, § 184.

⁵⁹ *Ibidem*, § 185.

⁶⁰ *Ibidem*, § 186, 124, 148–153.

⁶¹ *Ibidem*, § 185.

⁶² ECTHR judgment *I.C. v. Romania*: 24.05.2016, appl.no 36934/08, § 60.

⁶³ ECTHR judgment *Söderman v. Sweden*: 12.11.2013, appl. no 5786/08.

⁶⁴ *Ibidem*, Concurring Opinion of Judge Pinto de Albuquerque; The issue of child pornography should also be analyzed in the context of digitalization. See: Karol Karski, Bartłomiej Oreziak, „Selected Considerations Regarding the Digitalisation of Criminal Proceedings in Light of the Standards of the Council of Europe: Analysis Taking into Account the Experience of the Current Pandemic”

6 | Ill-treatment committed by teachers

The Court also had the opportunity to analyze the mistreatment of a child by a teacher. The case *VK v. Russia* concerned a four-year-old boy who teachers were severely ill-treated at a public nursery school. The applicant claimed in particular that his teachers had forcibly given him antibiotic eyedrops without a medical prescription or his parents' consent; had locked him in the dark in the toilets, telling him that rats would eat him; had forced him to stand in the nursery lobby in his underwear with his arms up for prolonged period; on one occasion had taped his mouth shut with sellotape. Due to this mistreatment, the child developed a neurological disorder^[65].

The ECtHR has stated that there has been a violation of Art. 3 of the Convention as regards both the young boy's ill-treatment by his teachers and the authorities' failure to effectively investigate his allegations. Concerning the substantive aspect of Art. 3, the Court noted that the ill treatment was detailed and consistent. The statements were also supported by the assistant teacher and some of the parents of other pupils, who confirmed some of the incidents^[66]. It was also stressed that the applicant was subjected to such treatment for at least several weeks and that many years later, he continues to suffer from its consequences, particularly post-traumatic neurological disorder^[67].

Concerning the state's procedural obligations under Art. 3, the Court noted that the criminal investigation was opened after a three-year delay. The most severe consequence of that fact was that the prosecution of the teachers became time-barred under domestic law. Therefore, the investigation in respect of those offenses was discontinued, even though the domestic authorities found that the teachers had subjected the applicant to violent acts that caused physical pain and cruel treatment^[68].

The Court also analyzed the issue of minors being placed in institutions. In *Scozzari and Giunta v. Italy*, the Court examined the case of two boys being placed in the "Il Forteto" children's home, where two of the principal leaders and co-founders had been convicted of sexual abuse of

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⁶⁵ ECtHR judgment *V.K. v. Russia*: 07.03.2017, appl. no 68059/13, § 6–21.

⁶⁶ *Ibidem*, § 171.

⁶⁷ *Ibidem*, § 172.

⁶⁸ *Ibidem*, § 189.

three handicapped people in their care^[69]. The Court analyzed the alleged violation of Art. 3 and decided that complaints in substance did not raise a separate issue from the ones arising under Art. 8 of the Convention^[70]. The ECtHR generally focuses on other provisions in cases concerning minors being placed in institutions. In *Nencheva and Others v. Bulgaria*, concerning young people in homes for physically and mentally disabled people who suffered from the effects of cold and food, medicines, and necessities shortages, the ECtHR focused on the violation of Art. 2^[71].

It should be stressed that placing children in institutions for minors may also adversely affect their relation with parents and thus affect their right to respect for family life under Art. 8. In *IGD v. Bulgaria*, the Court stated that placing the applicant in the sociopedagogical boarding schools deprived him of any genuine contact with his mother and violated his right to respect his private and family life^[72].

7 | Summary

Above all, it should be stressed that the above list of forms of ill-treatment is somewhat of an exemplary character and should not be considered exhaustive. The latter would be problematic because the ECtHR's case law constantly develops, and the Court may discover new issues arising under Art. 3^[73] in respect of children. This Article presented the most widespread issues concerning the protection of minor victims of torture, inhumane or degrading treatment, or punishment within the ECHR system.

According to the Convention on the Rights of the Child, children require specific protection and assistance to fully assume their responsibilities

⁶⁹ ECtHR judgment *Scozzari and Giunta v. Italy*: 13.07.2000, appl. no 39221/98, 41963/98, § 11–46.

⁷⁰ *Ibidem*, § 237.

⁷¹ ECtHR judgment *Nencheva and Others v. Bulgaria*: 18.06.2013, appl. no 48609/06.

⁷² ECtHR judgment *I.G.D. v. Bulgaria*: 07.06.2022, appl. no 70139/14, § 82–97.

⁷³ In 2019 the Court stated a violation of Art. 3 in regard of a minor witnessing the violent arrest of a father by police: ECtHR judgment *A. v. Russia*: 12.11.2019, appl. no 37735/09, § 66–70.

within the community^[74] due to their particular vulnerability. This is why children, as particularly vulnerable individuals, are provided special protection under international human rights law. This tendency is reflected in the ECtHR case law that prohibits torture, inhuman or degrading treatment, or punishment of minors.

The Court takes this particular vulnerability into account. The cases concerning allegations of violations of Art. 3, with respect to minors, not only analyze the violation itself, but also refer to the delicate mental condition of the child and the dire mental repercussions of the violation of Art. 3 might cause^[75].

The prohibition of torture, inhuman or degrading treatment, or punishment under the ECHR provides two sets of positive obligations: substantive and procedural. Both types are applied to protect minors from various forms of ill-treatment. Substantive obligations focus mainly on the prevention of ill-treatment and the adoption of criminal law provisions. States are also required to take measures to prevent any forms of ill-treatment. These measures should provide effective protection, particularly for children and other vulnerable persons, and include reasonable steps to prevent ill-treatment that the authorities should have known^[76].

Within the procedural scope, the states should guarantee the realization of the effective official investigation of allegations of torture, inhuman or degrading treatment, and punishment. This positive obligation cannot be limited solely to cases of ill-treatment by State agents^[77]. This obligation can also require the conducting of effective proceedings in allegations of torture and ill-treatment.

The character of substantive and procedural positive obligations is paramount in protecting the right to life and the prohibition of torture. About Art. 3 of the ECHR, these are also crucial with respect to the prohibition of torture and with regard to minor victims. However, in this regard, the Court has in mind the vulnerability of the child and seems to be focusing particularly on the substantive preventive obligations (e.g., in relation to minor migrants in detention). The consequences of torture and other ill-treatment are particularly grave when they affect children, and this is

⁷⁴ Convention on the Rights of the Child, Preamble.

⁷⁵ E.g. V.K. v. Russia, § 171-172.

⁷⁶ Z. v. United Kingdom, § 73; *Mutatis mutandis* Osman v. United Kingdom, § 116.

⁷⁷ M.C. v. Bulgaria, § 151.

why implementing effective domestic regulations and preventive measures plays a crucial role in the process of protecting minor victims of torture.

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