The view of the European Court of Human Rights on competent patients right of informed consent : research in the light of articles 3 and 8 of the European Convention on Human Rights

The View of the European Court of Human Rights on Competent Patient's Right of Informed Consent

A Research in the light of Articles 3 and 8 of the European Convention on Human Rights

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Abstract

It is an internationally recognized principle that patients should give their informed consent to a treatment in order to avoid a violation of their right to personal autonomy. This article discusses this principle in the light of Articles 3 and 8 of The European Convention on Human Rights and the view of the European Court of Human Rights on this matter. Indeed, nowadays more complaints related to (the lack of) informed consent not only concern a possible violation of Article 8 of the Convention, but Article 3 has also gained importance, especially when a treatment is intrusive.

Key Words

Personal autonomy – Informed consent – Article 8 European Convention on Human Rights – Private life – Article 3 European Convention on Human Rights – Torture, degrading or inhuman treatment – Therapeutic or medical necessity

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1 Introduction

In this article we will focus on medical treatments that have been carried out without the free and informed consent of a *competent* patient, e.g., forced feeding, sterilizations or gynecological examinations.[1] Would such treatments possibly violate the European Convention on Human Rights? The key articles in this connection are Article 3 and 8 of the Convention.[2]

Firstly, personal autonomy, exercised through the principle of informed consent, is a part of one's private life. Therefore it is protected under Article 8 of the Convention.[3] Hence, a first research question will be: *How is the principle of informed consent linked to Article 8 and what are the general principles in the case-law of the European Court of Human Right in this regard?* This will be discussed in Part II of the article.

Secondly, the case law on forced treatments also mentions Article 3 of the Convention (prohibition on torture, inhuman and degrading treatment). In this way informed consent seems to be introduced in Article 3 as well. A second twofold research question reads as follows: *What is the role of informed consent in connection with Article 3 and what could be the possible reasons for bringing informed consent under its scope?* An answer to these questions will be given under Part III.

As the title suggests, the research will be restricted to case-law of the European Court of Human Rights (hereafter: "the Court"). National law of the Member States will not be discussed. Also, the focus is on treatment of (generally[4]) *competent* patients. If we refer to cases where the patient's capability was questioned due to a mental disease, we only mention

[1] These examples are illustrative and non-exhaustive, more case-law will be discussed below.
[2] E.g., E. Wicks, "The Right to Refuse Medical Treatment under the European Convention on Human Rights", *Med.L.Rev.* 9 (1) (2001) 39-40; Articles 2, 5, 9 and 14 could also be relevant in this respect.
[3] ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para. 4; J. Velaers, "Het menselijk lichaam en de grondrechten", in: P. Reyngaert, J. Taels and G. Vanheeswijck (eds.), *Over zichzelf beschikken? Juridische en ethische bijdragen over het leven, het lichaam en de dood* (Antwerp: Maklu, 1996) pp. 196; P. De Herdt, *Art. 8 E.V.R.M. en het Belgische Recht. De bescherming van privacy, gezin, woonst en communicatie*, (Gent: Mys & Breesch, 1998) p. 138-139; S. Dewulf, *The Signature of Evil – (Re)Defining torture in International Law* (Antwerp: Intersentia, 2011) p. 320-321; T. Goffin, *De professionele autonomie van de arts. De rechtspositie van de arts in de arts-patiëntrelatie* (Brugge: die Keure, 2011) p. 433-434; M. Hartlev, "Patients' Rights", in: B. Toebes, M. Hartlev, A. Hendriks and J. Rothmar Herrmann (eds.), *Health and Human Rights in Europe* (Antwerp, Intersentia, 2012) pp.123.
[4] See below for some remarks about the possibility *as such* to give informed consent when being detained under state supervision.

the general principles that are also applicable to our research and we do not express an opinion about the (in)capability itself.[5]

2 Article 8 of the Convention

2.1 The principle of informed consent

2.1.1 Notion

Although Article 8 of the Convention does not specifically mention a right to autonomy or self-determination, nor does it address the question of obtaining consent to treatment,[6] the Court has explicitly stated that Article 8 of the Convention protects these rights.[7] The right to personal autonomy has been given legal effect, regarding healthcare decisions, through the requirement for consent to treatment and the corresponding legal recognition of the right to refuse a treatment.[8] This right to refuse a medical treatment is at the core of individual autonomy, by enabling an individual to retain his physical integrity.[9] Hence, as a principle, a *competent* patient must give his *free* and *informed* consent *prior* to any medical treatment or intervention.[10] Every medical intervention, even of minor importance that does not meet these conditions constitutes an *interference* with his or her private life and will violate Article 8, unless it can be justified in terms of the second paragraph.[11] Before turning to the possible justifications for such an interference, we will take a closer look on the court's view on the conditions to obtain a valid informed consent.

2.1.2 Validity

In order for a consent (or a refusal) to be valid, certain conditions have to be fulfilled. First of all, to be able to exercise autonomy, an individual must have *decision-making capacity*, legally as well as factually.[12] As mentioned above, the existence of such a decision-making capacity was the starting point of our research. Therefore, the specific discussion whether or not a person/patient is mentally capable falls outside the scope of this article. The other conditions are that a consent (or refusal) must be *free* (*2.1.2.1*) and *informed* (*2.1.2.2*). However, the *underlying motive* of a consent (or refusal) is irrelevant (*2.1.2.3*). Finally, the

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[5] The forced treatment of incapable (in the meaning of mentally ill) patients asks indeed for a different approach and is therefore beyond the scope of this article. Moreover, the principle of informed consent even presupposes basic decisional capability, e.g., J. Radden, "Forced Medication, Patients' Rights and Values Conflicts", *Psychiatry Psychol. & L.* 10 (1) (2003) 4-5.

[6] Contrary to Article 3 of the Charter on Fundamental Rights of the European Union, *O.J.C.* 31 October 2010, 83/389 and Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, http://conventions.coe.int/treaty/en/Treaties/Html/164.htm (Hereafter: The Biomedicine Convention).

[7] E.g., ECtHR 9 March 2004, *Glass.* v. *The United Kingdom*, no. 61827/00; ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01; ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99; ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04; Hartlev, *supra* note 3, 123.

[8] M. Donnelly, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism* (Cambridge: Cambridge University Press, 2014) p. 52.

[9] Wicks, *supra* note 2, 17.

[10] Velaers, *supra* note 3, 193; Dewulf, *supra* note 3, 320; A. Hendriks, "The Council of Europe and Health and Human Rights", in: B. Toebes, M. Hartlev, A. Hendriks and J. Rothmar Herrmann (eds.), *Health and Human Rights in Europe* (Antwerp: Intersentia, 2012) pp. 38-39.

[11] ECtHR 29 April 2002, *Pretty* v. *The United Kingdom*, no. 2346/02, paras. 61-63; ECtHR 22 July 2003, *Y.F.* v. *Turkey*, no. 24209/94, para. 33; ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.76; ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para. 84; N.A. Moreham, "The right to respect for private life in the European Convention on Human Rights: a re-examination", *E.H.R.L.R.* 1 (2008) 44-79, www.westlaw.uk, 4; *Cf. infra* title 2.2 for a further explanation on the preconditions of this second paragraph.

[12] Legal capacity is the personal capacity to make a rational decision, and presupposes a certain age that is laid down in national law. Therefore children under a certain age or adults who are mentally incapacitated are not in the position to exercise their right to self-determination and as a consequence cannot give a valid consent. An example of factual incapacity: patients who are temporarily incapable of making a rational decision, e.g., because of unconsciousness: Hartlev, *supra* note 3, 122; See also: Velaers, *supra* note 3, 193-194; Wicks, *supra* note 2, 26; G. Fernie, "Consent and the individual detained in custody", *Med.Law*. 24 (2005) 515 and 519.

question arises as to whether the consent (or refusal) should be *explicit* (*2.1.2.4*).[13]

2.1.2.1 Free consent

The consent must be truly *voluntary*. Patients who are subjected to undue pressure or influence, or are in a subordinate position where they have difficulties in making their own choices, are not capable thereof.[14] Of course many forms of persuasion are legitimate, every decision is made as a result of some influence, e.g., a patient's decision to consent to an operation will be influenced by the surgeon's advice.[15] Nevertheless, given that health and possibly life itself are at stake concerning healthcare decisions, the authenticity of the patient's consent or refusal is a legitimate concern.[16] Whether or not persuasion or coercion leads to undue influence and invalid consent will depend on the facts of each case. However, certain situations require a closer examination of consent for the purposes of establishing voluntariness, e.g., situations where the authority of the persuader over the patient is great,[17] like medical treatment in prison settings.[18]

Regarding religion, the Court accepted in the *Jehovah's Witnesses of Moscow* case that although arguments based on religious beliefs may be extremely persuasive and compelling, the right "to try to convince one's neighbour" is an essential element of religious freedom.[19] Especially in this case, concerning Jehovah's witnesses who have made a deliberate choice to refuse blood transfusions in advance, free from time constraints of an emergency situation, by filling out "No Blood"[20] cards and carrying them in their purses, nothing suggests that any form of improper pressure or undue influence is applied. As a consequence, their will is not overbore and their advanced refusal was made for themselves, representing their true decision.[21] It may be concluded that in this way the Court wanted to create a presumption: a patient's will to refuse blood transfusions is considered to be authentic if he is using a "No Blood" card, in our opinion only until the contrary has been proven, e.g., undue pressure from parents.[22]

2.1.2.2 Informed consent

In order to make thought-out decisions, the patient has to be, prior to any consent or refusal,[23] informed of his health status, the proposed procedure and the alternatives to it.[24] Furthermore, the foreseeable consequences of a planned medical procedure on the patient's physical integrity should be communicated. All this information has to be given in such a way

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[13] The discussion sometimes refers to case-law under Article 3. Since we are of the opinion that the basic principles of informed consent should be uniform these reasonings can be equally applied in the light of Article 8.
[14] Hartlev, *supra* note 3, 122.
[15] E. Jackson, *Medical Law. Text, Cases and materials* (Oxford: Oxford University Press, 2006) p. 282; Donnelly, *supra* note 8, 72-74.
[16] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 138; Wicks, *supra* note 2, 26.
[17] ECtHR 24 February 1998, *Larissis and Others* v. *Greece*, no. 140/1996/759/958–960, paras. 51, 54 and 59.
[18] *Ibid*., 282; Donnelly, *supra* note 8, 59-60. Confirmed in: ECtHR 22 July 2003, *Y.F.* v. *Turkey*, no. 24209/94, para.34; ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/9, para.76 and *Cf. infra* title 3.2.3.
[19] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 139. See also: ECtHR 24 February 1998, *Larissis and Others* v. *Greece*, no. 140/1996/759/958–960, para. 45.
[20] A pre-printed foldable card that bears the words "No Blood" in capital letters on the front page and empty fields to be filled out concerning the person(s) to be contacted in case of emergency and the holders' allergies, diseases and medicine(s): ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 68; See for an extensive research on negative advance directives: C. Lemmens, *Voorafgaande wilsverklaringen met betrekking tot het levenseinde* (Antwerp: Intersentia, 2013).
[21] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, paras. 139-140.
[22] *Re T (*adult: refusal of medical treatment) [1992] 3 W.L.R. 782.
[23] Lemmens, *supra* note 20, 97.
[24] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 112. The guidance provided by the case-law is rather general. A more detailed picture of the scope of the right to information can be found in paras. 35-36 of the Explanatory Report on the Biomedicine Convention: http://conventions.coe.int/Treaty/EN/Reports/Html/164.htm; See also for a detailed illustration: Hartlev, *supra* note 3, 130-132.

that a patient is able to give an informed consent.[25] For example, asking a woman to consent to sterilization without any further information, two and a half hours after she had been brought to the hospital, when she was in the process of established labour, is not compatible with the principle of human dignity, human freedom and the requirement of informed consent. Asking a woman to consent to such an intrusive intervention, on such short notice, did not permit her to make a decision of her own free will, after consideration of all the relevant issues and after having reflected on and discussed all the implications.[26]

2.1.2.3 Underlying motive is irrelevant

Unlike the preconditions of capability, voluntariness and prior sufficient information, the *underlying motive* of a consent or refusal is irrelevant. In view of the principles of self-determination and personal autonomy, a competent patient is free to decide, for instance, whether or not to undergo any kind of treatment.[27] For this freedom to be meaningful, the decision of a patient has to be protected irrespective of the choice made, regardless of how irrational, unwise or imprudent such choices may appear to others, even if that decision entails a refusal to accept a particular treatment which might lead to a fatal outcome.[28] An unwise or imprudent unwillingness to consent by a competent patient cannot be considered, without any further investigation, as a failure or an incapability to consent.[29] The free choice is a fundamental right of life that, absent of any indication of the need to protect third parties, the State must respect.[30] A medical intervention without informed consent, *only* with the aim to protect the patient's *own* health, constitutes not only an interference but also a violation of Article 8, except in case of emergency.[31]

2.1.2.4 Explicit consent?

Finally a consent (or refusal) can take various forms. Internationally it is generally accepted that a free and informed consent may be explicit – verbal or written – or implied.[32] This will largely depend on the nature of the intervention. Where for many routine medical acts an implicit consent is accepted, invasive diagnostic acts or treatments may require express consent.[33] Notwithstanding this internationally accepted principle, the Court does not seem to be satisfied with an implied consent.[34] Although in the *Bogumil* case, the Court could have acknowledged an implied consent, but did not.[35]

Mr. *Bogumil*, while in detention, was treated medically after swallowing drugs. For the first medical intervention, an endoscopy, he gave his written consent. But for the subsequent

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[25] ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para. 4; ECtHR 2 June 2009, *Codarcea v. Roumania*, no. 31675/04, para. 105; ECtHR 13 January 2013, *Csoma* v. *Romania*, no. 8759/05, para. 42.
[26] ECtHR 8 November 2011, *V.C. v. Slovakia*, no. 18968/07, paras.112-113.
[27] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para.136.
[28] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, paras. 135-136; Wicks, *supra* note 2, 29-30 and 33-34.
[29] Wicks, *supra* note 2, 27.
[30] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 136; X, "Note under EHRM 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*", *NCJM-Bull.* 8 (2010) 1073.
[31] *Cf. infra* title 2.2.3.
[32] See the additional explanation on Article 5 of the Biomedicine Convention in para. 37 of the Explanatory Report on the Biomedicine Convention, http://conventions.coe.int/Treaty/EN/Reports/Html/164.htm; This Biomedicine Convention sets out common general standards for the protection of the human person in the context of the development of the biomedical sciences; G. Fernie, *supra* note 12, 103.
[33] Para. 37 of the Explanatory Report on the Biomedicine Convention; H. Gros Espiell, J. Michaud and G. Teboul, *Convention sur les Droit de l'Homme et al Biomédecine. Analyse et commentaires* (Paris: Economica, 2010) p. 102; Lemmens, *supra* note 20, 97; 104; H.J.J. Leenen, J.C.H Dute, J.K.M Gevers, J. Legemaate, G.R.J. de Groot, M.E. Gelpke and E.J.C. de Jong, *Handboek Gezondheidsrecht* (Den Haag: Boom Juridische uitgevers, 2014) p. 117; The patient's express, specific consent must be obtained for participation in research or removal of body parts for transplantation purposes, see Articles 16 and 19 of the Biomedicine Convention and paras. 102 and 120 of the Explanatory Report.
[34] ECtHR 9 March 2004, *Glass. v. The United Kingdom*, no. 61827/00, para. 82; ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para. 76; Hendriks, *supra* note 10, 39.
[35] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03.

surgical procedure a written consent was not obtained. The government stated that he gave his consent orally. However it should be noticed that: one of the doctor's statements about the oral consent was made four years after the treatment was carried out, it was unclear which language was used to inform Mr. *Bogumil* and it is difficult to understand why the doctors did ask for a written consent for the endoscopy but not for the operation itself, which is more intrusive. From these circumstances the Court concludes that it was not proven beyond reasonable doubt that Mr. *Bogumil* gave his consent for the surgical intervention. Yet nothing indicated that he refused the treatment or was forced to undergo it.[36] As in other cases[37], the Court rightly does not seem to accept that an informed consent could be deducted from the *sole* fact that a patient did not actively resist a medical treatment. However, next to the lack of resistance or force, we find that other elements do support the presence of an implied consent. Firstly there was a written consent to an examination, an endoscopy, carried out right before the respective surgery.[38] Furthermore, as T. GOFFIN stated,[39] it is not inconceivable that Mr. *Bogumil* performed certain acts[40] during the preparation of the surgical intervention which made clear that he knew what was going to happen.

However, the Court's refusal to accept an implied consent in this case could be explained by the vulnerability of the applicant (a detainee).[41] Indeed, human rights law is particularly alert with regard to weak and vulnerable groups and wants to protect them against mistreatment and exploitation.[42] In our opinion, the *ratio* of this alertness is due to their subordinate position itself, which makes it difficult for them to resist pressure and all the more so to give their *free* consent.[43]

2.2 Negative obligation - No arbitrary interference by the state

2.2.1 Notion

The essential purpose of Article 8 is to protect the individual against arbitrary interference by public authorities.[44] As mentioned above, every medical intervention, even of a minor importance, without a valid consent, constitutes an *interference* with his or her private life. When the medical staff of a *public*[45] institution or *public* hospital carries out such an intervention or treatment, the respective State *can* be directly liable.[46] Despite the great importance of the autonomy of patients, it is nevertheless recognized that their right to self-determination has to be balanced in certain situations against opposing interests.[47] Hence, Article 8.2. of the Convention states that an interference is justified when it is in accordance

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[36] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para. 76: *"Dans ces conditions, la Cour, faute d'éléments suffisants à cet effet, n'estime pas établi que le requérant ait donné son consentement à l'intervention en cause. Rien n'indique par ailleurs qu'il aurait refusé l'intervention chirurgicale et qu'il ait été forcé à la subir."*

[37] The fact that a patient did not actively resist taking medication cannot *alone* be considered as indicative of consent. See for this reasoning: ECtHR 12 June 2014, *L.M.* v. *Slovenia*, no. 32863/05, para. 178.

[38] X., "Prisoners: surgical intervention without informed consent – lack of effective representation", *E.H.R.L.R.* 1 (2009) 103-107 and www.westlaw.uk, 4.

[39] T. Goffin, "Het einde van de geïnformeerde toestemming? Als medische noodzakelijkheid de regels bepaalt', *T.Gez.* 1 (2010-2011) 45-46.

[40] One could think of taking place on the operation table, allowing an infusion and other practical, yet necessary, steps which are inevitable to carry out a surgery.

[41] ECtHR 9 March 2004, *Glass. v. The United Kingdom*, no. 61827/00, (express informed consent of the mother of a severely handicapped child – administration of damorphine); ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, (express informed consent of a detained female prisoner – gynecological examination).

[42] See for a further explanation: Hartlev, *supra* note 3, 134-135; Hendriks, *supra* note 10, 38-39.

[43] *Cf. supra* title 2.1.2.1.

[44] ECtHR 26 May 2011, *R.R.* v. *Poland*, no. 27617/04, para. 183; ECtHR 24 June 2014, *Petrova* v. *Latvia*, no. 4605/05, para. 85; ECtHR 13 January 2015, *Elberte* v. *Latvia*, no. 61243/08, para. 103. As for actions (of members) of *private* hospitals, a State can only be *indirectly* liable for their behaviour when this follows from the state's violation of the *positive* obligations under Article 8. *Cf. infra* title 2.3.

[45] For private hospitals, a state can only be held indirectly liable when violating its positive obligations under Article 8 of the Convention, *Cf. infra* title 2.3.

[46] ECtHR 9 March 2004, *Glass.* v. *The United Kingdom*, no. 61827/00, para.71; ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para.4; ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, para.105.

[47] Velaers, *supra* note 3, 134-151; Hartlev, *supra* note 3, 125-130; Donnelly, *supra* note 8, 65-69 and 79.

with the law (2.2.2), justified in the interest of the public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (2.2.3) and necessary in a democratic society (2.2.4).

2.2.2 In accordance with the law

In order to determine whether a medical intervention without informed consent can be justified, the Court must first consider whether the interference was "*in accordance with the law*". This expression requires primarily that the impugned measure should have some basis in domestic law.[48] The term 'law' should be interpreted in a substantive sense, so that it includes both statutory, common, as well as judge-made "law".[49] The legislation at issue needs to be accessible and sufficiently clear so that citizens can foresee its consequences for them.[50] Finally, the domestic law must be formulated with sufficient precision to afford adequate legal protection against arbitrariness.[51] For instance, when the domestic authorities themselves held conflicting views as to the scope of obligations enshrined in national law[52] the provisions are not precise enough. [53] Yet, it is not possible to formulate a law that covers every eventuality.[54]

2.2.3 Legitimate aim

Secondly, a justified interference must pursue one of the *legitimate aims* listed in paragraph two. For example, the interest of public health and safety may permit restrictions to a patient's right to self-determination when the patient is suffering from an infectious disease, which could cause an epidemic.[55] In the context of our research the most pressing question is whether a *competent* patient's *own* health can be a legitimate aim in order to pursue an involuntary treatment. Having regard to the specific wording of the article, such an interference does not seem to be justified as paragraph two only covers the interest of *others* and society as a whole.[56] However in the *Matter* case[57], as in the *Bogumil* case[58], the Court accepted the protection of the patient's *own* health as a legitimate aim.

Nevertheless we are of the opinion that the patient's *own* health *alone* cannot be invoked to justify a medical intervention without the consent (or against the refusal) of a *competent* patient.[59] First of all, as mentioned above, interferences with the right to self-determination, based on paternalistic considerations, are in conflict with the essence of the principle of autonomy: the right to live a life in accordance with your own preferences, regardless of the consequences for your own health.[60] In our opinion, unlike in cases where a person is not capable of giving his informed consent (*Matter* case), the *medical necessity* of a

[48] In some cases the Court even raises a legal basis by itself, see: ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para. 88.
[49] ECtHR 26 April 1979, *Sunday Times* v. *The United Kingdom*, no. 6538/74, para. 47.
[50] ECtHR 26 April 19, *Sunday Times* v. *The United Kingdom*, no. 6538/74, paras. 48-49; S. Smis, C. Janssens, S. Mirgaux and K. Van Laethem, *Handboek Mensenrechten. De international bescherming van de Rechten van de mens* (Antwerp: Intersentia, 2011) p. 233.
[51] ECtHR 24 September 1992, *Herczegfalvy* v. *Austria*, no. 10533/83, para. 88; EC[t]HR 24 June 2014, *Petrova* v. *Latvia*, no. 4605/05, para. 86; De Herdt, *supra* note 3, 19-21.
[52] ECtHR 13 January 2015, *Elberte* v. *Latvia*, no. 61243/08, paras. 112-113.
[53] ECtHR 24 September 1992, *Herczegfalvy* v. *Austria*, no. 10533/83, para. 91.
[54] ECtHR 25 March 1983, *Silver and Others* v. *The United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 88.
[55] Lemmens, *supra* note 20, 109-110; W. Buelens, "Dwangbehandeling, afzondering en het EVRM", in: T. Vansweevelt en F. Dewallens (eds.), *Handboek gezondheidsrecht. Volume I. Zorgverleners: statuut en aansprakelijkheid* (Antwerp: Intersentia, 2014) pp. 514-533; Donnelly, *supra* note 8, 67-68.
[56] Wicks, *supra* note 2, 29; Hartlev, *supra* note 3, 128.
[57] ECtHR 5 July 1999, *Matter* v. *Slovakia*, no. 31534, para. 65.
[58] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.89.
[59] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 136. *Cf. supra* title 2.1.
[60] Hartlev, *supra* note 3, 127.

treatment *alone*[61] – i.e., treatment in the patient's *own* interest[62] – cannot waive a refusal – or justify the lack of informed consent – of a patient. As mentioned above, a medical intervention without a valid consent, *only* with the aim to protect the patient's *own* health, constitutes not only an interference but also a violation of Article 8 (except in case of emergency).[63] Therefore it is regrettable that the Court used the principle of medical necessity in the *Bogumil* case to obtain a logical outcome in this specific case: no violation of Article 8.[64] In our opinion, in the context of Article 8, when a *competent* patient did not gave his explicit consent to a treatment, there are only two options: conclude to a violation of this article or accept an implied consent (no violation).[65]

2.2.4 Necessary in a democratic society

To complete its investigation, the Court must consider whether the interference was "*necessary in a democratic society*". This notion of necessity implies that the interference corresponds to a pressing social need, in particular that it is proportionate to the legitimate aim pursued.[66] Therefore the reasons adduced to justify the interference must be relevant and sufficient.[67] For example, carrying out blood[68] and saliva[69] or urine tests[70] in order to obtain evidence or prevent crimes, could be necessary in a democratic society. On the other hand, the protection of gendarmes against false allegations of sexual assault was considered by the Court as a legitimate aim but, in any event, not such as to justify overriding the refusal of a female detainee or seeking to persuade her to give up her express objection to a gynecological examination, which is an intrusive and serious interference with her physical integrity.[71]

2.3 Positive obligation – Securing effective respect of physical integrity

2.3.1 Notion

In addition to the foregoing negative obligation – not to interfere without a proper justification – the Contracting States are under the positive obligation to secure to persons within their jurisdiction effective respect for their rights under Article 8 by both *public and private*[72] actors.[73] In so far as the State was found not to have complied with its positive obligation, these finding entails an automatic violation of Article 8. In contrast to the negative obligations, no justification in the light of the second paragraph is possible.[74] However, the aims in the second paragraph remain relevant. In determining whether there exists a positive obligation, the Court will ensure a fair balance has been struck between the general interest of the community and the competing interests of the individual concerned. The State enjoys a

[61] For example, when a patient is treated to prevent an epidemic to infect other citizens, this treatment will obvious be in the patient's best interest, but also in the best interest of the society as a whole. In such a case it can be justified to conduct this treatment against the patient's will or without his or her consent.
[62] *Cf. infra* title 3.2 for a further interpretation of this concept.
[63] *Cf.* supra title 2.1.2.3 *in fine*.
[64] This is contrary to the *Jalloh* case (ECtHR 11 July 2006, *Jalloh v. Germany*, no. 54810/00), where obtaining evidence was also an aim of the treatment. In the *Bogumil* case, the existence of a crime had already been proven, so the protection of the detainee's aim was the *only* aim.
[65] *Cf. supra* title 2.1.2.4 for our opinion on an implied consent in the *Bogumil* case.
[66] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 139; ECtHR 13 January 2015, *Elberte* v. *Latvia*, no. 61243/08, para. 103.
[67] ECtHR 23 March 2010, *M.A.K. and R.K.* v. *United Kingdom*, no. 45901/05 and 40146/06, para. 68; De Herdt, *supra* note 3, 36.
[68] EHRR 4 December 1978 (*dec.*), *X.* v. *Netherlands*, no. 8239/78, *DR* 1978, 187.
[69] ECtHR 5 January 2006 (*dec.*), *Schmidt* v. *Germany*.
[70] EHRR (*dec.*) 6 April 1994, *Peters* v. *Netherlands*, *DR* 1994, 75; EHRR (*dec.*) 22 February 1995, *A. B.* v. *Switzerland*, *DR* 1995, 66.
[71] ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.81. For other cases related to gynecological examinations and discussed under Article 3, *Cf. infra* title 3.4.
[72] For example: ECtHR 16 June 2005, *Storck* v. *Germany*, no. 61603/00.
[73] ECtHR 13 June 1979, *Marckx* v. *Belgium*, no. 6833/74, para. 31; ECtHR 26 March 1985, *X and Y* v. *The Netherlands*, no. 8978/80, para. 23; ECtHR 20 March 2007, *Tysiac* v. *Poland*, no. 5410/03, para. 110; ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 140.
[74] ECtHR 16 June 2005, *Storck* v. *Germany*, no. 61603/00, para. 151.

margin of appreciation in this connection.[75] As a consequence, the applicable principles are thus nonetheless similar.[76]

2.3.2 The obligations

The positive obligations may involve the adoption of reasonable and appropriate regulations designed to secure respect for private life (*2.3.2.1*), including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights (*2.3.2.2*) and the implementation, where appropriate, of specific measures (*2.3.2.3*).[77]

2.3.2.1 Adopt appropriate regulations

The positive obligation on the Contracting States to *adopt appropriate regulations* to ensure respect for the patient's physical integrity is based on the need to protect the latter, as much as possible, from the serious consequences which medical acts may give rise to.[78] In this connection obtaining the patient's consent prior to any medical intervention is of such great importance, that the States are bound to adopt the necessary *regulatory measures* to ensure doctors are considering the foreseeable consequences of the planned medical procedure on their patients' physical integrity and *inform patients* of these beforehand in such a way that they are able to give an informed consent.[79] For example, a specific provision in national law that requires doctors to provide information of the known risks of death or disability, even if those risks are extremely rare, arising from the planned procedure and obliges them to obtain prior to this intervention the patient's consent, meets these conditions.[80]

2.3.2.2 Prevent and/or penalize interferences

Secondly, states are obliged to introduce regulations that *prevent and/or penalize interferences* with the physical integrity of patients.[81] This obligation may be satisfied if the legal system affords victims a remedy in civil courts, either alone or in conjunction with a remedy in criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.[82] A judicial system, that only formally gives access to liability proceedings, but does not enable an effective compensation of the physical and moral damage caused by medical negligence – e.g. medical intervention without valid consent – does not meet this effectiveness.[83] Moreover retrospective measures alone are not sufficient to provide appropriate protection of vulnerable patients. Public and private hospitals should be controlled in advance. [84]

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[75] ECtHR 28 April 2009, *K.H. and Others* v. *Slovakia*, no. 32881/04, para. 45; De Herdt, *supra* note 3, 49; H.D.C. Roscam Abbing, "Artikel 8: recht op privéleven", in: J.K.M. Gevers (eds.), *Het EVRM en de gezondheidszorg* (Nijmegen: Ars Aequi Libri, 1994) pp. 115-117.
[76] ECtHR 20 March 2007, *Tysiac* v. *Poland*, no. 5410/03, para.111; Moreham, *supra* note 11, 44-79, www.westlaw.uk, 3.
[77] ECtHR 20 March 2007, *Tysiac* v. *Poland*, no. 5410/03, para. 110; ECtHR 26 May 2011, *R.R. v. Poland*, no. 27617/04, para. 185.
[78] ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para. 4; ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, paras. 102 and 104.
[79] ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para. 4; ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, paras.102 and 105; ECtHR 13 January 2013, *Csoma* v. *Romania*, no. 8759/05, para. 42.
[80] ECtHR 5 October 2006, *Trocellier* v. *France*, no. 75725/01, para. 4.
[81] De Herdt, *supra* note 3, 45.
[82] These principles are adopted from a similar reasoning under Article 2 elaborated in *Calvelli and Ciglio* v. *Italy*: ECtHR 17 January 2002, *Calvelli and Ciglio v. Italy*, no. 32967/96, para. 51; See for the concrete application under Article 8: ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, paras. 102-103; ECtHR 13 January 2013, *Csoma* v. *Romania*, no. 8759/05, para. 43.
[83] Procedure took longer than nine years, no insurance mechanism for medical negligence and no hospital's liability for its medical staff: ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, para. 105; judicial procedure that does not take into account all facts, reports that could be used to establish liability, again no hospital's liability: ECtHR 13 January 2013, *Csoma* v. *Romania*, no. 8759/05.
[84] ECtHR 16 June 2005, *Storck* v. *Germany*, no. 61603/00, para. 150. In the latter case the applicant was a psychiatric patient in a private psychiatric hospital. Yet we do believe that the specific reasoning in this case should be applied to all hospitals.

2.3.2.3 Ensure personal access to information

Finally, individuals should also have *personal access to information* about one's medical condition or about the health risks that they are facing.[85] The effective exercise of this right is often decisive for the possibility to exercise personal autonomy in the light of Article 8. Access to information concerning one's condition can give patients the opportunity to make informed decisions, e.g. by assessing the risks of a treatment.[86] In the context of pregnancy for instance, the effective access to information on the mother's or foetus's health can be directly relevant when legislation allows abortion in certain situations.[87] The right to get access to information encounters also a right to make photocopies. Moreover, individuals who want to invoke this right should not be obliged to give a specific justification. It is rather for the authorities to show that there are compelling reasons to refuse it.[88]

3 Article 3 of the Convention

3.1 Notion

From the foregoing analysis, it can be concluded that Article 8 of the Convention is the most appropriate Article to deal with complaints about informed consent.[89] However, sometimes the lack of informed consent is an occasion to file a complaint under Article 3 of the Convention. In *X. v. Denmark*, the Commission already held that medical treatment of an *experimental* character and without the consent of the person involved may under certain circumstances be regarded as prohibited by Article 3.[90] Since the definition of torture, inhuman or degrading treatment is subject to an ongoing reassessment in the light of the present-day conditions and the changing values of democratic societies[91], more and more cases consider a possible violation of Article 3 of the Convention because of a lack of informed consent also in a non-experimental context. This is a relatively recent phenomenon.[92]

Article 3 of the Convention reads: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."* This prohibition is absolute, meaning that there are no grounds to justify one of the three treatments, not even in case of war or other emergency. Besides, this Article also creates a positive obligation on member states to take measures to protect people from suffering Article 3 abuses – whether carried out by state officials or private individuals.[93] However, there are certain limitations on the scope of this Article, which temper the absolute character of the provision and render it 'relative'.

First of all, the treatment must attain a *minimum level of severity*, which depends on all the circumstances of the case, e.g., the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[94] Secondly, the treatment must go beyond the inevitable element of suffering or humiliation connected with a given

[85] ECtHR 19 February 1998, *Guerra and Others* v. *Italy*, no. 116/1996/735/932, para. 60 (health risk resulting from environmental pollution); ECtHR 9 June 1998, *McGinley and Egan* v. *the United Kingdom*, no. 10/1997/794/995-996, para. 101 (health risk resulting from participation in nuclear tests); ECtHR 19 October 2005, *Roche* v. *the United Kingdom*, no. 32555/96, para. 162 (health risk resulting from the exposure to toxic chemicals).
[86] ECtHR 2 June 2009, *Codarcea* v. *Roumania*, no. 31675/04, para.104.
[87] ECtHR 26 May 2011, *R.R.* v. *Poland*, no. 27617/04, paras.196-198.
[88] ECtHR 28 April 2009, *K.H. and Others* v. *Slovakia*, no. 32881/04, paras. 47-56.
[89] ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para. 76.
[90] EHRR (*dec.*) 2 March 1983, *X.* v. *Denmark*, no. 9974/82, *DR* 1983, 283.
[91] ECtHR 28 July 1999, *Selmouni* v. *France*, no. 25803/94, para.101.
[92] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, http://www.ohchr.org.
[93] O. Lewis, "Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights", *EJHL* (2002) 303.
[94] ECtHR 18 January 1978, *Ireland* v. *United Kingdom*, no. 5310/71, para.162.

form of legitimate treatment or punishment.[95] Yet, even when a treatment has a legitimate aim, it still can be humiliating or degrading.[96]

Most of the cases discussed below consider detained persons.[97] Since the thoroughness of the 'severity test' depends on it, the first important step in assessing whether Article 3 is violated, is determining the purpose of the medical intervention. The Court has already examined several reasons to subject detainees without their consent to medical interventions: whether the medical treatment was carried out for therapeutic reasons to protect the well-being of the detainee (3.2), or whether it was carried out solely to obtain evidence in criminal proceedings (3.3).[98] Another, more doubtful, reason is the protection of prison guards against false allegations of rape by subjecting women to gynecological examinations (3.4).

3.2 Therapeutic necessity of a treatment

3.2.1 Detainees

The most important reason to reject a violation of Article 3 because of the lack of a valid consent, is the presence of a *medical (or therapeutical)*[99] *necessity* for the treatment. The Court initially developed this concept to examine complaints about alleged violations of Article 3 in connection with treatments carried out on incompetent patients: "*The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading"*.[100] Later on, the Court also uses this concept to reject a violation of Article 3 in connection with competent patients under the supervision of the State, treated without informed consent (or forced). The motivation therefore reads as follows.

The Government is under an obligation to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The lack of appropriate medical treatment could amount to a violation of Article 2 (right to life)[101] or 3[102] of the Convention. Therefore, *as a principle*, treatments which are of a medical necessity cannot be regarded as inhuman or degrading. The medical authorities decide, guided by the established principles of medicine, whether or not there is a therapeutic necessity. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist and that procedural guarantees for the decision exist and are complied with. These procedural guarantees must avoid arbitrary decisions.[103] The Court attaches a lot of weight to the presence of an independent and proper[104] medical examination or other investigation which can justify the existence of a medical necessity and the subsequent treatment.[105]

The *ratio* of the concept 'medical necessity' is clear: striking a balance between the positive obligation of the State under Article 2 and 3 to protect the life and health of people

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[95] ECtHR 16 December 1999, *V.* v. *United Kingdom*, no. 24888/94, para.71; ECtHR 26 October 2000, *Kudla* v. *Poland*, no. 30210/96, para.92.
[96] J.K.M. Gevers, "Artikel 3", in: J.K.M Gevers (eds.), Het EVRM en de gezondheidszorg (Nijmegen, Aers Aequi Libri, 1994) pp. 43.
[97] Except for title 3.2.2 where some cases of free citizens will be discussed.
[98] X., "Commentary under ECtHR 7 October 2008, *Bogumil* v. *Portugal*" *EHRLR* 1 (2009) 106.
[99] The Court uses both terms, although they are synonyms.
[100] ECtHR 24 September 1992, *Herczegfalvy* v. *Austria*, no. 10533/83, para. 82.
[101] See for example: ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, para.93; ECtHR 19 June 2007, *Ciorap* v. *Moldavia*, no. 12066/02, para.76.
[102] See for example: ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.69; ECtHR 11 July 2006, *Jalloh v. Germany*, no. 54810/00, para.69.
[103] See for example: ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, para.96.
[104] In another context, see for example: ECtHR 10 October 2000, *Akkoç* v. *Turkey*, no. 22947/93 and 22948/93, para.11; ECtHR 29 september 2005, *Mathew v. Netherlands*, no. 24919/03, para.187.
[105] See for example: ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, paras. 95-96; ECtHR 19 June 2007, *Ciorap* v. *Moldavia*, no. 12066/02, paras.81-82.

under their supervision, on the one hand, and respect for the personal autonomy and physical integrity, on the other.[106] From the Court's jurisprudence in connection with Article 2, we can deduct that States are not always obliged to treat competent persons under their supervision. In the *Horoz v. Turkey case* the Court held that there is no violation of Article 2 of the Convention when a State respects the clear refusal of any medical intervention by a prisoner, even when his life is at stake.[107] We believe that, *a fortiori*, there will be no violation of Article 3 if the State does not treat a patient by force when he is clearly rejecting any treatment. So, States do have a choice to protect human dignity or respect the personal autonomy of a person.[108] As mentioned above, States do not have this choice under Article 8 of the Convention. They have to respect the refusal of a treatment by a competent patient when *no other interest* than the patient's *own* health is at stake. Otherwise Article 8 will be violated.[109]

From the Court's case law concerning competent persons it can be deducted that there is always a medical necessity when the patient's life is at stake, e.g., forced feeding that is aimed at saving a person's life[110] or removing drugs from a suspect's stomach to prevent death due to intoxication[111]. There is no medical necessity when a detainee is fed by force without any medical test that was carried out in advance and only aimed at discouraging him from continuing his protest.[112] So, the fact that a treatment's aim is to protect the patient's health[113] is a necessary, but insufficient, prerequisite to speak of a medical necessity. In our opinion, the *ratio* of 'medical necessity' taken into account, there is not only a medical necessity when a detainee's life is at stake (to prevent a possible violation of Article 2), but *possibly* also when the treatment aims to prevent a person from suffering feelings that are inhuman or degrading or torture (to prevent a possible violation of Article 3).

It is said that the use of medical necessity as a separate branch to assess an Article 3 violation is inconsistent with the Convention jurisprudence, and it suggests that there is a defence available to the State when actions meet a level of severity to engage Article 3. This is contrary to the absolute nature of Article 3, which admits no derogation.[114] We do not agree.

Even when a treatment is therapeutically necessary, *the manner* in which a forcible medical treatment is carried out may not go beyond the minimum level of severity.[115] In connection with medical treatments without informed consent, the Court puts forward some specific criteria in this respect: whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention, whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her State of health and

[106] See for example: ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, para.93.
[107] ECtHR 31 March 2009, *Horoz* v. *Turkey*, no. 1639/03, para.28.
[108] For example: ECtHR 29 April 2002, *Pretty* v. *the United Kingdom*, no. 2346/02.
[109] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, paras.135-142. *Cf. supra* titles 2.1.2.3 and 2.2.3.
[110] ECtHR 5 April 2005, Nevmerzhitsky v. Ukraine, no. 54825/00, para.93: *"…force-feeding that is* ***aimed at saving the life*** *of a particular detainee who consciously refuses to take food"* (own emphasis); ECtHR 19 June 2007, Ciorap v. Moldava, no. 12066/02, para. 83: *"In view of the lack of medical evidence that* ***the applicant's life or health*** *were in serious danger, it cannot be said that the authorities acted in the applicant's best interests in subjecting him to force-feeding"* (own emphasis).
[111] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.77: *"Nul ne conteste que le requérant* ***risquait de mourir*** *d'une intoxication"* (own emphasis).
[112] ECtHR 19 June 2007, *Ciorap* v. *Moldavia*, no. 12066/02, para.83.
[113] Wicks, *supra* note 2, 23-24.
[114] P. Bartlett, "Capacity, Treatment and Human Rights", *JMHL* 52 (2004) 60.
[115] ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, para.97; ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.72; ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.70; Dewulf, *supra* note 3, 322.

had lasting consequences for his or her health.[116] These factors need to be examined according to the generally accepted medical principles at the time the treatment was carried out.[117]

Hence, the medical necessity of a treatment is not a defence for the State to avoid a violation of Article 3, but an important element to determine whether the minimum level of severity has been reached. In the *Herczegfalvy case* the Court states that the established principles of medicine are *in principle* decisive, and that measures of a therapeutic necessity will *in principle* not violate Article 3. This not only suggests that there are exceptions to this 'general rule' – i.e., treatments which do reach the minimum level of severity – but also that the Court implicitly seems to accept that the presence of a medical necessity makes it more difficult to reach the minimum level of severity, since the medical necessity of a treatment is a decisive factor. The fact that the Court never found a violation of Article 3 when there was a medical necessity for a certain treatment confirms this.[118]

On the other hand, the lack of a medical necessity does not automatically include a violation of Article 3. The treatment must always go beyond the minimum level of severity. But, needless to say, this threshold will be more easily reached when there was no informed consent, nor a medical necessity for the treatment. For example, when there is no therapeutic necessity to feed a detainee by force *and* there was a less intrusive alternative which was not even considered, there is a violation of Article 3 (torture).[119] The same is true for the use of handcuffs, a mouth-widener and a special rubber tube inserted into the food channel, even in the event of resistance.[120]

3.2.2 Free citizens

It has to be remarked that the Court has also mentioned the notion of therapeutic necessity to medical treatments of *free* citizens. The most significant case-law is about sterilizations in Slovakian public hospitals of young women of Roma ethnic origin.[121] In all cases the Slovakian government stated that the sterilization's main aim was to protect the patient's health status.[122] It is worth noticing that the women's consent had been asked when they were in the last stage of labour and delivery, and therefore was not valid.[123] This was *one* of the reasons for the Court to find a violation of Article 3.

In fact, the Court developed two important thoughts which were a *prima facie* innovation for its case law.[124]

Firstly, the Court seems to define the therapeutically necessary treatment as a *life-saving* treatment. In addition, it noted that sterilization is not generally considered as life-saving

[116] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.70; See also: ECtHR 11 July 2006, *Jalloh v. Germany*, no. 54810/00, paras. 72-74.
[117] *Cf.* ECtHR 24 September 1992, *Herczegfalvy* v. *Austria*, para. 83.
[118] See: ECtHR 24 September 1992, *Herczegfalvy* v. *Austria*, para. 84 ; ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.82.It will become more difficult to find a violation of Article 3 when the therapeutic necessity is present, yet, in our opinion, it will not be impossible. *Cf. infra* title 3.2.3.
[119] ECtHR 19 June 2007, *Ciorap* v. *Moldavia*, no. 12066/02, para.87.
[120] ECtHR 5 April 2005, *Nevmerzhitsky* v. *Ukraine*, no. 54825/00, para.97.
[121] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07; ECtHR 12 June 2012, *N.B.* v. *Slovakia*, no. 29518/10; ECtHR 13 November 2012, *I.G. and Others* v. *Slovakia*, no. 15966/04.
[122] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 93; ECtHR 12 June 2012, *N.B. v. Slovakia*, no. 29518/10, para. 70; ECtHR 13 November 2012, *I.G. and Others* v. *Slovakia*, no. 15966/04, para. 114.
[123] In all three cases, the sterilization had been carried out during the delivery of a child by Caesarean section. When the women were already in the last stage of their labour and delivery, the medical staff told them that another pregnancy would be fatal for themselves or the baby. Hence, all women signed a document giving permission for sterilization, without them being fully aware of the document's meaning. ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 112.
[124] Since these reasonings were first developed in *V.C.* v. *Slovakia* and the same reasonings were simply copied or referred to in the other sterilization cases, we will only refer to the relevant paras in *V.C.* v. *Slovakia*.

surgery.[125] A. C. HENDRIKS stated that this narrowing of the therapeutic necessity to life-saving treatments probably only applies to sterilizations.[126] We do not agree, since also in the above mentioned cases on detainees[127] the therapeutic necessity of the treatments was linked to their life-saving nature. Moreover, there is no reason to give another interpretation of 'medical necessity' depending on the status of the person – free or detained.

Secondly, the Court attaches great importance to the (lack of) informed consent under Article 3, in the sense in which it is used under Article 8. The Court refers to *inter alia* the *Jehovah's Witnesses case* where it was stated that the very essence of the Convention is respect for human dignity and human freedom.[128] Therefore, a medical treatment without the consent of a competent patient would always *interfere* with his or her right to physical integrity protected under Article 8.[129] In connection with Article 3, the Court states that only an emergency situation involving imminent risk of irreparable damage to the patient's life or health could overrule the prerequisite of informed consent, *even if there was a therapeutic (life-saving) necessity*.[130]

The great importance of informed consent in the sterilization cases does not mean that Article 3 will be violated as soon as there is a lack of informed consent (and no emergency situation). The prerequisite of informed consent cannot be assessed separately. Again, it must be stressed that the Court's reasoning have to be read in the light of the specific circumstances of every case. The main question to find Article 3 violated is whether the minimum level of severity has been reached, taking together *all* circumstances of the case. The lack of informed consent was clearly one of those circumstances, yet in our opinion not the decisive one. The main factors are twofold.

Firstly, a sterilization is a *very intrusive treatment*. The Court itself stresses the fact that sterilization constitutes a major interference with a person's reproductive health status. It is one of the essential bodily functions.[131] Because of the strong involvement of the personal integrity itself, a sterilization against the patient's will could in principle violate Article 3.[132] Thus informed consent might in fact overrule the therapeutic necessity, because of the *intrusive nature* of the treatment, which could be more important than the treatment's *aim*. This is reinforced by the fact that a future pregnancy could also be prevented by means of alternative, less intrusive methods.[133] In our view, the very intrusive nature of the sterilizations was the most important element to find a violation of Article 3.[134]

Secondly, all patients were Roma women and therefore part of an *ethnic minority*. It should be remarked that in *V.C. v. Slovakia* the Court did not mention the latter as a reason for finding a violation of Article 3.[135] It also refused to examine the facts in the light of a possible discrimination based on grounds of race (and sex), protected by Article 14.[136] This view has

[125] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 110 and 117.
[126] E.g., A.C. Hendriks, "Note under EHRM 8 November 2011, *V.C.* v. *Slovakia*", *E.H.R.C.* 1 (2012) 210-211.
[127] *Cf. supra* title 3.2.1.
[128] ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02, para. 135.
[129] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, paras. 105 and 107.
[130] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 110. It has to be remarked that in emergency situations, it is not possible anyways to obtain the patient's informed consent.
[131] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 106.
[132] Gevers, *supra* note 96, 54.
[133] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 113.
[134] The decisive circumstance of the treatment's intrusive nature was also confirmed in: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, para. 32-35, http://www.ohchr.org.
[135] Yet, it was a decisive element to find a violation of Article 8's positive obligation to secure sufficient measures of protection of the private and family life. See: ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 145-155.
[136] ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 176-180.

been criticized in the dissenting opinion of judge Mijovic and the doctrine.[137] However, the Court has changed its position in *I.G. and others v. Slovakia*. There it explicitly mentioned the patient's belonging to a *vulnerable population group* as one of the reasons to consider the minimum level of severity attained under Article 3.[138]

3.2.3 Could the treatment's intrusive nature overrule the therapeutic necessity?

In the case of free citizens, the therapeutic necessity seems to be overruled by the prerequisite of informed consent. A therapeutically necessary treatment without the valid consent of a competent patient may violate Article 3, except in case of emergency. However, this cannot be assessed as a general rule since the true reason for a violation of this article mainly lies in the *very intrusive character* of the treatment. The question remains whether medical necessity is an appropriate term in the context of free citizens to examine a possible violation of Article 3. In our opinion this is not true, given the ratio of this concept. Indeed, unlike for persons deprived of their liberty, the State does not have the same positive obligations under Article 2 and 3 of the Convention towards free citizens to protect their physical well-being.[139]

The question arises if, like for free persons[140], the very intrusive treatment carried out on a *detainee* (without a valid consent) would also violate Article 3, *even if there was a therapeutic necessity*. Since no such case has been found in our research, we cannot give a definite answer to that question. However, some similar cases do show the importance of the intrusive nature of treatments, carried out on detainees, to find a violation of Article 3.

In the *Bogumil case*, there was a therapeutic necessity to surgically remove drugs out of a detainee's body to prevent him from dying. In this case, there was not enough proof to convince the Court of the presence of consent. On the contrary, it esteemed that the applicant did not refuse the treatment, neither was forced to have it.[141] Even if there would not have been doubt about the (lack of) informed consent, the Court would not have found a violation of Article 3. The treatment was of a therapeutic necessity. Next to that, the minimum level of severity had not been reached, mainly because of the treatment's *non*-intrusive nature.

In the *Yazgül Yilmaz case*, which will be discussed below, a gynecological examination which was not therapeutically necessary and was executed without the free and informed consent of the detained woman, violated Article 3. As in the *V.C. case*, the intrusive character of the treatment, and not the lack of informed consent as such, was the decisive factor to attain the minimum level of severity.[142]

If we return to our question, we do believe that Article 3 will always be violated when a detainee is subjected to a very intrusive treatment – e.g., sterilizations and gynecological examinations – even if the treatment was therapeutically necessary. Indeed, as mentioned above, even if there is a therapeutic necessity, there are still other elements which could reach the minimum level of severity. In our opinion, the intrusive nature of a treatment is more

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[137] E.g., M. Möshel, "Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?", *Human Rights Law Review* 12 (3) (2012), 479-507; L. Hoyle, "*V.C.* v. *Slovakia:* A reproductive rights victory misses the mark", *B. C. Int'l & Comp. L. Rev.* 36 (3) (2013)17-31.

[138] The other reasons were: the nature of the intervention (see above for the reasonings on very intrusive treatments), its circumstances and the patient's age. ECtHR 13 November 2012, *I.G. and Others v. Slovakia*, no. 15966/04, para. 124.

[139] *Cf. supra* title 3.2.1.

[140] *Cf.* ECtHR 8 November 2011, *V.C.* v. *Slovakia*, no. 18968/07, para. 110, discussed above.

[141] ECtHR 7 October 2008, Bogumil v. Portugal, no. 35228/03, para. 76: *"Dans ces conditions, la Cour, faute d'éléments suffisants à cet effet, n'estime pas établi que le requérant ait donné son consentement à l'intervention en cause. Rien n'indique par ailleurs qu'il aurait refusé l'intervention chirurgicale et qu'il ait été forcé à la subir."* One could say that in this way the Court wanted to introduce the notion of implied consent, as it is normally used under Article 8. Cf. *supra* title 2.1.2.4.

[142] ECtHR 1 February 2011, *Yazgül Yilmaz v. Turkey*, no. 36369/06. *Cf. infra* title 3.4.

decisive than its therapeutic necessity.[143] To avoid a violation of Article 3, such treatments always[144] require the patient's free and informed consent. Thus, the more intrusive the treatment's nature, the more important the principle of informed consent will be to avoid a violation of Article 3.

3.3 Obtaining evidence

Even when a treatment is not motivated by reasons of medical necessity, Article 3 of the Convention does not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain evidence.[145] For example, a blood sample, taken by a medical doctor, ordered by a Court because it was suitable and necessary for the determination of the authorship of a letter, does not attain the minimum level of severity in order to be qualified as inhuman or degrading.[146]

However, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence (e.g., drugs[147], blood[148], saliva[149], …) from his body must not exceed the minimum level of severity.[150] The specific criteria to assess this are the same as in cases of treatments carried out for therapeutic purposes.[151] Of course, the general criteria to analyse whether the minimum level of severity has been reached must also be taken into account.

Although the criteria to analyse whether the minimum level of severity has been reached are the same, the Court seems to make a more thorough analysis of the necessity of an intervention when the treatment was not carried out for therapeutic reasons[152]: *"Any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health."*[153]

In the *Jalloh* v. *Germany case*, the Court did find a violation of Article 3 of the Convention. In this case a *drug dealer* was held down and immobilized by four police officers so that a doctor could forcibly administer him a salt solution and a specific syrup through a tube introduced into his stomach through his nose, solely to provoke vomiting so that the evidence of a drug offence, 0.2 grams of drugs, was secured.

The Court puts particular weight on the fact that the medical intervention was not necessary to obtain the evidence, since the suspect was only a street dealer and it was clear that he had not been dealing in drugs on a large scale. Therefore the forcible administration of emetics was

[143] The same could be read in: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, para. 34-35, http://www.ohchr.org. In this report the doctrine of therapeutic necessity itself has been questioned in the light of, *inter alia*, intrusive and irreversible procedures.
[144] Whether or not detained.
[145] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.70.
[146] ECtHR 5 January 2006 (*dec.*), *Schmidt* v. *Germany*, para.1.
[147] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.70.
[148] EHRR 4 December 1978 (*dec.*), *X.* v. *Netherlands*, no. 8239/78, *DR* 1978, 187.
[149] ECtHR 5 January 2006 (*dec.*), *Schmidt* v. *Germany*.
[150] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.72.
[151] Whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention, whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (*Cf.* ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.72 and ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para.70.).
[152] X., *supra* note 98, 106.
[153] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.76.

not indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to come out naturally.[154] We agree with concurring judge Bratza that the seriousness of an offence and (the absence of) an urgent need to obtain evidence, are no relevant factors to determine whether Article 3 is violated. The absolute character of Article 3 prohibits torture or inhuman or degrading treatment, irrespective of the nature of the victim's conduct and which does not allow for the balancing of competing public interest against the use of a treatment which attains the Article 3 threshold. This threshold can never change according to the gravity of the offence or the urgency to obtain evidence.

Furthermore, the Court considers that the procedure entailed risks to the applicant's health and the manner in which the impugned measure was carried out, was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him.[155] It is clear that the treatment in the *Jalloh case* goes much further than a 'simple' blood test, and does go beyond the minimum level of severity, irrespective of the seriousness of the offence.

3.4 Gynecological examinations to protect prison guards against false allegations

It is difficult to draw a clear line in the Court's jurisprudence on the subject matter. In the first cases related to gynecological examinations of women in prison, the Court has recognised that gynecological examinations by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation by women against prison guards.[156] In the most recent case in this connection (*Yazgül Yilmaz* v. *Turkey*), the Court seems to be sensitive about the critiques on its point of view. The Court considered in general terms that it could not agree with a general and consistent practice to subject detained women automatically to such examinations *only* to avoid false allegations against prison guards. This practice does not take into account the interests of women and is not medically necessary.[157]

In the *Juhnke case*, the Court implicitly said that there will be a violation of Article 3 of the Convention when a State overrules the explicit refusal of a woman to a medical examination.[158] However, it is difficult to get a *free* consent of detainees, since a detained person cannot be expected to continue to resist undergoing a medical examination, given her vulnerability at the hands of the authorities, who exercise complete control over her throughout her detention.[159] Thus, there seems to be a factual presumption that detainees cannot give their *free* consent.[160] In the *Juhnke case*, the Court found it more appropriate to address this question under Article 8 of the Convention (violation).[161] Several authors did not agree with this reasoning and found that a gynecological examination without free and informed consent gives rise to feelings of inferiority and degradation and, without any rationally acceptable justification, it will be understood by the subject as being aimed exclusively at debasing and humiliating her.[162] The Court does not justify why an examination based on tainted consent is less seriously assessed than one carried out by force.[163] A forced

[154] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.77.
[155] ECtHR 11 July 2006, *Jalloh* v. *Germany*, no. 54810/00, para.82.
[156] ECtHR27 July 2003, *Y.F.* v. *Turkey*, para.43; ECtHR 2 March 2006, *Devrim Turan* v. *Turkey*, no. 879/02, para.20.
[157] ECtHR 1 February 2011, *Yazgül Yilmaz v. Turkey*, no. 36369/06, para.48. Notice: also in the *Juhnke case* the Court was in doubt about the desirability of a gynecological examination to protect the guards from false allegations (ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.81.
[158] ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.75.
[159] ECtHR 27 August 1992, *Tomasi* v. *France*, no. 12850/87 paras.113-115; ECtHR27 July 2003, *Y.F.* v. *Turkey*, no. 24209/94, para.34; ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.76.
[160] *Cf. supra* title 2.1.2.1.
[161] ECtHR 13 May 2008, *Juhnke* v. *Turkey*, no. 52515/99, para.76.
[162] Partly dissenting opinion of Judge David Thór Björgvinsson joined by Judge Garlicki; E. Brems, "Commentary under ECtHR 13 May 2008, *Juhnke* v. *Turkey*", *E.H.R.C.* 6 (2008) 816.
[163] X., "Commentary under ECtHR 13 May 2008, *Juhnke* v. *Turkey*", *E.H.R.L.R.* 5 (2008) 668.

examination (contrary to the explicit refusal of the woman) will evidently be worse than an examination without a valid consent (after convincing the woman to accept the treatment). But, due to the extreme intrusive character of the examination, both should be covered by Article 3 of the Convention. The first as inhuman, the second as degrading.[164]

In the *Yazgül Yilmaz case*, the Court seems to be sensitive about this critique given its explicit aversion towards gynecological examinations of women for the protection of guards against false allegations. It seems that a gynecological examination without free and informed consent of a woman is always a violation of Article 3, certainly when she is a minor.[165] As mentioned above, this is logical given the extremely *intrusive* character of the treatment and the *vulnerability* of women in that position.[166] It is for the State to give special guarantees to ensure that the consent is free of pressure. But, the *sole* fact that a woman was taken to the hospital for a gynecological examination, which did not take place because she refused the examination even when the doctors tried to convince her, does not attain the minimum level of severity.[167]

The circumstances in which the examination takes place can also give rise to a violation of Article 3. For example, the use of handcuffs during an examination by a gynecologist, and the presence of three male security officers in the examination room, even behind a folding screen, were disproportionate security measures since there are other practical alternatives, e.g., the male officers could be replaced by female ones. The Government should prove that the woman posed an acute security risk to justify the use of handcuffs during the examination. This is not the case for a female convicted of terrorism-related crimes. [168]

4 Conclusion

As a basic rule under the Convention, a *competent* patient must give his *free* and *informed* consent *prior* to any medical treatment or intervention.[169] We have shown that the lack of informed consent could possibly violate *inter alia* Articles 8 and 3 of the Convention. It still remains unclear whether the consent can be implied or should be explicit, since the Court has only discussed this matter regarding vulnerable patients.

Every medical intervention carried out by the medical staff of a public hospital, even of minor importance, without the patient's consent therefore constitutes an interference with his or her private life and can give rise to a breach of Article 8, for which the respective State *can* be directly liable. When such an interference is prescribed by law, pursues a legitimate aim and is necessary in a democratic society, it is justified in terms of the second paragraph of Article 8, so that neither a violation, nor liability can be established. It is important though that the protection of a *competent* patient's *own* health *alone* cannot be seen as a legitimate aim in order to pursue a medical treatment without informed consent or against informed refusal, even if the treatment is of a medical necessity.[170] In principle, a competent patient is thus free

[164] *Ibid*., 816.
[165] When a minor is subjected to a gynecological examination the Court has some specific safeguards: the State must obtain the consent of the minor and her representative in all the stages of the examination; give her the opportunity to be accompanied by a third person of her choice; give her the possibility to choose between a male or female doctor; give her information about the reason, the course and the results of the examination and show respect towards her shame (ECtHR 1 February 2011, *Yazgül Yilmaz* v. *Turkey*, no. 36369/06, para.47.)
[166] *Cf.* the sterilization cases, *Cf. supra* title 3.2.2.
[167] ECtHR 2 March 2006, *Devrim Turan v. Turkey*, no. 879/02, para.21.
[168] ECtHR 8 January 2009, *Filiz Uyan* v. *Turkey*, no. 7496/03, paras.32-33. *Cf.* EHRR (dec.) 6 April 1994, *Peters* v. *Netherlands*, DR 1994, 75: *"That given the generally accepted desirability to effectively control the use of drugs in prisons, the treatment complained of, i.e., that a detainee has the produce the urine in the presence of a supervisor, does not attain the minimum level of severity required in order to fall within the scope of this provision."*
[169] Dewulf, *supra* note 3, 320; Hendriks, *supra* note 10, 38-39; Velaers, *supra* note 3, 193.
[170] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03; ECtHR 10 June 2010, *Jehovah's Witnesses of Moscow and others* v. *Russia*, no. 302/02.

to decide about his own body, regardless of how irrational, unwise or imprudent a decision may seem, even if it might lead to a fatal outcome. Furthermore, if the State finds a legitimate aim that justifies such a treatment, the interference with the patient's physical integrity still has to be proportionate to this aim. Therefore it must advance serious and compelling reasons for interferences with choices that patients make. Finally, the State is not only bound to the foregoing negative obligation. To secure the effective respect, both by public and private actors, of the physical and psychological integrity – principle of informed consent – they have a threefold positive obligation.

Will there always be a violation of Article 3 when a treatment was carried out without a detainee's informed consent? No. It all depends on whether the minimum level of severity has been reached by treating a patient without a valid consent. If so, an informed consent is necessary to avoid a violation of Article 3.[171] The presence of a medical necessity is one of the decisive factors to assess whether this level is reached. Indeed, when a treatment is therapeutically necessary, *in principle* there will be no violation of Article 3 of the Convention. This could be outweighed by other elements. The most common elements in this respect are: the manner in which the treatment was executed, i.e., whether the patient underwent serious physical pain or suffering as a result of the medical intervention, and the intrusiveness of the treatment. Besides, when there is no medical necessity, the minimum level of severity will be more easily reached. Proof can be found in cases where treatments were carried out *solely* to obtain evidence, since the Court seems to make a more thorough analysis in this respect.

The same is true for free persons, except for the fact that in our opinion the medical necessity is not relevant, since the State does not have (the same) positive obligations under Articles 2 and 3. As a consequence, the minimum level of severity will be reached more easily, in which case the informed consent is a prerequisite to avoid a violation of Article 3.

Finally, the Convention is a living instrument and must always be read in the light of the present-day conditions. Hence, in cases where *today* the minimum level of severity has not been reached, nevertheless the same facts could in the *future* cause a violation of Article 3.

Thus, if a treatment is carried out *only* to protect a competent patient's own health (*i.e.* medical necessity), in both Articles informed consent is a prerequisite to avoid a violation of the Convention. The circumstances of the case will determine whether Article 8 or Article 3 has been violated when there is a lack of informed consent. When the minimum level of severity is not reached under Article 3, Article 8 will be *violated*. Indeed, for these very specific cases Article 8 will always protect the patient's autonomy, whereas in more severe cases they could also rely on Article 3.

Finally, the importance of whether Article 3 or Article 8 has been violated can be found in the awarded damages. These will be higher when Article 3 is violated. This is obvious, since the harm suffered by the applicant will be more severe.

[171] ECtHR 7 October 2008, *Bogumil* v. *Portugal*, no. 35228/03, para. 71.