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And then the Court Created Procedural Obligations:

A look into the European Court of Human Rights

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AND THEN THE COURT CREATED PROCEDURAL OBLIGATIONS: A LOOK INTO THE EUROPEAN COURT OF HUMAN RIGHTS

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Introduction

Evaluating the quality of domestic procedures is increasingly becoming the bread and butter of legal review carried out in Strasbourg. The European Court of Human Rights (the Court) has proactively promoted procedural obligations under various provisions of the European Convention of Human Rights (the Convention) such as Article 2 (right to life), Article 3 (prohibition of torture) or Article 5 (right to liberty and security). The literature has heralded this development as 'the procedural turn' (Gerards and Brems 2017; Brems 2017; Gerards 2017; Arnardottir 2017). Various scholars took on the challenge of systematizing procedural obligations of varying nature, and discussing the benefits and pitfalls of procedural obligations (Gerards 2017; Gerards and Brems 2017; Brems and Lavrysen 2013). This article contributes to this literature by giving an account of the emergence of procedural obligations under Article 3 (prohibition on torture and inhuman or degrading treatment) of the Convention. Different from the existing literature, however, the article empirically grounds their emergence and usage. To do so, it analyzes looking at 2'414 Article 3 cases and explains how and why the Court created procedural obligations under Article 3 relying on 36 expert interviews carried in and around of the Court. In 2014, I conducted with the current and former judges, staff of the Registry as well as several representatives of NGOs and activist lawyers who bring cases before the Court.[1] These interviews helped me understand the socio-political and legal reasons behind the procedural obligations' creation and frequent usage.

Where did procedural obligations come from? Procedural obligations are a form of

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[1] Please see Annex II for a complete list of interviews conducted in the course of conducting this research.

positive obligations (obligations to protect and guarantee the fulfillment of rights).[2] In that regard, they are different from classical negative obligations (obligations to refrain from infringing on rights) (Mowbray 2004: 5). Like most other rights under the Convention, Article 3 is originally formulated as a negative obligation, that is, an obligation to refrain from violating a right. However, over time, the European Court has progressively introduced positive obligations under this article through its caselaw. Ensuring that the Convention remains "practical and effective, not theoretical and illusory"[3] has been one of the most important missions of the Court, and procedural obligations came as an expression of this mission.[4] The Court has interpreted the Convention principles in such a way as to respond to the contemporary needs of the European societies (Mowbray 2013: 36). Positive obligations requiring States to take measures to ensure "the active protection of human rights" are devised to bring the European human rights protection system one step closer to be effective (Xenos 2012: 3). Procedural obligations are in particular ideal tools to realize this goal.[5] Indeed, introducing procedural obligations, as a "procedural layer to the protection of substantive ECHR provisions," could render "the guarantees of human rights more effective" (Brems 2013: 160). This is because States could be evaluated based on the "quality" of their domestic processes, in addition to substantive breaches they may have committed (Brems 2017: 17).

Procedural obligations under Article 3 primarily concern the obligations to carry out effective and timely investigation, and to provide effective remedy – arguably the most important procedural obligations (Brems 2013: 140). Laying down procedural obligations on Council of Europe Member States has also broader implications for establishing a 'rule of law standard' for the whole region. One can conceptualize procedural obligations as standards of minimum protection "consolidated and validated by the ECtHR" (Müller 2016:1070). As Gerards (2017:131) explains, the Court has not yet spelled out a specific guideline for procedural obligations. However, it has provided a general guidance and indicated some concrete requirements such as ensuring that legislations are foreseeable and accessible (legal

[2] The first judgment in which a positive obligation was evoked was *Marckx v. Belgium*, app. no. 6833/74, ECHR (13 June 1976).
[3] The Court developed this principle in *Airey v. Ireland*, app. no. 6289/73, ECHR (9 October 1979), arguing that "Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals." For more on this, see Letsas 2010.
[4] Interview 10.
[5] For the purposes of this paper, I categorize procedural obligations as positive obligations. This is due to the fact that the scope of this paper is limited to Article 3 and procedural obligations at issue are right to an effective investigation or right to a remedy. There are other scholars, Brems (2013) for example, who identifies procedural obligations as both negative and positive obligations.

certainty) and that there are certain safeguards in place to steer clear of arbitrariness (transparency and predictability) (Gerards 2017:132). When the Court communicates the need to adhere to such standards to the local authorities, it also appeals them to harmonize their legal system accordingly.[6] That is, each time the Court invokes procedural obligations, it signals the existence of minimum standards for domestic legal procedures. In that sense, they remind States that "procedure matters" (Nussberger 2017: 176), and each State should develop means that are in line with "the general notion of rule of law" (Gerards 2017: 132). While doing so, the Court still gives leeway to the domestic authorities to carry out these procedural steps according to their own national legislations (Cali 2016: 153).

This article takes a closer look at the development of procedural obligations, and explains why these obligations were introduced under Article 3. In particular, it explains the conditions leading to this change looking at *legal, practical and symbolic,* as well as *political and social* reasons. In so doing, it aims at describing the process thorough which they were created and the extent to which they are used within the European human rights system. The article empirically grounds the creation and the utilization of procedural obligations, and thus contributes to the existing legal and theoretical scholarship on positive obligations.

Few Words on Data and Methods

I take the definition provided in the European Convention as the baseline and then trace how the norm's conceptual boundaries have expanded in the jurisprudence of the European Court (as well as the European Commission of Human Rights, which operated between 1953 and 1998). I carried out content analysis on all the judgments pertaining the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention pronounced between 1967 and 2016. The analysis begins in 1967, the year in which the Commission reviewed a case invoking Article 3 for the first time, and covers the fifty-year period, up until 2016. When carrying out this analysis, I make a distinction between positive and negative obligations. If an obligation calls upon state authorities to refrain from perpetuating an act, I list it as a *negative* obligation. If an obligation requires state authorities to take steps to ensure that individuals enjoy their rights, then this obligation is categorized as *positive* obligation. Figure 1 displays

[6] Council of Europe System is not alone in this endeavor. European Union institutions are too involved in facilitating harmonization of different legal systems in Europe. For more see, Arnardottir and Buyse (2016).

the distribution of all the cases, and what percentage of those were Article 3 cases for the fifty-year period under study.

Figure 1: Article 3 cases calculated as percentage of total number of cases

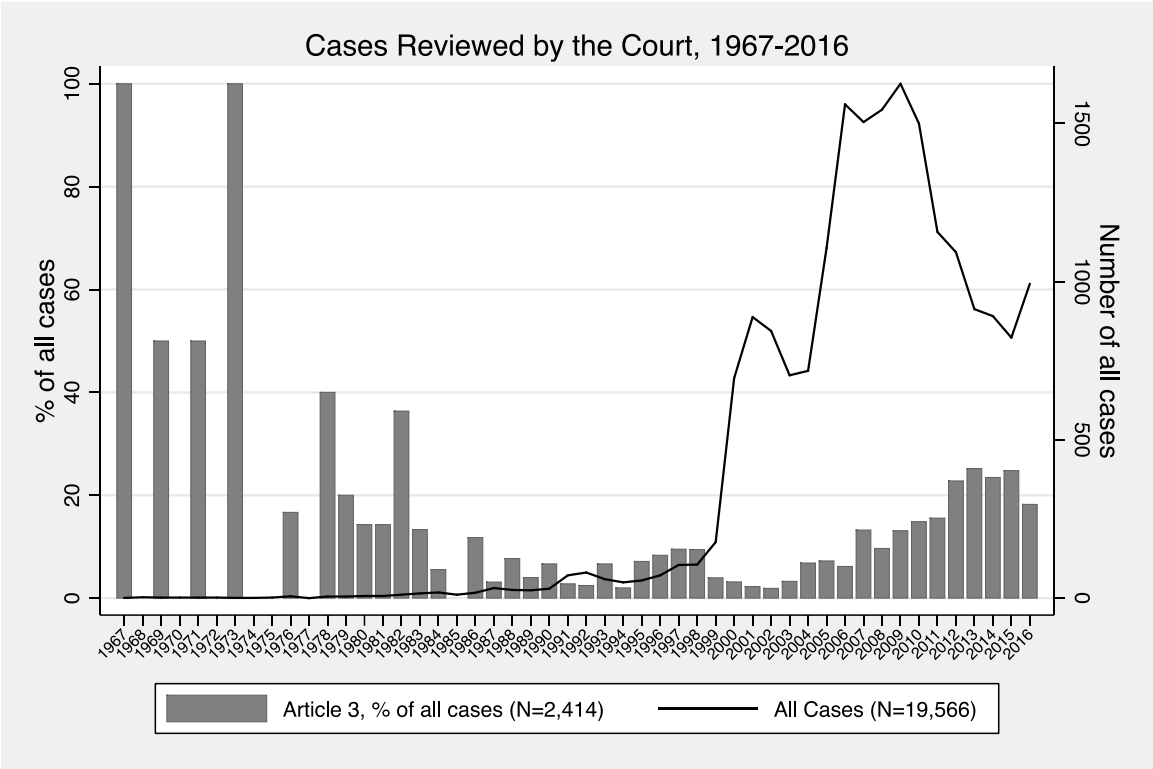


Figure 1 shows that in the earlier periods Article 3 cases constituted a higher percentage of the overall number of cases reviewed by the Court. As the number of cases reviewed by the Court surged in the 2000s, this percentage became smaller, yet still constituting a sizeable portion of the case law – 10.71% of all judgments between 1959 and 2016 to be exact.[7] There are a number of explanations for this change. First and foremost, the number of member states increased from twenty-two to forty seven in the late 1990s and early 2000s, with the eastward expansion of the Council of Europe.[8] Therefore, the geographical area under the jurisdiction of the Court, as well as the number of people who could potentially bring a case before the Court, dramatically increased.[9] Moreover, the European Court became a more visible institution over time, as "[it] has grown in its importance and influence."[10] Many individual applicants began to view the Court as the only recourse for justice against the backdrop of serious deficiencies in domestic

[7] *Overview 1959-2015*, p.7.
[8] For the purposes of this chapter, the member states of the Council of Europe that are all state parties to the European Convention will be referred as member states.
[9] Keller, Fischer, and Kühne 2010.
[10] Dzehtsiarou 2015: 146.

remedy systems in new members such as Ukraine, Russia and Romania, and old members such as Turkey and Italy.[11]

As for the nuts and bolts of this study, I analyzed 2,414 cases that the Court or the Commission reviewed based on its merits. That is to say, I only looked at the cases that passed initial screening and declared to be admissible for a review.[12] The unit of analysis of this study is claims, rather than cases. Therefore, the actual sample size is larger than the number of cases analysis. For this study, I have identified 3,587 claims. Of these, 2,229 concerned positive obligations and 1,358 negative obligations. Table below shows the distribution and the ratio of claims concerning positive and negative obligations.

Table I: Types and percentages of claims falling under Article 3

Types of claims	Number and percentage of claims
Claims invoking negative obligations	1,358 (38%)
Claims invoking positive obligations	2,229 (62%)
Total number of claims	3,587

Of these positive obligation claims, the Court issued a violation decision concerning procedural obligations 711 times and passed no violation decisions 49 times for the period under study.[13] That is, 34% of decisions concerning positive obligations concerned procedural obligations.[14] They are by far the most utilized form of positive obligations. In what follows I will explain the legal basis of their creation and frequent usage.

[11] Dzehtsiarou 2015: 146.
[12] Every complaint brought before the Court is subjected to an admissible test before being sent for judicial review. Article 35 of the Convention lays out criteria for admissibility decisions, according to which the applicant must exhaust all the domestic remedies and apply to the Court in no more than six months after the final decision given by a domestic court. The Court may declare any application inadmissible if the application is manifestly ill-founded (not based on facts or reliable evidence) or if the applicant has not suffered a significant disadvantage. Moreover, the Court may refuse to review a case, if the applicant wants the Court to revise and quash a decision taken by a domestic court – known as 'fourth-instance' applications.
[13] Please see Annex I for further information on each category.
[14] Other positive obligations categorized are as follows: *Failure to provide legal protection/remedy* 233 violation decisions and 62 no-violation decisions. *Failure to inform relatives of disappeared persons* 184 violation decisions and 51 no-violation decisions. *Failure to provide acceptable detention conditions* 620 violation decisions and 79 no-violation decisions. *Failure to provide necessary medical care* 169 violation decisions and 69 no-violation decisions. *Failure to facilitate euthanasia* 0 violation decision and 1 no-violation decision. *Failure to provide a healthy environment* 0 violation decision and 1 no-violation decision.

Part I: The Creation of Procedural Obligations

The Court first recognized states' procedural obligations under Article 3 in *Assenov and Others v. Bulgaria* in 1998.[15] The case concerns Bulgarian police's ill treatment of Anton Assenov, a teenage boy of Roma origin.[16] Assenov complained both about his ill treatment and the domestic authorities' failure to carry out a prompt and impartial investigation before the Court. The European Roma Rights Center and Amnesty International intervened in the case in support of his arguments.[17] Upon reviewing the complaint, the Court could not find sufficient evidence to ensure the injuries Anton sustained were due to police violence, but it did not stop there. Instead of dismissing Anton's complaint, the Court found the Bulgarian government in violation for not carrying out an effective investigation.[18] Specifically, it argued that Articles 1 and 3, read together, would require "by implication that there should be an effective official investigation. (…) If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity" [19] Hence, the Court emphasized that the prohibition of torture and ill treatment cannot be fully realized without effective investigations. In so doing, it presented procedural obligations as a supplementary layer – essential for ensuring the protection of victims from Article 3 violations.

While this principle was swiftly introduced as such, solidifying procedural obligations under Article 3 was not necessarily a straightforward affair for the European Court, however. Two years after Assenov, the Court retreated from its strong position in that case. In *Ilhan v. Turkey* (2000) it proposed that finding a procedural violation under Article 2 (right to life) would be justified as the provision entails the obligation to protect the right to life. [20] Nevertheless, this would not always be the case for Article 3, the Court argued. Since Article 3 is defined in substantive terms, it would not include an innate procedural obligation. The Court then qualified this statement, and argued that it may find a procedural breach if the circumstances require.[21] To back up its argument, the Court pointed out that there is already a

[15] *Assenov and Others v. Bulgaria,* app. no. 90/1997/874/1086, ECHR (28 October 1998).
[16] *Assenov and Others v. Bulgaria,* §8-10.
[17] *Assenov and Others v. Bulgaria,* §90.
[18] *Assenov and Others v. Bulgaria,* §106.
[19] *Assenov and Others v. Bulgaria,* §102.
[20] *Ilhan v. Turkey,* app. no. 22277/93, ECHR (27 June 2000).
[21] *Ilhan v. Turkey,* §92.

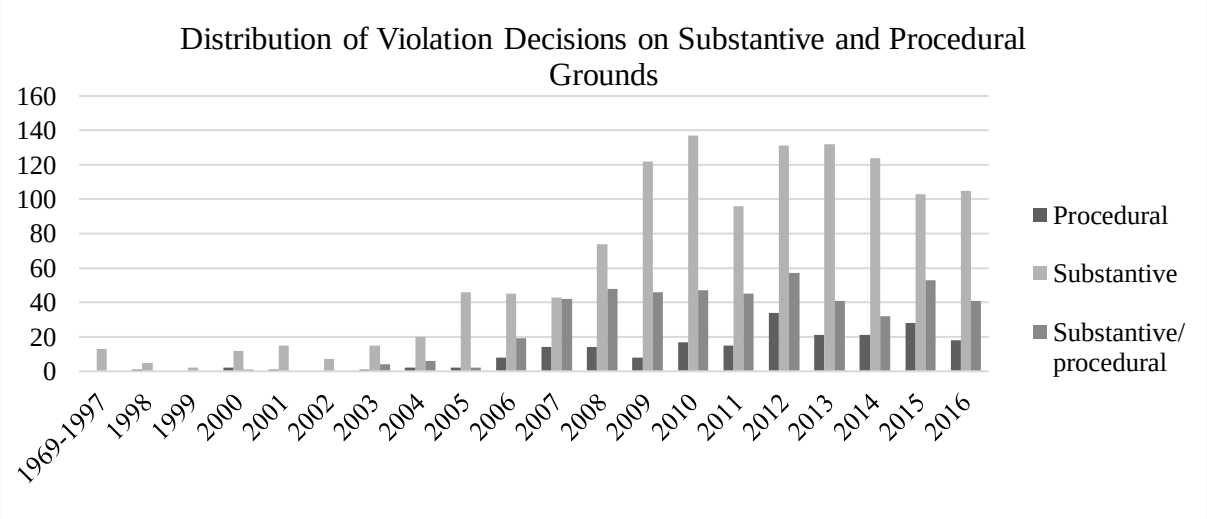
separate article concerning effective remedy in the Convention, Article 13.[22] According to it, "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Victims could seek redress and procedural safeguards relying on Article 13, the Court argued.[23] Therefore, the Court showed its hesitation to establish procedural obligations under Article 3 while there is already a separate article on effective remedy in *Ilhan*. This position had supporters. For example, the former British Judge Nicholas Bratza was an ardent critic of procedural obligations under Article 3. In his separate opinion in *Poltoratskiy v. Ukraine,* Judge Bratza supported the reasoning presented in *Ilhan.* He stated that the complaint concerning effective investigations should have been examined under Article 13, instead of "the so-called 'procedural aspects' of Article 3."[24] Similarly, in *Kuznetsov v. Ukraine* (2003), Judge Bratza dissented, and expressed that "[his] preference would have been to examine the complaint concerning the lack of effective official investigation into the applicant's allegations of ill treatment under Article 13 of the Convention instead of Article 3."[25] As Judge Bratza emphasized in his dissenting opinions, addressing states' procedural obligations was a matter of preference for a while.

The Court thus initially oscillated between Article 13 and Article 3. For example, in *Çakici v. Turkey* (1999), the Court found it would not be necessary to find a separate procedural violation under Article 3, as the alleged deficiencies in the investigation would be covered under Article 13.[26] Yet, in *Labita v. Italy*, it followed the *Assenov* line of reasoning and decided that there was a procedural breach due to the ineffectiveness of the investigation conducted.[27] After a series of inconsistent decisions, the Court settled on the existence of procedural obligations in Article 3 and gave them more recognition by coining the phrase "the procedural limb of Article 3."[28] Subsequently, a new practice of looking at the violations under both *substantive*

[22] *Ilhan v. Turkey*, §92.
[23] *Ilhan v. Turkey*, §92.
[24] *Poltoratskiy v. Ukraine*, app. no. 38812/97, ECHR (29 April 2003), (Nicholas Bratza, separate opinion).
[25] *Kuznetsov v. Ukraine*, app. no. 39042/97, ECHR (29 April 2003), (Nicholas Bratza, partly dissenting opinion).
[26] *Çakici v. Turkey*, app. no. 23657/94, ECHR [GC] (8 July 1999) §93. See also, *Berktay c. Turquie*, app. no. 22493/93, ECHR (1 Mars 2001); *Denizci and Others v. Cyprus*, app. nos. 25316-25321/94 and 27207/95, ECHR (23 May 2001);
[27] *Labita v. Italy*, app. no. 26772/95, ECHR (6 April 2000) §133-136. See also, *Sevtap Veznedaroglu v. Turkey*, app. no. 32357/96, ECHR (11 April 2000); *Dikme v. Turkey*, app. no. 20869/92, ECHR (11 July 2000).
[28] The practice of looking into "procedural limb" under Article was first introduced in the following cases: *Balogh v. Hungry*, app. no. 47940/99, ECHR (20 July 2004); *Khashiyev and Akayeva v. Russia*, app. nos. 57942/00 and 57945/00, ECHR (24 February 2005); *Akkum and Others v. Turkey*, app. no. 21894/93, ECHR (24 March 2005); *Süheyla Aydin v. Turkey*, app. no. 25660/94, ECHR (24 May 2005). The phrase was used for the first time in a partly dissenting opinion written by Judges Rozakis, Bonello, and Straznicka in *Calvelli and Ciglio v. Italy* (2002). There, the dissenting judges referred to "procedural limb of the protection of the right to life." Therefore, the term

and *procedural* limbs of Article 3 began.[29] Thus, procedural obligations were created in 1998 and consolidated around the mid-2000s. Though their introduction under Article 3 was not initially a straightforward affair, procedural obligations are no longer questioned. The following graph depicts the Court's decisions concerning declaring violations on substantive and/or procedural grounds.

Figure 2: The Distribution of Violations Found on Substantive and/or Procedural Grounds[30]



As the graph above shows, procedural obligations were first mentioned in 1998 and their usage became more frequent since the mid-2000s onwards. In addition, the mid-2000s was also the period when the Court began acknowledging substantive and procedural limbs of Article 3. Then on, it became a common practice to describe Article 3 as one prohibition composed of substantive and procedural obligations.

In addition to this terminology change, another sign of these obligations taking root was the acknowledgement expressed by the political bodies of the Council of Europe. For example, the Parliamentary Assembly of the Council of Europe expressed its support for the creation of

first arose in the context of Article 2 and then travelled to Article 3, in *Balogh v. Hungary* (2004), where the Court referred to the procedural limb of Article 3 for the first time.

[29] See for example, *Bekos and Koutropoulos v. Greece*, application no. 15250/02, ECHR (13 December 2005); *Danelia v. Georgia*, application no. 68622/01, ECHR (17 October 2006); *Affaire Melinte c. Roumanie*, application no. 43247/02, ECHR (9 November 2006); *Akpinar and Altun v. Turkey*, application no 56760/00, ECHR (27 February 2007); *Gök and Güler v. Turkey*, app. no. 74307/01, ECHR (28 July 2009); *Premininy v. Russia*, application no. 44973/04, ECHR (10 February 2011).

[30] The number of observations is 1,938. This is the number of decisions in which the Court found at least a violation. There are also 1,649 decisions in which the Court did not find a violation. These two numbers together make up the 3,538 claims analyzed for this study.

procedural obligations: "the Assembly commends the European Court of Human Rights for the extensive case law it has developed on impunity, in particular by imposing on member states the positive obligation to investigate serious human rights violations and to hold their perpetrators to account."[31] Similarly, the Committee of Ministers highlighted the importance of following procedural steps to fully realize the obligations deriving from the Convention. The Committee emphasized that states' obligation to implement judgments may go beyond simply paying compensation to the victims (just satisfaction) and "in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum.*"[32] Moreover, the Committee in its *Guidelines on Eradicating Impunity for Serious Human Rights Violations* define the duty to investigate as following: "States are under a procedural obligation arising under Article 3 of the Convention to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred."[33]

This meant that procedural obligations developed through the Court's jurisprudence received the blessing of the political bodies of the Council of Europe, and thereby the member states. As to the question why, I identify the main drivers behind this development, namely *legal, practical and symbolic,* as well as *political and social* reasons, in the next section.

Part II: Driving Forces of Change

While a systematic analysis on the case law can reveal *when and how* the change transpired, it tells little about *why* the change occurred. For this reason, observations gathered from interviews play a complementary role. According to the majority of the practitioners interviewed – be it the Court's judges and staff of its Registry, or NGO representatives – this was a natural and inevitable development. Most primarily this change was motivated by the conviction that human rights protection should be holistic without any blind spots.[34] For this

[31] Parliamentary Assembly of the Council of Europe, State of human rights in Europe: the need to eradicate impunity, *Resolution 1675(2009)*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17756&lang=en.
[32] Committee of Ministers of the Council of Europe, on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, *Recommendation No. R(2000)2* (19 January 2000), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06
[33] Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, *CM/Del/Dec(2011)1110/4.8-app5* / (30 March 2011), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cd111
[34] Interview 2; Interview 5; Interview 7; Interview 9; Interview 32; Interview 33.

reason, procedural obligations were required to make the Convention "more meaningful and effective."[35] Finally, they were there to encourage States to play "a pro-active" role in ensuring the core values of the Convention are "actively promoted, pursued, and protected."[36] However, holistic human rights protection ideal is only half of the story, as there are other underlying concerns with respect to this development.

Legal Reasons

There had been a growing jurisprudence on procedural obligations prior to their recognition under the European Convention. For example, the UN Human Rights Committee referred to the duty to investigate in *Bleier v. Uruguay*, as early 1982.[37] More precisely, the Committee affirmed that "it is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities."[38] Similarly, the Inter-American Court of Human Rights in *Velasquez Rodriguez* highlighted states obligations to "prevent, investigate and punish any violation of the rights recognized by the Convention" in 1988.[39] In addition, the legal basis of the duty to investigate can be traced to Article 12 of the Convention Against Torture of 1984, and General Comment 20 on Article 7 of 1992. Article 12 obliges state parties to "ensure shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[40] Moreover, in General Comment 20, the UN Human Rights Committee pronounced that "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. (…) Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."[41]

Procedural obligations were created against this legal background. Although the Court did not refer to the abovementioned jurisprudence or the legal instruments in its reasoning in

[35] Interview 6; Interview 11.
[36] Interview 10.
[37] *Bleier v. Uruguay*, Communication No. R. 7/30 (29 March 1982)
[38] *Bleier v. Uruguay*, §13,3.
[39] *Velasquez Rodriguez*, Judgment of July 29, 1988, IACtHR (Ser. C) No. 4 (1988), § 166.
[40] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx
[41] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/a)GeneralCommentNo20Prohibitionoftortureorothercruel,inhumanordegradingtreatmentorpunishment(article7)(1992).aspx

Assenov, the European Roma Rights Center made a reference to them in its *amicus curiae* brief.[42] It is not certain to what extent this compelled the Court in bringing procedural obligations to light, however. The Convention itself was the main legal basis that the Court relied upon when launching procedural obligations under Article 3.[43] As explained above, in *Assenov,* the Court referred to Article 1 and "the requirement that States parties to the Convention discharge their obligation (…) in a practical and effective way," when pronouncing the states' procedural obligations.[44]

Practical and Symbolic Reasons

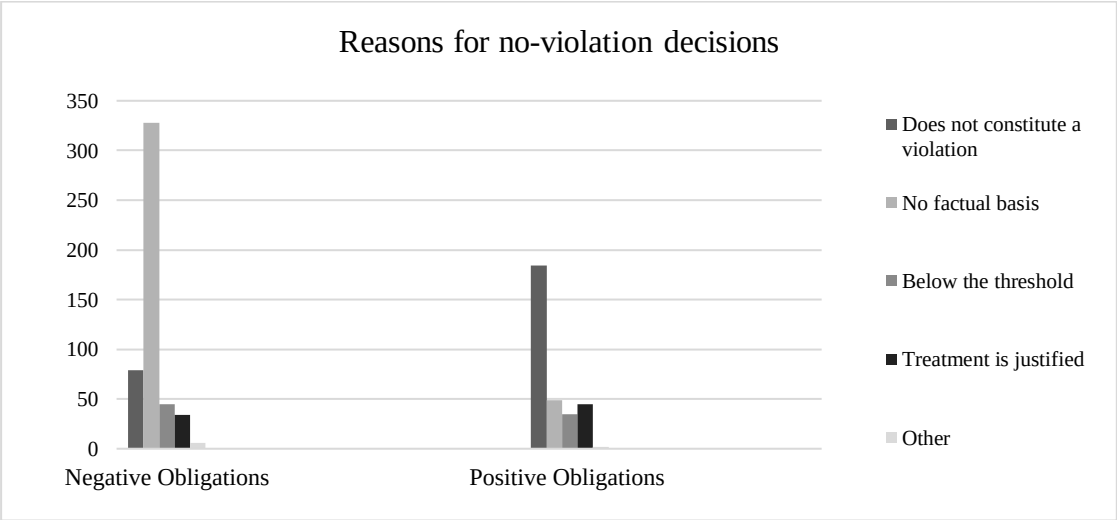
Procedural obligations were indeed presented as a solution to the practical problems related to domestic authorities' ability and willingness to investigate and provide effective remedies. The insights I gathered from my interviews reveal that there is a practical need to invoke procedural obligations. This is mostly because the Court does not carry out its investigations, and it has to rely on the findings presented by the parties.[45] Therefore, one could agree that the introduction of procedural obligations is a much-needed practical tool to deal with evidentiary problems embedded in the majority of the complaints brought under Article 3. This observation is built upon the simple fact that it is rather difficult to establish with certainty whether treatments falling under Article 3 indeed took place in the manner the complainant describes. As one judge, who was involved in strategic litigation before elected as a judge, voiced in an interview with the author, it is an arduous effort to prove whether substantive violations indeed took place.[46] The responding States' failure to supply the Court with relevant medical reports, detention records, or any other documents that could be relied upon as proof, often prevents the Court from arriving to a conclusion with certitude.[47]

As the graphs below show, finding no factual basis is the most frequently used reason for failing to establish whether a violation indeed occurred, particularly in the context of negative obligations.[48] More specifically, the Court found no violation in 67% of the applications in

[42] Written Comments of the European Roma Rights Center, available at http://www.errc.org/cikk.php?cikk=3856
[43] Interview 4; Interview 8; Interview 10.
[44] Interview 10
[45] Interview 15.
[46] Interview 12.
[47] Interview 12.
[48] The graph represents only the cases in which the Court did not find a violation under Article 3.

relation to negative obligations and 16% of the complaints concerning positive obligations on the grounds that there is no factual basis, for the period under study.[49]

Figure 3: Court's Reasoning for Finding No Violation Decisions for Negative and Positive Obligations[50]



The Court treats the claims concerning positive and negative obligations differently. 'No factual basis for the complaint' is the single most relied upon reason finding no violation under negative obligations. As for complaints in relation to positive obligations are often declared as no-violations for not constituting a violation. This difference seems to be due to different nature of positive and negative obligations. For positive obligations, the majority of no violation decisions are motivated by conclusions that the treatment does not constitute a violation and that the suffering resulting from the treatment is below the threshold. This could be due to the fact that the complaints with respect to positive obligations are not immediately associated with the norm against torture and inhuman or degrading treatment. They had to be identified as violations after careful scrutiny of their implications and their immediate ramifications. Since negative obligations are more clear-cut, these steps do not constitute a hurdle. Supporting allegations with evidence constitutes a significant problem, as the figure above demonstrates. Indeed, procedural obligations may provide a helpful solution to this drawback. As Judge Nussberger (2017:175) explains, the procedural obligations under Article 3 may serve an "*auxiliary*" function and "make it possible for the Court to attribute responsibility to the State

[49] The "other" category refers to the situations when a complaint is beyond the Court's jurisdiction or the scope of the prohibition of torture and inhuman or degrading treatment.
[50] The number of observations is 802. This number is lower than the total number claims that were declared no-violation. This is because the Court often gives the same reasoning for more than one claim. In such cases, I count the reasoning only once.

in cases in which it would otherwise escape responsibility because the standard of proof cannot be reached."

Secondly and relatedly, procedural obligations are motivated by symbolic reasons. They emphasize the subsidiary position of the Court as a supranational body. That is, the European Court is there to "support and strengthen the domestic judiciary's protection of human rights" (Follesdal 2016: 2000). As another judge underlined, "[expecting the domestic authorities to carry out effective procedural measures] is a question of subsidiarity."[51] He, then, added that the burden of conducting effective investigation and explaining the circumstances that gave rise to the complaint in the first place should be on the State.[52]

Subsidiarity, together with margin of appreciation have become the main pillars of the renewed vision that member states had for the Court, expressed in Brighton and Copenhagen declarations as well as Protocol 15. The principle of subsidiarity means that the European human rights regime is "supplementary and subsidiary to the protection of rights and freedoms under national legal systems" (Helfer 2008: 128). Similarly, the doctrine of margin of appreciation, which stems from the principle of subsidiarity, underlines that "state authorities are in principle in a better position to give an opinion on the necessity of a restriction" (Leach 2017: 161-162). This doctrine, which was also developed by the Court itself, transfers the power of discretion to the national authorities, and draws the boundary between "'primary' national discretion and the 'subsidiary' international supervision" (Petzold 1993: 59). Creation of procedural obligations, which shifts the burden of carrying out investigations and punishing perpetrators to the authorities at the domestic level, sends the right signals to the member states.

Moreover, the Court (as well as the European Commission prior to 1998) has very limited capacity to conduct its own fact-finding missions, which are "time consuming and expensive" (Leach et al. 2009, 5). Therefore, it has to rely on the information provided by the parties.[53] Accordingly, the introduction of procedural obligations, which emphasize that the States have to investigate the claims concerning torture or other forms of inhuman and/or degrading treatments in an effective and timely manner, is a solution to this practical problem. The underlying logic behind this development is also the fact that the responding States should not

[51] Interview 15.
[52] Interview 15.
[53] According to Leach et al. (2009), only in 92 cases, the Commission and the Court resorted to some form of fact-finding missions, between 1957 and 2009.

benefit from their own wrongdoing, and their failure to investigate properly should not do a disservice to the arguable claim of the applicant.[54] Therefore, the introduction of procedural obligations to the Convention System addresses these problems and streamlines the work of the Court.

Political and Social Reasons

A look at the jurisprudence also gives one the impression that this development was directly informed by emerging social needs in European societies. My analysis of the case law reveals that the majority of the violation rulings concern countries such as Turkey and Russia – where the Court had already identified lack of effective investigation as a systematic problem in its previous case-law, which was confirmed in an interview.[55] This list also includes several formerly communist Eastern European countries such as Ukraine, Romania, Bulgaria, or Moldova, where domestic legal and administrative systems had clear deficiencies that prevent proper investigations, one judge underlined.[56]

Emphasizing on procedural obligations has a more pedagogical effect, geared towards cultivating good practices and stronger rule of law tradition in such countries. However, this is task not just for the Court. This because it is difficult to introduce procedural obligations in states where the rule of law is already fragile,[57] or where there are not enough resources that could be used to discharge procedural obligations with due diligence.[58] The Court's attempts to cultivate rule of law and harmonize different legal traditions in Europe by promoting minimum standards for procedural obligations – be it for investigation or providing remedy – complements a larger rule of promotion agenda undertaken by other UN or European institutions.

First of them is the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) of 1999. It is an official UN document that gives clear directions as to how to carry effective investigations:

[54] Interview 12.
[55] Interview 20.
[56] Interview 10.
[57] Interview 27.
[58] Interview 28.

(a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;

(b) Identification of measures needed to prevent recurrence;

© Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.[59]

Despite being a UN document, the Istanbul Protocol indeed became a reference point for the European institutions for understanding how to dispense procedural obligations with due diligence. For example, it was included in the Guidelines to EU Policy on Torture.[60] Furthermore, the EctHR citied the Istanbul Protocol in various cases such as *Giuliani and Gaggio v. Italy*, *El-Masri v. Former Yugoslav Republic of Macedonia*, and *Dilek Aslan v. Turkey.*[61]

Second initiative is the Venice Commission, a Council of Europe advisory body on constitutional matters, created in 1990. One of the main missions of the Venice Commission is to "*provide legal advice* to its Member States and, in particular, to help States wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law."[62] Venice Commission establishes a dialogue with the Council of Europe Member States and advocates their adoption of a rule of law tradition. It encourages them to ensure that domestic legislations are "clear and predictable, and non-discriminatory" and that are "applied by independent courts under procedural guarantees."[63] Moreover, the Venice Commission outlines procedural obligations as a crucial component of good governance, by arguing the following: "the principle of good

[59] UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 2004, HR/P/PT/8/Rev.1, available at: http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf [accessed 2 June 2017], Chapter III, §78.

[60] European Union, *Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 13 March 2012, available at: http://www.eidhr.eu/files/dmfile/EUguidelinessupdated2012.pdf [accessed 2 June 2017].

[61] *Giuliani and Gaggio v. Italy*, app. no. 23458/02, ECHR [GC] (24 March 2011); *El-Masri v. Former Yugoslav Republic of Macedonia*, app. no. 39630/09, ECHR [GC] (13 December 2012); *Dilek Aslan v. Turkey*, app. no. 34364/08, ECHR (20 October 2015)

[62] Emphasis original. Council of Europe, Venice Commission, "Presentation," available at http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN [accessed 2 June 2017].

[63] Venice Commission, Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session, *CDL-AD(2016)007* (18 March 2016) §36.

administration is based on clearly identifiable procedural rights, the alleged violation of which can be invoked before a court."[64] In so doing, Venice Commission makes a clear link between good governance, the rule of law, and procedural obligations.

Third, the European Commission for the Efficiency of Justice (CEPEJ), created in 2002, another Council of Europe body that works towards harmonizing different legal traditions and cultivating the rule of law. The CEPEJ evaluates domestic judicial systems within European States on a comparative basis and presents concrete proposals to the national authorities to improve the quality of domestic procedures.[65] Similar to the Venice Commission, the CEPEJ carries out studies and provides guidance about how to increase the efficiency of national judicial systems.[66]

In addition to these Council of Europe initiatives, one should note the role of the EU institutions. As a matter of fact, the promotion of the rule of law is an EU initiative too. For example, the EU Commission published a "EU Framework to strengthen the Rule of Law" and passed several recommendations to improve the rule of law within Member States.[67] As this brief survey shows, the 'procedural turn' in Strasburg has not transpired in vacuum. Rather, one can see this development as a part of a larger European project that promotes the adoption of the rule of law and the improvement of the efficacy of domestic procedures.

Concluding Remarks

This paper has depicted the emergence of procedural obligations under Article 3 (prohibition on torture and inhuman or degrading treatment) of the European Convention. More specifically, I have traced how procedural obligations came to being by performing content analysis the Court's caselaw on Article 3 pronounced between 1967 and 2016. This analysis carried out on 2,414 Article 3 judgments shows that procedural obligations launched in the post-1998 period. Having empirically demonstrated the emergence of the procedural obligations in the Court's jurisprudence, I have then turned to the question of how and why procedural obligations were created under Article 3. I zoomed in on the specific moment in which procedural obligations

[64] Venice Commission, Stock Taking: On The Notions of "Good Governance" and "Good Administration" *Study no. 470 / 2008* (8 April 2011), §11.
[65] The European Commission for the Efficiency of Justice (CEPEJ), "About the CEPEJ" available at http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp [accessed 2 June 2017].
[66] The European Commission for the Efficiency of Justice (CEPEJ), "An Overview" *CEPEJ Studies No.23* (2016).
[67] For more, see the European Commission, "Rule of Law," available at http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm [accessed 2 June 2017].

were introduced. I have explained that they were not created overnight on a whim. Rather, they were carefully crafted in view of the increasingly evident fact that domestic authorities' inability and unwillingness to investigate and provide effective remedies had been jeopardizing the European human rights protection system.

Not having enough resources to carry out its own investigation, the Court had to (and still have to) rely on domestic authorities' findings when reviewing allegations. States' ability and willingness to cooperate in this regard has always been the Achilles heel. Nevertheless, this became even more difficult together with the eastward expansion of the Council of Europe. In face of the need to harmonize different legal traditions, procedural obligations were prescribed as the ideal remedy to consolidate a European standard for the rule of law. The Strasbourg's efforts in this regard were not isolated, however. Several other European initiatives took on the challenge of cultivating a rule of law tradition and increasing the efficiency domestic procedures across Europe.

Bibliography

Akandji-Kombe, Jean-François. 2007. *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of Human Rights*, Human Rights Handbook Series 7. Belgium: the Council of Europe.

Arnardóttir, Oddný Mjöll. 2017. "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance," *ICON* 15(1): 9-35.

Arnardottir, Oddy Mjoll and Antoine Buyse. 2016. Introduction. In *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, eds. Oddy Mjoll Arnardottir, and Antoine Buyse. London and New York: Routledge.

Bates, Ed. 2010. *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*. Oxford: Oxford University Press.

Brems, Eva and Laurens Lavrysen. 2013. "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," *Human Rights Quarterly* 35(1): 176-200.

Brems, Eva. 2013. Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights. In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards. Cambridge: Cambridge University Press.

Brems, Eva. 2017. The 'Logics' of Procedural-type Review by the European Court of Human Rights. In *Procedural Review in European Fundamental Rights Cases*, ed. Janneke Gerards and Eva Brems. New York: Cambridge University Press.

Cali, Basak. 2016. From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights. In *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, eds. Oddy Mjoll Arnardottir, and Antoine Buyse. London and New York: Routledge.

Christoffersen, Jonas, and Mikael Rask Madsen. 2013. Postscript. In *The European Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen, 230-239, Oxford: Oxford University Press.

Duranti Marco. 2017. *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention*. New York: Oxford University Press.

European Court of Human Rights, *Overview 1959-2014*, available at: http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf [accessed 1 November 2015].

Follesdal, Andreas. 2016. Squaring the Circle at the Battle at Brighton: Is the War Between Protecting Human Rights or Respecting Sovereignty Over, or Has it Just Begun?. In *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, eds. Oddy Mjoll Arnardottir, and Antoine Buyse. London and New York: Routledge.

Gerards, Janneke and Eva Brems. 2017. Procedural Review in European Fundamental Rights Cases: Introduction. In *Procedural Review in European Fundamental Rights Cases*, ed. Janneke Gerards and Eva Brems. New York: Cambridge University Press.

Gerards, Janneke. 2017. Procedural Review by the ECtHR: A Typology. In *Procedural Review in European Fundamental Rights Cases*, ed. Janneke Gerards and Eva Brems. New York: Cambridge University Press.

Helfer, Laurence R. 2008. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *European Journal of International Law* 19(1): 125-150.

Kiestra, Louwrens R. 2014. *The Impact of the European Convention on Human Rights on Private International Law*. The Hague: Asser Press.

Krahenmann, Sandra. 2012. Positive Obligations in Human Rights Treaties. PhD diss., the department of International Law, the Graduate Institute of International and Development Studies, Geneva.

Krasner Stephen D. 1983. Structural Changes and Regime Consequences: Regimes as Intervening Variables. In *International Regimes*, ed. Stephen D Krasner. Ithaca: Cornell University Press, pp. 1-21.

Lavrysen, Laurens. 2013. The Scope of Rights and the Scope of Obligations. In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards. Cambridge: Cambridge University Press.

Leach, Philip, et al. 2009. *An Analysis of the Fact-finding Missions Conducted by the European Commission and Court of Human Rights,* Report by the Human Rights & Social Justice Research Institute at London Metropolitan University.

Letsas, George. 2010. "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" *European Journal of International Law* 21(3): 509-541.

Madsen, Mikael Rask. 2013. The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence. In *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen, 43-60, Oxford University Press: Oxford.

Merrills, J.G. 1993. *The Development of International Law by the European Court of Human Rights*. Manchester, New York: Manchester University Press.

Moravcsik Andrew. 2000. The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe. *International Organization* 54(2): 217-252.

Mowbray, Alastair. 2013. Between the Will of the Contracting Parties and the Need of Today: Extending the Scope of Convention Rights and Freedoms Beyond What Could Have been Foreseen by the Drafters of the ECHR. In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards. Cambridge: Cambridge University Press.

Mowbray, Alistair. 2004. *The Development of Positive Obligations under the European Convention on Human Rights*. Portland, Oregano: Hart Publishing.

Nussberger, Angelika. 2017. Procedural Review by the ECtHR: A View From the Court. In

Procedural Review in European Fundamental Rights Cases, ed. Janneke Gerards and Eva Brems. New York: Cambridge University Press.

Smet, Stijn. 2013. "Conflict between Absolute Rights: A Reply to Steven Greer". *Human Rights Law Review* 13(3): 469-498.

Stone Sweet, Alec, Keller Helen. 2008. The Reception of the ECHR in National Legal Orders. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, eds. A Stone Sweet and H Keller. New York: Oxford University Press.

Xenos, Dimitris. 2012. *The Positive Obligations of the State under the European Convention of Human Rights*. London and New York: Routledge.

Yildiz, Ezgi. 2016. A Court with Many Faces: Institutional Identities and Interpretative Preferences; The Case of the European Court of Human Rights and the Norm against Torture. PhD diss., Graduate Institute of International and Development Studies, Geneva.

Zysset, Alain. 2017. *The ECHR and Human Rights Theory: Reconciling the Moral and the Political Concepts*. London and New York: Routledge.

Leach, Philip. 2017. *Taking a Case to the European Court of Human Rights*, New Edition, Fourth Edition. Oxford, New York: Oxford University Press.

Petzold, Herbert. 1993. "The Convention and the Principle of Subsidiarity," in *The European System for the Protection of Human Rights*, ed. Ronald St J. Macdonald and F. Matscher, 1993 edition. Dordrecht; Boston: Kluwer Law International.

Annex I

Table II: The Categories of Issues Falling under Article 3[68]

	Number of Violations	Number of No violations
Acts in Violation of Negative Obligations		
Ill-treatment during custody	319	142
Refoulement (and other)	131	102
Corporal punishment	2	2
Torture	101	32
Police brutality	179	85
Intrusive detention measures	98	37
Destruction of property	9	11
Discrimination	27	27
Acts in Violation of Positive Obligations		
Failure to provide legal protection/remedy	233	62
Failure to inform the family of disappeared	184	51
Failure to provide acceptable detention conditions	620	79
Failure to provide necessary (medical) care	169	69
Failure to fulfill procedural obligations	711	49

[68] In addition to these, there are few other categories, which were relatively less successful at being registered as violations under Article 3. Separation of families (state authorities' decision to (i) remove children from the custody of parents and place children with foster parents or childcare institutions or (ii) expel at least one of the parents from the country causing their separation from their children) and unacknowledged detention/extrajudicial killings (covers physical attacks, abductions or extrajudicial killings that take place with direct involvement or acquiescence from state agents). For the former there are 5 no violation and 3 violation decision, and for the latter there are 37 no violation and 9 violation decisions.

Annex II: List of Interviews for the European Court of Human Rights

Table III: Judges Serving at the European Court of Human Rights

Judges Serving at the European Court of Human Rights		
Interview 1	Current Judge	**15/09/14**
Interview 2	Current Judge	**15/09/14**
Interview 3	Current Judge	**17/09/14**
Interview 4	Current Judge	**17/09/14**
Interview 5	Current Judge	**18/09/14**
Interview 6	Current Judge	**18/09/14**
Interview 7	Current Judge	**19/09/14**
Interview 8	Current Judge	**23/09/14**
Interview 9	Current Judge	**24/09/14**
Interview 10	Current Judge	**24/09/14**
Interview 11	Current Judge	**26/09/14**
Interview 12	Current Judge	**26/09/14**
Interview 13	Current Judge	**29/09/14**
Interview 14	Current Judge	**29/09/14**
Interview 15	Current Judge	**29/09/14**

Table IV: Former Judges of the European Court of Human Rights

Former Judges of the European Court of Human rights		
Interview 16	Former Judge	**05/06/14**
Interview 17	Former Judge	**09/01/15**

Table V: The Registry (ECtHR)

The Registry		
Interview 18	Permanent law clerk	**04/09/14**
Interview 19	Permanent law clerk	**16/09/14**
Interview 20	Senior level official at the Registry	**17/09/14**
Interview 21	Assistant lawyer	**17/09/14**
Interview 22	Assistant lawyer	**19/09/14**
Interview 23	Assistant lawyer	**20/09/14**
Interview 24	Permanent law clerk	**23/09/14**
Interview 25	Permanent law clerk	**25/09/14**

Table VI: Human Rights NGOs Involved in Strategic Litigation (ECtHR)

Strategic Litigation NGOs		
Interview 26	Amnesty International	**16/05/14**
Interview 27	Interights	**12/06/14**
Interview 28	The Open Society Justice Initiative	**24/06/14**
Interview 29	Truth Justice Memory Centre (Hakikat Adalet Hafiza Merkezi)	**15/08/14**
Interview 30	The International Rehabilitation Council for Torture Victims	**12/12/14**
Interview 31	The Association for the Prevention of Torture	**21/01/15**
Interview 32	REDRESS	**24/02/15**
Interview 33	The Centre for Reproductive Rights	**27/03/15**

Table VII: Academic Lawyers (ECtHR)

Academic lawyers		
Interview 34	Academic lawyer affiliated with Kurdish Human Rights Project (KHRP) and European Human Rights Advocacy Center (EHRAC)	**09/07/14**
Interview 35	Academic lawyer affiliated with KHRP	**10/07/14**
Interview 36	Academic lawyer affiliated with KHRP and EHRAC	**11/07/14**