The right to the protection of health guaranteed under article 3 of the ECHR.

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The Convention does not comprise any provision specifically dedicated to the protection of health, especially as the matter concerns prisoners. The Commission has established a convention-based protection for these persons, as it concluded in 1978 that the extended detention of an elderly person who is ill might pose a problem under article 3[1]. Two years later, the Commission declared that the authorities were obliged to ensure the protection of health and of the well-being of prisoners, including those who are involved in an act of protest against the administration[2]. More explicitly, in its report issued in 1993 in the case Hurtado v. Switzerland, the Commission stated that "*there is a specific positive obligation weighing on the State under Art. 3 (…) to protect the physical integrity of people deprived of freedom. The absence of adequate medical care in such a situation should be qualified as inhuman treatment*".

This obligation to act that weighs on the authorities was determined by the Court in 2000, for example through its founding judgement Kudła v. Poland, delivered by the Grand Chamber, according to which "*under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance*" (§94). This depiction of the prison as a place that does not prejudice the human being integrates thus completely the definition of health given by the WHO: "*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".*

It is therefore on the basis of the "matrix" notion of dignity[3], falling within the scope of article 3, that the positive obligation of protection the physical and mental of prisoners has been established, whereas in the case of people who are not detained such protection is ensured by the right to the respect of private life under Art. 8. The fact that this obligation was evinced from an intangible right has certainly contributed to its rise, and the Kudla judgement has led to a broad and rich case-law. The contribution of the latter was systematized ten years later, in the judgement Xiros v. Greece, which organizes the requirements weighing on the authorities around three large principles: "*the duty to treat the ill person during his/her detention imposes on the State the specific obligations to* ***make sure that the detainee is able to serve his/her sentence****, to deliver* ***the necessary medical care*** *and to* ***adapt, if need be, the general conditions of detention to the particular situation of his/her health state***" (§73).

[1] Bonnechaux v. Switzerland, Report of the Commission, No 8224/78, 5 December 1979.
[2] No 8317/78, Dec. 15.5.80, D.R. 20, pp. 44, 138
[3] " […] the principle of respect of human dignity […] is a *founding interpretation* when the Court applies the rights enshrined in the Convention […] to persons deprived of freedom " (BELDA, §198)

As a sign that the medical issue has rapidly established itself as a central question in the field of prison litigation considered by the Court, the first quasi-pilot judgement in the prison field was issued in 2005 in order to obviate the systemic problem, observed in Turkey, concerning the recommitment of persons whose health state had been previously deemed to be incompatible with detention (Tekin Yeldis v. Turkey, No 22913/04, 10/11/2005). Similarly, as a sign that the Court has considered the internal procedural measures to be an essential part of the of the safeguard of the State's obligations, the judges have taken a stance with regards to the procedures to put in place in order to avoid unwarranted recommitments, with the aim to eradicate this systemic problem[4].

As a matter of fact, for the material obligations concerning the protection of health that have been thus generated to be implemented in practice, the case-law has added to them other procedural obligations, which prescribe that the State ensure a legal protection through the establishment of effective procedures. As of 2001, with the case Keenan v. the United Kingdom, the Court found a breach of Art. 13 due to the lack of a remedy in national law that may timely lift a disciplinary measure, which might cause a worsening of the psychiatric condition of the person concerned. The Court has incorporated, equally rapidly, procedural considerations under its review relative to the compatibility of continued detention of ill or disabled prisoners with the prohibition of inhuman or degrading treatment, by stressing the importance of judicial procedures for release on medical grounds within the protection from ill-treatment (Mouisel v. France, §44), or by examining the precautions taken by the judge during detention (Price v. the United Kingdom, §25). Thereafter, procedural obligations have been generated by the Court on several bases, most often Art. 13, and more rarely Art. 5[5] and 6[6]. These obligations have been included sometimes into the reasoning based on Art. 3[7]. In order to understand the scope of these obligations it is useful to have a preliminary overview[8] of the substantial requirements generated on this subject by the Court, whether the matter at hand is physical or mental health (1). The structure and the conduct expected from the bodies in charge of establishing violations of the right to the protection of health in prison will be examined at a later stage (2).

1. Scope of the substantial positive obligation with regards to the protection of health

1.1. General obligations of the State

i. The adequacy of care: a hesitant standard

The question has arisen, and still arises, whether a quality of care that is equivalent to that available outside the prison system is required, in other words the question of the gravity threshold triggering Art. 3. The equivalence of care is invoked both by the European Prison

[4] This issue has generated a second quasi-pilot judgement in 2013 : Gülay Çetin v. Turkey.
[5] Tekin Yeldis, cited above.
[6] See the chapter dedicated to this article.
[7] Either when the facts warrant an inquiry (see below), or, as in the case Aharon Schwartz v. Romania, when procedural aspects feed into the examination of compliance with Art. 3.
[8] Inevitably partial in a study of the procedural obligations, given the sheer size of the case-law in the field.

Rules (No 40.5) and the CPT (CPT / Inf (93)12, §38). The Court takes a less categorical stance, by stressing that the issue of the "adequate" nature of medical care is "*the most difficult element to determine*" (Blokhin v. Russia [GC], §137). Furthermore, the Court specifies that the right protected under Art. 3 does not imply that all prisoners will be granted the same level of care of the best medical facilities outside the prison system (Cara-Damiani v. Italy, No 2447/05, § 66, 7 February 2012). A legal trend goes as far as admitting that "the resources of medical facilities within the prison system are limited compared to those of civil[ian] clinics" (Grishin v. Russia, §76, Sergey Antonov v. Russia, §74), without condemning the existing situation, provided that this difference has not caused a degradation of the applicant's health state. Another trend points instead to the consistent position within the analysis based on Art. 3, i.e. that a lack of resources, regardless of the reason, or the general economic situation of the country cannot warrant detention conditions that would be contrary to the absolute prohibition contained in this article (Dykebu v. Albania, § 33 ; Kuznetsov v. Ukraine 2003, § 128, Poghossian v. Georgia, §48, Elefteriadis v. Romania).

Without closing this discussion, the Grand Chamber judgement Blokhin v. Russia states that "*the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment"* (§138). However, the Court refers to its case-law according to which if "*medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole*" (§137). The lack of reference to the judgements that signal a tolerance towards lower-quality care in the prison system is apparently a sign of the Grand Chamber's intention not to let a double standard develop on this matter.

ii. The existence of well-framed requirements

However, the case-law envisages well-framed requirements with regards to care quality. The right guaranteed under Art. 3 requires the delivery of "*relevant medical procedures to the ill person and medical care that is adequate for the specific situation of the person concerned*" (Cătălin Eugen Micu v. Romania, §55). It is established case-law that the simple fact that a prisoner has been examined by a doctor and has been prescribed this or that treatment does not automatically mean that this care is of an adequate nature (Hummatov v. Azerbaijan, § 116). An ill person should be able to consult qualified staff: resorting to general practitioners should be therefore integrated by examinations performed by specialists (Soysal v. Turkey, §50). Moreover, whenever the illness from which he/she suffers requires that, the person concerned should undergo regular and systematic check-ups that are linked to a global therapeutic strategy aimed at remedying his/her health problems or at preempting their worsening as opposed to treating their symptoms (Popov, cited above, § 211, Hummatov, §§ 109 and 114, and Amirov v. Russia, No 51857/13, § 93, 27 November 2014).

The authorities should deliver the treatment swiftly, and should adhere to the prescriptions of the medical staff (Hummatov, §§116-117; Vladimir Vasilyev v. Russia, §§65 et s.; Raffray

Taddei v. France). Generally speaking, "the diligence and frequency with which the medical care is afforded to the person concerned are two elements to be taken into consideration in order to assess the compatibility of the treatment with the requirements under Art. 3 of the Convention" (Cătălin Eugen Micu, §55).

iii. The delivery of care in accordance with medical ethics

The Court monitors, to a certain extent, the compliance with the ethical imperatives governing the field of care. The Court monitors the proportionality of the use of handcuffs and shackles during the treatment. Thus, the Court takes the view in its judgement Mouisel v. France that the applicant's "physical weakness", and "the absence of any previous conduct or other evidence giving serious grounds to fear that there was a significant danger of his absconding or resorting to violence", suggest that "the use of handcuffs was disproportionate to the needs of security" (§47; see also Hénaf v. France, §51 and Herczegfalvy v. Austria, §83).

Medical confidentiality, as another dimension of care that is regularly disregarded in prison, is also of interest to the Court. Therefore, in the judgement Duval v. France, the Court has condemned the presence of guards during the medical examination "of which some had an intimate nature" (§50) and has reminded that the CPT recommends "to perform the medical prisoner's examinations/consultations/treatment out of the hearing and, unless otherwise requested by the physician in a particular case, out of the escort personnel's eyesight" (§51).

The Court has also had the opportunity to rule, under Art. 8, that the opening by a prison doctor of the correspondence of a seriously ill prisoner addressed to a specialist outside the prison system was disproportionate (Szuluk v. the United Kingdom).

The case Sokolow v. Germany (No 11642/11, submitted on 8 March 2016) will lead the Court to rule on the conditions under which prisoners exercise their right of access to their medical file[9].

1.2 Specific obligations: protection through categorization into different health situations

The Court has fine-tuned its case-law by considering specific medical situations, to which it applied the general principle – together with its three variations – set out in the judgement Xiros. By doing that, the Court has categorized the main medical situations that occur in prison. Their most salient features will be touched upon in this paper.

i. Preventive measures: contagious diseases and passive smoking

[9] In the case Alexander Zheludkov v. Ukraine (Communication No. 726/1996, U.N. Doc. CCPR/C/76/D/726/1996 (2002)), the UN Human Rights Committee considered that the continuous and unexplained refusal on the part of the authorities to submit to the detained applicant his/her medical file was a breach of the provisions under Art. 10§1 of the International Covenant on Civil and Political Rights.

The authorities are required to take *preventive measures* in order to guarantee the health of prisoners. The transmission of transmissible diseases and notably of tuberculosis, of hepatitis and of HIV/AIDS should be, in the Court's view, a major public health concern, first and foremost in the prison system (Cătălin Eugen Micu, §56). This leads to the requirement that the administration carry out, whenever prisoners give their consent, a screening campaign of the main transmissible diseases "within a reasonable period of time" (ibid.). Therefore, the three-year delay with which the administration had performed a hepatitis C screening after the appearance of the first symptom and in an environment that was strongly affected by the epidemic was deemed to be excessive (Jeladze v. Géorgie, §44). Likewise, this leads to the obligation to administer the required treatment. Therefore, in the judgement Kushnir v. Ukraine, the conviction was motivated among other things with the fact that the applicant's tuberculosis had been reactivated in prison due to a lack of preventive treatment, which would have allowed to stem the progression of the contagion (§§143 et s.; see also Poghosyan v. Georgia). As far as HIV is concerned, the Court examines the quality of the care delivered in accordance with the WHO recommendations on retrovirals (Kozhokar v. Russia, §109).

Furthermore, the Court deems that the State has the obligation to adopt measures aimed at protecting a prisoner from the harmful effects of passive smoking whenever this is required by his/her state of health, on the basis of the medical examinations and the recommendations of the attending physicians (Elefteriadis v. Romania, §48). The matter at stake is separating the person concerned from smoking prisoners. The overcrowding in the establishments does not in any way exempt the authorities from their obligation to protect the health of the person concerned (ibid. §50). In the Elefteriadis case, the Court takes into account the fact that following the period during which he had been detained in a cell with smokers, the medical certificates issued by several doctors recorded a deterioration in the applicant's respiratory condition and the emergence of a further illness.

ii. Dental and eye prostheses and care

The lack of supply of orthopedic shoes during several years, when the need for such equipement has been established by the medical services, is a breach of Art. 3 (Vladimir Vasilyev v. Russia, §§67-69). The same applies to the refusal to supply dental prostheses to a toothless and destitute prisoner, who was not able to purchase them on his own (V.D. v. Romania). In the case Slyusarev v. Russia, the Court has equally considered that the confiscation of the applicant's glasses during five months constituted for the applicant a treatment that violated Art. 3.

iii. Hunger strikes and forced treatment

Regardless of the harm that the applicant may have inflicted upon himself/herself by choosing to start a long-term hunger strike, that does not exempt in any way the State from its obligations vis-à-vis under Art. 3 (see Nevmerzhitsky v. Ukraine, judgement of 5 April 2005 No 54825/00, §§ 82-106; Tekin Yildiz v. Turkey, §82). In the case of forced feeding, the Court reminds that a measure required for therapeutical needs cannot be considered inhuman

or degrading, provided "*that the medical necessity has been convincingly proved and that the procedural safeguards that should be incorporated into the decision to proceed with such a measure exist and are complied with*" (Herczegfalvy v. Austria, §82; Bogumil v. Portugal, §90), and that "*the manner in which an applicant is force-fed during his/her hunger strike does not represent a treatment exceeding the minimum gravity threshold required by Article 3*" (Rappaz v. Switzerland, §65).

Moreover, the decision to order the recommitment of a person that has observed a hunger strike may be contrary to Art. 3 of the Convention if this person suffers from long-lasting damage such as the Wernicke-Korsakoff syndrome (Uyan v. Turkey, §§ 44-54; Balyemez v. Turkey, §§ 90-96).

iv. Physical disability and situations of stark dependence

Disabled persons should benefit from adapted detention conditions allowing them to enjoy a certain independence (Arutyunyan v. Russia, §75). Therefore, in the Arutyunyan case, the fact that the applicant, who has reduced mobility and suffers from multiple health problems, has been placed on the fifth floor of a building with no lift, while he had to reach the ground floor to receive treatment or meet his lawyer, has led to the conclusion that there was a breach of Art. 3 (§§73 et s.). Likewise, in the judgement D. G. v. Poland, the Court has condemned the fact that a paraplegic prisoner who suffered from incontinence had not benefited from daily access to medical staff (§44). In the case Vincent v. France, the Court questioned the fact that the applicant could not leave his cell on his own, as accessing the door implied removing a wheel from his armchair. The case-law seems to opt for adapting the conditions of detention, rather than for the obligation to release the persons concerned (Helhal v. France).

The impairment of prisoners may impose resorting to carers in order to help them perform everyday activities. The Court has condemned time and again the use for such purposes of co-detainees, not only because they are not necessarily qualified for such tasks, and thus not necessarily ready to such sharing of intimacy (Farbtuhs v. Latvia, §60; Hüseyin Yıldırım v. Turkey, §81), but also because such a situation places the applicant in a position of dependency toward such co-detainees (Helhal v. France, §62).

v. Compatibility of the state of health with detention

As far as the issue of compatibility of the state of health with detention is concerned, the Court specifies that the " clinical picture " of a prisoner is "*one of the criteria with regards to which the ability to withstand detention can be assessed nowadays on the basis of Art. 3 in the Member States of the Council of Europe. It has become a part of the elements to be taken into account in the enforcement methods of a prison sentence, notably with regards to keeping in prison persons who are affected by a life-threatening disease or by a disease whose state is incompatible with life in prison in the long run"* (Gülay Çetin v. Turkey, prec., §102). The corresponding control implies a triple review (alternative or cumulative): *"a) the condition of*

a prisoner, b) the quality of the treatment afforded and c) the advisability to keep the applicant in detention in the light of his/her health state (ibid.).

The first criterion concerns the material conditions of detention. They essentially include the characteristics of detention with regards to hygiene and cleanliness, but other aspects may be included, such as the conditions of medical extractions and in particular the safety measures adopted on these occasions (Mouisel v. France, §§46 and 47; Henaf v. France, 27 Nov. 2003, No 65436/01, §§ 49 et seq.).

As for the second criterion, an important indicator is a strong deterioration of the health state in detention, which inevitably generates doubts as to the adequacy of the care that is being delivered (Khudobin v. Russia, No 59696/00, § 84; Salakhov et a. v. Ukraine, 14 March 2013, No 28005/08). In the case Aharon Schwartz v. Romania, the Court questioned the fact that the person concerned had no alternatives other than undergoing surgery in the prison hospitals, whose capacity to perform surgery is uncertain (§106).

But the matter at heart is not only to determine whether the person concerned has benefited from the medical care prescribed by qualified physicians (Gorodnitchev v. Russia, No 52058/99, §91, 24 May 2007), e.g. whether he could access expert consultations and the technical means required for his treatment. This second criterion equally requires determining whether the person concerned has benefited from more "peripheral" care vis-à-vis the disease, such as assistance for everyday activities and psychological support. From this point of view, the focus is on tasks that imply the intervention of qualified staff, rather than prison guards or co-detainees (Kaprykowski v. Poland, No 23052/05, §74, 3 February 2009, Gülay Çetin v. Turkey, 5 March 2013, No 44084/10, §112).

The third and last criterion, which is examined in connection with the previous criterion, globally refers to the "capacity to deal with detention", taking into consideration the "clinical picture of the prisoner". As a matter of fact, the Court has ruled that at this stage the extension of detention, in and of itself and independently of the quality of the delivered care (which may not be under review, as in the judgement Gülay Çetin v. Turkey, above, §109) necessarily has an impact on the individual. In the case Gülay Çetin, the Court thus ruled that the authorities had violated Art. 3 by keeping in detention a prisoners when "this was not warranted in terms of the protection of society, and a total lack of diligence on the part of the authorities in this respect amounted to leaving her alone, with no family support and unable to maintain her dignity against the outcome to which her disease progressed fatally and inevitably" (Gülay Çetin, cited above, §122). Equally, the Court has consistently ruled that the recommitment of a person who has been released for health reasons is a breach of Art. 3, if it does not take account of the health state of the person concerned (Rokosz v. Poland; Tekin Yildiz v. Turkey).

vi. Mentally ill persons

Whenever it is called upon to verify the compatibility of the detention conditions of a mentally ill person with Art. 3, the Court *"initially objectivizes its approach by admitting that the very nature of mental disorders renders the persons concerned more vulnerable compared to ordinary prisoners, and that the sheer fact of their detention obliges the Court to verify whether such detention unfolds in conditions that conform to human dignity*" (Tulkens & Dubois-Hamdi). The Court expresses this point of view very clearly in the judgement Dybeku v. Albania, where it considers that the fact that the applicant has been treated like all other prisoners is sufficient to conclude that the State has not lived up to its international commitments (§48, see also the quasi-pilot judgement Sławomir Musiał v. Poland). Moreover, the Court indicates that one should, *"within the vast category of mental diseases, distinguish those like psychosis which imply particularly high risks for the people who suffer from it*" (Rivière v. France, §63). This means that the impact of detention on the health of the persons concerned is hypothesized, i.e. presumed (Tulkens & Dubois-Hamdi).

The detention conditions of mentally ill persons should be adapted to their disorder[10]. As a consequence of the finding that keeping ill persons *"in establishments not suitable for incarceration of the mentally-ill, raises a serious issue under the Convention"* (Sławomir Musiał v. Poland, §94), the Court requires that *"prisoners who suffer from severe mental disorders [be] placed and treated in a hospital adequately equipped and having qualified personnel"* (Rivière v. France, §72).

The issue of knowing whether the detention of the persons concerned should end or not remains problematic. The ad hoc judge Briede, in her dissenting opinion in the case Farbtuhs v. Latvia, deplores that the majority has *"not insisted on the 'conditions', but rather on 'keeping' the applicant in prison"*, and stresses that she agrees with the principle of a dynamic interpretation aimed at broadening the scope of application of Art. 3 of the Convention, and that *"this principle should be reconciled with the principle of assessment subsidiarity"*. According to her the review of the possibility to keep in detention falls within the scope *"of the criminal and prison policy of each State, based on sociological considerations which go well beyond the limits defined in the Convention"*. In the case Rivière v. France, Judge Cabral Barreto has instead questioned the fact that the Court has not adopted a clear stance on the issue of determining whether the mentally ill applicant was capable of being detained, regardless of the issue of the quality of the delivered care. In the case Sławomir Musiał v. Poland, the Court holds the view that the refusal to commit the person concerned to an adapted psychiatric ward or a prison that has a specialized psychiatric wing unnecessarily exposed the prisoner to a health risk. The Court takes a clearer stance in the case G. v. France by concluding that the state of health of the applicant was *"incompatible with detention"*, noting that detention had *"hampered the medical treatment"* and disregarded Art. 3. It should be noted that in the case Renolde v. France the Court questioned, based on Art. 2, the fact that, notwithstanding the suicide attempt and the diagnosis of the prisoner's mental state, the possibility to hospitalize him in a psychiatric establishment had not been discussed. Thus, authorized observers may conclude that *"the recent evolution of the case-law*

[10] For the detention in prison establishments of detainees on the grounds that they are considered as "aliens" under subparagraph f) of Art. 5 § 1, see for instance Aerts v. Belgium (1998, § 46),

clearly marks a trend towards questioning the prison environment when it comes to ill prisoners" (Tulkens & Dubois-Hamdi).

Recent judgements apparently show that this development is accelerating. In the case Bamouhammad v. Belgium, the applicant, who suffered from a "prison psychosis", had allegedly been subjected to extreme security measures which had caused his mental health to worsen. The need for a psychological follow-up had been stressed by all medical tests, which confirmed the degradation of his condition, but continuous efforts had hampered such follow-up. A prison director had considered that *"the applicant's imprisonment had been a total failure and raised questions about the applicant's ability to withstand detention"*. The Court observed the contrast between the conclusions of experts who *"on a regular basis, have considered since 2011 that the applicant's imprisonment, which has been nearly uninterrupted since 1984, did not meet its legitimate objectives anymore, and who were in favour of alternatives being implemented, and on the other hand the response of the prison authorities, which have consistently refused to change the applicant's situation despite the degradation of his health state"* (§153). The Court concludes therefore that the security measures applied *"the authorities' refusal to envisage the slightest adaptation of his sentence in spite of the decline in his health, had subjected him to distress of an intensity exceeding the inevitable level of suffering inherent in detention"* (§155).

The Grand Chamber judgement Murray v. the Netherlands reminds that *"[o]bligations under Article 3 may go so far as to impose an obligation on the State to transfer prisoners (including mentally ill ones) to special facilities in order to receive adequate treatment"* (§105). However, in the case of prisoners serving life sentences who suffer from personality or behavioural disorders that are likely to represent recividism factors a diagnosis should be made, including without a request by the persons concerned, and they should benefit from psychiatric or psychological treatment that gives them the possibility of rehabilitation and a perspective of release (§109).

Finally, it should be noted that the fragility of persons with mental disorders requires special vigilance with regards to the suicide risk associated with them (Renolde v. France; Keenan v. the United Kingdom; see the chapter of this study devoted to chapter 2).

1.3 The European Court's supervision methodology

As far as the protection of the health of prisoners is concerned, the Court adopts the classical approach applied to the cases of breach of Art. 3 of the Convention.

i. Fact finding

Firstly, fact finding. Taking account of their situation, prisoners may face difficulties in providing evidence supporting their allegations. This is why the Court has modified the burden of proof, as the "Government alone have access to information capable of corroborating or refuting allegations" (Vladimir Vasilyev v. Russia, §54). Therefore, the

Court admits that the applicant only gives prima facie evidence, which it is up to the Government to counter. Henceforth, there is a burden of allegation, the requirement that the applicant provide a circumstantiated account of his situation. This is what is illustrated in the case Amirov v. Russia: as the applicant had provided medical documents corroborating his allegations, the Court considers that the burden of proof is now on the Government (§91). Moreover, although the Court recognizes that it is problematic that the expertise is provided by an expert that could not *personally* visit the applicant, it considers that the circumstance is of no consequence, as the Government had not organized an independent expertise of the person concerned and as it has not granted permission to consult physicians of his choice (idem). As the issue revolves around mentally ill persons, their difficulty to file a grievance is duly taken into account (Rivière v. France, §63). The Court states that the issue of ascertaining whether the given conditions of detention are incompatible with Art. 3 should take account of the vulnerability of the persons concerned and in certain cases of their inability to coherently file a grievance, or even to file a complaint, of the treatment they are subjected to and of the impact on them (Murray v. the Netherlands (GC), §106).

iii. Gravity threshold for ill-treatment

In order to constitute a breach of Art. 3, the damage done to the applicant's health due to the action or inaction of the Government should be beyond a certain gravity threshold, which is determined on a case-by-case basis. As explained above, the level of the delivered care should be "compatible with human dignity", taking into account the "practical requirements of detention", and by reference, even if it is in a fluctuating manner (see above), the quality of care in civilian hospitals.

An important indicator to this effect is a marked worsening of the state of health in detention, which inevitably raises doubts on the adequacy of care there. On the contrary, the Court insists on the fact that a deterioration of the state of health is not sufficient to condemn a State if such deterioration is not ascribable to a deficiency on the part of the State.

The duration of the treatment afforded to the applicant, regardless of his/her gravity, can be a decisive factor. This is what is illustrated by the case Slyusarev v. Russia: the applicant, who suffered from average nearsightedness, had been deprived of his glasses. Even if "having no glasses had no permanent effect on the applicant's health, he must have suffered because of it", "it must have created a lot of distress in his everyday life, and given rise to a feeling of insecurity and helplessness" (§36). The Court concluded that there was a breach of Art. 3 "due to [the] duration" of the situation denounced (idem). However, the duration of the deficiency on the part of the State does not constitute in and of itself a prerequisite of the finding of a breach. The Court clearly states in the judgement Ashot Harutyunyan v. Armenia that the simple fact that a prisoner may have needed and demanded medical assistance to no avail can result in a breach of Art. 3 (§114). Therefore, for the Court, even a failed delivery of medical care that does not lead to a medical emergency or otherwise severe or prolonged pain in detention can be deemed incompatible with Art. 3.

The Court may take into account the applicant's conduct in its analysis of the facts. Therefore, in reference to the judgement Gelfmann v. France, in which the Court asserted that the applicant "was 'uncooperative' and had refused or suspended his treatment on various occasions" (§56), it could state, in the judgement Aleksanyan v. Russia, that the applicant's refusal to benefit from a treatment might lead one to believe that his situation is not as critical as he claims (§154). The Court, however, has fine-tuned its position: in the Aleksanyan case, the applicant's conduct is described as being "understandable" insofar as he had stayed in the prison's medical ward in spite of the doctors' insistence that he be placed in a specialized clinic (§154, see also along the same lines Aharon Schwartz v. Romania). Furthermore, it is out of the question that prisoners who are on a hunger strike can be deprived of the protection granted to them under Art. 3, as the Court reminded in the judgement Tekin Yıldız v. Turkey (§82).

On balance, it is difficult to identify a precise methodology from these solutions, such is the level of "heterogeneity and fragmentation" within the Court (RANALLI). As a matter of fact, "unlike litigation related to conditions of detention, which poses structural questions, the requirement of adequate care is particularly casuistic and the Court's case-law does not allow to elaborate e theoretical framework of protection standards that apply to all situations" (SIMON, §416).

2. Procedural obligations on States

The Court has defined a series of procedural obligations which are meant to allow for prisoners to ensure the compliance, in the domestic legal order, with the substantial obligations weighing on the State. From this perspective, the requirements outlined are similar to, if not identical with, those identified in the realm of material detention conditions. There are several judgements handed down on health matters which refer to the case-law in the field of material conditions in order to explain the obligations linked to care.

2.1 Structuring of the legal remedies

i. Preventive, compensatory and complementary remedies

All ill prisoners whose medical care conditions or detention, taking into account their state of health, are likely to violate the Convention should be able to benefit, if need be, from an appropriate remedy. As in the case of material detention conditions, the persons concerned should benefit from preventive and compensatory in a complementary way. As for the former, the remedy should be to *immediately* stop the treatment that violates the Convention to which the prisoners are subjected ("direct and timely redress"). In the case Reshetnyak v. Russia, the Court explicitly notes how a simple remedy is in and of itself insufficient, as it cannot put an end to the situation when the judge cannot order in this context the cessation of the breach, nor impose detention conditions and medical care that conforms to the needs of the person concerned, nor, moreover, impose sanctions on the authorities for their breach. The latter should allow to adequately remedy the damage generated by the violation.

ii. Features required for the reviewing body and the procedure

The reviewing body is required to meet a certain number of characteristics that are generally specific to the jurisdictions – the Court explicitly refers to these in certain cases (Reshetnyak v. Russia, §71). In this regard, the case-law shows an alignment as to the requirements applicable to material detention conditions.

Firstly, it should be an independent instance. Taking into account that it falls upon the prison authorities to organize the conditions of detention – and thus medical care – of prisoners, an administrative remedy challenging these conditions of detention that is introduced by the very same authorities, who would then be judges and judged, would not offer sufficient safeguards of independence (Petrea v. Romania, §34 4792/03, 29/04/2008, Patranin v. Russia, §87, 12983/14 23/07/2015; Goginashvili v. Georgia, §55). The status of the authority in the domestic order should guarantee its independence and impartiality (Melnik v. Ukraine, §69, 72286/01, 28/03/2006).

Secondly, the exercise of the procedure should trigger the review. The venues for filing claims to an authority that will then have discretionary power as to whether to proceed with the claim do not meet such a requirement. Not only the introduction of the remedy should lead to the consideration of the merit of the claims, but the prisoner should be involved in the procedure and be informed on its progress. Therefore, the possibility envisaged by Russian law to submit a request to the prosecutor is deemed insufficient by the Court, which notes that there is no obligation for the latter to hear the applicant or to inform him/her on the progress of the procedure – *"which may thus remain only known to the prosecutor and the prison administration"*. In this perspective, the system should envisage an organized procedure, and not only charge an authority of the reviewing process, even if it is before a jurisdictional body (Dermanovic v. Serbia, §41).

Under Art. 6-1 (civil limb), the Court requires compliance with the adversarial principle and the principle of equal arms, which may imply the right to appear and be heard in person to explain the conditions of care (Vladimir Vasilyev v. Russia).

Thirdly, the body should intervene in a timely fashion, so as to "rapidly" stop the treatment that is the matter of the complaint (Dirdizov v. Russia, §73). A proceeding that is closed within ten days is deemed satisfactory by the Court (ibid., §85).

Fourthly, the proceeding should lead the instance in charge to rule on the adequacy of care or the compatibility of the state of health with detention, as the case may be. The court should not limit itself to ordering the transfer to a civilian hospital in order to perform surgery without ruling on the merits of the grievance of the person concerned (Yunusova and Yunusov v. Azerbaijan, §129).

Then, as previously explained, the authority in charge should have the power to stop the breach while it is still ongoing. Therefore, a decision which has a mere declaratory impact is insufficient (Reshetnyak v. Russia, §63). Likewise, besides its legal effect, the decision should yield practical effects, insofar that it should be possible to implement it. In this respect, the Court takes account of the structural nature of the problem at stake, which can ruin in practice the administration's capacity to comply with the decision handed down against it (Visloguzov v. Ukraine, § 64, No 32362/02, 20/05/2010).

2.2 Appropriate procedures allowing for the release of a detainee who is severely ill or very aged

The Court repeats that there is no general obligation to release or commit to a civilian hospital ill defendants (in the case of pre-trial custody, Hunvald v. Hungary, §41 No 68435/10, 10/12/13). However, in the case where a prisoner, taking into consideration his/her age and/or his/her state of health, is unable to endure detention, the State should foresee legal proceedings for release (Mouisel v. France, §44), in accordance with Art. 13.

Such proceedings should benefit indistinctly both defendants and convicts. The Court has considered that reserving the measure of release on health grounds only to convicts constituted discrimination, and was therefore contrary to Art. 14 of the Convention (Gülay Çetin v. Turkey, §126 et s.). In the case of defendants, the Court most frequently focuses on Artt. 5§3 and 4, *lex specialis* with respect to Art. 13.

The implementation of the proceedings should meet several requirements, first and foremost the swiftness requirement, which should allow a prisoner whose health is failing to benefit rapidly from a release based on "humanitarian" grounds (Raffray Taddei v. France, §102).

Likewise, in the case Gülay Çetin v. Turkey, among other "redundancies and delays", the 20-day period it takes the Prosecutor's Office to charge the competent instance with ruling on sentence suspensions has been deemed excessive, taking into account the emergency of the situation (Gülay Çetin v. Turkey, §123). With the same attention for efficiency, the Court, in the same case, recommended that Turkey rethinks the procedure that was in place, marked by a "excessively formal approach with no public oversight", as well as the functioning of the Forensic Institute, which had a "rather administrative than scientific" role (§148).

In the judgement Mouisel v. France, the Court ruled on the French procedure (established after the registration of the request) of suspension of the sentence on medical grounds. It noted the "new remedies before the judge responsible for the execution of sentences, enabling prisoners whose health has deteriorated significantly to apply to be released at short notice; those remedies are available in addition to the possibility of applying for a pardon on medical grounds, which the French President alone is empowered to grant" (Mouisel v. France, §44). The criterion of the jurisdictional character of the procedure (opposed to the mechanism of presidential pardon), and of the swiftness of the procedure are highlighted.

Subsequently, the decision of the authorities on the purely medical issues should be corroborated by an expertise, as in the case Xiros v. Greece. In this case, an expertise had been ordered by the court, which had subsequently deviated from it, probably because it was not happy with its content (the expertise concluded that the applicant's detention should be suspended). The Court considered that, *"if the national jurisdiction did not wish to endorse the conclusions [of the expertise], it would have been preferable that it request an additional medical expertise on this controversial subject, instead of ruling on its own on this fundamentally medical issue, which constituted the essential point in the delivery of care to the applicant"* (§87).

The expertise should also be irreproachable, both in terms of comprehensiveness and impartiality (Khudobin v. Russia, §96). This impartiality can be achieved by addressing varied medical experts, both in terms of the different fields represented as well as in light of their connections with the authorities or the applicant. In this respect the Court, in the case Aleksanyan v. Russia, had called for the establishment of a *"*bipartisan*"* medical commission in charge of ruling on the applicant. The Court had insisted, on the basis of Art. 39 (interim measures), on the fact that the latter should not be deprived of the possibility to benefit from the services of his/her attending physician.

Once an expertise has been delivered, it should be considered by the authorities. On this point, the case Contrada v. Italy (No 2) is enlightening: despite the submission to the competent jurisdiction of a dozen medical reports and certificates that "consistently and unequivocally found that Mr Contrada's state of health was incompatible with the prison regime to which he was subjected" (§82), the applicant obtained the right to benefit from house arrest only nine months after his first request, and after nine attempts (§§79-85; see also Makharadze and Sikharulidze v. Georgia, §86).

Lastly, the suspension of the sentence or release granted *on medical grounds* can be withdrawn only *for medical reasons*. It is only in the case of a "clear change in the medical ability on the part of the applicant to withstand such a measure " (Tekin Yıldız v. Turkey, §84; Gürbüz v. Turkey, §71), a change established by a new expertise, that the humanitarian measure of release can be ended for medical reasons. The ill person should then be able to benefit from an *appeal with suspensive effect* that allows him/her to challenge such unfavourable expertise underlying a decision to recommit him/her; this decision can therefore be enforced only after all remedies are exhausted (Tekin Yıldız v. Turkey, §95).

2.3 Obligation to conduct an in-depth inquiry

Taking into account the damage to physical and/or psychological integrity deriving from insufficient medical care in detention, an inquiry obligation, "flagship procedural requirement" (AKANDJI-KOMBE), can apply to the procedural limb under Art. 3. Without getting into the details of the characteristics required of the inquiry, which correspond to those

employed in the field of violence and offences against life[11], of in-depth and effective investigations leading to the identification and punishment of those responsible, and, if need be, on the initiative of the authorities themselves when they are informed on defensible ill-treatment.

The scope of this obligation does not coincide with that of the material requirements under Art. 3 on health-related matters. As a matter of fact, the Court considers that, when nothing indicates that the physicians have acted in bad faith, with the intention to ill-treat the applicant, the positive obligation to establish an effective judicial system does not require necessarily a criminal remedy. The positive procedural obligation can also be met if, for instance, the legal system implies *"a civil remedy, on its own or jointly with criminal remedies, with the aim to establish the responsibility of the doctors concerned and, if need be, to obtain the implementation of appropriate civil penalties, such as the payment of damages and the publication of the decision"* (Dvoracek v. Czech Republic, §111, 12927/13, 06/11/2014). The opposite applies in situations where only criminal procedures seem apt to allow the collection of evidence under the conditions required by the Convention. In the case Mitkus v. Latvia, related to the case of an infection possibly acquired in detention as a consequence of a failure in the organization and delivery of care, the Court holds that the authorities should have initiated criminal proceedings on the basis of the applicant's complaint (§§76 et s.)[12]. The Court holds on the one hand that the circumstance that the applicant was in prison severely limited his capacity to take the required procedural steps before civil courts, and on the other hand, as he could not be present during the hearing, the person concerned could not benefit from a contentious discussion on his case. The Court found a breach of Art. 3, that it doubles from the rest of the finding of a breach of Art. 6-1 (civilian limb) due to the applicant's absence from the appeal hearing. One can equally cite the case Hénaf v. France, in which the Court questions the fact that the authorities have not opened on their own legal proceedings on the basis of the applicant's allegations, who alleged to have been shackled to his hospital bed right before surgery. These allegations *"were sufficiently serious, both in respect of the alleged facts and the status of the persons implicated"*, in order to justify such an inquiry (§36).

2.4 Safeguards in the field of forced treatment

As previously mentioned, one of the prerequisites for the delivery of care or forced feeding not to be considered substantially as a treatment contrary to Art. 3 is the existence of adequate procedural safeguards.

These safeguards consist in norms that outline accurately enough cases in which constrained care is resorted to, as well as in the adoption of motivated decisions with regards to the proceedings in which the person concerned is involved (Rappaz v. Switzerland, §79).

[11] For more details on the subject, see the relevant chapters.

[12] The nature of this requirement is related to the content of national law. In this case, the Court has grounded its considerations on the fact that Latvian law organizes a "criminal proceedings prevail over civil proceedings ... in terms of the means available to establish the facts and gather evidence" (§76)

Conclusion: procedural obligations at the service of material rights

At the material level, the right to material conditions of detention that are in accordance with human dignity and the right to the protection of health have a common starting point, the Grand Chamber judgement Kudla v. Poland, which interprets in a constructive manner Art. 3 of the Convention. The procedural safeguards associated with one or the other of these rights has evolved in a similar fashion. Furthermore, very strong traffic between these two fields has led them to virtually merge the Convention-related requirements on the matter so as to form a common procedural code, whose fundamental principles are the following: independence of the reviewing bodies, modification of procedural rules with the aim to take account of the prisoner's situation of subjugation and allow his/her participation in the contentious discussion, swiftness of judicial protection, ability to stop the found breach.

As in the field of material conditions of detention, the safeguards aimed at guaranteeing the effectiveness of the material right. In this respect, the case-law does not seem to be characterized by a shift from the substantial to the procedural. On the contrary, the procedural limb has intensified and expanded the obligations of the State. As the force of the humanitarian logic is arguably more vivid as far as health is concerned than conditions of detention, the procedural requirements are here more advanced and clash more directly with the sovereign exercise of the right to punish. As a matter of fact, the Court requires the establishment of a series of remedies that guarantee the release from prison of persons who, because of their state of health, are deemed incapable of being in detention. Therefore, in the psychiatric field – but the finding can be made in the field of somatic treatment – *"the Court is now fully aware that the prison is always a prison and that, regardless of the facilities and infrastructure, it remains a place that is not appropriate for the treatment of mental health problems."* (Tulkens & Dubois-Hamdi).

In this respect, the obligation to implement adequate procedures enabling the release of a prisoner who is severely ill or aged, which is the procedural obligation relative to the issue of prisoners' health, is eroding the traditional reticence of the Court to interfere with the orientations and criminal decisions of the national authorities[13]. One doctrinal current sees in this orientation a blatant attack to the principle of subsidiarity (BELDA, §198), in the sense that it would produce a shift in the assessment of compliance of the conditions of detention with the Convention toward the expediency of continuing the detention; now, *"it is […] primarily up to the State to balance the reasons for imprisoning a person, since the reasons for imprisoning a person are of some gravity"* (BELDA, idem).

One could object to the point of view that, by doing this, the Court, which is now better informed on the real conditions in which medical treatment is administered in prison and on the impact of the sentence on the ill person, only protects *"rights that are not theoretical and*

[13] In this respect, see Neshkov et al. v. Bulgaria: "It is not the Court's task to […] make specific recommendations on how the respondent State should organize its penal and penitentiary systems" (§274)

illusory, but concrete and effective", in accordance with its most traditional line of conduct[14]. Furthermore, the legal mechanisms of early release required at the national level aim exactly to ensure the subsidiarity of the Court's intervention.

Above all, despite a dynamic conducive to its expansion, the obligation to release severely ill persons is still apparently limited to the most extreme situations. In the majority of cases, the requirement of the Court focuses less on the decision to continue the detention than on its conditions, taking account of the prisoner's state of health. The danger is that such an approach would lead to a medicalization of detention, aimed at extending as much as possible the imprisonment of "borderline cases". Such a setup risks turning physicians into auxiliaries to the sentence. In this respect, it is worth reminding that the UN principles on medical ethics in prison, according to which *"[i]t is a contravention of medical ethics for health personnel, particularly physicians (...) [t]o certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments"*[15]. Yet the extension of the duration of the sentences observed in numerous States automatically exacerbates the problem of great dependence in detention[16]. Such a situation calls for a clear statement of the obligation to release gravely ill or severely dependent detainees on health grounds.

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[14] European Court of Human Rights, Airey v. the United Kingdom, 9 October 1979, § 24

[15] Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 37/194 of 18 December 1982

[16] See PACE, Recommendation 2082 (2015) and Resolution 2082 (2015) on the fate of critically ill detainees in Europe

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