

IN THE EUROPEAN COURT OF HUMAN RIGHTS
IN THE MATTER OF:

Case 90/1997/874/1086

Anton Assenov and others

-v-

Bulgaria

**WRITTEN COMMENTS OF THE EUROPEAN ROMA RIGHTS
CENTER**

INTRODUCTION

1. The European Roma Rights Center ("ERRC") respectfully submits written comments by permission of the President of the Chamber of the European Court of Human Rights (the "Court") pursuant to rule 37(2) of the Rules of Court "A".
2. This is the first case in this Court involving applicants from the Roma (Gypsy) ethnic group from Central or Eastern Europe. Accordingly, it invites consideration, not simply of the particular facts at issue, but of the broader context of discrimination and disadvantage which Roma face throughout Bulgaria and much of Europe. This matter offers an opportunity for the Court to make clear that the rights secured by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention" or "ECHR") extend to Europe's most vulnerable minorities.
3. The ERRC sought and was granted permission to undertake the following:
 - a) provide "factual information based on ERRC research and experience about the incidence of police ill-treatment of Romani individuals in Bulgaria and the extent to which the investigation and prosecution authorities provide remedies in such cases"; and
 - b) provide comments on "whether Article 3 of the European Convention on Human Rights, read in conjunction with States' general duty under Art. 1 to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention', should be understood to require an effective official investigation in circumstances where significant injuries have been caused to an individual at a time when he is in custody after apprehension by the police, particularly where the individual's vulnerability is heightened by age, association with a disadvantaged minority group, or other factors."

4. These written comments are divided into two parts and address the above issues in turn. As directed, they take the form of general information rather than pleadings concerning the particular issues in this case.

DISCUSSION

PART ONE

Factual information concerning the incidence of police ill-treatment of Roma in Bulgaria and the extent to which law enforcement authorities provide remedies in such cases

5. Relations between Roma and law enforcement authorities in Bulgaria must be viewed against the backdrop of enduring and widespread prejudice against Roma among large segments of the non-Roma population. Surveys conducted in 1992, 1994 and 1997 reveal overwhelming levels of anti-Roma bias on the part of ethnic Bulgarians.¹ Similar attitudes have been reflected among Bulgarian law enforcement authorities and in official government publications.²
6. In view of this broad-based hostility, it should not be surprising that, since 1992, international and domestic non-governmental organisations have documented a consistent pattern of unremedied police abuse of Roma, including numerous cases of racially-motivated beating, ill-treatment and shooting.³ In this time period, at

¹ For example, 90% of ethnic Bulgarians surveyed in 1992, 91% in 1994 and 89% in 1997 agreed with the proposition that "*Gypsies are inclined to commit crimes.*" Studies conducted throughout the 1992-97 period confirm that more than 80% of ethnic Bulgarians believe that "*Roma are lazy and irresponsible,*" and that "*Roma can not be trusted or relied upon.*" Eighty-nine percent would not marry Roma; 64% would not befriend Roma; and 59% would not wish to live in the same neighbourhood with Roma. (See Kanev, Krassimir, "Changing Attitudes Towards Ethnicity in Bulgaria and the Balkans 1992 - 1997" (unpublished, Sofia, 1997)).

² See, e.g., Ministry of Foreign Affairs, "Situation of Roma in Bulgaria" (Sofia, February 1997), p. 10 ("*every third perpetrator of housebreaking, every fourth perpetrator of rape, violence or coercion of children is Roma*"); *ibid.*, pp. 10-11 ("*the crimes perpetrated by persons of Gypsy origin are usually characterized by their brutality*"). During the 1205th meeting of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on 17 March 1997, which addressed the Fourteenth Periodic Report of Bulgaria, one CERD member criticised the assertion of the Bulgarian Ministry of Foreign Affairs that "*crime was 20 times higher among Gypsies than among Bulgarians*" (contained in "Situation of Roma in Bulgaria", *supra* note 2, p. 2). "[S]uch language," the member explained, "*runs the risk of encouraging the negative stereotypes towards the Romas.*" (CERD/C/SR.1205, 16 April 1997, paragraph 46).

³ A recent full-length study by the ERRC (portions of which are attached as Appendix B to these comments) found systematic abuses against Roma held in detention facilities of the police and the National Investigation Service. (See ERRC, "Profession Prisoner: Roma in Detention in Bulgaria" (December 1997). Ten copies of the report have been supplied to the registrar of the Court.).

least

14 Romani men have died in, or after having last been seen alive in, police custody, or as a result of the unlawful use of firearms by law enforcement.⁴ International governmental organisations have expressed concern about the disadvantaged position of Roma in Bulgarian society and the high incidence of racially-motivated abuse and discriminatory treatment of Roma by Bulgarian authorities. Particular note has been taken of the repeated acts of violence against Roma by law

Also in 1997, on the occasion of a series of cases of police abuse against Roma in the Montana region of Bulgaria, Amnesty International observed that these incidents *"are illustrative of a country-wide pattern of ill-treatment, which frequently appears to be motivated by the victim's ethnic background. Amnesty International is concerned that police impunity, which prevails as Bulgarian authorities consistently fail to investigate such incidents promptly and impartially, places at even greater risk of racist violence the most vulnerable ethnic community in Bulgaria."* (Amnesty International Concerns in Europe January - June 1997, AI Index: EUR 01/06/97).

In 1994, Amnesty International observed that *"Roma throughout Bulgaria have been subjected to beatings and other ill-treatment by law-enforcement officers. Amnesty International believes that in most instances such treatment is racially motivated and is concerned that the ill-treatment of Roma is one of the major human rights problems in Bulgaria. The Roma have also been subjected to acts of racial violence from which the authorities failed adequately to protect them. The Bulgarian Government's apparent lack of will adequately to investigate these human rights abuses is an indication of a discriminatory policy towards its citizens of Roma origin."* (Bulgaria: Turning a Blind Eye to Racism, September 1994, AI Index: EUR 15/04/94 p.1.) See also Amnesty International, "Bulgaria: Shootings, deaths in custody, torture and ill-treatment," June 1996, AI Index: EUR 15/07/96; Amnesty International, "Bulgaria: Torture and ill-treatment of Roma," May 1993, AI Index: EUR 15/03/93.

Additional information about police abuse of Roma since 1992 has been published by the following monitoring organisations: Human Rights Watch, the Human Rights Project, and the Bulgarian Helsinki Committee.

⁴ The fourteen Romani men are: Zakhari Aleksandrov Stefanov, 5 June, 1993, died in the police department in Kazanlak; Lyubcho Sofiev Terziev, 4 August 1994, died in the police department in Kazanlak; Slavcho Lyubenov Tsonchev, 24 September, 1994, died in the police department in Pleven; Khristo Nikolov, 15 November 1994, died in a hospital after being beaten in the police department in Nikopol; Khristo Gheorgiev Gheorgiev, 25 December 1994, shot dead by a police officer at his home in Varna; Iliya Dimitrov Gherghinov, 11 February 1995, found dead in handcuffs after last being seen in the custody of a police officer in the village of Gratets, Sliven region; Anghel Anghelov, 20 March 1995, shot dead by a police officer in Nova Zagora; Asen Ivanov, 12 April 1995, died in the hospital in Sandanski after having spent the night in police custody; Anghel Zabchikov, 29 January 1996, pronounced dead in a hospital where the police took him following detention in the police station in Razgrad; Kancho Nachkov Angelov and Kiril Rangelov Petkov, 19 July 1996, shot dead by a military police officer in the village of Lesura; Velko Vergiev, 26 September 1996, shot dead by a police officer in Kyustendil; Elin Karamanov, 2 February 1997, shot dead by a police officer in Plovdiv; Kolyo Todorov, 12 May 1997, shot dead by a police officer in Assenovgrad.

enforcement officials, and the inadequate remedies provided.⁵ Notwithstanding this pervasive abuse, the ERRC is aware of very few prosecutions of responsible police officers for violence against Roma, only two of them resulting in conviction, and of no case in which allegations that police violence against Roma were motivated by racial animus were investigated, let alone remedied.⁶

7. Appendix A lists 45 cases of police abuse resulting in death⁷ or serious physical injury to Roma, all of which are alleged to have occurred between 1992 and 1997. For each of these cases, ERRC possesses documentation showing that written complaints of the alleged abuses were filed with, and received by, the Bulgarian prosecution and/or police authorities. Appendix A provides a brief summary of each case, together with a list of documents in the possession of the ERRC -- including victim descriptions of their alleged ill-treatment, forensic reports describing the victims' injuries, and responses and decrees issued by the police and prosecution authorities concerning the complaints. It should be emphasised that Appendix A is a conservative list containing only some of the cases in which documentary proof currently exists to show that a written complaint alleging abuse was filed, and that at least one law enforcement agency received the complaint. ERRC is aware of other cases of alleged abuse in which victims have forwarded only oral complaints, or as to which information concerning the case has not been clearly established. However, such cases have not been included herein, in order to insure that only the most reliable information forms the basis of this written

⁵ In its Concluding Observations on the Fourteenth Periodic Report of Bulgaria, the United Nations Committee on the Elimination of Racial Discrimination expressed "[a]larm ... that the State party has not been sufficiently active in effectively countering incidents of racial violence against members of minority groups and that Bulgarian police and prosecutors seem to have failed to investigate acts of violence promptly and effectively. In addition, concern is expressed at the information from various sources indicating that the number of charges and convictions is low relative to the number of abuses reported." CERD/C/304/Add.29 (April 1997).

In his 25 January 1996 report to the UN Commission of Human Rights, the Special Rapporteur on extra-judicial, summary or arbitrary executions expressed concern "*about reports [in Bulgaria] indicating that persons belonging to the Roma minority are the main victims of police violence, in particular of violations of the rights to life. He calls upon the Government to take measures to prevent the occurrence of such violations, to investigate the allegations, and to provide victims with appropriate compensation.*" (E/CN.4/1996/4, 25 January 1996, para 82)

⁶ The Fourteenth Periodic Report of Bulgaria to the CERD, which reviewed the period 1990 - mid-1996, failed to mention a single criminal prosecution resulting in conviction in a case involving "manifestations of racial discrimination" under those provisions of the Penal Code which punish racially-motivated crimes. (See CERD/C/299/Add.7 (June 1996), para. 43, passim).

⁷ Cases of murder and death in suspicious circumstances have been included because many of them raise issues under both Articles 2 and 3 of the Convention. In addition, these cases further illustrate the inadequate response of Bulgarian law enforcement authorities to allegations of police abuse of Roma.

submission.

8. Bulgarian law enforcement's deliberate indifference to complaints of abuse by Roma is particularly pronounced in cases involving allegations of ill-treatment motivated by racial animus. Allegations of racial motivation were made in 18 of the cases listed in Appendix A, including 14 referred to the prosecution and 4 to the police. In only one of these cases (No.40) did the response of the authorities even address the allegations, acknowledging the existence of certain "negative attitudes towards the Roma" among the local Bulgarian population but denying that the police had displayed racial bias. In none of the remaining 17 cases do responses of the authorities mention -- let alone evidence any effort to investigate and remedy -- the suggestion that police ill-treatment was prompted by racial prejudice.
9. The cases described in Appendix A are divided into two categories: (i) cases in which a written complaint was filed at the prosecutor's office; and (ii) cases in which a written complaint was filed with the police. In the majority of these cases, Bulgarian authorities have failed to investigate at all complaints of police abuse of Roma.

A. The Response of the Prosecution Authorities to Written Allegations of Police Abuse against Roma

10. In twenty-nine (29) cases, Roma victims or third parties acting on their behalf filed⁸ a written complaint with the prosecution alleging police abuse.

- a. No Response

In nine cases, the prosecution did not respond as of 1 April 1998. In most of these cases, the failure to respond has already had the practical effect of denying prompt relief to the complainants. For example, as of 1 April 1998, in one of these cases (No. 1), more than four years had passed since the filing of the complaint; in one case (No. 2), more than two years had passed, in two cases (Nos. 3-4) more than one year had passed, in three cases (Nos. 5-7) more than nine months had passed, in one case (No. 8) more than six months had passed and in one case (No. 9) more than four months had passed.

- b. Refusal to Institute Investigation

In ten cases, the prosecution concluded that the allegations did not warrant the opening of an investigation.⁹ In six of these cases, the prosecutor characterised

⁸ Under Bulgarian law, a complaint requesting the institution of criminal investigation can be filed not only by the alleged victim of the violation, but also by any third person who may not be directly affected. (Art. 188 Bulgarian Code of Criminal Procedure).

⁹ Under Bulgarian law, upon receiving a complaint, the prosecution first must decide whether to open a criminal investigation. See Arts. 186-193 of the Code of Criminal Procedure. Once having opened an investigation, the prosecution then must decide whether criminal charges are to be brought. See Arts. 207 *et seq.* of the Code of Criminal Procedure.

the allegations of the complainant as "groundless" without offering any alternative explanation of the documentary evidence.

c. Failure to Consider Evidence

The majority of complaints referred to in paragraphs 10(a) and (b) have been supported by documentary and/or other corroborating evidence. In most of the cases, however, the prosecution failed to take into account, let alone rebut convincingly, this additional proof.

1) Medical Evidence

In all 19 cases in which complaints were not answered or resulted in prosecutorial refusals to open investigations, the victims submitted medical evidence -- including reports of forensic experts -- documenting the injuries sustained. This medical proof has, however, been largely ignored by the investigative authorities.¹⁰

2) Witnesses

Similarly, in 12 cases the complainant named one or more witnesses who (i) viewed the alleged mis-treatment first hand, or (ii) saw marks of beating and/or other signs of injury shortly after the alleged abuse. However, only one of the decrees declining to open an investigation (No. 17) suggested that the authorities had questioned a witness named by the complainant.

3) Complainants

Out of the 19 cases in which the prosecution failed to respond or refused to institute investigation, the ERRC is aware of only one complainant -- Kiril Yordanov (No. 10) -- who was interviewed by the authorities. None of the other nine written decisions in which the prosecution declined to commence an investigation evidences that the complainants were ever examined by law enforcement officers. In only one such case (No. 18) was this apparent lapse attributable to the complainant's own failure to report when summoned for questioning.

¹⁰ None of the prosecutorial decrees rejecting the institution of criminal investigation challenged the accuracy of the findings of the forensic experts. Only six decrees even made reference to the medical evidence. In one case (No. 19) the decree noted the absence in the medical report of any reference to signs of physical beating. However, the prosecutor who authored the decree apparently overlooked the fact that the complaint alleged, not physical beating, but psychological ill-treatment of 10-, 12-, and 13-year-old girls, resulting in emotional suffering and, in one case, epileptic shock.

d. Investigation Opened

In ten of the cases under review the prosecutor commenced criminal investigation. However, the effectiveness of the investigation in remedying abuse has been significantly impaired by delay.¹¹ As of 1 April 1998, two investigations (Nos. 24, 27) had lasted for more than four years; one investigation (No. 20) for more than three years; and another investigation (No. 21) for more than two years. The principal cause of delay in each of these cases has been the inactivity of the prosecution itself. Thus in the case of Khristo Khristov (No. 24), not a single investigative step was recorded in the prosecution file between July 1993 and April 1996. Similarly in the case of Slavcho Tsonchev (No. 20), no investigative measures were evident in all of 1995 or after June 1996.¹²

The results of the investigations follow:

1) Investigation Not Concluded

In three cases the investigation was still pending without resolution as of 1 April 1998.

2) Investigation Concluded with No Indictment

In five cases, the investigation has been suspended or closed¹³ with a decision not to bring criminal charges.¹⁴

3) Investigation Concluded - Trial and Conviction

¹¹ The effect of prolonged investigative delays in denying effective remedies to victims is exacerbated by Article 182(d) of the Code of Civil Procedure, which effectively prevents crime victims from obtaining civil remedies while a criminal investigation is pending. See *Assenov and others v. Bulgaria*, Application No. 24760/94, Report of the Commission of 10 July, 1997, para. 74.

¹² Indeed, promptness is not assured even once a decision has been reached not to bring charges. In the case of *Zakhari Stefanov* (No. 27), who died in police custody in Kazanlak on 5 June 1993, prosecutors decided to terminate the investigation in December 1995. However, they failed to notify the wife of the deceased and her lawyer for 11 months - until November 1996.

¹³ Bulgarian law distinguishes between a suspension -- when the investigation remains pending due to obstacles which temporarily impair its continuation (Arts. 22, 22a, 239 Code of Criminal Procedure) -- and the definitive termination of an investigation (Arts. 21, 237 Code of Criminal Procedure).

¹⁴ In four of the five cases the decision to close the investigation was appealed; each time, the non-indictment decision was confirmed at higher levels of the prosecution. Bulgarian law does not provide for judicial review of prosecutorial non-indictment decisions. See Art. 237(6), Bulgarian Code of Criminal Procedure.

In sum, out of a total of 45 documented cases of police abuse of Roma since 1992, only two have resulted in an indictment and been brought to trial. Both of them resulted in convictions, though one is scheduled for re-trial.¹⁵

B. The Response of the Police to Written Allegations of Police Abuse against Roma

11. Appendix A also documents twenty-three (23) cases of police abuse of Roma in which written complaints were filed with the police, including seven cases in which separate written complaints were filed with both the police and the prosecution.¹⁶

a. No Response

In three cases, the police did not respond. As of 1 April 1998, more than five months had passed since the filing of complaints in two cases (Nos. 30 and 31), and more than three months in a third case (No. 32).

b. Complaint Examined and Considered without Foundation

In 17 cases, the police concluded that the complaint was unfounded. However, only six written responses purport to justify their conclusions in any fashion. The other eleven offer mere summary assertions unsupported by any explanatory information or reasoning, let alone information about the nature of the investigation, the methods employed, or the number and the identity of police officers and witnesses who were questioned.

c. Referral to the Prosecution¹⁷

In three cases, the police concluded that the complaints merited further investigation, and referred them to the prosecution authorities.¹⁸

¹⁵ In one case (No. 28), two police officers charged with willful murder of a Romani man in detention were initially each convicted of manslaughter and sentenced to four and one half years in prison. On appeal, the Supreme Court quashed the lower court verdict and ordered a new trial on murder charges. The trial has yet to be held. In a second case (No. 29) two police officers were convicted of causing light bodily injuries and sentenced to a suspended term of eight months in prison and three years' probation.

¹⁶ The seven "overlapping" cases are listed in Appendix A, footnote 5.

¹⁷ In Bulgaria, the police do not have power to bring formal charges; rather, where merited, police may refer a case for criminal prosecution.

¹⁸ Only one of these three cases has yielded a criminal prosecution which proceeded to trial (No. 29, see footnote 16, supra).

PART TWO

Comments concerning States' obligations under Article 3 of the Convention

12. The European Roma Rights Center submits that Article 3 of the Convention, read in conjunction with States' general duty under Article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention," should be understood to require a prompt, impartial and effective investigation whenever an allegation of torture or inhuman or degrading treatment is made, or when reasonable grounds exist to believe that an act of torture or inhuman or degrading treatment or punishment has occurred. This obligation carries even greater force where an individual's vulnerability is heightened by age or association with a disadvantaged minority group.¹⁹
13. Particularly in much of Central and Eastern Europe, where official investigations of alleged police misconduct are not infrequently deficient (see Part One of these Comments, *supra*, and Appendices), the absence of an explicit requirement that States carry out an effective investigation where persons have suffered injuries in custody may have a particularly severe impact on Roma and other highly vulnerable victims of police misconduct. The experience of the European Roma Rights Center in monitoring human rights conditions for Roma in more than a dozen countries confirms the information contained in Part One: Alongside widespread discrimination, police abuse is the single most serious human rights problem for Roma today. Complaints of police mistreatment of Roma all too commonly encounter indifference, neglect and even hostility on the part of investigative authorities. Accordingly, the issues which arise under Article 3 in the instant case extend beyond police brutality to the question of whether the Convention can provide remedies for the injustices suffered by one of Europe's most despised minority groups.²⁰

¹⁹ In urging the foregoing, we draw upon the opinion of Mrs. J. Liddy, partially dissenting from the Report of the Commission in the instant case. Mrs. Liddy's opinion explained that the rationale underlying a procedural component to Article 2 of the Convention "is equally applicable to circumstances where significant injury has been caused to an individual at a time when he or she was in custody after apprehension by the police. This principle is particularly important where the individual is doubly vulnerable, by reason not only of age but of association with a disadvantaged and probably unpopular minority within the community." *Assenov and others v. Bulgaria*, Application No. 24760/94, Report of the Commission of 10 July, 1997, Partially Dissenting Opinion of Mrs. J. Liddy.

²⁰ In the first case involving a Roma applicant to come before the Court, Judge L.E. Pettiti framed the issue as follows: "Europe has a special responsibility towards gypsies. During the Second World War States concealed the genocide suffered by gypsies. After the Second World War this direct or indirect concealment continued (even with regard to compensation). Throughout Europe, and in member states of the Council of Europe, the gypsy minority have been subject to discrimination, and rejection and exclusion measures have been taken against them. There has been a refusal to recognize gypsy culture and the gypsy way of life. In

14. Portions of the Commission Report in this case addressing Article 3 evidence insufficient awareness of this recurring pattern of deficient redress for Roma complaints. The Commission found no Article 3 violation, explaining that the facts are "disputed" and that "it does not appear possible for the Commission to establish, more than four and a half years after the events, which version is more credible."²¹ It acknowledged that "the evidential difficulties in question are due exclusively to the fact that no independent and timely investigation of the applicants' complaints was effected by the domestic authorities."²² However, the Commission "consider[ed] it more appropriate to examine this issue under Article 13 of the Convention."²³
15. The central problem with the reasoning at paragraphs 94 and 95 of the Commission Report is that it creates a perverse incentive structure at odds with the underlying purposes of the Convention. Thus, in cases where police officers have engaged in torture or inhuman or degrading treatment or punishment, a State which undertakes an investigation (but which fails to provide an effective remedy sufficient to obviate the filing of an admissible application) risks making it "possible" -- as it was not in *Assenov* -- "for the Commission to establish" the facts and find a violation of Article 3. By contrast, a State which, as in *Assenov*, fails even to institute an investigation, but disputes the factual account of the complainant, may -- due to "evidential difficulties" -- avoid a finding that Article 3 has been breached, even where the lack of clear evidence is owing to its own negligence or deliberate indifference. Under certain circumstances, the reasoning employed in the Commission Report curiously "rewards" States who stonewall and "punishes" those who seek genuinely to ascertain the facts (though not to remedy discovered wrongs), thus frustrating the capacity of the Convention organs to exercise effective control and ensure compliance.²⁴
16. These comments address, in turn, the following matters: (i) the caselaw of the Convention organs providing a basis for interpreting Article 3 so as to include a procedural component; (ii) other relevant international law; and (iii) the particular significance of the victim's (a) age and (b) association with a minority group which has historically been the object of widespread prejudice.²⁵

eastern Europe the return to democracy has not helped them. Can the European Convention provide a remedy for this situation?" *Buckley v United Kingdom* (23/1995/529/615), Judgment of the European Court of Human Rights from 25 September, 1996, Dissenting Opinion of Judge Pettiti, p. 30. Although the instant case poses this question in a somewhat different form, it is no less pressing today than when *Buckley* was decided.

²¹ *Assenov*, Report of the Commission, para. 94.

²² *Assenov*, Report of the Commission, para. 95.

²³ *Ibid.*

²⁴ We say nothing about the actual intentions of States concerning their obligations under the Convention. Rather, these Comments are directed to the legal effect of the rationale underlying the Commission's Article 3 finding.

²⁵ We are aware that the Court has previously declined an invitation to consider under Article 3 claims alleging ineffective investigation of torture, and instead chosen to examine them under Articles 6 and 13. See *Aydin v. Turkey* (57/1996/676/866), Judgment of 25 September,

A. Caselaw of the Convention organs

17. It is now generally accepted that Article 2 of the Convention requires High Contracting Parties to investigate the circumstances of the use of lethal force by law enforcement officials. The Court first asserted this principle in *McCann and others v. United Kingdom*²⁶:

[A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.²⁷

18. This principle has been reaffirmed most recently in the case of *Kaya v. Turkey*, (158/1996/777/978), Judgment of 19 February, 1998, para. 86.²⁸ The judgment of the Court in *Kaya* -- which explained persuasively the difference between the "effective official investigation" required under Article 2, and the "effective remedy" called for under Article 13 -- has implications for Article 3 as well.

19. In *Kaya*, as in the instant case, the Court was "confronted with fundamentally divergent accounts of how the" death at issue occurred. (Ibid. para. 74). See *Assenov*, Commission Report, para. 94. Nonetheless, the Court in *Kaya* went on to examine the adequacy of the authorities' investigation under Article 2, and found it "seriously deficient" in several respects.²⁹ In addition, and notwithstanding its finding with respect to Article 2, the Court in *Kaya* also found the authorities in violation of Article 13 for having denied the deceased's next-of-kin an effective remedy. (Ibid., para. 108).

1997, paras. 76, 88. The situation in *Aydin*, however, was quite different from that presented herein. It is one thing for the Convention organs to refer to Article 13 all claims of procedural inadequacy, once they have (i) conducted their own fact-finding investigations on two occasions, *Aydin*, para. 39; and (ii) already found violation of Article 3 on two separate substantive grounds. *Aydin*, para. 86. It is quite another to do so where (i) there has been a finding that Article 3 was not violated on substantive grounds, and (ii) the no-violation finding was based principally on the State's own investigatory inadequacies.

²⁶ *McCann and Others v. United Kingdom*, 21 EHRR 97 (1995).

²⁷ *McCann*, para. 161.

²⁸ See also *Aytekin v. Turkey*, Application No. 22880/93, Report of the Commission from 18 September 1997, paras. 99-106 (finding investigation into death at issue "so inadequate" as to amount to violation of Article 2).

²⁹ *Kaya*, paras. 89, 90.

20. In contrast to the reasoning employed by the Commission in Assenov (see para. 95 of the Report of the Commission), the Court in Kaya found violation of both the procedural component of Article 2 and of Article 13. In doing so, it explained the differences between the two kinds of investigatory procedures envisioned under the Convention, and thus offered a clear rationale for articulating a procedural component to Article 2 independent of the effective remedy requirement of Article 13.
21. Thus, the procedural requirement of Article 2 is one component of the substantive right to life. This requirement exists to "secure[] the accountability of agents of the State...." Kaya, para. 87. By contrast, Article 13 "is central to the cooperative relationship between the Convention and national legal systems."³⁰ Together with Article 26, Article 13 serves as a regulatory mechanism to enhance "the primary responsibility of the States to secure the enjoyment of human rights."³¹
22. Similarly, Article 2 requires only "some form of effective official investigation" (Kaya, para. 86; McCann, para. 161), whereas Article 13 requires the State, "in addition to the payment of compensation where appropriate," to conduct "a thorough and effective investigation." (Kaya, para. 107; Aydin v. Turkey (57/1996/676/866), Judgment of 25 September 1997, para. 103; Aksoy v. Turkey (100/1995/606/694), Judgment of 18 December 1996, para. 98).
23. The objective of the investigation required by Article 2 is to establish "whether the force used was or was not justified in a particular set of circumstances." Kaya, para. 87. However, the investigation mandated under Article 13 is more far-reaching; it must be "capable of leading to the identification and punishment of those responsible." (Kaya, para. 107; Aydin, para. 103; Aksoy, para. 98).
24. Reflecting its broader purposes, the investigation under Article 13 must "includ[e] effective access for the relatives to the investigatory procedure." (Kaya, para. 107; Aydin, para. 103; Aksoy, para. 98). There is no similar requirement of access to the Article 2 investigation.
25. Finally, whereas an Article 2 investigation is required whenever "individuals have been killed as a result of the use of force by, *inter alios*, agents of the State," (Kaya, para. 86; McCann, para. 161); an investigation under Article 13 is required only when the applicant has "an arguable claim that the victim has been unlawfully killed by agents of the State...." (Kaya, para. 107 (emphasis added)).³²
26. In short, as this Court has explained, "the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an

³⁰ D.J. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights (1995), p. 443.

³¹ *Ibid.*

³² In the instant case, the Commission concluded "that the applicants, when they seized the national authorities, had an arguable claim under Article 3 of the Convention...." Assenov, Report of the Commission, para. 103.

effective investigation." (Kaya, para. 107). Article 2 may require an investigation in situations where Article 13 does not -- i.e., where individuals have been killed as a result of the use of force by agents of the State, but where there is no arguable claim that the killing was unlawful. However, once it is determined that an investigation under Article 13 is necessary, the scope and goals of that investigation will extend beyond those pertaining to an investigation for the purposes of Article 2.

27. We submit that the reasoning of this Court in Kaya applies with equal force to the investigative requirement of Article 3. Thus, as for Article 2, the proposed procedural requirement of Article 3 is one component of the substantive right not to be subjected to torture or to inhuman or degrading treatment or punishment. This requirement exists to vindicate the State's substantive obligations under Article 3, rather than to insure the provision of effective remedies. Second, because the proposed requirement emanates from the State's affirmative obligations under Article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention," Article 3 (like Article 2) may require investigations in situations where Article 13 does not -- for example, where reasonable grounds exist to believe that an act of torture (or of inhuman or degrading treatment or punishment) has occurred, even if no victim has come forward to seek a remedy. Finally, Article 3 requires, we suggest, a prompt, impartial and effective investigation, in order to determine whether torture (or inhuman or degrading treatment or punishment) has taken place. It need not extend, as Article 13 demands, to the payment of compensation.³³
28. Indeed, the Convention organs have on a number of occasions underlined the shared nature of Articles 2 and 3 of the Convention - the extent to which both protect different aspects of the right to physical security. It has been repeatedly noted that Article 3, like Article 2, ranks as one of the most fundamental provisions of the Convention, enshrines one of the basic values of democratic societies and admits of no derogation under Article 15. (See Andronicou and

³³ In highlighting the parallels between the existing procedural component of Article 2 and its proposed counterpart in Article 3, we do not overlook the differences in the text of each provision. Thus, whereas Article 2 lists certain exceptions to the general prohibition against the intentional taking of life, Article 3's ban on torture or inhuman or degrading treatment or punishment is unequivocal. Nonetheless, this textual distinction does not undermine the case for a procedural requirement in Article 3. The Court in McCann rested its articulation of the investigative requirement in that case on the very real concern that, "in practice," the prohibition against arbitrary killing would be "ineffective" without it. *Ibid.*, para. 161 (emphasis added). Article 3's prohibition against "torture or ... inhuman or degrading treatment or punishment" is often similarly ineffective, in practice, absent a procedure for reviewing the circumstances under which injuries have been caused to an individual in police custody. The Court's focus on the "effect" of Article 2 "in practice" should guide consideration of the proposed procedural component for Article 3. Despite the textual distinctions between Articles 2 and 3, investigation is required under both provisions to distinguish properly between those fact situations which give rise to a violation and those which do not.

Constantinou v. Cyprus, (86/1996/705/897), Judgement of 9 October 1997, para. 171; Aydin, para. 81; Aksoy, para. 62; McCann, para. 147).³⁴

29. The expansive interpretation which the Convention organs have given to Article 3 further supports express recognition of a procedural component. The Court has repeatedly observed that the Convention is a "living instrument" which should be interpreted according to evolving standards and present day conditions.³⁵ Article 3 is the Convention provision which perhaps more than any other has been given interpretive vitality through application of this principle so as to offer the broadest possible protection against various forms of torture and inhuman and degrading treatment and punishment. Thus, the Commission has held that racial discrimination may in certain conditions amount to inhuman and degrading treatment.³⁶ Under certain circumstances, extradition of an alien to a country which would put his life at risk may violate Article 3.³⁷ Where the risk of harm is real and the authorities are not able to obviate the risk by providing appropriate protection, Article 3 may also apply to acts by persons or groups of persons who are not public officials.³⁸ And expulsion of a person infected with HIV to a country incapable of providing the same quality of treatment as the country of origin, may violate Article 3.³⁹
30. Finally, the notion that Article 3 imposes on States positive obligations is by no means foreign to the jurisprudence of the Convention organs. In a series of cases addressing claims of mistreatment in police custody, the Court and Commission have held that, where the victim of alleged physical abuse is in custody at the relevant time, Article 3 requires the government to show that its agents were not responsible for the resulting injuries. (Aksoy, para. 61; Ribitsch, para. 34; Tomasi v. France, 15 EHRR 1 (1993), paras. 108-11).⁴⁰ It is hard to envision how a State

³⁴ This Court's recognition of the close relationship between Articles 2 and 3 was made manifest in the Kaya judgment which, though it concerned Article 2, relied on both Aydin and Aksoy -- two Article 3 cases -- to distinguish the procedural component of Article 2 from the effective remedy requirement of Article 13. Kaya, paragraph 107.

³⁵ See Tyrer v United Kingdom, 2 EHRR 1 (1978), para. 31; Soering v. United Kingdom, 11 EHRR 439 (1989), para. 102.

³⁶ East African Asians v. United Kingdom, Report of the Commission from 14 December, 1973, paras. 207-209.

³⁷ Soering, paras. 90-91. See also Ahmed v. Austria (71/1995/577/663), Judgment of 17 December 1996, para. 39 (expulsion may violate Article 3); Cruz Varas and others v. Sweden, 14 EHRR 1 (1991), paras. 69-70 (same); Vilvarajah and others v. United Kingdom, 14 EHRR 248 (1991), paras. 102-03 (same); Chahal v. United Kingdom (70/1995/576/662), Judgment of 15 November 1996, paras. 73-74, 80 (same).

³⁸ H.L.R.. v. France (11/1996/630/813), Judgment from 29 April 1997, para. 40.

³⁹ D. v. the United Kingdom (146/1996/767/964), Judgment from 2 May 1997, para. 53.

⁴⁰ In Assenov, the Commission sought to distinguish this line of authority by noting "that the first applicant's complaints concern ill-treatment which took place partly in public, at the bus

might comply with this obligation without conducting some form of effective official investigation.⁴¹

31. Indeed, in its admissibility decision in the instant case, the Commission affirmed that Article 3 imposes on States certain positive obligations. Thus, in explaining why the applicants were not required to have filed a civil action for damages in order to exhaust domestic remedies, the Commission properly observed that "...compensation could not be deemed to have rectified a violation in a situation where the State had not taken reasonable measures to comply with its obligations under Article 3."⁴² In this regard, "[t]he present case has to be distinguished from situations where the authorities, in the course of proceedings opened for this purpose, have carefully examined the allegations of ill-treatment."⁴³ The clear implication of the Commission's rationale is that "careful[] examin[ation of] the allegations of mistreatment" is one of the "reasonable measures" which a State must undertake in order "to comply with its obligations under Article 3."

B. Other International Law

32. Article 3 should be construed and applied so as to accord with evolving internationally accepted standards. The Convention organs have not hesitated to

station in Shoumen," so that the question is "whether the applicant has adduced materials which might call into question the findings of the domestic courts and add weight to his allegations before the Commission." Report of the Commission, para. 92. However, the Commission relied on *Klaas v. Germany*, 18 EHRR 305 (1993), a case in which the allegations of the victim received a full-blown hearing and were considered by no fewer than three domestic courts. *Ibid.*, paras. 14-19. In the instant case, there were no findings of domestic courts which the victim might call into question, precisely because the investigation and prosecution authorities failed to give the matter due consideration.

⁴¹ The Convention organs have held that rights protected by the Convention in other contexts may also give rise to positive obligations on the part of States, above and beyond the obligation to provide effective remedies under Article 13. See, e.g., *Costello-Roberts v. United Kingdom*, 19 EHRR 112 (1993), para. 26 ("the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction"); *A v. United Kingdom*, Report of the Commission, Application No. 25599/94 (18 September 1997), para. 45 (failure of domestic legal system to provide "practical and effective protection" to victim of corporal punishment violates Article 3); *Costello-Roberts v. United Kingdom*, Application No. 13143/87, Report of the Commission of 8 October 1991, para. 37 (Article 1 imposes on States an obligation to secure the rights guaranteed by Article 3). The Convention organs have also recognised positive obligations in relation to Article 8. See, e.g., *X and Y v. The Netherlands*, 8 EHRR 235 (1985), paras. 21 - 30; *Airey v. Ireland*, 2 EHRR 305 (1979), para. 32.

⁴² *Assenov and others v Bulgaria*, Application 24760/1994, Decision on Admissibility from 27 June 1996, p. 16

⁴³ *Assenov*, Decision on Admissibility, p. 16

look to other international legal instruments for guidance in construing the provisions of the Convention.⁴⁴

33. It is thus significant that a large body of international law and jurisprudence underlines States' duty -- as part of their overarching obligation to prohibit torture -- to conduct prompt, impartial and effective investigations where allegations arise or reasonable grounds exist to believe that torture has occurred. Article 12 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)⁴⁵ requires that a State party ensure "a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed" within its jurisdiction. Article 13 of the Convention against Torture obliges each State party to "ensure that any individual who alleges that he has been subjected to torture" within its jurisdiction "has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."⁴⁶ The Committee against Torture has reaffirmed these principles in its rulings on individual complaints.⁴⁷
34. Article 8 of the Inter-American Convention to Prevent and Punish Torture guarantees "any person making an accusation of having been subjected to torture within their jurisdiction ... the right to an impartial examination of his case. Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed," the "authorities will proceed properly and immediately to conduct an investigation into the case and ... initiate, whenever appropriate, the corresponding criminal process." (Emphasis added). Other international instruments are in accord.⁴⁸

⁴⁴ See, e.g., Aydin, paras. 48-51; Aksoy, para. 98; McCann, paras. 138-40; Soering, paras. 86, 88.

⁴⁵ A/RES/39/46, 10 December 1984.

⁴⁶ The duty to investigate complaints or reports of torture extends to cruel, inhuman or degrading treatment or punishment (not amounting to torture) by virtue of Article 16(1) of the Convention against Torture.

⁴⁷ See., e.g., Communication No. 6/1990, Parot v. Spain, Views of the Committee against Torture of 2 May 1995 (UN Document A/50/44), para. 10.4 (Article 13 "does not require the formal submission of a complaint of torture. It is sufficient for torture only to have been alleged by the victim for the State to be under an obligation promptly and impartially to examine the allegation"); Communication No. 8/1991, Halmi-Nedzibi v. Austria, Views of the Committee against Torture of 18 November 1993 (UN Document A/49/44), para. 13 (delay of 15 months before investigation of allegations of torture initiated, is "unreasonably long and not in compliance with the requirement of Article 12 of the Convention").

⁴⁸ See, e.g., United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 35(4) (complaints by prisoners, including pre-trial detainees, "shall be promptly dealt with and replied to without undue delay"); United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle No. 33 (every complaint by a person in detention "shall be promptly dealt with and replied to without undue delay"); Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (3 October 1991), Sec. 23(1) (requests or complaints of "torture or other cruel, inhuman or degrading treatment" by detainees "will be promptly dealt with and

35. International monitoring organs have already recognized a procedural component to rights analogous to those protected under Article 3 ECHR, notwithstanding the existence -- in other international instruments -- of effective remedy provisions analogous to Article 13 ECHR. In an authoritative interpretation, the United Nations Human Rights Committee (UNHRC) has construed Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁴⁹ broadly so as to impose on States a positive obligation to conduct prompt and impartial investigations in cases where there has been lodged a complaint alleging torture and/or ill-treatment:

Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal systems effectively guarantee the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.⁵⁰

36. As the General Recommendation makes clear, the procedural requirement of Article 7 ICCPR is closely connected with the effective remedies rule of Article 2(3) ICCPR. Nevertheless, it constitutes a separate and independent obligation of prompt and effective investigation alongside Article 7's general prohibition against torture.

replied to without undue delay"); Declaration adopted at the CSCE Budapest Summit, 6 December 1994, Part VIII, Art. 20 (committing participating States "to inquire into all alleged cases of torture and to prosecute offenders"). The international community has also required the authorities to conduct thorough, prompt and impartial investigations of extra-legal, arbitrary and summary executions and "disappearances," which often involve torture, and inhuman or degrading treatment. See UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (E/RES/1989/65), 24 May 1989, recommended by the UN Economic and Social Council (ECOSOC); and UN Declaration on the Protection of All Persons from Enforced Disappearance (A/RES/47/133), 18 December 1992, adopted by the UN General Assembly.

⁴⁹ Article 2(3) provides, in language closely tracking that of Article 13 ECHR: "Each State Party to the present Covenant undertakes ... [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...." And Article 7 ICCPR provides, employing text similar to that of Article 3 ECHR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment....."

⁵⁰ General Comment No. 20, paragraph 14 (emphasis added). See M. Nowak, U.N. Covenant on Civil and Political Rights - CCPR Commentary (1993), p. 136, para. 18 ("When read together with Art. 2 [ICCPR], there arises [under Art. 7 ICCPR] a duty on States Parties to ensure effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities, torturers must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation").

37. In the American context, the Inter-American Court of Human Rights made clear that Article 1(1) of the American Convention on Human Rights -- which, like Article 1 of the European Convention, obliges States "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" recognized in the Convention -- requires States affirmatively to investigate violations, notwithstanding the failure of victims to come forward in search of remedies:

184. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation....

187. The State is obliged to investigate every situation involving a violation of the rights protected by the Convention....

188. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.⁵¹

C. The relevance of age and association with a disadvantaged minority group

38. As noted above, the ERRC respectfully submits that Article 3 of the Convention, read together with Article 1, requires States to conduct a prompt, impartial and effective investigation in all cases where an allegation of torture or inhuman or degrading treatment is made, and in all cases where reasonable grounds exist to believe that an act of torture or inhuman or degrading treatment has occurred. However, we believe this obligation carries even greater legal force where, as in the instant case, the vulnerability of the victims is heightened by age or association with a disadvantaged minority group.

39. This Court has made clear that, in evaluating claims of violation of Article 3, it will take into account a range of factors which bear on the vulnerability of the victim, including sex, age, and state of health. (See, e.g., Ireland v. United Kingdom, 2 EHRR 25 (1979-80), para. 162 (assessment of whether ill-treatment attains minimum level of severity to fall within scope of Article 3 "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."); Aydin, para. 84; Tyrer, para. 30; Costello-Roberts, paras. 26-28). In the instant case, the Commission itself reaffirmed this principle. (See Report of the Commission, para. 90).

⁵¹ Godínez Cruz Case, Judgment of January 20, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 5 (1989). See also Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), pars. 166-167 (Article 1(1) of the Convention requires, *inter alia*, that States "prevent, investigate and punish any violation of the rights recognised by the Convention").

1. Association with a disadvantaged minority group

40. The rationale for taking account of the victim's sex, age and state of health in assessing whether Article 3 has been violated is clear: the level of ill-treatment required to be "degrading" depends, in part, on the vulnerability of the victim to physical or emotional suffering. The same reasoning supports the conclusion that association with a minority group historically subjected to discrimination and prejudice may, in certain cases, render a victim more vulnerable to ill-treatment for the purposes of Article 3, particularly where, as in Bulgaria, see Part One, supra, law enforcement bodies have consistently committed racially-motivated violence against Roma and refused to investigate allegations of abuse. The following considerations support express recognition of membership in a minority group historically subjected to discrimination and prejudice as one important factor to be taken into account by the Convention organs when reviewing Article 3 claims.
41. First, the Convention organs have recognised that government policy which is racially discriminatory may, under certain circumstances, so affront the dignity of persons affected as to constitute "degrading treatment" in violation of Article 3. In its report on the merits in the East African Asians Case, the Commission stated that, "as generally recognised, a special importance should be attached to discrimination based on race."⁵² Similarly, in its admissibility decision in the case of Arthur Hilton v United Kingdom⁵³ -- where the applicant, a black inmate, complained of various forms of ill-treatment -- the Commission found that "the applicant's allegations of assault, abuse, harassment, victimisation, racial discrimination and the like raise an issue under Article 3 of the Convention..."⁵⁴ Indeed, in the instant case, the Commission itself affirmed this principle by choosing to consider under Article 3 of the Convention the applicants' allegations "that three police officers had unnecessarily detained, beaten and insulted the first applicant ... on the basis of his gipsy origin." (Report of the Commission, paras. 84, 85 (emphasis added)).
42. Second, all else being equal, a given level of physical abuse is more likely to constitute "degrading or inhuman treatment or punishment" when motivated by racial animus and/or coupled with racial epithets, than when racial considerations are absent. Recognition of the extent to which racial hatred contributes to degradation and inhumanity -- particularly in custodial situations, where the use of racial language serves to emphasize the vulnerability of the detainee and/or to humiliate and debase -- suggests that heightened vigilance must be demanded of state investigatory agencies when racial bias is alleged. In short, prompt, impartial

⁵² East African Asians against United Kingdom, Report of the Commission from 14 December 1973, para. 207. The Commission further concluded that discrimination on the ground of race may under certain circumstances amount to degrading treatment within the meaning of Article 3. See paras. 208-209 of the Report.

⁵³ Application No. 5613/72, Decision of 5 March 1976.

⁵⁴ Hilton, Decision, p. 187.

and effective investigations of Article 3 violations are of particular importance when racial animus is alleged to underlie mistreatment.⁵⁵

43. Finally, allegations of racial motivation must surmount substantial evidentiary obstacles in order to succeed. Among other problems, the nature of racial bias and its mode of expression (often oral rather than written) means that material proof is often lacking. Given the debilitating effects of racial prejudice, its often subtle manifestations, and the vulnerable position of detainees generally, it is often extremely difficult for victims of racially-motivated abuse to corroborate their allegations of racial bias. Acknowledgement of these difficulties further suggests the wisdom of requiring States to investigate such allegations expeditiously.

2. Age

44. The Convention organs have in various contexts held that the Convention imposes on States certain positive obligations to ensure that adequate protection is afforded to children. As noted above, this Court has long maintained that the age of the victim is one of the factors to be considered in assessing whether alleged ill-treatment rises to the level prohibited under Article 3. Treatment of an adult which is merely objectionable may become "inhuman" or "degrading" when applied to minors.

45. Moreover, this Court has recognised that, in certain instances, the age of the victim may require the imposition of additional duties upon States to vindicate the rights protected under the Convention. Thus, in *X and Y v. The Netherlands*,⁵⁶ the Court found that the protection afforded by the civil law for a 16-year-old, mentally handicapped victim of sexual assault was "insufficient": "[e]ffective deterrence is indispensable in this area and it can be achieved only by criminal law provisions...." (Ibid, para. 27).

46. In *A v. United Kingdom*, Application No. 25599/94, Report of the Commission from 18 September 1997, the Commission observed that, although States are ordinarily afforded a "margin of appreciation" in deciding how to enforce Convention rights in relations between private parties, less latitude is permitted

⁵⁵ International law already recognises the special obligations States bear to investigate and sanction racially-motivated violence, threats of violence, and racial discrimination. Article 6 of the International Covenant on the Elimination of All Forms of Racial Discrimination requires that states "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions." See also Communication No. 4/1991, *L.K. v. The Netherlands*, Opinion of the Committee on the Elimination of Racial Discrimination, adopted 16 March 1993, para. 6.6 ("it is incumbent upon the State to investigate with due diligence and expedition" threats of racial violence); General Recommendation XV on Article 4 of the Convention, A/48/18 (1993) ("States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response").

⁵⁶ 8 EHRR 235 (1985).

when children are involved: "effective protection of vulnerable individuals such as children against treatment or punishment falling within Article 3 of the Convention requires the deterrent effect of the criminal law." (Ibid., para. 47). In holding unanimously that the State had failed "to provide practical and effective protection" of the right of a nine-year-old boy not to be subjected to corporal punishment, the Commission:

attaches importance to the international recognition of the need for the protection against all forms of physical ill-treatment of children, who by reason of their age and vulnerability are not capable of protecting themselves. The Commission has had particular regard to the UN Convention on the Rights of the Child, setting out as it does general standards as to the protection of children and children's rights. The Commission notes that by Article 19 of the UN Convention, States are enjoined to take all appropriate measures "to protect the child from all forms of physical or mental violence, injury or abuse".⁵⁷

47. See also Costello-Roberts, Report of the Commission, para. 37 (Articles 1, 3 and 8 of the Convention "impose[] a positive obligation on High Contracting Parties to ensure a legal system which provides adequate protection for children's physical and emotional integrity 'Contracting States do have an obligation under Article 1 of the Convention to secure that children within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention'" (quoting from admissibility decision)).⁵⁸

48. In short, the proposition that children who allegedly suffer Article 3 violations merit special scrutiny on the part of State investigative bodies, falls within the heart of the jurisprudence of the Convention organs. We submit that a prompt, impartial and effective investigation is one of the "appropriate measures" which Article 3 requires of States "to protect the child from all forms of physical or mental violence, injury or abuse."⁵⁹

⁵⁷ A v United Kingdom, paragraph 49. See also UN Convention on the Rights of the Child, Art. 37 ("States Parties shall ensure that: a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment") (emphasis added).

⁵⁸ This portion of the Report of the Commission in Costello-Roberts is cited with favor in A v. United Kingdom, para. 45.

⁵⁹ In this context we also note that in its Concluding Observations/Comments (CRC/C/15/Add.66) from 24 January, 1997 on the initial report of the Bulgarian government, the United Nations Committee on the Rights of the Child (CRC) made observations which are of relevance in assessing the facts of the present case, especially with reference to the above mentioned principles developed in the case-law of the Strasbourg organs. The CRC noted that it was "particularly concerned at the insufficient policies, measures and programs for the protection of the rights of the most vulnerable children, especially children living in poverty, children born out of wedlock, abandoned children, disabled children, children belonging to minority groups, especially Roma, and children who in order to survive, are living and/or working in the streets." CRC/C/Add.66, par. 11. With respect to the implementation of the general principle of non-discrimination, enshrined in Art. 2 of the Convention, the Committee expressed particular concern at the "insufficiency of measures to prevent and combat

discrimination practiced against Roma children, disabled children and children born out of wedlock." CRC/C/Add.66, par. 12.