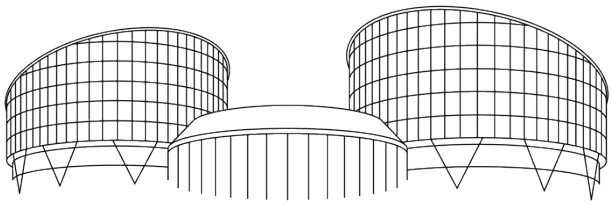

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GÄFGEN v. GERMANY

(Application no. 22978/05)

JUDGMENT

This version was rectified on 3 June 2010
under Rule 81 of the Rules of Court.

STRASBOURG

1 June 2010

In the case of Gäfgen v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Anatoly Kovler,
Ljiljana Mijović,
Renate Jaeger,
Sverre Erik Jebens,
Danutė Jočienė,
Ján Šikuta,
Ineta Ziemele,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power,
Nebojša Vučinić, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 18 March 2009 and on 24 March 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 22978/05) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Magnus Gäfgen ("the applicant"), on 15 June 2005. The applicant was granted legal aid.

2. The applicant alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of a boy, J., on 1 October 2002 constituted torture prohibited by Article 3 of the Convention. He claimed that he remained a victim of this violation. He further alleged that his right to a fair trial as guaranteed by Article 6 of the Convention, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence which had been obtained in violation of Article 3 had been admitted at his criminal trial.

3. The application was allocated to the Third Section and, subsequently, to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). By a

decision of 10 April 2007, it was declared partly admissible by a Chamber of the latter Section, composed of Peer Lorenzen, President, Snejana Botoucharova, Volodymyr Butkevych, Margarita Tsatsa-Nikolovska, Rait Maruste, Javier Borrego Borrego, Renate Jaeger, judges, and Claudia Westerdiek, Section Registrar.

4. On 30 June 2008 a Chamber of the Fifth Section, composed of Peer Lorenzen, President, Rait Maruste, Volodymyr Butkevych, Renate Jaeger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, Zdravka Kalaydjieva, judges, and Claudia Westerdiek, Section Registrar, delivered its judgment. The Chamber decided unanimously that it was not necessary to rule on the Government's preliminary objection of non-exhaustion of domestic remedies. It held, by six votes to one, that the applicant could no longer claim to be the victim of a violation of Article 3 of the Convention. It further held, by six votes to one, that there had been no violation of Article 6 of the Convention.

5. By submissions dated 19 September 2008, received at the Court's Registry on 26 September 2008, the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73, maintaining his claim that there had been a violation of both Article 3 and Article 6 of the Convention. On 1 December 2008 a panel of the Grand Chamber accepted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the German Government ("the Government") each filed a memorial on the merits and replied in writing to each other's memorials. In addition, third-party comments were received from Mr Friedrich von Metzler and Mrs Sylvia von Metzler, the parents of J., who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2) and who were represented by Mr E. Kempf and Ms H. Schilling, lawyers practising in Frankfurt am Main. Additional third-party submissions were received from the Redress Trust, a London-based international human rights non-governmental organisation, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 §§ 2 and 3) and which was represented by Ms C. Ferstman, Director, and Mr L. Oette, Adviser. The parties replied to those submissions (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 March 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms A. WITTLING-VOGEL, *Ministerialdirigentin*,
Federal Ministry of Justice, *Agent*,
Mr J.A. FROWEIN, Director (emeritus) of the
Max Planck Institute for Comparative Public Law
and International Law, *Counsel*,
Mr M. BORNMANN, Public Prosecutor,
Mr J. KOCH, District Court Judge, *Advisers*;

(b) *for the applicant*
Mr M. HEUCHEMER, lawyer, *Counsel*,
Mr D. SCHMITZ, lawyer,
Mr B. VON BECKER, lawyer,
Mr J. SCHULZ-TORNAU, lawyer, *Advisers*,
Mr S. STRÖHM,
Mr M. BOLSINGER, *Assistants*.

The Court heard addresses by Mr Heuchemer and Mr Frowein as well as their replies to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1975 and is currently detained in Schwalmstadt Prison, Germany.

A. The kidnapping of J. and the police investigation

10. J. was the youngest son of a banking family in Frankfurt am Main. He got to know the applicant, a law student, as an acquaintance of his sister.

11. On 27 September 2002 the applicant lured J., aged 11, into his flat in Frankfurt am Main by pretending that the child's sister had left a jacket there. He then killed the boy by suffocating him.

12. Subsequently, the applicant deposited a ransom note at J.'s parents' place of residence stating that J. had been kidnapped and demanding one million euros. The note further stated that if the kidnappers received the ransom and managed to leave the country, then the child's parents would see their son again. The applicant then drove to a pond located on a private

property near Birstein, approximately one hour's drive from Frankfurt, and hid J.'s corpse under a jetty.

13. On 30 September 2002 at around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was under police surveillance. He paid part of the ransom money into his bank accounts and hid the remainder of the money in his flat. That afternoon, he was arrested at Frankfurt am Main airport with the police pinning him face down on the ground.

14. After having been examined by a doctor at the airport's hospital on account of shock and skin lesions, the applicant was taken to the Frankfurt am Main police headquarters. He was informed by detective officer M. that he was suspected of having kidnapped J. and was instructed about his rights as a defendant, notably the right to remain silent and to consult a lawyer. He was then questioned by M. with a view to finding J. Meanwhile, the police, having searched the applicant's flat, found half of the ransom money and a note concerning the planning of the crime. The applicant intimated that the child was being held by another kidnapper. At 11.30 p.m. he was allowed to consult a lawyer, Z., for thirty minutes at his request. He subsequently indicated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake.

15. Early in the morning of 1 October 2002, before M. came to work, Mr Daschner ("D."), deputy chief of the Frankfurt police, ordered another officer, Mr Ennigkeit ("E."), to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. D.'s subordinate heads of department had previously and repeatedly opposed such a measure (see also paragraph 47 below). Detective officer E. thereupon threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him in a cell with two huge black men who would sexually abuse him. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. The Government disputed that the applicant had been threatened with sexual abuse or had been physically assaulted during the questioning.

16. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of J.'s body after approximately ten minutes.

17. The applicant was then driven with M. and numerous other police officers to Birstein. He had refused to go with detective officer E. The police waited for a video camera to be brought to the scene. Then, the applicant, on the communicated order of the police officer in command and while being filmed, pointed out the precise location of the body. The police found J.'s corpse under the jetty at the pond near Birstein as indicated by the applicant. The applicant claimed that he had been obliged to walk without

shoes through woods to where he had left the corpse and, on the orders of the police, he had had to point out its precise location. The Government disputed that the applicant had had to walk without shoes.

18. Upon forensic examination of the scene, the police discovered tyre tracks left by the applicant's car near the pond near Birstein. Under questioning by detective officer M. on the return journey from Birstein the applicant confessed to having kidnapped and killed J. He was then taken by the police to various other locations indicated by him where they secured J.'s school exercise books, a backpack, J.'s clothes and a typewriter used for the blackmail letter in containers. An autopsy carried out on J.'s corpse on 2 October 2002 confirmed that J. had died of suffocation.

19. Having returned to the police station, the applicant was then permitted to consult his lawyer, En., who had been instructed to act on his behalf by his mother and who had tried, in vain, to contact and advise the applicant earlier that morning.

20. In a note for the police file dated 1 October 2002, the deputy chief of the Frankfurt police, D., stated that he believed that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be threatened by detective officer E. with considerable pain which would not leave any trace of injury. He confirmed that the treatment itself was to be carried out under medical supervision. D. further admitted that he had ordered another police officer to obtain a "truth serum" to be administered to the applicant. According to the note, the threat to the applicant was exclusively aimed at saving the child's life rather than furthering the criminal proceedings concerning the kidnapping. As the applicant had disclosed the whereabouts of J.'s body, having been threatened with pain, no measures had in fact been carried out.

21. A medical certificate issued by a police doctor on 4 October 2002 confirmed that the applicant had a haematoma (7 cm x 5 cm) below his left collarbone, skin lesions and blood scabs on his left arm and his knees and swellings on his feet. A further medical certificate dated 7 October 2002 noted that, following an examination of the applicant on 2 October 2002, two haematomas on the left-hand side of the applicant's chest of a diameter of around 5 cm and 4 cm were confirmed, together with superficial skin lesions or blood scabs on his left arm, his knees and his right leg and closed blisters on his feet. According to the certificate, these discreet traces of injuries indicated that the injuries had been caused a few days before the examination. The precise cause of the injuries could not be diagnosed.

22. During subsequent questioning by the police on 4 October 2002, by a public prosecutor on 4, 14 and 17 October 2002, and by a district court judge on 30 January 2003 the applicant confirmed the confession he had made on 1 October 2002.

23. In January 2003 the Frankfurt am Main public prosecutor's office opened criminal investigation proceedings against the deputy chief of the Frankfurt police, D., and detective officer E. on the basis of the applicant's allegations that he had been threatened on 1 October 2002.

B. The criminal proceedings against the applicant

1. The proceedings in the Frankfurt am Main Regional Court

(a) The preliminary applications concerning the discontinuation of the proceedings and the inadmissibility of evidence

24. On 9 April 2003, the first day of the hearing, the applicant, represented by counsel, lodged a preliminary application for the proceedings to be discontinued. The basis of his claim was that during interrogation and prior to confessing he had been threatened by detective officer E. with being subjected to severe pain and sexual abuse. He argued that this treatment had been in breach of Article 136a of the Code of Criminal Procedure (see paragraph 61 below) and Article 3 of the Convention and warranted the discontinuation of the proceedings against him.

25. The applicant also lodged an alternative preliminary application seeking a declaration that, owing to the continuous effect (*Fortwirkung*) of the threat of violence against him on 1 October 2002, all statements which he had made to the investigation authorities should not be relied upon in the criminal proceedings. Moreover, the applicant sought a declaration that on account of the violation of Article 136a of the Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the confession extracted – the so-called "fruit of the poisonous tree" – was prohibited (*Fernwirkung*).

26. On 9 April 2003, in response to the first preliminary application, the Frankfurt am Main Regional Court dismissed the applicant's application for the discontinuation of the criminal proceedings. The court noted that in the applicant's submission, detective officer E. had threatened that a specialist was on his way to the police station by helicopter who, without leaving any traces, would inflict on him intolerable pain the likes of which he had never before experienced, if he continued to refuse to disclose J.'s whereabouts. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter. E. had further threatened that the applicant would be locked up in a cell with two big "Negroes" who would anally assault him. He would wish that he had never been born. The court found as a fact that the applicant had been threatened with the infliction of considerable pain if he refused to disclose the victim's whereabouts. However, the court did not find it established that the applicant had also been threatened with sexual

abuse or had been otherwise influenced. The threat to inflict pain upon the applicant had been illegal pursuant to Article 136a of the Code of Criminal Procedure, and also pursuant to Article 1 and Article 104 § 1 of the Basic Law (see paragraphs 59-60 below) and in violation of Article 3 of the Convention.

27. However, notwithstanding this breach of the applicant's constitutional rights, the court found that the criminal proceedings were not, in consequence, barred and could proceed. It found that the use of the investigation methods in question, though prohibited in law, had not so restricted the rights of the defence that the criminal proceedings could not be pursued. In view of the seriousness of the charges against the applicant on the one hand, and the severity of the unlawful conduct during investigation on the other, there had not been such an exceptional and intolerable violation of the rule of law as to bar the continuation of the criminal proceedings.

28. In response to the applicant's second preliminary application, the Frankfurt am Main Regional Court found that, in accordance with Article 136a § 3 of the Code of Criminal Procedure, all confessions and statements hitherto made by the applicant before the police, a public prosecutor and a district court judge were inadmissible as evidence in the criminal proceedings because they had been obtained through the use of prohibited methods of interrogation.

29. The court found that on 1 October 2002 detective officer E. had used prohibited methods of interrogation within the meaning of Article 136a § 1 of the Code of Criminal Procedure by threatening the applicant with intolerable pain if he did not disclose the child's whereabouts. Therefore, any statements which the applicant had made as a consequence of this forbidden investigative measure were inadmissible as evidence. This exclusion of evidence (*Beweisverwertungsverbot*) did not only comprise the statements made immediately after the unlawful threat. It covered all further statements which the applicant had made to the investigation authorities since that date in view of the continuous effect of the violation of Article 136a of the Code of Criminal Procedure.

30. The procedural irregularity caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that his earlier statements made as a consequence of the threat of pain could not be used as evidence against him. However, the applicant had only been instructed about his right not to testify, without having been informed about the inadmissibility of the evidence that had been improperly obtained. He had therefore not been given the necessary "qualified instruction" (*qualifizierte Belehrung*) before making further statements.

31. However, the court limited the inadmissible evidence to the above-mentioned statements. It went on to dismiss the applicant's application for a

declaration that, on account of the prohibited investigation methods, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities as a consequence of the statements extracted from the applicant ought to be excluded from trial (*Fernwirkung*). The court found as follows:

> "... there is no *long-range effect* of the breach of Article 136a of the Code of Criminal Procedure meaning that the items of evidence which have become known as a result of the statement may likewise not be used [as evidence]. The Chamber agrees in this respect with the conciliatory view (*Mittelmeinung*) taken by scholars and in court rulings ... according to which a balancing [of interests] in the particular circumstances of the case had to be carried out, taking into account, in particular, whether there had been a flagrant violation of the legal order, notably of provisions on fundamental rights, and according to which the seriousness of the offence investigated also had to be considered. Balancing the severity of the interference with the defendant's fundamental rights – in the present case the *threat* of physical violence – and the seriousness of the offence he was charged with and which had to be investigated – the *completed murder* of a child – makes the exclusion of evidence which has become known as a result of the defendant's statement – in particular the discovery of the dead child and the results of the autopsy – appear disproportionate."

(b) The Regional Court's judgment

32. Following the above ruling on the applicant's preliminary applications lodged on the opening day of the trial, the proceedings continued. The next day, in his statement on the charges, the applicant admitted having killed J., but stated that he had not initially intended to do so. His defence counsel submitted that by confessing, the applicant wanted to take responsibility for his offence notwithstanding the interrogation methods used on 1 October 2002. As the trial proceeded, all further items of evidence found as a consequence of the applicant's original statement and which the applicant sought to have excluded were adduced. At the close of the trial on 28 July 2003 the applicant admitted that he had also intended from the outset to kill the child. He described his second confession as "the only way to accept his deep guilt" and as the "greatest possible apology for the murder of the child".

33. On 28 July 2003 the Frankfurt am Main Regional Court convicted the applicant, *inter alia*, of murder and kidnapping with extortion causing the death of the victim. It sentenced him to life imprisonment and declared that his guilt was of particular gravity, warranting a maximum sentence (see paragraph 63 below).

34. The court found that at the hearing the applicant had been instructed anew about his right to remain silent and about the fact that none of his earlier statements could be used as evidence against him and had thereby been given the necessary qualified instruction. However, the applicant had, following the qualified instruction, confessed that he had kidnapped and killed J. His statements at the trial concerning the planning of his offence

formed the essential, if not the only, basis for the court's findings of fact. They were corroborated by the testimony of J.'s sister, the blackmail letter and the note concerning the planning of the crime found in the applicant's flat. The findings of fact concerning the execution of the crime were exclusively based on the applicant's confession at the trial. Further items of evidence showed that he had told the truth also in this respect. These included the findings of the autopsy as to the cause of the child's death, the tyre tracks left by the applicant's car near the pond where the child's corpse had been found, and the discovery of money from the ransom which had been found in his flat or paid into his accounts.

35. In assessing the gravity of the applicant's guilt, the court observed that he had killed his 11-year-old victim and demanded one million euros in ransom in order to preserve his self-created image of a rich and successful young lawyer. It did not share the views expressed by the public prosecutor's office and the private accessory prosecutors that the applicant's confession "was worth nothing" as the applicant had only confessed to what had in any event already been proven. The fact that the applicant had volunteered a full confession at the trial, even though all his earlier confessions could not be used as evidence pursuant to Article 136a § 3 of the Code of Criminal Procedure, was a mitigating factor. However, even without his confession, the applicant would have been found guilty of kidnapping with extortion causing the death of the victim. The applicant had been kept under police surveillance after he had collected the ransom, which had later been found in his flat or paid into his accounts. Furthermore, it had been proved by the autopsy on J.'s corpse that the boy had been suffocated, and tyre tracks left by the applicant's car had been detected at the place where J.'s body had been found.

36. The court further observed that in questioning the applicant, methods of interrogation prohibited under Article 136a of the Code of Criminal Procedure had been employed. Whether and to what extent detective officer E. and the deputy chief of the Frankfurt police, D., were guilty of an offence because of these threats had to be determined in the criminal investigations then pending against them. However, their allegedly illegal acts did not mitigate the applicant's own guilt. The misconduct of police officers, belonging to the executive power, could not prevent the judiciary from assessing findings of fact in accordance with the law.

2. The proceedings in the Federal Court of Justice

37. On the day following his conviction, the applicant lodged an appeal on points of law with the Federal Court of Justice. He complained that the Regional Court, in its decision of 9 April 2003, had refused his preliminary application to discontinue the criminal proceedings against him. It had further refused to declare that the use in the criminal proceedings of all other items of evidence, such as the child's corpse, which had become

known to the investigation authorities because of the statements unlawfully extracted was prohibited. The applicant included a full copy of these applications of 9 April 2003, including the grounds given for them. He further included a copy of the Regional Court's decision of 9 April 2003 dismissing his application for the proceedings to be discontinued and argued in respect of the police's threats of torture against him that, developing the case-law of the Federal Court of Justice, such conduct "leapt beyond" the exclusion of evidence and led to an impediment to the proceedings (*dass ein derartiges Verhalten das Verwertungsverbot "überspringt" und ein Verfahrenshindernis begründet*).

38. In his observations dated 9 March 2004 the Federal Public Prosecutor objected that the applicant's appeal on points of law was manifestly ill-founded. He argued that the use of prohibited methods of interrogation did not lead to an impediment to the criminal proceedings. Article 136a of the Code of Criminal Procedure expressly provided that the use of any of the prohibited methods enumerated entailed only the exclusion of evidence. The applicant had not complained of a breach of Article 136a § 3 of the Code of Criminal Procedure. In any event, there would be no grounds for such a complaint as the Regional Court had only used the applicant's confession at the trial, which he had made after having been informed that his previous statements had not been admitted as evidence.

39. On 21 May 2004 the Federal Court of Justice, without giving further reasons, dismissed the applicant's appeal on points of law as ill-founded.

3. The proceedings in the Federal Constitutional Court

40. On 23 June 2004 the applicant lodged a complaint with the Federal Constitutional Court. Summarising the facts underlying the case and the content of the impugned decisions, he complained under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law about the way in which he had been questioned by the police on the morning of 1 October 2002. He argued that he had been threatened with being subjected to torture and sexual abuse if he did not disclose the child's whereabouts. In the circumstances of the case, this treatment amounted to torture within the meaning of Article 3 of the Convention and infringed Article 104 § 1 of the Basic Law. It also violated his absolute right to human dignity under Article 1 of the Basic Law, which lay at the heart of the provisions in question. These unjustifiable human rights violations ought to have been a bar to the criminal proceedings for murder and a prohibition on using the evidence obtained as a consequence of the confession extracted from him by means of prohibited measures.

41. On 14 December 2004 the Federal Constitutional Court, sitting as a panel of three judges, held that the applicant's constitutional complaint was inadmissible.

42. Firstly, in so far as the applicant complained of the failure of the criminal courts to discontinue the proceedings against him, the court found that he had not sufficiently substantiated his complaint. It observed that the Regional Court had already stated that the police's threat to inflict pain on the applicant had violated Article 136a of the Code of Criminal Procedure and Article 3 of the Convention and that the applicant's rights under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law had been disregarded.

43. However, the violation of fundamental rights outside the trial did not necessarily warrant the conclusion that the judgment delivered by a criminal court, which was based on the findings made during the trial, breached constitutional law. In the present case, the criminal courts had found that the methods of investigation used by the police had been prohibited, but had differed from the applicant as to the legal consequences that flowed from that finding. They had taken the view that the statements obtained as a result of the measures in question could not be used but that there was no bar to the specific criminal proceedings being pursued.

44. According to the Federal Constitutional Court, the procedural flaw of having used prohibited investigation measures could be regarded as having been remedied by the criminal courts, because they had prohibited the admission of the statements obtained thereby. Such a prohibition was prescribed by Article 136a § 3 of the Code of Criminal Procedure in order to compensate for a prior infringement of the rights of the person concerned. However, the circumstances in which substantial procedural irregularities might entail a bar to criminal proceedings were not laid down in law. In these circumstances, the applicant had failed to explain why the contested methods of investigation had not only required a prohibition on using the statements obtained thereby as evidence, but should also lead to a bar to criminal proceedings against him.

45. Secondly, the Federal Constitutional Court found that, in so far as the applicant complained that the Regional Court had refused to exclude the use in the proceedings of all items of evidence obtained as a result of the confession extracted under duress, his constitutional complaint was likewise inadmissible. It held that the applicant had failed to raise this issue in the proceedings before the Federal Court of Justice.

46. The decision was served on the applicant's lawyer on 22 December 2004.

C. Subsequent events

1. The criminal proceedings against the police officers

47. On 20 December 2004 the Frankfurt am Main Regional Court delivered judgments against the deputy chief of the Frankfurt police, D., and

detective officer E. The court found that on the morning of 1 October 2002 D. had ordered that the applicant was to be questioned while being subjected to pain in the manner set out in his subsequent note for the police file (see paragraph 20 above). By doing so, he had acted against the advice of all his subordinate heads of department entrusted with the investigation into J.'s kidnapping. The heads of department had opposed this measure, which D. had previously ordered on the evening of 30 September 2002 and then twice on the morning of 1 October 2002. The heads of department had resisted the orders, proposing instead further questioning and confrontation of the applicant with J.'s family. D. had then issued an order to detective officer E. directing him to comply with his instructions that the applicant should be threatened with torture and, if necessary, subjected thereto. The subjection to pain was to be carried out under medical supervision, without any traces being left, by another specially trained police officer, who would be brought to the police station by helicopter. A police doctor had agreed to supervise the execution of D.'s order. The court noted that the measure had been aimed at finding out where the applicant had hidden J., whose life D. believed was at great risk. Therefore, E. had threatened the applicant in the manner ordered by D. and had also informed him that a "truth serum" would be administered. After approximately ten minutes, the applicant confessed that he had hidden J.'s body under a jetty at a pond near Birstein.

48. The Regional Court observed that the method of investigation had not been justified. It rejected the defence of "necessity" because the method in question violated human dignity, as codified in Article 1 of the Basic Law. Respect for human dignity also lay at the heart of Article 104 § 1, second sentence, of the Basic Law and Article 3 of the Convention. The protection of human dignity was absolute, allowing of no exceptions or any balancing of interests.

49. The Frankfurt am Main Regional Court convicted detective officer E. of coercion committed by an official in the course of his duties. However, in terms of penalty, it cautioned the defendant and imposed a suspended fine of 60 euros (EUR) per diem for 60 days, which the defendant would be required to pay if he committed another offence during the probation period. Furthermore, the court convicted the deputy chief of the Frankfurt police, D., of having incited E., a subordinate, to commit coercion in the course of his duties. It also cautioned D. and imposed on him a suspended fine of EUR 120 per diem for 90 days. The applicant had given evidence as a witness in these proceedings.

50. In determining the sentences, the Regional Court considered that there were significant mitigating factors to be taken into account. It took into consideration that the defendants' sole concern had been to save J.'s life and that they had been under extreme pressure because of their respective responsibilities *vis-à-vis* the superior authority and the public. They had been exhausted at the relevant time and had acted in a very tense

and hectic situation. They did not have any previous convictions. Moreover, D. had taken responsibility for his acts by admitting and explaining them in a note for the police file on the same day. The proceedings had lasted a long time and had attracted immense media attention. The defendants had suffered prejudice in their professional career: D. had been transferred to the Hessian Ministry of the Interior, and E. had been prohibited from acting in the prosecution of criminal offences. Furthermore, it was the first time that a conflict situation such as the one in the defendants' case had been assessed by a German criminal court. The court took into consideration as aggravating factors that D. had not acted spontaneously as he had already directed the use of force on the evening before he had given the order to E. Moreover, by their acts, the defendants had risked compromising the applicant's conviction for murder. The court further found that the preservation of the legal order did not warrant the enforcement of the fines imposed. Through the defendants' criminal conviction it had been made clear that an order by a State agent to use force to obtain information was illegal.

51. The judgment became final on 20 December 2004.

52. Subsequently, D. was appointed chief of the Police Headquarters for Technology, Logistics and Administration.

2. The official liability proceedings brought by the applicant

53. On 28 December 2005 the applicant applied to the Frankfurt am Main Regional Court for legal aid for bringing official liability proceedings against the *Land* of Hesse for the payment of compensation. He claimed that he had been traumatised and in need of psychological treatment because of the methods deployed during the police investigation.

54. In its submissions dated 27 March 2006 the Frankfurt am Main police headquarters contested that E.'s conduct when questioning the applicant in the morning of 1 October 2002 was to be legally classified as coercion and amounted to a breach of official duties.

55. On 28 August 2006 the Frankfurt am Main Regional Court dismissed the applicant's application for legal aid and the applicant appealed.

56. On 28 February 2007 the Frankfurt am Main Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it confirmed, in particular, that police officers D. and E., when threatening the applicant, had infringed human dignity, which was inviolable, and had thus breached their official duties. However, the applicant would face difficulties establishing causation between the threats of torture and alleged mental damage allegedly necessitating psychological treatment. The officers' threat was negligible compared to the traumatisation caused by the fact of having killed a child. Moreover, even assuming that the applicant would be able to prove that detective officer E.

had shaken him, causing him to hit his head against a wall, or had once hit him on the chest, allegedly causing a haematoma, such physical damage would be too minor to necessitate the payment of compensation. Furthermore, the violation of his human dignity by the threat of torture did not warrant the payment of compensation since the applicant had obtained sufficient satisfaction for this by the exclusion of his statements as evidence and the criminal conviction of the police officers.

57. On 19 January 2008 the Federal Constitutional Court, allowing a constitutional complaint by the applicant, quashed the Court of Appeal's decision and remitted the case to that court. It found that in refusing to grant the applicant legal aid, the Court of Appeal had violated the principle of equal access to court. In particular, that court had speculated that the applicant would not be able to prove that the threat to torture him had led to mental damage. In addition to that, it was not obvious that the physical injuries the applicant claimed to have suffered in the course of the interrogation, during which he had been handcuffed, could be considered to be of minor importance. Moreover, the question whether the violation of the applicant's human dignity necessitated the payment of damages despite the satisfaction he had already obtained was a difficult legal question on which no precedent existed in a judgment of a court of final instance. It should, therefore, not be determined in an application for legal-aid proceedings.

58. The remitted proceedings are still pending before the Frankfurt am Main Regional Court.

II. RELEVANT DOMESTIC, PUBLIC INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE

A. Provisions of domestic law

1. The Basic Law

59. Article 1 § 1 of the Basic Law, on the protection of human dignity, reads as follows:

> "Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authorities."

60. Article 104 § 1, second sentence, of the Basic Law, on the rights of persons in detention, provides:

> "Persons taken into custody may not be subjected to mental or to physical ill-treatment."

2. The Code of Criminal Procedure

61. Article 136a of the Code of Criminal Procedure, on prohibited methods of interrogation (*verbotene Vernehmungsmethoden*), provides:

> "1. The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.
>
> 2. Measures which impair the accused's memory or ability to understand and accept a given situation [*Einsichtsfähigkeit*] shall not be permitted.
>
> 3. The prohibition under sub-paragraphs 1 and 2 shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use."

3. The Criminal Code

62. According to Article 211 of the Criminal Code, the intentional killing of a person is to be classified as murder if certain aggravating elements are present such as cupidity, treachery or intent to cover up another offence. Murder is punishable by life imprisonment.

63. A declaration by the sentencing court that the defendant's guilt is of a particular gravity may, *inter alia*, have a bearing on a subsequent decision regarding suspension of the latter part of the defendant's prison sentence on probation. Article 57a of the Criminal Code states that the court is to suspend the remainder of a life sentence on probation if the convicted person has served fifteen years of his sentence, provided that this can be justified in the interests of public security and the particular gravity of the defendant's guilt does not warrant the continued execution of the sentence.

B. Provisions of public international law

64. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the United Nations Convention against Torture"), which was adopted by the United Nations General Assembly on 10 December 1984 (Resolution 39/46) and which came into force on 26 June 1987, provides:

Article 1

> "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or

for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

..."

Article 15

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Article 16

"1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

..."

C. Practice of the courts of other States and of other human rights monitoring bodies

1. The legal qualification of threats of torture

65. Several institutions which monitor observance of the prohibition of torture and of other inhuman or degrading treatment have addressed the question of the scope of that prohibition in the context of threats of subjecting a person to physical harm.

66. The Inter-American Court of Human Rights, in its judgment of 27 November 2003 (*Merits, Reparations and Costs*) in the case of *Maritza Urrutia v. Guatemala* (Series C No. 103), found:

"85. With regard to the treatment that the State officials afforded to Maritza Urrutia while she was unlawfully and arbitrarily detained, the court has considered proven that the alleged victim's head was covered by a hood, she was kept handcuffed to a bed, in a room with the light on and the radio at full volume, which prevented her from sleeping. In addition, she was subjected to very prolonged interrogations, during which she was shown photographs of individuals who showed signs of torture or had been killed in combat and she was threatened that she would be found by her family in the same way. The State agents also threatened to torture her physically or to kill her or members of her family if she did not collaborate. To this end, they showed her photographs of herself and her family and correspondence from her to her former

husband ... Lastly, Maritza Urrutia was obliged to film a video, which was subsequently broadcast by two Guatemalan television channels, in which she made a statement against her will, the contents of which she was forced to ratify at a press conference held after her release ...

92. An international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognised that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered 'psychological torture'. ...

...

98. In light of the foregoing, the court declares that the State violated Article 5 of the American Convention [on Human Rights], in relation to Article 1 § 1 thereof, and the obligations established in Articles 1 and 6 of the Inter-American Convention against Torture, to the detriment of Maritza Urrutia."

67. The United Nations Special Rapporteur for the Commission on Human Rights found in his report of 3 July 2001 to the General Assembly on the question of torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/56/156) as follows:

"As stated by the Human Rights Committee in its General Comment No. 20 (10 April 1992), on Article 7 of the International Covenant on Civil and Political Rights, the Special Rapporteur would like to remind governments that the prohibition of torture relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, such as intimidation and other forms of threats." (paragraph 3)

He pointed out that "the fear of physical torture may itself constitute mental torture" (paragraph 7). Furthermore, the Special Rapporteur was of the opinion that:

"... serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials." (paragraph 8)

68. The United Nations Human Rights Committee, in its Views adopted on 29 March 1983 in the case of *Estrella v. Uruguay* (Communication No. 74/1980), found as follows regarding the author of the communication, a concert pianist:

"The author was subjected to severe physical and psychological torture, including the threat that the author's hands would be cut off by an electric saw, in an effort to force him to admit subversive activities." (paragraph 8.3)

The Human Rights Committee held that the author had been subjected to torture in violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (paragraph 10).

2. The admission of evidence procured as a result of torture or other prohibited ill-treatment: the exclusionary rule

(a) The States Parties to the Convention

69. Materials before the Court show that there is no clear consensus in the States Parties to the Convention on the scope of the exclusionary rule.

(b) Other human rights monitoring bodies

70. The United Nations Human Rights Committee stated in its General Comment No. 7 on torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR) of 30 May 1982:

> "1. ... it follows from Article 7, read together with Article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are ... provisions making confessions or other evidence obtained through torture or other treatment contrary to Article 7 inadmissible in court; ..."

71. General Comment No. 7 was replaced by General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment of 10 March 1992. In the latter, it is stated:

> "12. It is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

72. The United Nations Committee against Torture, which monitors the implementation of the United Nations Convention against Torture, stated in its Concluding Observations on Germany of 11 May 1998 (UN Doc. A/53/44) as follows:

> "The Committee recommends that further legislative attention be paid to the strict enforcement of Article 15 of the Convention and that all evidence obtained directly or indirectly by torture be strictly prevented from reaching the cognisance of the deciding judges in all judicial proceedings." (paragraph 193)

(c) Case-law of the courts of other States

73. The prohibition on using, in any manner prejudicial to the accused, information derived from facts learned as a result of the unlawful acts of State agents (the so-called doctrine of the "fruit of the poisonous tree") is firmly rooted in the legal tradition of the United States of America (see, for instance, US Supreme Court, no. 82-1651, *Nix v. Williams*, decision of 11 June 1984, 467 US 431 (1984), pp. 441 et seq.; US Supreme Court, no. 82-5298, *Segura v. United States*, decision of 5 July 1984, 468 US 796 (1984), pp. 796-97 and 815; and US Supreme Court, no. 07-513, *Herring v.*

United States, decision of 14 January 2009, 555 US ... (2009), part II. A., with further references). The prohibition applies to information obtained from coerced confessions (see, on the issue of coercion, US Supreme Court, no. 50, *Blackburn v. Alabama*, decision of 11 January 1960, 361 US 199 (1960), pp. 205-07, and US Supreme Court, no. 8, *Townsend v. Sain*, decision of 18 March 1963, 372 US 293 (1963), pp. 293 and 307-09), meaning that if the confession leads to additional evidence, such evidence is also inadmissible in court in addition to the confession itself (compare *Nix*, cited above, p. 441, and *Segura*, cited above, p. 804). The evidence is to be excluded, however, only if the illegality is the proximate cause of the discovery of the evidence. In other words, evidence will be excluded if it can be shown that "but for" the illegal conduct it would not have been found. The exclusionary rule does not apply where the connection between the illegal police conduct and the discovery of the evidence is so remote as to dissipate the taint. This is the case, for example, where the police relied on an independent source to find the evidence (see *Nix*, cited above, pp. 441-44, and *Segura*, cited above, pp. 796-97, 804-05 and 815, with further references) or where the evidence would ultimately or inevitably have been discovered even had no violation of any constitutional provision taken place (see *Nix*, cited above, pp. 441-44).

74. The exclusionary rule is also applied in other jurisdictions. The Supreme Court of Appeal of South Africa found in its recent judgment of 10 April 2008 in the case of *Mthembu v. The State*, case no. 379/2007, [2008] ZASCA 51 as follows:

> "Summary: The evidence of an accomplice extracted through torture (including real evidence derived from it) is inadmissible ...
>
> ...
>
> 33. ... The Hilux and the metal box were real evidence critical to the State's case against the appellant on the robbery counts. Ordinarily, as I have mentioned, such evidence would not be excluded because it exists independently of any constitutional violation. But these discoveries were made as [a] result of the police having tortured Ramseroop. There is no suggestion that the discoveries would have been made in any event. If they had the outcome of this case might have been different.
>
> 34. Ramseroop made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux and metal box was extracted through torture. ... therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.
>
> ...

36. To admit Ramseroop's testimony regarding the Hilux and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.

37. For all these reasons I consider Ramseroop's evidence relating to the Hilux and metal box to be inadmissible. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

75. The applicant complained that he had been subjected to torture contrary to Article 3 of the Convention in the context of his police interrogation on 1 October 2002. He argued that he was still a victim of that breach of Article 3, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

76. The Government contested that view, arguing that the applicant could no longer claim to be the victim of a violation of Article 3.

A. The applicant's victim status

77. Article 34 of the Convention provides, where relevant:

"The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."

78. The Court considers that in the present case it cannot answer the question whether the applicant subsequently lost his initial status as the victim of a breach of Article 3 of the Convention within the meaning of Article 34 of the Convention without having first established how the applicant was treated in the context of his questioning, and without having assessed the severity of that treatment in the light of Article 3. Thereafter, the adequacy or otherwise of the authorities' response thereto can be considered.

1. Whether the impugned treatment was contrary to Article 3

(a) The Chamber judgment

79. The Chamber considered that the applicant had been threatened by detective officer E. on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence causing considerable pain in order to make him disclose J.'s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond reasonable doubt. Having regard to all the circumstances of the case, the Chamber characterised this threat of violence as inhuman treatment prohibited by Article 3.

(b) The parties' submissions

(i) The applicant

80. The applicant claimed that during his interrogation by detective officer E. on 1 October 2002, he had been subjected to treatment prohibited by Article 3. Detective officer E. had threatened that "intolerable pain the likes of which he had never before experienced" would be inflicted on him if he did not disclose J.'s whereabouts. He had threatened that this pain would be inflicted without leaving any traces and that an officer, specially trained in such techniques, was en route to the police station in a helicopter. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter and had described the pain of the torture in graphic detail. The applicant alleged that concrete measures had in fact been taken at that time in that a police doctor had subsequently confirmed that she had been prepared to be present during the torture so as to prevent the applicant from losing consciousness or the procedure from leaving any traces.

81. The applicant further alleged that he had been threatened with sexual abuse in that he would be locked up in a cell with two large "Negroes" who would anally assault him. Physical injuries had also been inflicted on him during the interrogation. E. had hit him several times on the chest, causing bruising, and on one occasion had pushed him, causing his head to hit the wall. He produced two medical certificates of 4 and 7 October 2002 issued by police doctors to support this claim (see paragraph 21 above). He claimed that, afterwards, he had been taken to Birstein against his will and had been obliged to walk without shoes through woods to where he had left the corpse and, at the command of the police, he had had to point out its precise location. He had also been forced to disclose other evidence on the return journey from Birstein. He claimed that he had been threatened by the police at a time when they had already been aware that J. was dead and had therefore been forced to incriminate himself solely in order to further the criminal investigations against him.

82. Referring, in particular, to Articles 1 and 15 of the United Nations Convention against Torture (see paragraph 64 above), the applicant argued that the treatment to which he had been subjected in order to force him to confess should be characterised as torture.

(ii) The Government

83. As in their submissions before the Chamber, the Government recognised that, regrettably, Article 3 had been violated during the applicant's questioning on 1 October 2002. They stressed, however, that the applicant had only been threatened with severe pain if he did not inform the police about J.'s whereabouts. They contested that there had been additional threats of sexual assault upon the applicant. They further contested that the injuries the applicant had suffered had been caused during the interrogation in question and that he had been forced to walk without shoes at Birstein. He had suffered skin lesions when he was arrested at Frankfurt am Main airport. They underlined that until now, the applicant had claimed that E. had hit him only once on the chest and that his head had only once hit the wall. The domestic courts had not found the additional threats or injuries to have been established.

84. The Government further pointed out that police officers D. and E. had resorted to the method of interrogation in question in order to save the life of J., which they had considered to be at great risk. They had not known that J. had already been killed at that time.

(iii) The third-party interveners

(α) J.'s parents

85. J.'s parents endorsed the Government's submissions. They pointed out that the applicant's various injuries, including the injury below his collarbone, were now for the first time alleged to have been inflicted during the interrogation on 1 October 2002. However, the applicant had previously admitted that he had already sustained those injuries during his arrest on 30 September 2002. This admission was contained in a book he had published in 2005 (*Allein mit Gott – der Weg zurück* ("Alone With God – The Way Back"), pp. 57-61), dealing, *inter alia*, with the criminal investigations and the trial against him. In a chapter entitled "The arrest", the applicant reproduced a copy of the medical certificate issued by a police doctor on 4 October 2002 (see paragraph 21 above) in order to show which injuries had been inflicted on him during his arrest on 30 September 2002. That same certificate was now being used by him in order to support his claim that the injuries were sustained during his interrogation. His injuries were not, therefore, connected with his interrogation on 1 October 2002.

(β) The Redress Trust

86. Referring, in particular, to the Convention institutions' findings in *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the *Greek* case") (nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, p. 461) and in *Akkoç v. Turkey* (nos. 22947/93 and 22948/93, §§ 25 and 116-17, ECHR 2000-X), the Redress Trust stressed that for a particular act to constitute torture it was not necessary for physical injury to be caused. Mental harm in and of itself was a prevalent form of torture. Moreover, the Court had confirmed that a mere threat of conduct prohibited by Article 3 could itself give rise to a violation of that Article (the third party cited *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 26, Series A no. 48). Various international bodies, including, *inter alia*, the Inter-American Court of Human Rights (see paragraph 66 above), the United Nations Special Rapporteur for the Commission on Human Rights (see paragraph 67 above) and the United Nations Human Rights Committee (see paragraph 68 above), had likewise found that a threat of serious physical injury could, depending on the circumstances and the impact on the particular individual, constitute torture or another form of ill-treatment. In any event, making a distinction between torture and other ill-treatment was unnecessary in relation to Article 3 of the Convention since, unlike the United Nations Convention against Torture in Articles 1, 15 and 16 (see paragraph 64 above), the relevant Convention Article did not attach any different legal consequences to torture compared to other forms of prohibited ill-treatment. Referring, *inter alia*, to the case of *Labita v. Italy* ([GC], no. 26772/95, § 119, ECHR 2000-IV), the Redress Trust underlined that the prohibition on torture and other cruel, inhuman and degrading treatment was absolute and afforded no exceptions, justifications or limitations, irrespective of the circumstances of the case or the conduct of the victim.

(c) The Court's assessment

(i) Recapitulation of the relevant principles

87. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Labita*, cited above, § 119). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person

concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V, and *Labita*, cited above, § 119). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX; and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008).

88. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum 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 (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia*, *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; and *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004), as well as its context, such as an atmosphere of heightened tension and emotions (compare, for instance, *Selmouni*, cited above, § 104, and *Egmez*, loc. cit.).

89. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120, and *Ramirez Sanchez*, cited above, § 118). Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (see, *inter alia*, *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III, and *Jalloh*, cited above, § 68).

90. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, cited above, § 167; *Aksoy*, cited above, § 63; and *Selmouni*, cited above, § 96). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see *Akkoç*, cited above, § 115).

91. The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment (compare *Campbell and Cosans*, cited above, § 26).

92. In assessing the evidence on which to base the decision as to whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Jalloh*, cited above, § 67, and *Ramirez Sanchez*, cited above, § 117). The Court has held, in particular, that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (compare *Tomasi v. France*, 27 August 1992, § 110, Series A no. 241-A; *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336; *Aksoy*, cited above, § 61; and *Selmouni*, cited above, § 87).

93. Where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny (see *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006, and *Vladimir Romanov v. Russia*, no. 41461/02, § 59, 24 July 2008). Where domestic proceedings have taken place, however, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269, and *Jasar v. "the former Yugoslav Republic of Macedonia"*, no. 69908/01, § 49, 15 February 2007). Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts.

(ii) Application of these principles to the present case

(α) The Court's assessment of the facts

94. In assessing the treatment to which the applicant was subjected on 1 October 2002, the Court notes that it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., with intolerable pain if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. This was, indeed, established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant (see paragraph 26 above) and in the criminal proceedings against

the police officers (see paragraph 47 above). Furthermore, it is clear both from D.'s note for the police file (see paragraph 20 above) and from the Regional Court's finding in the criminal proceedings against D. (see paragraph 47 above) that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent.

95. As D. had ordered his subordinate heads of department on several occasions to use force against the applicant, if necessary, before finally ordering E. to threaten the applicant with torture (see paragraph 47 above), his order cannot be regarded as a spontaneous act and a clear element of intention was present. It further appears that the applicant, while detained, was handcuffed in the interrogation room (see paragraph 57 above) and was therefore in a situation of particular vulnerability and constraint. The Court, having regard to the findings of the domestic courts and to the material before it, is persuaded that the police officers resorted to the method of interrogation in question in the belief that J.'s life might be saved.

96. The Court further observes that the applicant alleged that he had also been physically assaulted and injured and threatened with sexual abuse during interrogation. In assessing whether these allegations, which were contested by the Government, have been proven beyond reasonable doubt, the Court finds that in view of the medical certificates furnished by the applicant, his assertion of assault during his interrogation is not wholly without foundation. These certificates indicate that the applicant had indeed sustained bruising to his chest in the days prior to the medical examinations.

97. However, the Court also notes the Government's explanation as to the cause of the applicant's injuries, together with the submissions of J.'s parents on this point. They argued, by reference to the applicant's own statements in his book published in 2005, that all of the injuries, including lesions to his skin, which the applicant had incontestably sustained had been caused during his arrest when he was pinned, face down, on the ground (see paragraphs 13 and 14 above). The Court further notes that the domestic courts did not find any of the applicant's additional allegations to have been established. It would appear that before the domestic courts, which heard and evaluated the evidence, the applicant had not made the allegations of physical injuries having been sustained during interrogation, at least not to the same extent as the way in which he did before this Court (see, in particular, paragraph 26 above). Moreover, the medical certificates contain no indication as to the probable causation of injuries (see paragraph 21 above).

98. In view of the foregoing, the Court is unable to conclude that the applicant's complaints concerning physical assaults and injuries together with the alleged threat of sexual abuse during interrogation have been established beyond reasonable doubt.

99. The Court further observes that in the applicant's submission, he was again subjected to treatment prohibited by Article 3 in that he was obliged to walk without shoes through woods in Birstein and was directly forced to point out the precise location of the corpse and to disclose other items of evidence. These allegations are likewise contested by the Government. The Court notes that, according to the findings of the domestic authorities, the applicant, following his interrogation, had agreed to accompany the police officers to the pond where he had hidden J.'s corpse (see paragraph 17 above). There is nothing to indicate that the applicant was verbally threatened en route to Birstein by any of the police officers present in order to make him indicate the precise location of the corpse. However, the question as to whether and to what extent the disclosure of evidence by the applicant in Birstein was causally connected to the threats issued at the police station remains a question to be determined under Article 6. In view of the fact that the medical certificates contained a diagnosis of swellings and blisters on the applicant's feet (see paragraph 21 above), the Court finds that his allegation that he had been obliged to walk without shoes is not entirely without foundation. However, the domestic courts, having examined the evidence before them, did not consider this allegation – which the applicant does not appear to have mentioned from the outset in the domestic proceedings either – to have been proven (see, in particular, paragraph 26 above). The cause of the injuries was not established by the examining doctors. In these circumstances, the Court does not consider the applicant's allegations in this regard to have been proven beyond reasonable doubt.

100. In view of the foregoing, the Court considers it established that the applicant was threatened in the morning of 1 October 2002 by the police with being subjected to intolerable pain in the manner set out in paragraphs 94 to 95 above in order to make him disclose J.'s whereabouts.

(β) Legal qualification of the treatment

101. The Court notes the Government's acknowledgment that the treatment the applicant was subjected to by E. violated Article 3 of the Convention. However, having regard to the serious allegations of torture made by the applicant and the Government's claim of loss of victim status, the Court considers it necessary to make its own assessment of whether this treatment can be said to have attained the minimum level of severity to bring it within the scope of Article 3 and, if so, how it is to be classified. Having regard to the relevant factors indicated in the Court's case-law (see paragraphs 88-91 above), it will examine, in turn, the duration of the treatment to which the applicant was subjected, its physical or mental effects on him, whether it was intentional or otherwise, its purpose and the context in which it was inflicted.

102. In so far as the duration of the impugned conduct is concerned, the Court notes that the interrogation under threat of ill-treatment lasted for approximately ten minutes.

103. As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J.'s whereabouts, confessed under threat as to where he had hidden the body. Thereafter, he continued to elaborate in detail on J.'s death throughout the investigation proceedings. The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering. The applicant, however, did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result.

104. The Court further observes that the threat was not a spontaneous act but was premeditated and calculated in a deliberate and intentional manner.

105. As regards the purpose of the threats, the Court is satisfied that the applicant was intentionally subjected to such treatment in order to extract information on J.'s whereabouts.

106. The Court further notes that the threats of deliberate and imminent ill-treatment were made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability. It is clear that D. and E. acted in the performance of their duties as State agents and that they intended, if necessary, to carry out that threat under medical supervision and by a specially trained officer. Moreover, D.'s order to threaten the applicant was not a spontaneous decision, since he had given such an order on a number of earlier occasions and had become increasingly impatient at the non-compliance of his subordinates with his directions. The threat took place in an atmosphere of heightened tension and emotions in circumstances where the police officers were under intense pressure, believing that J.'s life was in considerable danger.

107. In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law (see paragraph 87 above), the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under

Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

108. Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law (see paragraph 91 above), which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture (see paragraphs 64 and 90 above), and according to the views taken by other international human rights monitoring bodies (see paragraphs 66-68 above), to which the Redress Trust likewise referred, a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.

2. Whether the applicant lost his victim status

(a) The Chamber judgment

109. The Chamber considered that the applicant could no longer claim to be the victim of a violation of Article 3. It found that the domestic courts had expressly acknowledged, both in the criminal proceedings against the applicant and in the criminal proceedings against police officers D. and E., that the applicant's treatment during his interrogation by E. had violated Article 3. Moreover, the applicant had been afforded sufficient redress for this breach at national level. The two police officers involved in threatening him had been convicted and punished and had suffered prejudice in their careers. In the circumstances of the present case, these convictions had to be considered sufficient in affording redress in a manner other than by way of monetary compensation. Furthermore, the use of the proscribed methods of investigation had resulted in sanctions in that none of the applicant's pre-trial statements had been admitted as evidence at his trial.

(b) The parties' submissions

(i) The applicant

110. The applicant argued that he had not lost his status as the victim of a breach of Article 3. The domestic courts had failed to acknowledge clearly a breach of his Convention right in a legally binding manner. They had merely mentioned Article 3 in their decisions dismissing the applicant's applications and complaints.

111. Furthermore, the applicant claimed that he had not received adequate redress for the breach of the prohibition of torture. He had not derived any personal benefit from the convictions of D. and E., who, in any event, had been sentenced to very modest, suspended fines and who had otherwise suffered no disciplinary consequences for their conduct. D. had even been promoted following his conviction. The official liability proceedings, in which the applicant had claimed compensation for the damage resulting from his treatment in breach of Article 3, were still pending before the civil courts and, to date, he had not received any compensation. Furthermore, he argued that the status quo ante could only have been restored by the exclusion, at trial, of all items of evidence which had been obtained as a direct result of the violation of Article 3. This evidence, the admissibility of which had been determined at the outset of his trial, had secured his conviction and, by implication, the imposition of the maximum applicable penalty. The exclusion only of the pre-trial statements he had made as a result of coercion was not sufficient redress as such statements were not necessary for the prosecution's case against him once the real evidence had been admitted.

(ii) The Government

112. The Government asked the Grand Chamber to confirm the Chamber's finding that the applicant had lost his status as the victim of a violation of Article 3. Three German courts – namely the Regional Court and the Federal Constitutional Court in the criminal proceedings against the applicant and the Regional Court in the criminal proceedings against the police officers – had expressly acknowledged the breach of Article 3. These courts had underlined that human dignity was inviolable and that torture was prohibited even if the life of a person were at stake.

113. In the Government's submission, the applicant had also been afforded sufficient redress. The two police officers involved had been convicted in criminal proceedings and sentenced. The Government stressed that for a police officer to be tried and convicted of coercion was a very serious matter. Moreover, both police officers had been removed from their posts. The Government admitted that the applicant had not yet received compensation, but argued that since he had brought official liability

proceedings before the domestic courts only after lodging his application with the Court, the fact that those proceedings were still pending could not be taken into consideration as far as the loss of his victim status was concerned. Moreover, the Frankfurt am Main Regional Court had excluded the admissibility not only of the confession of 1 October 2002, but also of all subsequent confessions made by the applicant before the police, the prosecution and a judge prior to his trial. However, the applicant, after having been instructed that his previous confessions could not be used in evidence, had nevertheless made a new full confession on the second day of his trial, before any other evidence had been introduced.

(iii) The third-party interveners (the Redress Trust)

114. In the Redress Trust's submission, international jurisprudence had recognised that adequate and sufficient remedies in cases of torture and other prohibited ill-treatment included, in particular, the following forms of reparation which could be relevant cumulatively in a particular case. Firstly, an investigation capable of leading to the identification and punishment of those responsible for any ill-treatment was required (it cited, *inter alia*, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII). Secondly, States were obliged to have an effective criminal justice system capable of effectively punishing those who perpetrated torture and other prohibited ill-treatment and of deterring the commission of future offences. The punishment for a violation of Article 3 should reflect the gravity of the offence and the State's obligation to punish the agents responsible had to be complied with seriously and not as a mere formality (by way of comparison, it cited *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 63, 20 December 2007). Thirdly, adequate and sufficient remedies for torture and other forms of ill-treatment included effective civil remedies; in particular, compensation for pecuniary and non-pecuniary damage. The Court itself had repeatedly found that a judgment *per se* was not sufficient to constitute just satisfaction in cases of serious violations, such as those of Article 3, and had made an award for non-pecuniary damage (it cited, for instance, *Selçuk and Asker v. Turkey*, 24 April 1998, §§ 117-18, *Reports* 1998-II). Fourthly, a restoration of rights addressing the continuing impact of the torture, such as the exclusion of involuntary confessions, was required. Fifthly, the State had to provide for measures guaranteeing the non-recurrence of the prohibited conduct.

(c) The Court's assessment

(i) Recapitulation of the relevant principles

115. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at

all stages of the proceedings under the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Siliadin*, cited above, § 62; and *Scordino (no. 1)*, cited above, § 180).

116. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (compare, for instance, *Scordino (no. 1)*, cited above, § 186). In cases of willful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see, *inter alia*, *Krastanov*, cited above, § 48; *Çamdereli v. Turkey*, no. 28433/02, §§ 28-29, 17 July 2008; and *Vladimir Romanov*, cited above, §§ 79 and 81). Secondly, an award of compensation to the applicant is required where appropriate (see *Vladimir Romanov*, cited above, § 79, and, *mutatis mutandis*, *Aksoy*, cited above, § 98, and *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 53, 2 November 2004 (both in the context of Article 13)) or, at least, the possibility of seeking and obtaining compensation for the damage which the applicant sustained as a result of the ill-treatment (compare, *mutatis mutandis*, *Nikolova and Velichkova*, cited above, § 56 (concerning a breach of Article 2); *Çamdereli*, cited above, § 29; and *Yeter v. Turkey*, no. 33750/03, § 58, 13 January 2009).

117. As regards the requirement of a thorough and effective investigation, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that 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 an effective official investigation. Such an investigation, as with one under Article 2, should be capable of leading to the identification and punishment of those responsible (see, *inter alia*, *Assenov and Others*, cited above, § 102; *Labita*, cited above, § 131; *Çamdereli*, cited above, §§ 36-37; and *Vladimir Romanov*, cited above, § 81). For an investigation to be effective in practice it is a prerequisite that the State has enacted

criminal-law provisions penalising practices that are contrary to Article 3 (compare, *mutatis mutandis*, *M.C. v. Bulgaria*, no. 39272/98, §§ 150, 153 and 166, ECHR 2003-XII; *Nikolova and Velichkova*, cited above, § 57; and *Çamdereli*, cited above, § 38).

118. With regard to the requirement for compensation to remedy a breach of Article 3 at national level, the Court has repeatedly found that, in addition to a thorough and effective investigation, it is necessary for the State to have made an award of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment (see, in detail, the references in paragraph 116 above). The Court has already had occasion to indicate in the context of other Convention Articles that an applicant's victim status may depend on the level of compensation awarded at domestic level, having regard to the facts about which he or she complains before the Court (see, for instance, *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001, and *Scordino (no. 1)*, cited above, § 202, in respect of a complaint under Article 6, or *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003, in respect of a complaint under Article 11). This finding applies, *mutatis mutandis*, to complaints concerning a breach of Article 3.

119. In cases of willful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of willful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, *Krastanov*, cited above, § 60; *Çamdereli*, cited above, § 29; and *Vladimir Romanov*, cited above, § 78).

(ii) Application of these principles to the present case

120. The Court thus has to examine, firstly, whether the national authorities have acknowledged, either expressly or in substance, the breach of the Convention. It notes in this connection that in the criminal proceedings against the applicant, the Frankfurt am Main Regional Court, in its decision dated 9 April 2003, expressly stated that the threat to cause the applicant pain in order to extract a statement from him had not only constituted a prohibited method of interrogation under Article 136a of the Code of Criminal Procedure; the threat had also disregarded Article 3 of the Convention, which underlay that provision of the Code (see paragraph 26 above). Likewise, the Federal Constitutional Court, referring to the Regional Court's finding of a violation of Article 3, observed that the

applicant's human dignity and the prohibition on subjecting prisoners to ill-treatment (Article 1 and Article 104 § 1, second sentence, of the Basic Law) had been disregarded (see paragraph 42 above). In addition to that, in its judgment of 20 December 2004 convicting police officers D. and E., the Frankfurt am Main Regional Court found that such methods of investigation could not be justified as an act of necessity because "necessity" was not a defence to a violation of the absolute protection of human dignity under Article 1 of the Basic Law, which also lay at the heart of Article 3 of the Convention (see paragraph 48 above). In view of this, the Grand Chamber, which agrees with the findings of the Chamber in this respect, is satisfied that the domestic courts which were called upon to rule on this issue acknowledged expressly and in an unequivocal manner that the applicant's interrogation had violated Article 3 of the Convention.

121. In assessing whether the national authorities further afforded the applicant appropriate and sufficient redress for the breach of Article 3, the Court must determine, in the first place, whether they carried out a thorough and effective investigation against those responsible in compliance with the requirements of its case-law. In doing so, the Court has previously taken into account several criteria. Firstly, important factors for an effective investigation, viewed as a gauge of the authorities' determination to identify and prosecute those responsible, are its promptness (compare, *inter alia*, *Selmouni*, cited above, §§ 78-79; *Nikolova and Velichkova*, cited above, § 59; and *Vladimir Romanov*, cited above, §§ 85 et seq.) and its expedition (compare *Mikheyev v. Russia*, no. 77617/01, § 109, 26 January 2006, and *Dedovskiy and Others v. Russia*, no. 7178/03, § 89, 15 May 2008). Furthermore, the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as disciplinary measures taken, have been considered decisive. It is vital in ensuring that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined (compare *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 62, 8 April 2008; *Çamdereli*, cited above, § 38; and *Nikolova and Velichkova*, cited above, §§ 60 et seq.).

122. The Court notes in the present case that criminal investigations against police officers D. and E. were opened some three to four months after the applicant's questioning on 1 October 2002 (see paragraph 23 above) and that the officers were convicted in a final judgment some two years and three months after that date. Even though the Court notes that the Frankfurt am Main Regional Court mitigated their sentence in view of, among many other factors, the long duration of the proceedings (see paragraph 50 above), it is prepared to accept that the investigation and the criminal proceedings were, nevertheless, sufficiently prompt and expeditious to meet the standards set by the Convention.

123. The Court further observes that the police officers were found guilty of coercion and incitement to coercion respectively, under the provisions of German criminal law, for their conduct in their interrogation of the applicant which was in contravention of Article 3. However, the Court notes that they were sentenced for this contravention only to very modest and suspended fines. The Court reiterates in this connection that it is not its task to rule on the degree of individual guilt (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 116, ECHR 2004-XII, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII), or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged (see *Nikolova and Velichkova*, cited above, § 61, with further references). It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill-treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the State's duty to carry out an effective investigation would lose much of its meaning (see *Nikolova and Velichkova*, cited above, § 62; compare also *Ali and Ayşe Duran*, cited above, § 66).

124. The Court does not overlook the fact that the Frankfurt am Main Regional Court, in determining D.'s and E.'s sentences, took into consideration a number of mitigating circumstances (see paragraph 50 above). It accepts that the present application is not comparable to other cases concerning arbitrary and serious acts of brutality by State agents which the latter then attempted to conceal, and in which the Court considered that the imposition of enforceable prison sentences would have been more appropriate (compare, for instance, *Nikolova and Velichkova*, cited above, § 63, and *Ali and Ayşe Duran*, cited above, §§ 67-72). Nevertheless, imposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120 respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.

125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of

criminal offences (see paragraph 50 above). D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief (see paragraph 52 above). In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted (see, for instance, *Abdülsamet Yaman*, cited above, § 55; *Nikolova and Velichkova*, cited above, § 63; and *Ali and Ayşe Duran*, cited above, § 64). Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.'s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty.

126. As to the additional requirement of compensation in order to remedy a breach of Article 3 at national level, the Court observes that the applicant availed himself of the possibility of seeking compensation for the damage sustained as a result of the violation of Article 3. However, his application for legal aid to bring such official liability proceedings, following a remittal, has itself, apparently, been pending for more than three years and, consequently, no hearing has yet been held and no judgment given on the merits of his claim. The Court would observe that, in practice, it has made awards under Article 41 of the Convention in respect of non-pecuniary damage in view of the seriousness involved in a violation of Article 3 (see, among many other authorities, *Selçuk and Asker*, cited above, §§ 117-18).

127. In any event, it considers that appropriate and sufficient redress for a Convention violation can only be afforded on condition that an application for compensation remains itself an effective, adequate and accessible remedy. Excessive delays in an action for compensation, in particular, will render the remedy ineffective (compare, *mutatis mutandis*, *Scordino (no. 1)*, cited above, § 195, in respect of compensation for non-compliance with the "reasonable time" requirement of Article 6). It finds that the domestic courts' failure to decide on the merits of the applicant's compensation claim for more than three years raises serious doubts as to the effectiveness of the official liability proceedings in the circumstances of the present case. The authorities do not appear to be determined to decide on the appropriate redress to be awarded to the applicant and thus have not reacted adequately and efficiently to the breach of Article 3 at issue.

128. The Court further notes that in the applicant's submission, redress for the authorities' breach of Article 3 could only have been granted by also excluding, at his trial, all items of evidence obtained as a direct result of the violation of that Article. It observes that in its case-law as it stands, it has generally considered compliance with the requirements of an investigation

and compensation both necessary and sufficient in order for a respondent State to provide adequate redress at national level in cases of ill-treatment by its agents breaching Article 3 (see paragraphs 116-19 above). However, it has also found that the question as to what measures of redress are appropriate and sufficient in order to remedy a breach of a Convention right depends on all the circumstances of the case (see paragraph 116 above). It would not, therefore, exclude the possibility that in cases in which the deployment of a method of investigation prohibited by Article 3 led to disadvantages for an applicant in criminal proceedings against him, appropriate and sufficient redress for that breach may have to entail, in addition to the above-mentioned requirements, measures of restitution addressing the issue of the continuing impact of that prohibited method of investigation on the trial, in particular the exclusion of evidence obtained by breaching Article 3.

129. In the present case, the Court does not, however, have to determine that issue and does not, therefore, have to examine at this stage whether the prohibited method of interrogation in the investigation proceedings can be said to have had a continuing impact on the applicant's trial and to have entailed disadvantages for him. Having regard to its above findings, it considers that, in any event, the different measures taken by the domestic authorities failed to comply fully with the requirement of redress as established in its case-law. The respondent State therefore did not afford the applicant sufficient redress for his treatment in breach of Article 3.

130. It follows that the applicant may still claim to be the victim of a violation of Article 3 within the meaning of Article 34 of the Convention.

B. Compliance with Article 3

131. The Court refers to its above finding (see paragraphs 94-108) that while being interrogated by the police on 1 October 2002 the applicant was threatened with torture in order to make him disclose J.'s whereabouts and that this method of interrogation constituted inhuman treatment as prohibited by Article 3.

132. There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

133. The applicant further submitted that his right to a fair trial had been violated, in particular, by the admission and use of evidence that had been obtained only as a result of the confession extracted from him in breach of Article 3. Article 6 provides in its relevant parts as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ..."

A. Scope of the case before the Grand Chamber

134. The Court notes that before the Grand Chamber, the applicant also repeated his complaint under Article 6 that he had been deliberately refused contact with his defence counsel on 1 October 2002 until all the evidence against him had been secured. According to its case-law, the "case" referred to the Grand Chamber is the application as it has been declared admissible by the Chamber (see, *inter alia*, *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII; *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V; and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 66, ECHR 2004-XI). As the Chamber, in its decision on admissibility of 10 April 2007, found that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in respect of the complaint concerning consultation of his defence counsel, the Grand Chamber has no jurisdiction to examine it.

B. The Government's preliminary objection

135. The Government objected that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in respect of his remaining complaint under Article 6. He had not properly raised before the domestic courts his complaints about the failure to discontinue the criminal proceedings against him and the failure to exclude the use in those proceedings of items of evidence obtained as a result of the prohibited methods of investigation.

1. The Chamber judgment

136. The Chamber did not consider it necessary to rule on the Government's preliminary objection, which it had joined to the merits of the complaint under Article 6, as it found that there had been no violation of Article 6 (see paragraph 86 of the Chamber judgment).

2. The parties' submissions

(a) The Government

137. The Government objected before the Grand Chamber that the applicant had failed to exhaust domestic remedies for the same reasons as those they had relied on in the proceedings before the Chamber. They submitted, firstly, as regards the applicant's claim that his criminal trial had been unfair as it should have been discontinued on account of the threats against him, that the Federal Constitutional Court had declared his constitutional complaint inadmissible for failure to provide sufficient substantiation. It had been up to the applicant to explain why constitutional law did not only require the exclusion of the statements made during the questioning by the police, but also the discontinuation of the proceedings.

138. Secondly, the applicant had not exhausted domestic remedies in so far as he complained about the refusal to exclude the admission of certain items of evidence in the proceedings. As confirmed by the Federal Constitutional Court, he had failed to substantiate in detail in the proceedings before the Federal Court of Justice, as required by the applicable rules on procedure, that he was also challenging the use of the evidence found in Birstein, which was a completely different claim compared to his application to discontinue the proceedings. In particular, the applicant had not corrected the Federal Public Prosecutor's statement of 9 March 2004 which contained the latter's evaluation of the scope of the appeal on points of law to the effect that the applicant had not alleged a violation of Article 136a § 3 of the Code of Criminal Procedure.

(b) The applicant

139. The applicant contested this view and argued that he had exhausted domestic remedies. In his appeal before the Federal Court of Justice, he had lodged the broadest possible application, aimed at discontinuing the criminal proceedings because of the manner in which evidence had been obtained. His broad appeal had included the narrower application regarding the inadmissibility of the real evidence obtained as a result of the confession extracted from him. In lodging his appeal, he had included full copies of his preliminary applications of 9 April 2003. His appeal on points of law had been dismissed without the Federal Court of Justice furnishing any reasons.

140. The applicant further stressed that in his subsequent complaint to the Federal Constitutional Court, he had substantiated his claim fully, explaining in detail and with reference to leading decisions of that court how the failure to discontinue the proceedings and to exclude the impugned items of evidence had breached his rights under Articles 1 and 104 of the Basic Law.

3. The Court's assessment

141. The Grand Chamber has jurisdiction to examine the preliminary objection as the Government previously raised that same objection before the Chamber in their observations on the admissibility of the application (see paragraph 84 of the Chamber judgment), in accordance with Rules 54 and 55 of the Rules of Court (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X; *Azinas v. Cyprus* [GC], no. 56679/00, §§ 32 and 37, ECHR 2004-III; and *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II).

142. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). While Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of effective remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003).

143. Consequently, domestic remedies have not been exhausted when an appeal is not accepted for examination because of a procedural mistake by the applicant. However, non-exhaustion of domestic remedies cannot be held against him if, in spite of his failure to observe the forms prescribed by law, the competent authority has nevertheless examined the substance of the appeal (compare, *inter alia*, *Metropolitan Church of Bessarabia and Others v. Moldova* (dec.), no. 45701/99, 7 June 2001; *Skałka v. Poland* (dec.), no. 43425/98, 3 October 2002; *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004; and *Vladimir Romanov*, cited above, § 52).

144. The Court observes that the applicant complained before it that his criminal trial had been unfair owing to the admission into trial of items of evidence obtained as a direct result of confessions extracted from him. He raised this issue, specifically, before the Regional Court, in particular in his preliminary application of 9 April 2003 seeking a declaration that the use in the criminal proceedings of all items of evidence which had become known to the investigation authorities because of the statements unlawfully extracted was prohibited (see paragraph 25 above). The Court notes that in his appeal on points of law to the Federal Court of Justice, the applicant referred to that application and submitted a full copy of it to that court (see paragraph 37 above). The Federal Court of Justice itself dismissed his appeal as ill-founded without giving reasons for its decision. In these

circumstances, the Court is persuaded that, in accordance with the requirements of its case-law, the applicant raised the substance of his complaint under Article 6 in the proceedings before the Federal Court of Justice. In particular, it cannot speculate as to whether the Federal Public Prosecutor's possibly different interpretation of the scope of the applicant's appeal was adopted by that court. As the applicant again argued before the Federal Constitutional Court that the use of the unconstitutional methods of investigation should have entailed a prohibition on the admission of the impugned items of evidence at his trial (see paragraph 40 above), the Court finds that he raised the substance of his complaint under Article 6 throughout the proceedings before the domestic courts.

145. The Court further observes that the applicant, in addition, argued before the Regional Court, the Federal Court of Justice and the Federal Constitutional Court that the criminal proceedings against him ought to have been discontinued because of the use of unconstitutional methods of investigation (see paragraphs 24, 37 and 40 above). As with his application mentioned above (see paragraph 144), this request concerned the legal consequences in a criminal trial of the use of evidence obtained by prohibited methods of interrogation in pre-trial investigation proceedings. The Federal Constitutional Court declared his constitutional complaint on this account inadmissible for failure to substantiate it sufficiently. The Court notes, however, that in its decision, the Federal Constitutional Court confirmed that the police officers' threat to inflict pain on the applicant in the investigation proceedings had violated human dignity and the prohibition on subjecting the applicant to ill-treatment, as enshrined in the Basic Law. That court further held that the procedural flaw of having applied unconstitutional methods of investigation had been sufficiently remedied by the criminal courts by the exclusion from trial of the statements made under threat and had not, in addition, required the discontinuation of the criminal proceedings (see paragraphs 42-44 above). The Court considers that through these observations, the Constitutional Court examined, at least partly, the substance of the applicant's constitutional complaint concerning the discontinuation of the criminal proceedings against him. Therefore, non-exhaustion of domestic remedies cannot be held against him in this respect either.

146. The Court finds that the applicant thus provided the domestic courts with the opportunity to put right the alleged violation and concludes that the Government's objection of non-exhaustion of domestic remedies must be dismissed.

C. Compliance with Article 6 of the Convention

1. The Chamber judgment

147. The Chamber held that there had been no violation of Article 6 §§ 1 and 3. It observed that the Regional Court had excluded the use at trial of all pre-trial statements made by the applicant to the investigation authorities owing to the continuous effects of the prohibited methods of interrogation in the investigation proceedings. The domestic court had, however, used some items of evidence secured as an indirect result of the statements extracted from the applicant. The Chamber considered that there was a strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 rendered a trial as a whole unfair in the same way as the use of the extracted confession itself. However, in the particular circumstances of the case, it had been the applicant's new confession at the trial which had been the essential basis for his conviction. Other items of evidence, including the impugned real evidence, had been of an accessory nature only and had been relied upon merely to prove the veracity of that confession.

148. The Chamber was not persuaded that the applicant had no longer had any defence option left to him but to confess at the trial in view of the admission of the impugned items of evidence. In the domestic proceedings, in which he had been assisted by counsel, he had confirmed that he had volunteered his confession out of remorse. The fact that his confessions at the trial had differed could be seen as a variation in his defence strategy. The applicant had also taken the opportunity to challenge the impugned real evidence at his trial, and the Chamber acknowledged that the Regional Court had weighed up all the interests involved in deciding to admit that evidence.

149. In view of these elements, the Chamber concluded that the use of the impugned items of evidence had not rendered the applicant's trial as a whole unfair.

2. The parties' submissions

(a) The applicant

150. In the applicant's submission, the admission of real evidence obtained in breach of Article 3 had rendered his criminal trial unfair in violation of Article 6. Once that evidence had been admitted, he had been deprived, entirely, of his right to defend himself. He had also been deprived of the protection afforded by the principle against self-incrimination. He claimed that the evidence recovered in Birstein and on the return journey therefrom had been obtained by the police order directly forcing him to

point out its precise whereabouts. He had been obliged to walk, without shoes, through woods to the place where he had hidden J.'s corpse. The fact that his directions as to where he had hidden the corpse and its consequent discovery had been recorded on videotape demonstrated that the events at Birstein had not been about the child's rescue but about the recovery of evidence in a manner aimed at securing his conviction.

151. The applicant argued that the impugned real evidence had been decisive in, and not merely accessory to, securing his conviction. Though other charges would have been possible, the self-incriminating evidence obtained as a result of his extracted confession was wholly necessary for the charge of and conviction for murder. There had been no other hypothetical clean path which would have led the police to this evidence at the relevant time. Whether they would ever have found it was a matter of pure speculation.

152. As the trial court at the outset of the trial had rejected his application to exclude the evidence obtained in violation of Article 3, the outcome of the trial had, at that point, effectively, been determined. Every possible defence strategy, such as relying on the right to remain silent or alleging that J. had been killed accidentally or volunteering at an early stage a full confession in the hope of mitigation of sentence, had become ineffective. He had partially confessed on the second day of the trial and had only admitted to having killed J. intentionally at the end of the trial after all the impugned items of evidence which he had sought to have excluded had been adduced. Indeed, even the prosecution and the accessory prosecutors, in opposing any possibility of mitigation of sentence, had pointed out that he had only confessed to what had already been proven.

153. The applicant further submitted that, regardless of whether the method of interrogation was to be classified as torture or as inhuman treatment, the Convention (he referred, in particular, to the Court's judgment in *Jalloh*, cited above) and provisions of public international law (in particular, Article 14 of the International Covenant on Civil and Political Rights and Articles 15 and 16 of the United Nations Convention against Torture) warranted the exclusion of all evidence obtained by means of a violation of the absolute prohibition of torture and inhuman treatment. Contrary to the view taken by the domestic courts and by the Chamber, protection of the absolute right under Article 3 could not and should not be weighed against other interests, such as the satisfaction of securing a conviction. As a matter of principle, the exclusion of the evidence in question was essential for removing all incentives for engaging in torture or ill-treatment and thus for preventing such conduct in practice.

(b) The Government

154. The Government invited the Grand Chamber to confirm the Chamber's finding that there had been no violation of Article 6 §§ 1 and 3

of the Convention. As regards the way in which the impugned evidence had been obtained, they contested that the applicant had had to walk without shoes or had been subjected to further threats either in Birstein or on the return journey.

155. The Government accepted that the Regional Court had decided at the outset of the trial that the impugned items of evidence found in Birstein would be admitted as evidence at the trial. Nevertheless, the applicant had confirmed before the domestic courts that he had volunteered his confession at the trial out of remorse and because he wanted to take responsibility for his crime, even though he could also have remained silent or could have lied to the court. He might have changed his defence strategy in the hope that he would receive a more lenient sentence, but this decision had not been related to the use of the impugned items of evidence. It was not correct that the applicant had had no choice but to confess at the trial because, as the trial court had confirmed, it was possible that he might not have been found guilty of murder had he not confessed anew. Following a qualified instruction by the trial court, he had confessed, on the second day of his trial, and it was clear from this confession that he had killed J. intentionally. The difference between the first trial confession and the later one was comparatively minor in that the former had not included an admission that the death of J. had been part of his plan from the outset. This additional admission was not a necessary element to prove murder.

156. The Government underlined that the applicant's conviction had been based on the confession he had volunteered at his trial. The items of evidence secured after the journey to Birstein, such as J.'s corpse and the autopsy report thereon and the tyre tracks from the applicant's car at the pond, had been of an accessory nature only and had been used merely to test the veracity of the applicant's confession at the trial. This was clearly stated in the reasoning of the Regional Court's judgment convicting the applicant.

157. The Government noted that Article 6 of the Convention did not lay down any rules on the admissibility of evidence, as such, which was primarily a matter for regulation under national law. They underlined their obligation under the Convention to apply the criminal law against a murderer. The public interest in having the murderer of an abducted child convicted was of very serious weight. The Government further argued that the case-law of the United States Supreme Court, which went furthest in prohibiting the use of the "fruit of the poisonous tree", needed careful analysis. In the leading case of *Nix v. Williams* (decision of 11 June 1984, 467 US 431; see paragraph 73 above), for instance, that court had held that a body found after an improper investigation could be admitted into evidence in circumstances where it would have been found in any event. It was likely in the present case that J.'s corpse, hidden at a place which the applicant had previously visited, would have been found sooner or later.

(c) The third-party interveners

(i) J.'s parents

158. In the submission of J.'s parents, the applicant's trial had fulfilled the requirements of Article 6. At the trial, the applicant had never indicated that he had felt coerced to confess but had repeated that he was making his statements freely and out of respect for his victim's family. They claimed that the applicant had already confessed on the second day of the trial that he had suffocated J., even though he had denied, at that moment, that he had planned to do so before abducting him. In his later statement he had subsequently admitted that he had planned from the outset to kill the boy.

159. J.'s parents further underlined that the applicant had confirmed in his final statement that, owing to the exclusion of his pre-trial statements, he had been given the choice of remaining silent or of making a confession and that it was not as if everything had been established. He had claimed that he had made a full and free confession even though he had recognised the risk that it would not have any (mitigating) effect on the trial court's judgment. In a book published subsequently by the applicant (entitled "Alone With God – The Way Back"; see paragraph 85 above) there was no mention that his confession at the trial had been caused as a consequence of the police interrogation. In that book, he had confirmed, regarding his motives for making a new confession at his trial, that he had wished to express remorse and had therefore described his acts in detail, at the risk – which materialised – that his confession might not have any effect on his sentence (pp. 225-26). His conduct in the proceedings had not, therefore, been a response to the trial court's decision to admit the impugned evidence.

(ii) The Redress Trust

160. The Redress Trust underlined that the rationale of the exclusionary rule which prohibited the admission of evidence obtained by torture or ill-treatment was based upon (i) the unreliability of evidence obtained as a result of torture; (ii) the outrage to civilised values caused and represented by torture; (iii) the public-policy objective of removing any incentive to undertake torture anywhere in the world; (iv) the need to ensure protection of the fundamental rights (to due process and fairness) of the party against whose interest the evidence was tendered; and (v) the need to preserve the integrity of the judicial process.

161. Numerous international declarations, rules, resolutions and conventions prohibited the admission of statements obtained by torture or inhuman treatment as evidence in judicial proceedings. In the Redress Trust's view, it was arguable that the exclusionary rule covered not only confessions but also derivative evidence found as a result of a statement made under torture, notwithstanding that Article 15 of the United Nations

Convention against Torture (see paragraph 64 above), in particular, was cast in narrower terms. The United Nations Human Rights Committee, for instance, in its General Comment No. 7 of 30 May 1982 (see paragraph 70 above) had found that, in order to secure effective control of the prohibition of torture, it was essential to make both confessions and other evidence obtained through torture or inhuman or degrading treatment inadmissible in court. Likewise, the Supreme Court of Appeal of South Africa, in its judgment of 10 April 2008 in the case of *Mthembu v. The State* (see paragraph 74 above), had held that any use of evidence obtained by torture, including real evidence derived from it, rendered proceedings unfair. This had to apply in equal measure to other forms of ill-treatment. The findings of the Court in its judgments in *Jalloh* (cited above, §§ 99 and 104-07) and *Harutyunyan v. Armenia* (no. 36549/03, § 63, ECHR 2007-III) pointed in the same direction.

3. The Court's assessment

(a) Recapitulation of the relevant principles

162. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007).

163. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

164. In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to

oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35 and 37; *Allan*, cited above, § 43; and the judgment in *Jalloh*, cited above, § 96). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, *Khan*, cited above, §§ 35 and 37).

165. As to the examination of the nature of the Convention violation found, the Court reiterates that the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question (compare, *inter alia*, *Khan*, cited above, §§ 35-40; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 77-79; and *Bykov v. Russia* [GC], no. 4378/02, §§ 94-98, 10 March 2009, in which no violation of Article 6 was found). However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003; the judgment in *Jalloh*, cited above, §§ 99 and 104; *Göçmen v. Turkey*, no. 72000/01, §§ 73-74, 17 October 2006; and *Harutyunyan*, cited above, § 63).

166. Accordingly, the Court has found in respect of confessions, as such, that the admission of statements obtained as a result of torture (compare *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006; *Harutyunyan*, cited above, §§ 63, 64 and 66; and *Levinţa v. Moldova*, no. 17332/03, §§ 101 and 104-05, 16 December 2008) or of other ill-treatment in breach of Article 3 (compare *Söylemez v. Turkey*, no. 46661/99, §§ 107 and 122-24, 21 September 2006, and *Göçmen*, cited above, §§ 73-74) as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction (ibid.).

167. As to the use at the trial of real evidence obtained as a direct result of ill-treatment in breach of Article 3, the Court has considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as

proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see the judgment in *Jalloh*, cited above, § 105). In its *Jalloh* judgment, the Court left open the question whether the use of real evidence obtained by an act classified as inhuman and degrading treatment, but falling short of torture, always rendered a trial unfair, that is, irrespective of, in particular, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial (ibid., §§ 106-07). It found a breach of Article 6 in the particular circumstances of that case (ibid., §§ 107-08).

168. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of fair procedures under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. the United Kingdom* [GC], 17 December 1996, § 68, *Reports* 1996-VI; *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40, ECHR 2000-XII; and the judgment in *Jalloh*, cited above, § 100).

(b) Application of these principles to the present case

169. As the requirements of Article 6 § 3 concerning the rights of the defence and the principle against self-incrimination are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (compare, among other authorities, *Windisch v. Austria*, 27 September 1990, § 23, Series A no. 186; *Lüdi v. Switzerland*, 15 June 1992, § 43, Series A no. 238; *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A; and *Saunders*, cited above, § 68).

170. In examining whether, in the light of the above principles, the criminal proceedings against the applicant, who, from the outset, had objected to the use of evidence obtained in breach of his Convention rights, can be deemed to have been fair as a whole, the Court must consider, firstly, the nature of the Convention violation at issue and the extent to which the impugned evidence was obtained thereby. It refers to its above finding that the applicant's statement on the morning of 1 October 2002 during his interrogation by E. was extracted in violation of Article 3 (see

paragraph 108 above). It further concluded that there was nothing to indicate that the applicant had been threatened for a second time by the police, at Birstein or during the journey to and from that place, in order to make him disclose real evidence (see paragraph 99 above).

171. The Court notes the Regional Court's finding that the applicant's statements made following the threat, including those made at Birstein and those made on the return trip to the police station, had been made under the continuous effect of the threats issued during interrogation and were therefore inadmissible (see paragraph 29 above), whereas it regarded the real evidence which had become known as a result of such statements as admissible. The Court notes that in the proceedings before the domestic courts, the impugned real evidence was classified as evidence which had become known to the investigation authorities as a consequence of the statements extracted from the applicant (the "long-range effect" (*Fernwirkung*) – see paragraph 31 above). For the purposes of its own assessment under Article 6, it considers it decisive that there is a causal link between the applicant's interrogation in breach of Article 3 and the real evidence secured by the authorities as a result of the applicant's indications, including the discovery of J.'s body and the autopsy report thereon, the tyre tracks left by the applicant's car at the pond, as well as J.'s backpack, clothes and the applicant's typewriter. In other words, the impugned real evidence was secured as a direct result of his interrogation by the police that breached Article 3.

172. Furthermore, an issue arises under Article 6 in respect of evidence obtained as a result of methods in violation of Article 3 only if such evidence was not excluded from use at the applicant's criminal trial. The Court notes that at the trial the Regional Court did not admit any of the confessions the applicant had made in the investigation proceedings under threat or as a result of the continuous effects of the threat (see paragraphs 28-30 above). However, that court, rejecting the applicant's motion at the outset of the trial, refused to bar the admission of items of evidence which the investigation authorities had secured as a result of his statements made under the continuous effect of his treatment in breach of Article 3 (see paragraph 31 above).

173. The Court is therefore called upon to examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture. As shown above (see paragraphs 166-67), in its case-law to date, it has not yet settled the question whether the use of such evidence will always render a trial unfair, that is, irrespective of other circumstances of the case. It has, however, found that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and the use of real evidence obtained as a direct result

of acts of torture made the proceedings as a whole automatically unfair, in breach of Article 6 (ibid.).

174. The Court notes that there is no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule (see the references in paragraphs 69 to 74 above). In particular, factors such as whether the impugned evidence would, in any event, have been found at a later stage, independently of the prohibited method of investigation, may have an influence on the admissibility of such evidence.

175. The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of – often reliable and compelling – real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2. On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.

176. While having regard to the above interests at stake in the context of Article 6, the Court cannot but take note of the fact that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature (compare also, *mutatis mutandis*, *Saadi*, cited above, §§ 138-39). In the Court's view, neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice.

177. The Court also takes note, in this connection, of the Government's argument that they were obliged under the Convention to apply the criminal law against a murderer, and thus to protect the right to life. The Convention indeed requires that the right to life be safeguarded by the Contracting States (see, among many other authorities, *Osman v. the United Kingdom*,

28 October 1998, §§ 115-16, *Reports* 1998-VIII). However, it does not oblige States to do so by conduct that violates the absolute prohibition of inhuman treatment under Article 3 or in a manner that breaches the right of every defendant to a fair trial under Article 6 (compare, *mutatis mutandis*, *Osman*, cited above, § 116). The Court accepts that the State agents in this case acted in a difficult and stressful situation and were attempting to save a life. This does not, however, alter the fact that they obtained real evidence by a breach of Article 3. Moreover, it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (compare *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008).

178. However, contrary to Article 3, Article 6 does not enshrine an absolute right. The Court must therefore determine what measures are to be considered both necessary and sufficient in criminal proceedings concerning evidence secured as the result of a breach of Article 3 in order to secure effective protection of the rights guaranteed by Article 6. As established in its case-law (see paragraphs 165-67 above), the use of such evidence raises serious issues as to the fairness of the proceedings. Admittedly, in the context of Article 6, the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

179. The Court notes that, in the present case, the Regional Court expressly based its findings of fact concerning the execution of the crime committed by the applicant – and thus the findings decisive for the applicant's conviction for murder and kidnapping with extortion – exclusively on the new, full confession made by the applicant at the trial (see paragraph 34 above). Moreover, that court also considered the new confession the essential, if not the only, basis for its findings of fact concerning the planning of the crime, which likewise played a role in the applicant's conviction and sentence (ibid.). The additional evidence admitted at the trial was not used by the Regional Court against the applicant to prove his guilt, but only to test the veracity of his confession.

This evidence included the results of the autopsy as to the cause of J.'s death and the tyre tracks left by the applicant's car near the pond where the child's corpse had been found. The Regional Court further referred to corroborative evidence which had been secured independently of the first confession extracted from the applicant under threat, given that the applicant had been secretly observed by the police since the collection of the ransom and that his flat had been searched immediately after his arrest. This evidence, which was "untainted" by the breach of Article 3, comprised the testimony of J.'s sister, the wording of the blackmail letter, the note found in the applicant's flat concerning the planning of the crime, as well as ransom money which had been found in the applicant's flat or had been paid into his accounts (ibid.).

180. In the light of the foregoing, the Court considers that it was the applicant's second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence.

181. In the light of these findings, the Court further has to examine whether the breach of Article 3 in the investigation proceedings had a bearing on the applicant's confession at the trial. It notes that, in his application before the Court, the applicant submitted that this had been the case. In his submission, he had not had any other defence option at the trial but to confess once the Regional Court, at the outset of the trial, had dismissed his request to exclude the real evidence obtained in violation of Article 3.

182. The Court observes in the first place that prior to his confession on the second day of the trial, the applicant had been instructed about his right to remain silent and about the fact that none of the statements he had previously made on the charges could be used as evidence against him (see paragraph 34 above). It is therefore satisfied that domestic legislation and practice did attach consequences to the confessions obtained by means of prohibited ill-treatment (contrast *Hulki Güneş v. Turkey*, no. 28490/95, § 91, ECHR 2003-VII, and *Göçmen*, cited above, § 73) and that the status quo ante was restored, that is, to the situation the applicant was in prior to the breach of Article 3, in this respect.

183. Moreover, the applicant, who was represented by defence counsel, stressed in his statements on the second day and at the end of the trial that he was confessing freely out of remorse and in order to take responsibility for his offence despite the events of 1 October 2002 (see paragraph 32 above). He did so notwithstanding the fact that he had previously failed in

his attempt to have the impugned real evidence excluded. There is no reason, therefore, for the Court to assume that the applicant did not tell the truth and would not have confessed if the Regional Court had decided at the outset of the trial to exclude the impugned real evidence and that his confession should thus be regarded as a consequence of measures which extinguished the essence of his defence rights.

184. In any event, it is clear from the Regional Court's reasoning that the applicant's second confession on the last day of the trial was crucial for securing his conviction for murder, an offence of which he might otherwise not have been found guilty (see paragraphs 34 and 35 above). The applicant's confession referred to many additional elements which were unrelated to what could have been proven by the impugned real evidence. Whereas that evidence showed that J. had been suffocated and that the applicant had been present at the pond in Birstein, his confession notably proved his intention to kill J., as well as his motives for doing so. In view of these elements, the Court is not persuaded that, further to the failure to exclude the impugned evidence at the outset of the trial, the applicant could not have remained silent and no longer had any defence option but to confess. Therefore, the Court is not satisfied that the breach of Article 3 in the investigation proceedings had a bearing on the applicant's confession at the trial either.

185. As regards the rights of the defence, the Court further observes that the applicant was given, and availed himself of, the opportunity to challenge the admission of the impugned real evidence at his trial and that the Regional Court had discretion to exclude that evidence. Therefore, the applicant's defence rights were not disregarded in this respect either.

186. The Court notes that the applicant claimed that he had been deprived of the protection afforded by the privilege against self-incrimination at his trial. As shown above (see paragraph 168), the right not to incriminate oneself presupposes that the prosecution prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the latter's will. The Court refers to its above findings that the domestic courts based the applicant's conviction on his second confession at the trial, without having recourse to the impugned real evidence as necessary proof of his guilt. The Court therefore concludes that the privilege against self-incrimination was complied with in the proceedings against the applicant.

187. The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.

188. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

189. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

190. The applicant did not claim any award for pecuniary or non-pecuniary damage, stressing that the objective of his application was to obtain a retrial before the domestic courts. The Government did not comment on this issue.

191. The Court accordingly does not make an award in respect of damage. As to the specific measure requested by the applicant in compensation, the Court considers, in view of the conclusion reached under Article 6, that there is no basis for the applicant to request a retrial or the reopening of the case before the domestic courts.

B. Costs and expenses

192. Submitting documentary evidence, the applicant upheld his claims made before the Chamber and requested the payment of the costs of the criminal proceedings which the Regional Court had directed him to pay following his conviction. These amounted to 72,855.60 euros (EUR). He left it to the Court's discretion to decide which of these costs (which included, *inter alia*, expert and other witness costs together with counsel's fees) had to be regarded as having been caused by violations of his Convention rights. He argued that the costs of lodging an appeal on points of law and a constitutional complaint to the Federal Constitutional Court (the amount of which has not been further specified) had been incurred solely in an attempt to rectify the violations of the Convention.

193. The applicant, who had been granted legal aid, further claimed a total of EUR 22,647.85 in costs and expenses incurred in the proceedings before the Court. These vouched or invoiced costs included legal fees, fees for accessing case files from the domestic proceedings and for legal experts' reports, copying costs, and travel, subsistence and accommodation expenses, together with the costs of further proceedings pending before the domestic courts.

194. The Government did not comment on the applicant's claims before the Grand Chamber. Before the Chamber, they had argued that the costs awarded against the applicant by the Regional Court had not been incurred in order to prevent or redress a violation of his Convention rights. The applicant had not specified any costs incurred in the proceedings before the Federal Court of Justice or before the Federal Constitutional Court. If the proceedings were to be reopened before the domestic courts following a finding of a violation of the applicant's Convention rights and if the applicant were to be acquitted, then the decision on the costs of the proceedings before the Regional Court would be reviewed.

195. The Government further left it to the Court's discretion to decide on the reasonableness or otherwise of the lawyers' fees, as claimed.

196. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 176, ECHR 2008; and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

197. As to the costs and expenses incurred in the proceedings before the domestic courts, the Court notes that the applicant left it to its discretion to assess what portion of the costs of the criminal proceedings against him before the Regional Court could be attributed to his attempt at preventing a violation of the Convention. It notes, however, that, whereas it has found that Article 3 was disregarded in the investigation proceedings, it has concluded that the criminal proceedings against the applicant complied with the requirements of the Convention. As the applicant failed to specify the costs incurred in all proceedings before the domestic authorities which were aimed at remedying the breach of Article 3, the Court cannot make an award of costs under this head.

198. As to the costs and expenses incurred in the proceedings before it, the Court considers that the amounts claimed by the applicant were in part not necessarily incurred and are as a whole excessive. Moreover, the applicant's claims before the Court were only partly successful. It therefore considers it reasonable to award the applicant EUR 4,000 under this head, less EUR 2,276.60 received by way of legal aid from the Council of Europe, making a total of EUR 1,723.40, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

199. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection in respect of the applicant's complaint under Article 6 of the Convention;

2. *Holds* by eleven votes to six that the applicant may still claim to be the "victim" of a violation of Article 3 of the Convention for the purposes of Article 34 of the Convention;

3. *Holds* by eleven votes to six that there has been a violation of Article 3 of the Convention;

4. *Holds* by eleven votes to six that there has been no violation of Article 6 §§ 1 and 3 of the Convention;

5. *Holds* by ten votes to seven
   (a) that the respondent State is to pay the applicant, within three months, EUR 1,723.40 (one thousand seven hundred and twenty-three euros and forty cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 June 2010.

Erik Fribergh
Registrar

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly concurring opinion of Judges Tulkens, Ziemele and Bianku;

(b) joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power;

(c) partly dissenting opinion of Judge Casadevall joined by Judges Kovler[1], Mijović, Jaeger, Jočienė and López Guerra.

J.-P.C.
E.F.

[1] Rectified on 3 June 2010: the name of Judge Kovler has been added.

JOINT PARTLY CONCURRING OPINION OF JUDGES TULKENS, ZIEMELE AND BIANKU

(Translation)

1. With regard to Article 3 of the Convention, we agree with the conclusion reached in the judgment[1] that the applicant may still claim to be a "victim" within the meaning of Article 34 of the Convention and that Article 3 has therefore been breached. However, our reasoning on the issue of the applicant's victim status differs from that adopted by the majority.

2. In order to determine whether or not the applicant had lost his status as a victim, the Court was required to examine, in accordance with its case-law, whether the domestic authorities had acknowledged and afforded redress for the alleged breach of Article 3.

3. The breach was indisputably acknowledged since the judicial authorities expressly admitted that the methods of investigation employed constituted "ill-treatment" and could not be justified on the ground of "necessity", which was not a defence to a violation of the absolute protection of human dignity under Article 1 of the Basic Law and Article 3 of the Convention.

4. However, the judgment considers that appropriate and sufficient redress was not afforded, basing that finding on what it views as shortcomings in the conduct of the criminal proceedings resulting in the police officers' conviction. While it finds that the criminal investigation in respect of the police officers who threatened the applicant with torture was compatible with the requirements of the Convention, the same does not apply to the *penalties* imposed on the police officers. The judgment concludes that they were not "adequate" and were "manifestly disproportionate" to the seriousness of the offence; accordingly, they did not have "the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations" (see paragraphs 123 and 124 of the judgment).

5. Admittedly, this assessment by the Court of the scope of the State's duty to punish is not new and has been found in many previous judgments. However, in our view it raises three questions, especially in the present case. Firstly, sentencing is one of the most delicate and difficult tasks in the administration of criminal justice. It requires a range of factors to be taken into account, as well as knowledge of, and hence closeness to, the facts, situations and persons concerned. It is normally the role of the national courts and not the Court, which should involve itself in this process only

1. However, with regard to Article 6 of the Convention, we consider, unlike the majority, that there was a violation of that Article, and we refer to the joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power.

with the utmost caution and in cases of absolute necessity. Secondly, we wonder whether the Court, in making the assumption that more severe criminal penalties have a deterrent effect, is not at risk of creating or maintaining an illusion. The (general or individual) preventive effect of sentences has long been the subject of extensive studies and research, particularly of an empirical nature. Such studies have concluded that this effect is relative, if not limited[1]. Lastly, even – and no doubt especially – where criminal punishment serves the purpose of protecting rights and freedoms, at the risk of obscuring the fact that it is also a threat to rights and freedoms, we should not lose sight of the subsidiarity principle, which is a basic axiom of criminal law: use of the weapon of punishment is acceptable only if there are no other means of protecting the values or interests at stake.

6. As the Court never tires of repeating, the rights protected by the Convention cannot be theoretical and illusory but must be practical and effective. However, in the present case was the police officers' criminal trial, which clearly had to take place, the only possible means of preventing further violations of Article 3, a provision that forms part of the core rights protected by the Convention? We do not think so.

7. According to the Court's case-law as reiterated in the judgment, the appropriateness and sufficiency of redress for a Convention violation must be assessed with due regard to all the circumstances of the case (see paragraph 116 of the judgment). In the present case we consider that the most appropriate form of redress for the violation of Article 3 that was found and acknowledged would have been the *exclusion from the trial* of the evidence obtained in breach of the Convention; as this did not happen, our conclusion is that the applicant may still claim to be a "victim" within the meaning of Article 34 of the Convention.

8. It is, however, interesting to observe that, at the end of its analysis, the Court does not in principle rule out the possibility of excluding evidence as an additional measure:

> "... in cases in which the deployment of a method of investigation prohibited by Article 3 led to disadvantages for an applicant in criminal proceedings against him, appropriate and sufficient redress for that breach may have to entail, in addition to the above-mentioned requirements, measures of restitution addressing the issue of the continuing impact of that prohibited method of investigation on the trial, in particular the exclusion of evidence obtained by breaching Article 3." (see paragraph 128 *in fine*)

1. G. Kellens, *Punir. Pénologie et Droit des Sanctions Pénales*, (Liège: Editions juridiques de l'Université de Liège), 2000, pp. 59 et seq.; P. Poncela, *Droit de la Peine*, (Paris: PUF), coll. Thémis, 2nd edition, 2001, pp. 458 et seq.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, JEBENS, ZIEMELE, BIANKU AND POWER

1. We do not share the majority's opinion that there has been no violation of Article 6 §§ 1 and 3 of the Convention. In our view, there was a breach of Article 6 because real evidence which had been secured as a direct result of a violation of Article 3 was admitted into the applicant's criminal trial. The breach was compounded by the fact that this evidence had also been obtained in circumstances that were self-incriminating.

2. The admission into criminal proceedings of any evidence obtained in violation of Article 3 raises a fundamental and vitally important question of principle. While the Court's case-law was clear in so far as the admission of confession statements obtained in violation of Article 3 is concerned, (such statements being always inadmissible regardless of whether they were obtained by torture or inhuman or degrading treatment) the question of the consequences for a trial's fairness of admitting other types of evidence ("real evidence") obtained as a result of treatment falling short of torture but still within the ambit of Article 3, remained to be settled. Difficult though this case was, it presented the Grand Chamber with an opportunity to rule upon the precise scope of the exclusionary rule in respect of any evidence obtained by a breach of Article 3. The Court could have answered that question categorically by asserting, in an unequivocal manner, that irrespective of the conduct of an accused, fairness, for the purpose of Article 6, presupposes respect for the rule of law and requires, as a self-evident proposition, the exclusion of any evidence that has been obtained in violation of Article 3. A criminal trial which admits and relies, to any extent, upon evidence obtained as a result of breaching such an absolute provision of the Convention cannot *a fortiori* be a fair one. The Court's reluctance to cross that final frontier and to establish a clear or "bright-line" rule in this core area of fundamental human rights is regrettable.

3. It is clear from the Court's case-law that the admission of evidence obtained in violation of Article 3 has always been subject to different considerations than those arising where other Convention rights, such as those protected under Article 8, are concerned[1]. Heretofore, the Court took the view that even if proper procedural safeguards are in place, it would be unfair to rely on material if its nature and source were tainted by any oppression or coercion[2]. The use of *statements* obtained as a result of

1. *Schenk v. Switzerland*, 12 July 1988, Series A no. 140; *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX; *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX; *Perry v. the United Kingdom*, no. 63737/00, ECHR 2003-IX; *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX; and *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009.

2. *Perry v. the United Kingdom* (dec.), no. 63737/00, 26 September 2002.

violence, brutality or other conduct which could be characterised as torture[1] or ill-treatment[2] in breach of Article 3 always rendered the proceedings as a whole unfair, irrespective of whether such evidence was decisive in securing the applicant's conviction. Whether that principle applied with equal force to other types of evidence remained to be considered. In *Jalloh*, the Court indicated that an issue *may* arise under Article 6 § 1 in respect of any evidence obtained in violation of Article 3 even if its admission was not decisive in securing a conviction[3]. On the facts of that case, the general question as to whether the use of real evidence obtained by an act falling short of torture but still within the scope of Article 3 automatically renders a trial unfair was left open[4]. Regrettably, the answer now given and the reasoning adopted by the majority risks undermining the effectiveness of the absolute rights guaranteed by Article 3. A distinction has been introduced into the Court's jurisprudence between the admissibility of statements obtained in breach of the absolute prohibition of inhuman and degrading treatment and the admissibility of other evidence obtained in the same manner. Such a distinction is difficult to sustain.

4. The majority accepts that the real evidence against the applicant in this case, which was admitted into trial, "was secured as a direct result of his interrogation by the police that breached Article 3" (see paragraph 171 of the judgment). That prohibited conduct resulted in a coerced confession followed by a journey to the scene of vital evidence where the applicant, upon the order of the police, pointed out the locus of the body (while being filmed) and, thereafter, assisted in the gathering of other self-incriminating evidence. There is no doubt from the proceedings before the domestic courts that this evidence was then admitted, adduced, examined and relied upon at the trial and referred to in the Regional Court's judgment (see paragraphs 32 and 34). Notwithstanding the foregoing, the majority has nevertheless concluded that the applicant's trial was fair because of "a break in the causal chain" (see paragraph 180) leading from that breach to the applicant's conviction and sentence. We do not agree with its finding or with the reasoning upon which it is based.

5. From the moment of arrest to the handing down of sentence, criminal proceedings form an organic and interconnected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings. This approach has previously been confirmed and underlined,

1. *Harutyunyan v. Armenia*, no. 36549/03, §§ 63 and 66, ECHR 2007-III.
2. *Göçmen v. Turkey*, no. 72000/01, §§ 74-75, 17 October 2006.
3. *Jalloh*, cited above, § 99.
4. Ibid., § 107.

in principle, by the Court in its consideration of the importance of the investigation stage for the preparation of criminal proceedings by finding that the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. Thus, in *Salduz v. Turkey* (which involved restrictions on the applicant's access to a lawyer while in police custody) the Court found that neither the legal assistance provided subsequently nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the time spent in police custody and it proceeded to find a violation of Article 6[1]. If that is so when considering a breach of the right to consult a lawyer, then surely the same reasoning must apply with even greater force when confronted with a breach of a suspect's right not to be subjected to inhuman treatment and the subsequent admission into criminal proceedings of the evidence obtained as a result of such a breach.

6. Instead of viewing the proceedings as an organic whole, the majority's *modus operandi* was to compartmentalise, parse and analyse the various stages of the criminal trial, separately, in order to conclude that the terminus arrived at (conviction for murder warranting maximum sentence) was not affected by the route taken (admission of evidence obtained in violation of Article 3). Such an approach, in our view, is not only formalistic; it is unrealistic since it fails altogether to have regard to the practical context in which criminal trials are conducted and to the dynamics operative in any given set of criminal proceedings. The majority's judgment pays no regard to the fact that the applicant's confession which, it is claimed, "broke" the causal chain, was made immediately after his failed attempt to exclude the incriminating evidence and that it was repeated, more fully, only after all of that evidence had been adduced at trial. Having failed to have it excluded, he cannot but have been aware that the trial court would have before it forensic and other compelling evidence which he himself had pointed out on the order of the police authorities and which would clearly establish his guilt. We consider it telling that both the Federal Public Prosecutor and counsel for J.'s parents argued that the applicant's confession "was worth nothing" since he had only confessed to what had, in any event, already been proven (see paragraph 35 of the judgment). Therein lies the core of the problem and it is difficult to disagree with their submissions in this regard.

7. In our view, the evidence secured in breach of Article 3 and thereafter admitted into trial cannot be regarded as having had no bearing upon the subsequent development and outcome of the proceedings. The exclusion only of the applicant's pre-trial statements afforded little if any benefit to him in terms of curing the defect caused by the violation of Article 3. Once the incriminating evidence had been admitted, his freedom to mount a

1. *Salduz v. Turkey* [GC], no. 36391/02, § 58, ECHR 2008.

defence was restricted substantially, if not entirely, and a conviction for the charges upon which he stood accused was all but inevitable. That such inevitability was articulated by the prosecuting parties who participated in the trial confirms us in our view that serious doubt must be cast over the capacity of the applicant, at the outset of the trial, to defend himself effectively.

8. Neither the applicant's confession at trial nor the ostensibly limited reliance upon that coerced evidence to establish the veracity of the said confession was capable of curing the manifest defect in the proceedings that was caused by the admission into evidence of such tainted materials. The only way to ensure effective protection of the applicant's fundamental right to a fair hearing would have been to exclude all impugned evidence and to have proceeded (albeit on other charges, such as kidnapping with extortion causing death; see paragraph 35 of the judgment) on the basis of the non-contaminated evidence that was available to the prosecution. To allow evidence obtained by a breach of Article 3 to be admitted into a criminal trial weakens, inevitably, the protection which that provision confers and signals a certain ambivalence about how far that protection goes.

9. We find it disturbing that the Court has introduced, for the first time, a dichotomy in principle between the types of conduct prohibited by Article 3 at least in so far as the consequences for a trial's fairness are concerned where breaches of that provision occur. In effect, the Court has concluded that real evidence obtained by inflicting inhuman treatment upon an accused person may be admitted into trial and that such a trial may nevertheless be regarded as "fair" so long as such evidence has no bearing on the outcome of proceedings. If it can have no bearing, what, one wonders, is the purpose of its admission? And why, in principle, should the same reasoning not now apply to real evidence obtained by torture? If a break in the causal chain from torture to conviction can be established – where, for example, a torture victim chooses to confess during trial – why not permit the admission of such evidence at the outset of his trial and wait to see if any break in the causal chain might occur? The answer is manifestly obvious. Societies that are founded upon the rule of law do not tolerate or sanction, whether directly, indirectly or otherwise, the perpetration of treatment that is absolutely prohibited by Article 3 of the Convention. Neither the wording of Article 3 nor that of any other provision of the Convention makes a distinction between the consequences to be attached to torture and those attaching to inhuman and degrading treatment. There is thus no legal basis, in our view, for regarding inhuman treatment as different from torture in terms of the consequences that flow from the perpetration thereof. Neither "a break in the causal chain" nor any other intellectual construct can overcome the inherent wrong that occurs when evidence obtained in violation of Article 3 is admitted into criminal proceedings.

10. The Court has repeatedly stated that Article 3 is an absolute right and that no derogation from it is permissible under Article 15 § 2 – even in the event of a public emergency[1]. Being absolute, all violations thereof are serious and, in our view, the most effective way of guaranteeing that absolute prohibition is a strict application of the exclusionary rule when it comes to Article 6. Such an approach would leave State agents who are tempted to perpetrate inhuman treatment in no doubt as to the futility of engaging in such prohibited conduct. It would deprive them of any potential incentive or inducement for treating suspects in a manner that is inconsistent with Article 3.

11. We are mindful of the consequences that flow from a strict application of the exclusionary rule where violations of Article 3 are concerned. We recognise that, at times, often reliable and compelling evidence may have to be excluded and that the effect upon the prosecution of a crime may thereby be compromised. Furthermore, the exclusion of such evidence may result in an accused person receiving a lighter sentence than he or she might otherwise have received. However, where this occurs the ultimate responsibility for any such "advantage" to the accused lies, firmly, with the State authorities whose agents, irrespective of their motivation, permitted the perpetration of inhuman treatment and thereby risked compromising the subsequent conduct of criminal proceedings.

12. We are also cognisant of the fact that victims of crime, their families and the public at large all have an interest in the prosecution and punishment of those who engage in criminal activities. However, in our view, there is an equally vital, compelling and competing public interest in the preservation of the values of civilised societies founded upon the rule of law. In such societies, recourse to subjecting individuals to inhuman or degrading treatment, regardless of its purpose, can never be permitted. There is, in addition, a critical public interest in ensuring and maintaining the integrity of the judicial process and the admission into a trial of evidence obtained in violation of an absolute human right would undermine and jeopardise the integrity of that process. In our view, criminal activity may not be investigated nor an individual's conviction secured at the cost of undermining the absolute right not to be subjected to inhuman treatment as guaranteed under Article 3. To hold otherwise would involve sacrificing core values and bringing the administration of justice into disrepute.

13. As with the majority, we acknowledge that the State agents in this case acted in a difficult and highly charged situation. This does not, however, alter the fact that they obtained, by a breach of Article 3, real evidence which was subsequently used and relied upon at the criminal trial

1. See, *inter alia*, *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V; *V. v. the United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v.* France [GC], no. 59450/00, § 116, ECHR 2006-IX; and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008.

of the applicant. Though the situation in this case was critical it is precisely in times of crisis that absolute values must remain uncompromised.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL JOINED BY JUDGES KOVLER[1], MIJOVIĆ, JAEGER, JOČIENĖ AND LÓPEZ GUERRA

(Translation)

1. I am unable to agree with the conclusions reached by the majority in this case regarding the applicant's victim status and the finding of a violation of Article 3 of the Convention. The case was admittedly delicate in terms of the applicant's legitimate rights, but was all the more delicate and difficult for the prosecuting authorities, who were faced with an extremely serious and tragic situation culminating in the murder of an 11-year-old child.

2. It is not disputed that the threats of violence against the applicant amounted to inhuman and degrading treatment proscribed by Article 3 of the Convention. This was formally acknowledged by the German judicial authorities: the Frankfurt am Main Regional Court stated that "the threat to cause the applicant pain in order to extract a statement from him had not only constituted a prohibited method of interrogation under Article 136a of the Code of Criminal Procedure; the threat had also disregarded Article 3 of the Convention", and the Federal Constitutional Court found that "the applicant's human dignity and the prohibition on subjecting prisoners to ill-treatment ... had been disregarded" (see paragraph 120 of the judgment).

3. The Chamber held in its judgment that the applicant could no longer claim to be the victim of a violation of Article 3 after the domestic courts had acknowledged the violation and afforded sufficient redress for it, seeing that the two police officers involved in the events in question had been convicted and punished. I support that conclusion in the present case.

4. The majority of the Grand Chamber, endorsing the Chamber's findings, consider that the domestic courts "acknowledged expressly and in an unequivocal manner that the applicant's interrogation had violated Article 3 of the Convention" (see paragraph 120 *in fine* of the judgment); that the investigation and the criminal proceedings were "sufficiently prompt and expeditious to meet the standards set by the Convention" (see paragraphs 121 and 122); and that "the police officers were found guilty of coercion and incitement to coercion, respectively, under the provisions of German criminal law" (see paragraph 123). However, they conclude that the applicant can still claim to be a victim and that there has been a violation of Article 3.

5. This assessment appears to be based mainly on the leniency of the penalties imposed on the police officers, because

[1] Rectified on 3 June 2010: the name of Judge Kovler has been added.

(i) in the criminal proceedings they were sentenced "only to very modest and suspended fines" (see paragraph 123), which were "almost token" and "manifestly disproportionate" (see paragraph 124); and

(ii) the disciplinary sanctions, consisting in their transfer to posts which no longer involved direct association with the investigation of criminal offences, were too lenient as the officers were not "suspended from duty while being investigated or tried" or dismissed after being convicted (see paragraph 125).

6. In the very particular circumstances of this case, regard being had to the fact that after the interrogation D., the deputy chief of police, drew up a note for the police file in which he described – and admitted – the manner in which the events had occurred and provided reasons, or indeed justification, for them; that the domestic courts (the Regional Court and the Federal Constitutional Court) expressly declared that there had been a breach of the Basic Law and the Convention; and that the two police officers were found guilty and received criminal and disciplinary sanctions, the question of the quantum of the penalties should no longer be relevant. The Court points out that, except in manifestly arbitrary cases, "it is not its task to rule on the degree of individual guilt ... or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts" (see paragraph 123 of the judgment). There are good reasons for such judicial restraint, namely the lack of familiarity with the criminal case that resulted in the conviction and the fact that the convicted persons do not take part in the proceedings before the Court.

7. Applying the criterion of the severity of the penalty imposed, one may wonder what degree of punishment the majority might have accepted in order to find that the applicant was no longer a victim. In other words, should the applicant's victim status depend on the severity of the penalty imposed on the police officers? In my opinion the answer is "no".

8. This leaves the question of the additional requirement of compensation and the doubts as to the effectiveness of the official liability proceedings instituted by the applicant (see paragraphs 126 and 127 of the judgment). I have two observations on this point: (a) the applicant did not bring his compensation claim at national level until after his application to the Court had been communicated and his request for legal aid granted, that is, three years after the alleged damage; and (b) the case is pending before the domestic courts and there is no cause to prejudge either the effectiveness or the eventual outcome of this remedy. In addition, the fact that the applicant did not seek any award for non-pecuniary damage (see paragraph 190 of the judgment) is fairly significant.

9. The question also arises as to what useful purpose is served by the operative provisions of the judgment. In the final analysis, the majority of the Grand Chamber simply confirm what the German judicial authorities – the Frankfurt am Main Regional Court and the Federal Constitutional Court

– had already expressly and unequivocally acknowledged in their three decisions of 2003 and 2004: the applicant, having been threatened with torture in order to make him disclose the child's whereabouts, was subjected to "inhuman treatment as prohibited by Article 3" (see paragraph 131 of the judgment). On this precise issue all of us – the national judicial authorities, the Government, the applicant and the judges of the Court – are in agreement.

10. Ultimately, this judgment will not even result in an award to the applicant by way of just satisfaction.