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THE ILLUSION OF ABSOLUTENESS?

Theory and Practice of the Absolute Prohibition of Torture, Inhuman or Degrading Treatment or Punishment under the European Convention of Human Rights

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'Torture is senseless violence, born in fear... torture costs human lives but does not save them. We would almost be too lucky if these crimes were the work of savages: the truth is that torture makes torturers'.[1]

- Jean Paul Sartre

[1] Jean-Paul Sartre, 'A Victory' in Henri Alleg (ed), *The Question* (John Calder tr, Calder Publishers 1958)

Content

Abstract

The present dissertation elucidates the principle of absoluteness and revisits the question as to whether the prohibition of torture or inhuman or degrading treatment or punishment as enshrined Article 3 of the European Convention on Human Rights is truly absolute or not. It does so from both a theoretical and practical point of view. While setting up the theoretical framework in which it defines the underlying principles, it has regard the case-law of the European Court of Human Rights in this complex and interesting field of law. This dissertation demonstrates that, while the Court is a staunch advocate of the so-called "principle of absoluteness", some flaws can be detected in its jurisprudence on Article 3 of the Convention. Indeed, scholarship shows that the Court uses elements of legitimacy, proportionality and balancing while adjudicating on this absolute prohibition. In addition, both the conundrum of conflicts of rights or obligations under this provision and the pre-conceived legitimacy inherent in the concepts of "punishment" and the "use of force" leave the Court with some challenges. It will be demonstrated that the threshold of application, the minimum threshold of severity and the process of contextualisation are of utmost importance in order to provide for an answer to the question whether Article 3 ECHR is truly absolute. In the end, it appears that this question is one of definition and that the Court should start to devote some of its time to define the "principle of absoluteness" in the context of the absolute prohibition of torture or inhuman or degrading treatment or punishment.

Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFEU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
UDHR	Universal Declaration of Human Rights
UN – ICCPR	United Nations International Covenant on Civil and Political Rights
UN-SRTorture	United Nations Special Rapporteur on Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment

1. Introduction to the current research

1.1. The state of art

In its principled rhetoric, the European Court of Human Rights (the Court or the ECtHR) has constantly referred to Article 3 of the European Convention on Human Rights (the Convention or the ECHR) as enshrining an absolute prohibition of torture or inhuman or degrading treatment or punishment.[2] Indeed, Article 3 itself does not allow for any justification nor can it be derogated from in times of war or other public emergency threatening the life of the nation (Article 15 ECHR). As Gewirth puts it, '[a] right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions'.[3] Despite the Court's firm stance on the absolute nature of Article 3 ECHR, an academic debate unfolded on the question whether the Court , in its case-law, is truly faithful to the absolute prohibition of torture or inhuman or degrading treatment or punishment.[4] To date, legal scholars are still divided on this. Whereas some scholars, like Palmer – although recognising that considerations of justification take place in the determination of the "threshold of application" – argue that 'the ECtHR has never permitted ill-treatment that would fall within the scope of Article 3 even for most pressing reasons of public interest and irrespective of the victims conduct'[5], other critical legal scholars

[2] *Gäfgen v Germany* App no 22978/05 (ECHR, 1 June 2010), para 87

[3] Alan Gewirth, 'Are There Any Absolute Rights? (1981) 31 (122) The Philosophical Quarterly 1, p 2

[4] Michael K Addo and Nicholas Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 (3) European Journal of International Law 510; Stephanie Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 (2) The Cambridge Law Journal 438; Helen Fenwick, *Civil Liberties and Human Rights* (4th edition Routledge – Cavendish 2007), p 46; Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 (4) Human Rights Law Review 723; Stijn Smet, 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only? in Janneke Gerards and Eva Brems (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013); Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law' (2015) 15 (1) Human Rights Law Review 101. See also Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (7th edition, Oxford University Press 2017), p 184

[5] Palmer (n 3), p 450

refer to the injection of relativity in the Court's reasoning.[6] Smet, for example, argues that although the Court has been consistent in upholding the absolute prohibition whenever alleged ill-treatment was inflicted for illegitimate purposes, the matters are different when legitimate objectives underlie the act complained of. In the latter situation, the concepts of "balancing" and "proportionality" come into play.[7] Indeed, several elements of relativity can be deduced from its jurisprudence. When adjudicating on alleged ill-treatment during imprisonment, it is settled case-law of the Court that '[i]n order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'.[8] In addition, the Court has held that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the Community and the requirements of the protection of the individuals fundamental rights'.[9] Attempts have been made to reconcile the Court's jurisprudence on torture with the (theoretical) absolute nature of Article 3 ECHR. In this connection, Nowak proposed to distinguish between the prohibition of torture and the prohibition of inhuman or degrading treatment or punishment. He argues that while the former provides for an absolute prohibition, the latter may be subject to elements of relativity.[10] Also Smet attempted to uphold the absolute nature of Article 3 ECHR in the

[6] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), p 89; Hemme Battjes, 'In search of a fair balance: the absolute character of the prohibition of *refoulement* under Article 3 ECHR re-assessed' (2009) 22 (3) Leiden Journal of International Law 583; Smet, 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' (n 3)

[7] Smet. 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' (n 3), p 279

[8] *Jalloh v Germany* App no 54810/00 (ECHR, 11 July 2006), para 68; *Wenner v Germany* App no 62303/13 (ECHR, 1 September 2016), para 55. See more specific on the prohibition of punishment in Article 3 Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context (2015) 15 (4) Human Rights Law Review 721

[9] *Soering v the United Kingdom* App no 14038/88 (ECHR, 7 July 1989), para 89; The implications of this consideration was critically discussed by the separate opinion in *N v the United Kingdom* App no 26565/05 (ECHR, 27 May 2008), para 9

[10] Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 (4) Netherlands Quarterly on Human Rights 674, p 688. This view is however challenged by Steven Greer in:

context of solitary confinement and force-feeding by arguing that 'the Court could for instance extend the principle of unavoidable suffering inherent in detention to encompass measures of solitary confinement'.[11] Despite these attempts, there has been no clear answer on whether the Court, in practice, lives up with the absolute nature of Article 3 ECHR and, in the case it does not, how the Court might achieve reconciliation with this principle of absoluteness. Moreover, although several scholars touched upon the relationship between the "minimum level of severity" and the absolute nature of Article 3 ECHR, this connection has not been explored in depth in academic scholarship, in particular in light of current developments in the Court's line of jurisprudence. Therefore, the present research aims to fill this gap and to shed light on this connection and decipher the scope and absolute nature of Article 3 ECHR. In addition, different from many other scholars, who merely focussed on specific areas of law (e.g. punishment[12], solitary confinement[13] or refoulement[14]), this dissertation aims to provide for a global overview on (asssumed) elements of relativity.

1.2. Research questions and objectives

Three objectives form the basis of the main research question of this dissertation. The first aim is to provide an insightful overview of the current tensions and debate surrounding the question as to whether Article 3 ECHR is really absolute in human rights law. The second objective is to explore how the Court addresses challenges which have the potential to undermine the absolute character of the prohibition of torture or inhuman or degrading treatment or punishment. Moreover, the present research aims to elucidate the connection between the "minimum level of severity" and the absolute nature of Article 3 ECHR. In this connection, it will touch upon current developments within the Court's case-law and investigate how they reconcile with the principle of absoluteness. Finally, this dissertation aims to provide for some recommendations for the future on how the Court could uphold its

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Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (n 3), pp 119 – 120

[11] Smet, 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' (n 3), p 284

[12] Mavronicola, 'Crime, Punishment and Article 3 ECHR' (n 7)

[13] Smet, 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment or Punishment in Article 3 ECHR: Truly a Question of Scope Only?' (n 3)

[14] Battjes, 'In search of a fair balance: the absolute character of the prohibition of refoulement under Article 3 ECHR re-assessed' (n 5)

own mantra that Article 3 ECHR enshrines an absolute right or whether it should adopt a different approach towards Article 3 ECHR.

Together, these four aims form the basis for the main research question which is at the heart of this dissertation. It reads "Is the absolute prohibition of torture and inhuman or degrading treatment or punishment really absolute within the case-law of the European Court of Human Rights?".

In order to provide for a substantiated answer to this question, three sub-questions will be explored in depth in this dissertation as well:
1. How does the absolute nature of Article 3 ECHR relate to the "minimum level of severity"?;
2. Which flaws *vis-à-vis* the absolute character of Article 3 ECHR can be detected within the case-law of the Court?; and
3. How could the Court adhere to the absolute nature of Article 3 ECHR in the future?

1.3. Methodology and approach

The methodology adopted in the present dissertation consists primarily of a doctrinal approach – that is, research 'into the law and legal concepts'.[15] The descriptive analysis is mainly based on positive law, in particular jurisprudence of the Court and the Convention of 1950. Furthermore, in order to provide for a more comprehensive analysis of the current academic debate on the absoluteness of Article 3 ECHR, relevant legal scholarship will be discussed. The present dissertation sets up the theoretical framework and assesses how the judicial practice of the ECtHR fits into it. The cases examined are those related to the substantive limb of Article 3 ECHR. Accordingly, issues raised under its procedural limb fall, in principle, outside the scope of the current research. Moreover, the cases are primarily about the negative obligations of the State involved, only where necessary regard will be had to the positive obligations which may give rise to issues under Article 3 ECHR. This selection implies that any conclusions drawn from this dissertation may not be extended to include situations concerning the procedural limb of Article 3 of the Convention or involving primarily positive obligations.

[15] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) Deakin Law Review 83, p 85

In order to give a substantiated answer on the research questions, the present research will first provide for a comprehensive overview of the issues related to the absolute nature of Article 3 ECHR. Chapter 2 aims to set the stage and introduces the concept of an absolute right and gives an overview of the different academic voices *vis-à-vis* the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment. In addition, this introductory chapter unravels several elements of relativity within the Court's jurisprudence. After having set the stage, Chapter 3 explores the connection between the two thresholds inherent in Article 3 of the Convention and the absoluteness of Article 3 ECHR (research question 1). Thereafter, the main body of this dissertation (Chapters 4 and 5) will be devoted to unravelling the flaws within the case-law of the Court when it adjudicates on cases involving issues within the context of Article 3 ECHR (research question 2). The conclusion (Chapter 6) aims to provide for an answer to the main research question and provides for recommendations for the future (research question 3). As a preliminary note it should be emphasised that although the issues discussed are subdivided in separate chapters, they overlap to a large extent. Accordingly, the chapters should be read together.

2. Setting the stage: absolute or relative?

'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'.[16]

2.1. Introduction: an absolute prohibition in international human rights law

In international human rights law, a special stigma is attached to the prohibition of torture as being one of the most shocking forms of arbitrary state interference and constituting a gross violation of human dignity.[17] Accordingly, it occupies a special position in international law, having the status of an absolute right (or prohibition) from which no derogation is permissible.[18] The European Court of Human Rights affirmed this special status by considering that 'the prohibition of torture occupies a prominent place in all international instruments on the protection of human rights'.[19] On the international level, the International Court of Justice (ICJ) ruled that the prohibition of torture has become a peremptory norm in international law – that is, it has the status of *jus cogens*.[20] In *Furundžija* the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) was even more explicit and clarified both its meaning and its consequences:

'[w]hile the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules, **The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.** Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a

[16] *Selmouni v France* App no 25803/94 (ECHR, 28 July 1999), para 95; *Gäfgen v Germany* (n 1), para 87

[17] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009), p 320. See also: *Jalloh v Germany* (n 7), para 106

[18] ibid, p 320

[19] *Ould dah v France* App no 13113/03 (ECHR, 17 March 2009) (decision on its admissibility). See also: Louise Dowald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), p 194

[20] *Questions relating to the Obligation to Prosecute or Extradite Case (Belgium v Senegal)* ICJ Reports 422, para 90

deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate'.[21]

Although the Trial Chamber of the ICTY provided for some clarification and guidance on the meaning of the absolute prohibition of torture or inhuman or degrading treatment or punishment, the general clause of this absolute prohibition in international treaties and conventions remains rather broad and general, leaving much room for interpretation.[22] Specific treaties, like the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the European Convention for the Prevention of Torture (CPT), were adopted to give more (substantive) expression to this right. In this connection, Article 2 (2) of the CAT is of relevance. It reads:

'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'.[23]

This provision confirms, in an unequivocal manner, that there is no room left to the Court for any justificatory considerations. In addition, scholars agree and confirm that the absolute prohibition of torture does not allow for any exceptions. Within the European context, this framework of absoluteness applies to Article 3 ECHR as well. Indeed, unlike other

[21] *Prosecutor v Furudžija Case* (Judgment) ICTY – 95 – 17 (10 December 1980), paras 153 – 154

[22] Examples of the prohibition of torture in international treaties and conventions are: Article 5 of the Universal Declaration of Human Rights (UDHR) (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation); Article 5 of the African Charter on Human and Peoples Rights (ACHPR) (Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited); Article 5 (2) of the American Convention on Human Rights (No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person); Article 3 ECHR (No one shall be subjected to torture or to inhuman or degrading treatment or punishment); and Article 4 of the Charter of Fundamental Rights of the European Union (CFEU) (No one shall be subjected to torture or to inhuman or degrading treatment or punishment)

[23] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS 39/46 (Convention against Torture) art 2(2)

Convention provisions, for example Article 8 (Right to family life and private life), Article 9 (Freedom of religion), Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association), Article 3 lacks a two-layered structure – that is, a provision in which the first paragraph identifies the right while the second provides for express exceptions. Accordingly, Article 3 itself does not allow for any exemptions and thereby confirms and stresses its absolute nature. Moreover, it enshrines a right from which no derogations are permissible under Article 15§2.[24] The European Court confirmed this conclusion and it is settled case-law that '[u]nlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, 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'.[25]

Although Article 3 ECHR does not define the prohibition of torture to be an absolute one, a short overview of the drafting history reveals that the inclusion of the adjective "absolute" was being considered at the material time.[26] Seymour Cock, the British member of the Consultative Assembly of the Council of Europe, held that:

'The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organisations or any other persons are inconsistent with civilised society, are offences against heaven and humanity and must be prohibited.

[24] Article 15 § 1 reads: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. According to Article 15 § 2 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision'. See among authorities: *Ireland v the United Kingdom* App No 5310/71 (ECHR, 18 January 1978), para 163; *Selmouni v France* (n 15), para 95; *Ramirez Sanchez v France* App No 59450/00 (ECHR, 04 July 2006), para 116; *Saadi v Italy* App No 37201/06 (ECHR, 28 February 2008), para 127

[25] *Selmouni v France* (n 15), para 95; *Labita v Italy* App no 26772/95 (ECHR, 6 April 2000), para 119; *Öcalan v Turkey* App no 46221/99 (ECHR, 12 May 2005), para 179; *J.K. and Others v Sweden* App no 59166/12 (ECHR, 23 August 2016), para 77

[26] See for a more elaborate overview of the drafting history: William. A. Schabbas, '*The European Convention on Human Rights: A Commentary*' (Oxford University Press 2015), pp 165 – 168

They declare that this prohibition must be **absolute** and that torture **cannot be permitted by any purpose whatsoever, neither by extracting evidence for saving life nor even for the safety of the State**. They believe that it would be better even for Society to perish than for it to permit this relic of barbarism to remain'.[27]

Despite this strong and convincing statement, the term "absolute" was not included in the final text as adopted in 1950. However, a global overview of the Court's case-law on Article 3 ECHR reveals that this omission has had no implications for its absolute nature. Indeed, as the subsequent section will demonstrate, it is still the Court's mantra that Article 3 of the Convention enshrines an absolute right.

2.2. The Court's principled rhetoric: Article 3 ECHR as an absolute right

When adjudicating on cases involving an alleged violation of Article 3 ECHR, the Court explicitly confirms and reiterates its absolute nature. It adheres to this principle of absoluteness even in the most difficult circumstances like the fight against terrorism[28], a ticking-bomb scenario[29], and in the face of an enormous influx of migrants.[30] The following three examples illustrate this strong position of the Court.

In *Tomasi v France*[31] the European Court confirmed that Article 3 is absolute even if a state is confronted with the threat of terrorism. Felix Tomasi, the applicant, was a French national who was suspected of having taken part in a terroristic attack. Two men were shot. One of them died and the other was severely wounded.[32] During his imprisonment the applicant was beaten up (sometimes for even forty hours!), did not have moments of rest and was left without food and drinks.[33] The French Government argued that the "minimum level of

[27] Amendment proposed by Mr S. Cocks, Assembly Document No. 91 (1949) TP 252 – 4. p 236 (emphasis added)

[28] *Tomasi v France* App no 12850/87 (ECHR, 27 August 1992), para 115; *Ilasçu and Others v Russia and Moldova* App no 48787/99 (ECHR, 8 July 2004), para 424; *Balogh v Hungary* App no 47940/99 (ECHR, 20 July 2004), para 44. The former will be discussed in more detail below.

[29] *Gäfgen v Germany* (n 1). This case will be discussed below

[30] *Aden Ahmed v Malta* App no 55352/12 (ECHR, 23 July 2013), para 90; *Khlaifia and Others v Italy* App no 16483/12 (ECHR, 15 December 2016), para 184; *S. F. and Others v Bulgaria* App no 1838/16 (ECHR, 7 December 2017), para 92. The case *Khlaifia and Others v Italy* will be elaborated upon below.

[31] *Tomasi v France* (n 27)

[32] ibid, paras 7 – 9

[33] ibid, para 49

severity", which is inherent in the application of Article 3 ECHR[34], had not been attained. According to the Government the Court should not turn a blind eye to the "particular circumstances" obtaining in Corsica at the material time, the fact that the applicant was suspected of a terroristic attack which resulted in the death of one victim, while the other was gravely wounded. Plausible as these arguments may be, the Court was not prepared to accept them. It considered that 'the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals'.[35] This formulation is illustrative for the Court's case-law on this matter which it developed over time, reiterating (with a strong voice) that Article 3 of the Convention cannot give in to the aim to combat terrorism.

One of the most well-known cases for which the Court was applauded for being a staunch advocate of the principle of absoluteness of Article 3 ECHR is *Gäfgen v Germany*.[36] The facts of the case are as follows. The applicant, Magnus Gäfgen, kidnapped the son of a rich banking family, Jakob von Metzler. He lured the boy to his apartment where he suffocated him. Thereafter, Gäfgen buried the body in the woods beside a lake. Gäfgen demanded a lumpsum from the parents who were still unaware about the killing and the whereabouts of their son. Hoping that Jakob was still alive and fearing his (suspected) death if he was not found soon, Jakob's parents paid the lumpsum. When Gäfgen imposed the lumpsum, the police followed Gäfgen and arrested him. During the investigation proceedings, Gäfgen refused to disclose any information of the whereabouts of his victim. Assuming that Jakob was still alive and risked grave danger, the police deputy chief authorised officer E. to threaten Gäfgen with torture. E. acted accordingly and threatened Gäfgen with the infliction of considerable pain by the hands of a person trained for it and the threat of locking him up in a cell in which he would be sexually abused if he did not disclose the whereabouts of his victim. In addition, Gäfgen claimed to be hit several times by the officer. Tempted by the threat of torture, Gäfgen disclosed the location of the body.[37] Before the Court in Strasbourg, the applicant alleged that the threat of torture amounted to a violation of Article 3 ECHR. The chamber (fifth section) of

[34] See more on this in Chapter 3

[35] *Tomasi v France* (n 27), paras 114 – 115

[36] *Gäfgen v Germany* (n 1)

[37] ibid, paras 8 – 19

the Court held that although the ill-treatment was inflicted with the aim of saving the life of a victim, it could distance itself from the absolute nature of Article 3, since it 'would like to underline in this connection that in view of the absolute prohibition of treatment contrary to Article 3 irrespective of the conduct of the person concerned and even in the event of a public emergency threatening the life of the nation – or, *a fortiori*, of an individual – the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations'.[38] Hence, even if the aim is to save the life of an individual, torture is prohibited in absolute terms.

Recently, the Court was invited to adjudicate on a migration case in *Khlaifia and Others v Italy.*[39] During the Arab spring, three Tunisian nationals, while trying to reach the Italian shores, were intercepted by the Italian coastguard. They were brought to the island of Lampedusa where they were accommodated in a "*Centro di Soccorso e Prima Accoglienza*" (CSPA – an Early Reception and Aid Centre). According to the applicants, the Centre was overcrowded, they had to sleep on the floor due to the shortage of beds and matrasses, they had to eat on the ground and any contact with the world outside was made impossible by the permanent police surveillance.[40] In Strasbourg, they claimed that the conditions they faced in the CSPA amounted to a violation of Article 3 ECHR. In its submission, the Italian Government, called upon the Court to have regard to the enormous influx of migrants which is not only a problem for Italy but for all the member states of the European Union as well. Therefore, the Court had 'to adopt 'a "realistic, balanced and legitimate approach" when it came to deciding on the "application of ethical and legal rules"'.[41] Emphatically, the Court was not blind for the challenged which Italy faced, and still faces. It was, in the words of the Court, 'confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that during this period the Italian authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local

[38] *Gäfgen v Germany* App no 22978/05 (ECHR, 30 June 2008), para 69

[39] *Khlaifia and Others v Italy* (n 29). See also *Boudraa v Turkey* App no 1009/16 (ECHR, 28 November 2017), para 30

[40] ibid, paras 11 – 13

[41] ibid, para 151

people and to maintain law and order'.[42] Nevertheless, the Court held that it could only reiterate and adhere to the absolute nature of Article 3 ECHR.[43] Hence, the enormous influx of migrants could not absolve the Italian state from any of its obligations under that provision.[44]

Both cases, *Gäfgen* and *Khlaifia*, indicate that the European Court of Human Rights is very strict in its adherence to the absolute nature of Article 3 ECHR. Even though the majority of these cases are about state interference, the Court has confirmed that Article 3 ECHR might even bite when the danger emanates not from the state itself but from individuals.[45] Its considerations in *D.L. v Austria* are illustrative:

'Owing to the absolute nature of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from individuals or groups of people who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[46]

To sum up, reiterating its own "mantra" that Article 3 ECHR enshrines an absolute right in (almost) every single case and adhering to it even in the face of the most difficult situations and in the most striking cases, the Court appears to be a staunch advocate of this "principle of absoluteness". This might lead to the assumption that it cannot but be concluded that Article 3 of the Convention is, both in theory and in practice, absolute. Nevertheless, in some cases elements of relativity could be deduced within the Court's reasoning and which have the potential to undermine the absoluteness of the prohibition of torture. These elements will be summarised in the following section and elaborated upon in the subsequent chapters.

[42] ibid, para 183

[43] According to Rainey, Wick and Ovey the Court its consideration on the ability of the States services is a controversial one, undermining the absolute nature of Article 3. This position and its connection with the "minimum threshold of severity will be discussed in more detail in Chapter 4. See: Rainey, Wicks and Ovey, '*The European Convention on Human Rights*' (n 3), p 184

[44] *Khlaifia and Others v Italy* (n 29), para 184

[45] *Pretty v the United Kingdom* App no 2346/02 (ECHR, 29 April 2002), para 51

[46] *D.L. v Austria* App no 34999/16 (ECHR, 7 December 2017), para 56

2.3. Unravelling elements of relativity in the Court's jurisprudence

Over time, the adherence of the European states to the absolute nature of the prohibition of torture, which was very strong present in the first few years after the second World War, slowly faded away. When the European continent was confronted with new challenges like the fight against terrorism and migration, several Contracting States called upon the Court to allow for a certain degree of relativity. In particular the United Kingdom was, and still is, in favour of a more relative approach towards Article 3 of the Convention. In for example, *Saadi v Italy*[47], the United Kingdom, acting as a third-party intervener, argued that the Court should take into account that society should be protected against the serious danger of terrorism. Therefore, it asked the Court to weigh the rights of the applicant, a suspected terrorist, against the interest of the community.[48]

Besides the critique of like-minded states and despite the strong position of the Court *vis-à-vis* the absolute nature of the prohibition of torture, there are some flaws in its mantra that Article 3 is absolute. *Ramirez Sanchez v France* is a case in point.[49] The applicant, Ramirez Sanchez, was internationally known as one of the most dangerous terrorists. For eight years and two months (98 months), the applicant was held in solitary confinement because of his dangerousness, the need to maintain order and security within prison and the risk of his absconding. He was occasionally examined in order to determine whether he was still fit enough to remain in solitary confinement.[50] Before the Court, the applicant alleged that his prolonged solitary confinement amounted to inhuman and degrading treatment and hence constituted a violation of Article 3 ECHR. A careful read of the Court's judgement leads to the conclusion that several elements of relativity can be deduced from the Court its judgement. First, the Court was mindful to the fact that, not only France but, all Member States faced serious difficulties in the fight against terrorism.[51] Second, it did not turn a blind eye to the applicant's reputation as being one of the most dangerous terrorists. Finally, it had regard to the applicant's refusal to express remorse for his acts. The Court, therefore,

[47] *Saadi v Italy* (n 23)

[48] ibid, paras 117 – 123

[49] *Ramirez Samchez v France* (n 23)

[50] ibid, paras 9 – 76

[51] ibid, paras 115 – 116

concluded that it was understandable that the French authorities considered it necessary to combine his detention with extraordinary security measures – that is, solitary confinement. [52]

Besides this example, several other elements of relativity can be detected in the jurisprudence of the Court. In addition to these elements, the Court is confronted with some challenges in the case of conflicts of rights as well. Indeed, conflicting rights demand for a balancing test.[53] Accordingly, if two absolute rights are in conflict, the Court will face difficulties with upholding the "principle of absoluteness" inherent in Article 3 of the Convention. Although they will be discussed in more detail in the subsequent chapters, they will be shortly introduced and summarised below.

First, the application of "a minimum threshold of severity criterium"[54] allows the Court to take several circumstances into account. The Court could take considerations such as the proportionality of the measure taken, the personal conditions of the applicant, the difficulties which a state faces into account before it even comes to the core of Article 3 ECHR. Moreover, a certain level of relativity is inherent in Article 3 ECHR since it distinguishes between five types or, if one prefers, levels of ill-treatment, being: torture; inhuman treatment; degrading treatment; inhuman punishment and degrading punishment. Although the boundaries are, conceptually speaking, clearly defined in the Court's case-law, it is still a matter of contextualisation when determining whether the alleged act amounts to, for example, torture or inhuman treatment. Moreover, and in connection with the first element, the Court has held that the Convention is a living instrument and that ill-treatment which falls first outside the scope of Article 3 ECHR may in the future amount to a violation.[55] In a

[52] ibid, para 125

[53] See for example: *Nevmerchitsky v Ukraine* App no 54825/00 (ECHR, 5 April 2005), para 93; *Ciorap v Moldova* App no 12066/02 (ECHR, 19 June 2007), para 76

[54] Before Article 3 is applicable a minimum level of severity has to be met, e.g. a minimum level of suffering is required. This 'minimum level of severity' is settled case-law of the European Court of Human Rights. See for example: *Ireland v the United Kingdom* (n 23), para 130; *Soering v the United* Kingdom (n 8), para 100; *Jalloh v Germany* (n 7), para 67; *Boudraa v Turkey* App (n 34), para 29; *T.K. v Lithuania* App no 14000/12 (ECHR, 12 June 2018), para 82

[55] *Selmouni v France* (n 15), para 101; *Öcalan v Turkey* (n 24), para 163. See also: *Tyrer v the United Kingdom* App no 5856/72 (ECHR, 25 April 1978), para 31 in which the Court for the first time referred to the living instrument doctrine in the context of Article 3

similar vein, ill-treatment which amounted to inhuman treatment may after several years be conceptualised as torture.

Second, in *Soering v the United Kingdom*[56], the Court held that '[i]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right'.[57] This, much contested[58], consideration is difficult to reconcile with the absolute nature of the prohibition of torture and 'clearly reflects the non-absolute protection of Article 3' and leads to a dual standard.[59] This concept of an "inherent fair balance" leads to an even more fundamental question: how to deal with conflicting rights? Although this issue is less controversial in the case of a conflict between an absolute and a relative right, it is so if the Court is confronted with a conflict between two absolute rights. Here, a balancing approach proves necessary which, at the same time, raises the question of "how to uphold the absolute nature of Article 3 ECHR?'.

Besides the conflict of (absolute) rights, a balanced approach is required if legitimate aims and a proportionality test are involved. In several cases, the Court refers to certain legitimate aims. Examples are: combatting crime[60], the society's general interest in securing that justice is done in criminal cases[61] and prison safety and security.[62] Moreover, in determining whether the required standard of healthcare in detention centres has been adhered to, the Court reserves sufficient flexibility: 'the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee but should also take into account "the

[56] *Soering v the United Kingdom* (n 8)

[57] ibid, para 89. See also *N v the United Kingdom* (n 8), para 44; *I. K. v Austria* App no 2964/12 (ECHR, 28 March 2013), para 44 ; *Paposhvili v Belgium* App no 41738/10 (ECHR, 13 December 2016), para 178

[58] See for example dissenting judges Tulkens, Bonello and Spiellman in *N v the United Kingdom* (n 8), para 7

[59] Christoffersen, '*Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights'* (n 5), p 90

[60] *Tomasi v* France (n 27), para 115; Soering *v the United Kingdom* (n 8), para 110.

[61] *Soering v the United Kingdom* (n 8), para 89; *Lopez Elorza v Spain* App no 30614/15 (ECHR, 12 December 2017), para 111

[62] *Dejnek v Poland* App no 9635/13 (ECHR, 1 June 2017), para 60. See also, although less explicit: *Wenner v Germany* (n 7), para 74

practical demands of imprisonment"'.[63] Hence, it should be further explored whether and, if so, how this balanced approach could be reconciled with the absolute nature of the prohibition of torture.

Finally, the concept of "inhuman or degrading punishment" allows for a certain degree of relativity. It is settled case-law of the Court that 'the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'.[64] Hence, the Court accepts that there is an element of "pre-conceived legitimacy" inherent in this concept of punishment which might call the absolute nature of Article 3 ECHR into question. The former citation implies that "a given form of legitimate treatment" is allowed. Accordingly, the Court has to distinguish between legitimate and illegitimate treatment – a distinction which heavily depends on the facts of each case. As a consequence, the same treatment might amount to a violation of Article 3 ECHR in one case while, in another case, it is considered to be in compliance with the accepted standards solely on the basis of considerations of legitimacy. Here, the question remains how this could be reconciled with the principle of absoluteness.

2.4. Conclusions

The previous paragraphs made clear that the Court pretends to be a staunch advocate of the absolute prohibition of torture or inhuman or degrading treatment or punishment in international human rights law. In every single Article 3 case, it reiterates that this provision enshrines an absolute right from which no derogations are possible. Adhering to this absolute nature in the most difficult circumstances, as it was the case in *Gäfgen v Germany*[65] or *Khlaifia v Italy*[66] the Court does not deviate from its absolute nature. Nevertheless, several scholars rightly point out that the Court seems to allow for some relativity. First, the minimum threshold of severity and the threshold distinguishing torture from inhuman and or degrading treatment or punishment have the potential to confront the Court with some difficulties. Before entering the scope of Article 3 ECHR, the Court has regard to elements of

[63] *Aleksanyan v Russia* App no 46468/06 (ECHR, 22 December 2008), para 140; *Akimenkov v Russia* App nos 2613/13 and 50041/14 (ECHR, 06 February 2018), para 83

[64] *Kudla v Poland* App no 30210/96 (ECHR, 26 October 2000), para 92; *Mozer v the Republic of Moldova and Russia* App no 11138/10 (ECHR, 23 February 2016), para 178

[65] *Gäfgen v Germany* (n 1)

[66] *Khlaifia v Italy* (n 34)

justification and proportionality. These considerations call the absolute nature of Article 3 ECHR into question. Second, the Court's consideration that inherent in the whole of the Convention is a search for a fair balance. This leaves us with the striking questions: 'how can an inherent fair balance be in compliance with the absolute nature of Article 3 ECHR? Besides this inherent fair balance, the Court is, in some cases, confronted with a conflict between (absolute rights). This calls for a balancing approach which might conflict with the principle of absoluteness. In this connection, it is important to note that the Court sometimes uses considerations which are very similar to the legitimate aims of non – absolute Convention provision, e.g. prevention of disorder and crime, general interest of the society. Finally, the concept of "punishment" within Article 3 of the Convention is puzzling. Legitimate punishment is inherent in an Article which is absolute and does not allow for any considerations of legitimacy.

Hence, although the Court takes a strong position *vis-à-vis* the absolute nature of Article 3 ECHR, some flaws can be detected in its case-law. The following three chapters will deal with these issues and will lead to the conclusion as to whether the absolute nature of Article 3 ECHR is an illusion in international human rights law or not.

3. Determining the minimum level of severity and the application of Article 3

'[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it 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'.[67]

3.1. Introduction

Two thresholds are of significance for the application of Article 3 ECHR. First, before an action falls foul of Article 3 of the Convention a minimum level of severity has to be attained (henceforth: the threshold of application). This "threshold of application" is a relative one which 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'.[68] This list is not exhaustive. In, for example, *Khlaifia and Others v Italy*[69], the Court had regard to the purpose of ill-treatment, the context and the vulnerable situation of the victim as well.[70] In another case about asylum seekers, the Court was even more convincing. In *Tarakhel v Switzerland*[71] it considered that 'as a "particularly underprivileged and vulnerable" population group, asylum seekers require "special protection" under that provision. This requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents'.[72] Further, in a case about the Roma minority in Croatia, the protection of minorities and their

[67] *Ireland v the United Kingdom* (n 23), para 130; *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011), para 218

[68] Ibid. See also *Jalloh v Germany* (n 7), para 67; *Bouyid v Belgium* App no 23380/09 (ECHR, 28 September 2015), para 86

[69] *Khlaifia and Others v Italy* (n 29)

[70] *Khlaifia and Others v Italy* (n 29), para 60

[71] *Tarakhel v Swizerland* App no 29217/12 (ECHR, 4 November 2014)

[72] ibid, paras 118 – 119. See also: *M.S.S. v Belgium and Greece* (n 63), para 251

vulnerability were factors which had to be taken into account.[73] Finally, in *Gäfgen v Germany*[74] the Court attached weight to the intentional nature of the ill-treatment.[75]

Besides and after this "threshold of application" a second threshold determines the classification of the type of ill-treatment. This threshold will be defined and referred to as the "threshold of classification". Article 3 ECHR prohibits five types or, if one prefers, levels of ill-treatment: torture; inhuman treatment; degrading treatment; inhuman punishment and degrading punishment.[76] Although a special stigma is attached to the classification of an act as torture[77], Vermeulen and Battjes rightly point out that identical consequences are attached to the infliction of any of these types of ill-treatment.[78] The present chapter elaborates on the theoretical framework underpinning these two thresholds, explaining the applicability parameter, the specification parameter and the concept of contextualisation. After having set up this framework, it examines how this framework works in practice and finds its way in the Court's case-law. Finally, it explores the interaction between the two thresholds and the principle of absoluteness.

3.2. The theoretical framework: applicability, specification and contextualisation

Three concepts are of relevance for a clear understanding of the two thresholds inherent in the application of Article 3 ECHR and their interaction with the principle of absoluteness. These three principles are: the applicability parameter, the specification parameter and the process of contextualisation.[79]

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[73] *Oršuš and Others v Croatia* App no 15766/03 (ECHR, 16 March 2010), para 147

[74] *Gäfgen v Germany* (n 1)

[75] *Gäfgen v Germany* (n 1), paras 101 – 106

[76] This distinction was clearly outlined by the former Commission of the Council of Europe in the so-called Greek case: *Denmark, Norway, Sweden and the Netherlands v Greece* App nos 3321/67, 3322/67, 3323/67, 3344/67 (ECOMHR, 5 November 1969)

[77] See the introduction to Chapter 2

[78] Ben Vermeulen and Hemme Battjes, 'Prohibition of Tortrure and Other Inhuman or Degrading Treatment or Punishment (Article 3)'in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edition, Intersentia 2018), p 386

[79] The concepts "applicability parameter" and "specification parameter" are borrowed from research done by Natasa Mavronicola in Natasa Mavronicola, 'What is an absolute right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (n 3), p 749

The applicability parameter holds the idea that once an absolute right applies, 'it cannot be overridden in any circumstances, so that it must be fulfilled without any exceptions'.[80] The specification parameter refers to the definitional question of Article 3 ECHR. It is subdivided in two different levels: the threshold between prohibited treatment and treatment falling outside the scope of Article 3 ECHR (the threshold of application) and the threshold between torture and inhuman or degrading treatment or punishment (the threshold of classification).[81] It poses a question of content: what is the content of an absolute right? Or, more specific: it denotes to the norm which Article 3 of the Convention proscribes.[82] The last concept, the process of contextualisation, is closely connected with the former: specification. But, contextualisation is more precise: it refers to the application of the facts to the relevant norm (Article 3 ECHR). Contextualisation is inherent in the process of adjudication. Put it differently: it are the facts which determine whether a given (Convention) provision applies. Leaving the applicability parameter for what it is, the remainder of this chapter will focus on the specification parameter and the process of contextualisation.

3.2.1. The threshold of application in practice

As explained above, ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3 ECHR. Within this criterium, the choice of the term "relative" is an unfortunate one likely to cause confusion.[83] It might give rise to the (mis)perception that the Court allows for considerations of proportionality, legitimate aims and balancing within the scope of Article 3 ECHR. Greer took notice of this confusion, observing that '[s]ome commentators argue that relativity in the application of Article 3 has no bearing on its absoluteness. But most have observed that the variability of the relevant threshold undermines this status or at least raises a query about what it really means'.[84] To fully grasp and to illustrate the argument that the principle of absoluteness and the term "relative" are likely to cause confusion and to explain the practical relevance of the concepts of specification and

[80] ibid, p. 729. See also cited therein: Gewirth, 'Are There Any Absolute Rights?' (n 2), p. 2

[81] Mavronicola, 'What is an 'absolute right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (n 3), p 749 and p. 754

[82] ibid, p. 749

[83] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012), p 208

[84] Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law' (n 3), p 116

contextualisation, the case of *Yankov v Bulgaria*[85] will be compared with a hypothetical situation in which the facts differ a bit. Together, they aim to clarify the concept of contextualisation and its role in the threshold of application.

The facts of scenario I, borrowed from the case of *Yankov v Bulgaria*, can be summarized as follows. While in prison, the applicant, X, writes a book describing the events he faces during his detention and his experiences. The written materials are seized by the prison authorities during a search. The prison authorities considered the written statements to be defamatory and sanctions are ordered. X is being placed in an isolation cell for one week. Before X was brought to the isolation cell, his hair had been shaved off.[86] In Strasbourg, the applicant alleges that his placement in an isolation cell and the forced head shaving amounts to a violation of Article 3 of the Convention. The Court, finding a violation of Article 3 ECHR, is mindful to the situation at hand and considered:

'[T]he forced shaving off of a prisoner's hair, is that it consists in a forced change of the person's appearance by the removal of his hair. The person undergoing that treatment is very likely to experience a feeling of inferiority as his physical appearance is changed against his will. Furthermore, for at least a certain period of time a prisoner whose hair has been shaved off carries a mark of the treatment he has undergone. The mark is immediately visible to others, including prison staff, co-detainees and visitors or the public, if the prisoner is released or brought into a public place soon thereafter. The person concerned is very likely to feel hurt in his dignity by the fact that he carries a visible physical mark. The Court thus considers that the forced shaving off of detainees' hair is in principle an act which may have the effect of diminishing their human dignity or may arouse in them feelings of inferiority capable of humiliating and debasing them. Whether or not the minimum threshold of severity is reached and, consequently, whether or not the treatment complained of constitutes degrading treatment contrary to Article 3 of the Convention will depend on the particular facts of the case, **including the victim's personal circumstances, the context in which the impugned act was carried out and its aim (….)**.Furthermore, in the particular case the applicant must have had reasons to believe that the aim had been to humiliate him, given the fact that his hair was shaved off by the prison administration in the context of a punishment imposed on him for writing critical and offensive remarks about prison warders, among others. Additional factors to be taken into consideration in the present case are the applicant's age - 55 at the relevant time - and the fact that he appeared at a public hearing nine days after his hair had been shaved off.'.[87]

Two elements are of significance. First, the Court emphasizes that the assessment of the facts and its findings about the aims underpinning the act alleged of takes place before the

[85] *Yankov v Bulgaria* App no 39084/97 (ECHR, 11 December 2003)

[86] ibid, paras 65 – 76

[87] ibid, paras 112 – 119 [emphasis added]

minimum threshold of severity has been attained. In other words: these facts are inherent in its assessment on the minimum threshold of Article 3 ECHR. Second, the former citation illustrates and shows that the European Human Rights Court has regard to the aim (debasing and humiliating the applicant) the context in which the acts took place (short before a public hearing and in the context of a punishment) and the personal circumstances of the applicant (his age). Accordingly, the outcome of the present case could have been completely different if the facts, and thus the context, of the case were different. In order to illustrate this and to fully understand how contextualisation plays an important role in deciding whether Article 3 of the European Convention applies, the case of *Yankov v Bulgaria* will be compared with the following hypothetical situation in which the facts are a bit different.

In scenario II, X is still writing a book about his detention. The prison authorities search X's cell and find some of his written materials. Besides X's experiences, the materials contain evidence for his correspondence with other prisoners. It reveals that, while in prison, the applicant deals in drugs. Sanctions are ordered and X is brought to an isolation cell. In addition, a strip search is carried out and his hear is shaved off his head in order to ensure that he has no drugs hidden in his clothes or in his hair.

Different from scenario I, the acts complained of by X in the second scenario were based on a legitimate aim: prison safety and security and the prevention of disorder and crime.[88] Although, it is plausible and legitimate to argue that the imposition of legitimate aims (potentially) undermines the absolute nature of Article 3 ECHR, that argument does not hold water since the assessment takes place before the situation attains the minimum threshold of severity in order to fall within the scope of Article 3 ECHR.[89] It is the context which determines whether a specific case falls foul of the prohibition of torture or inhuman or degrading treatment or punishment. As the two scenarios show, the aim to humiliate and arouse feelings of inferiority and the belief of the applicant that the sole aim of the prison authorities was to humiliate him and arouse feelings of inferiority was enough to attain the minimum threshold of severity in the first scenario. The Court's conclusion would however be different if the acts were carried out in accordance with a legitimate aim as was the case in

[88] See for similar considerations: *Dejnek v Poland* App no 9635/13 (ECHR, 1 June 2017), para 60. See by analogy: *Mouisel v France* App no 67263/01 (14 November 2002), para 47

[89] See further on this in Chapter 4

scenario II: prison safety and security and the prevention of disorder or crime. The change of facts, and thus the context, change the Court's conclusion significantly. In this connection, the distinction between legitimate and illegimate aims is of utmost importance. On the one hand, aims which are considered to be illegitimate, e.g. to cause feelings of inferiority and to humiliate, leave the Court with less room to find no convention violation. On the other hand, acts which are considered to be legitimate leave the Court with more leeway for considerations of legitimacy. Indeed, in scenario II it could very well be argued that solitary confinement was legitimate based on prison safety, security and the prevention of disorder or crime.[90] Whether an act is illegitimate or legitimate depends, in the end, on the particular circumstances of each single case. In short, it are the facts which matter in a specific situation and as a consequence, no exhaustive list could be drawn providing for acts which are prohibited under Article 3 ECHR.[91]

3.2.2. The threshold of classification

Besides the distinction made by the Court, between prohibited ill-treatment and unprohibited ill-treatment (the threshold of application), it distinguishes torture from inhuman or degrading treatment or punishment. The assessment and the definition underpinning this classification are in line with Article 1 of the CAT. The prevailing standard is that:

'[i]n determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment (…) it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which 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'.[92]

[90] See more on this: Smet, 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment or Punishment in Article 3 ECHR' (n 3)

[91] Ben Vermeulen and Hemme Battjes, 'Prohibition of Tortrure and Other Inhuman or Degrading Treatment or Punishment (Article 3)' (n 77), p 385

[92] *Salman v Turkey* App no 21966/93 (ECHR, 27 June 2000), para 114; *Akkoç v Turkey* App nos 22947/93 and 229748/93 (ECHR, 10 October 2000), para 115; *Gäfgen v Germany* (n 1), para 90

This citation reveals that, as is the case with the threshold of application, the context plays a decisive role. On the basis of the relevant facts, the Court decides as to whether ill-treatment was intentionally inflicted; whether the intensity of suffering was severe enough and if it was inflicted with the intention to obtain a certain aim. Accordingly, once Article 3 ECHR applies, there is an extra threshold which has to be attained before the alleged ill-treatment amounts to torture. A clear understanding of this threshold is of relevance for the shifting boundaries in the Court's case-law. The subsequent paragraph will demonstrate that the Court developed a lower threshold. This development made, and still makes, this "threshold of classification" even more important (see paragraph 3.3.2).

3.3. Unravelling the interaction between applicability, classification, the principle of absoluteness and the living instrument doctrine

There is, beyond doubt, a strong connection between the threshold of application and the principle of absoluteness. Although less evident, a similar connection exists between this principle and the threshold of classification. As regards the former, the applicability parameter teaches us that once the minimum level of severity has been attained, the prohibition of torture or inhuman or degrading treatment or punishment is absolute. However, as we saw in the example of *Yankov v Bulgaria*[93], this minimum level of severity may shift depending on the context (contextualisation). This feature makes the line between applicability and non-applicability and absoluteness and non-absoluteness a fine, and sometimes even blurred, one. This is even more since the Court seems to lower the minimum standard of absoluteness to a significant extent. Already in 1978, the Court explicitly recognized the living nature of the Convention in *Tyrer v the United Kingdom*.[94] This "living instrument doctrine" encompasses the notion that the norms set forth in the European Convention change and develop over time due to the development of common standards in the Member States making up the Council of Europe. Measures which were allowed in the past, may be prohibited and amount to a violation in the future.[95] Over time, the Court reiterated this doctrine in many cases.[96] So, in *V*

[93] *Yankov v Bulgaria* (n 80)

[94] *Tyrer v the United Kingdom* (n 54), para 31. See also: *Aoulmi v France* App no 50278/99 (ECHR, 17 January 2006), para 109

[95] *Henaf v France* App no 65436/01 (ECHR, 27 November 2003), para 55

[96] *Selmouni v France* (n 15), para 101; *Riad and Idiab v Belgium* App nos 2977/03 and 29810/03 (ECHR, 24 January 2008), para 97

v the United Kingdom[97] the Court used this doctrine in a case about the accepted minimum age for criminal responsibility.[98] It questioned itself 'whether the attribution to the applicant of criminal responsibility in respect of acts committed when he was ten years old could, in itself, give rise to a violation of Article 3. In doing so, it has regard to the principle, well established in its case-law that, since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member States of the Council of Europe'.[99]

The evolution of European standards, which is inherent in this "living instrument doctrine" is clearly illustrated by the historical development of the changing standards in Court's jurisprudence on the death penalty. In the *Soering case*[100] (1989) the Court considered that Article 3 ECHR cannot be interpreted a generally prohibiting the death penalty.[101] The facts in *Soering v the United Kingdom* can be summarized as follows. The German student Jens Soering resided for educational purposes in the United States where he met his girlfriend, Elizabeth Haysom. Being opposed to their love affair, her parents told him that they would do anything to prevent their relationship. A row developed and in March 1985, Soering killed Elizabeth's parents with a knife. After the murder, both Soering and Elizabeth disappeared. It was only in April 1986 that both suspects were arrested in the United Kingdom. After admitting the murder on William and Nancy Haysom, the United States asked for the extradition of Soering. Nevertheless, since the death penalty was still, *de jure et de facto*, in place, the British Government asked for a diplomatic assurance, which should confirm that Soering would not be subjected to the death penalty.[102] In Strasbourg, the applicant complained that his extradition to the United States would be contrary to Article 3 of the Convention since he would be exposed to the death-row phenomenon – that is, the phenomenon which encompasses 'a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death'.[103] Being mindful to the fact that the applicant's claim was not

[97] *V v the United Kingdom* App no 24888/94 (ECHR, 16 December 1999)

[98] ibid, paras 72 – 80

[99] ibid, para 70

[100] *Soering v the United Kingdom* (n 8)

[101] ibid, paras 102 – 103

[102] ibid, paras 11 – 26

[103] ibid, para 81

about the (possible) imposition of the death penalty, the Court nevertheless elaborated on its views about it, recognizing that the imposition thereof would not give rise to a violation under Article 3 *per se*. Nevertheless, the death row phenomenon itself constituted a breach of the prohibition of torture or inhuman or degrading treatment.[104]

In 2010, the Court came, however, to a different conclusion. In *Al-Sadoon and Mufdhi v the United Kingdom*[105], the Court held that if there are substantial grounds to believe that an individual would risk being subjected to the death penalty, that individual may not be returned to the requesting state.[106] Despite the express authorisation for the death penalty in Article 2(1) of the Convention, the Court concluded that State practice led to an amendment thereof. It observed that all but two States had ratified Protocol 13 which prohibits the death penalty under all circumstances. It further observed that consistent State practice led to a moratorium on the death penalty.[107]

Comparing the *Al-Sadoon and Mufdhi* case with the *Soering* judgment, the practical relevance of the living instrument doctrine becomes evident. Indeed, the comparison of these two cases illustrates how State practice and the evolutive nature of the Convention have the power to change both written law and case-law over time.

3.3.1. The role of the living instrument doctrine in the threshold of application and the threshold of classification

In both the threshold of application and the threshold of classification, the living instrument doctrine plays an important role. This doctrine allows for chancing and developing standards and, as a consequence, both thresholds shift accordingly. Nevertheless, higher human right standards seem to lower the relevant threshold, thereby leaving less room for the process of contextualisation and mitigating circumstances. With respect to the interaction of this doctrine with the threshold of application, the case of *Mubilanzila Mayeka and Kaniki Mitunga v*

[104] According to Harris, O'Boyle and Bates, the Court came to this conclusion since Article 2 ECHR permitted the death penalty. See David Harris, Michael O'Boyle and Ed Bates, *Law of the European Convention on Human Rights* (Oxford University Press 2014), pp 245 – 246

[105] *Al-Sadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECHR, 02 March 2010)

[106] ibid, para 120

[107] ibid

Belgium is a case in point.[108] In this case about the detention of an unaccompanied minor while awaiting the final decision of her asylum application, the Court considered that:

'In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which 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. In order to carry out this assessment, regard must be had to "the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' [and] that the **increasingly high standard being required in the area of the protection of human** *rights* and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[109]

Here, the Court explicitly spells out the higher level of protection which unfolded itself in the light of present-day conditions. The case of *Bouyid v Belgium*[110] illustrates how this higher level of protection works out in practice and revealed that it has, in the light of the absolute nature of Article 3 ECHR, downsides as well. The case is about the alleged violation of Article 3 ECHR by two brothers. Already before the alleged acts took place, their family had a strained relation with the local police whose basis was stationed close to their house. On one day, one of the brothers was standing in front of the house, trying to get in since he had forgotten his keys. A passing police officer, in plain clothes, requested the boy to show him his identity card. After the latter's refusal to adhere to the order given to him, he was grabbed by his jacket and taken to the police station. Inside, the boy was slapped in his face while he was protesting about his arrest. According to a medical certificate, which was issued on the same day, the first applicant was in "a state of shock" and indicated that he was physically harmed. Two months later, his brother (the second applicant) was arrested and being questioned because of an altercation. During the proceedings, the second applicant was slapped in his face. Later that day, a medical certificate was drawn up indicating bruises on the second applicant's left cheek.[111] After having followed the national legal proceedings, the applicants complain that Article 3 ECHR has been violated. Finding a violation, the Court considered that:

[108] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECHR, 12 October 2006)

[109] ibid, para 48 [emphasis added]

[110] *Bouyid v Belgium* (n 67)

[111] ibid, paras 9 – 17

'As the Court has pointed out previously, where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The Court emphasises that the words "in principle" cannot be taken to mean that there might be situations in which such a finding of a violation is not called for, because the above-mentioned severity threshold has not been attained. Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question. In the present case the Government did not claim that the slaps of which the two applicants complained had corresponded to recourse to physical force which had been made strictly necessary by their conduct; they simply denied that any slaps had ever been administered. In fact, it appears from the case file that each slap was an impulsive act in response to an attitude perceived as disrespectful, which is certainly insufficient to establish such necessity. The Court consequently finds that the applicants' dignity was undermined and that there has therefore been a violation of Article 3 of the Convention'.[112]

Moreover, the Court attached weight to the fact that a slap inflicted by a police officer on an individual who was under his control amounts to a serious attack to that person's dignity. According to the Court, the face is the part of a human's body which expresses his or her individuality, manifests his or her social identity and constitutes the centre of a person's senses used for the communication with others.[113] In addition, the fact that the slap in the face could, according to the Court, well suffice to conclude that the applicant was humiliated in his own eyes, which constitutes degrading treatment under Article 3 ECHR. That is even more since the slap was inflicted by a police officer which has, in the eyes of the victim, a status of superiority.[114] Finally, it held that although the slap might have been inflicted thoughtlessly by a frustrated officer, that element is immaterial. It reiterated well-settled case-law that even in the most difficult circumstances, the Convention prohibits torture in absolute terms.[115]

In a strong dissenting opinion, three judges explained why they consider that the slap in the face by a police officer did not amount to inhuman and degrading treatment. While explaining

[112] ibid, paras 100 – 102

[113] ibid, para 104

[114] ibid, paras 105 – 106

[115] ibid, para 108

their views, they touch upon the so-called "principle of absoluteness". Leaving the word to De Gaetano, Lemmens and Mahoney:

'As the Chamber noted, both the incidents in the present case involved an isolated slap inflicted thoughtlessly by a police officer who was exasperated by the applicants' disrespectful or provocative conduct, in a context of tension between the members of the applicants' family and police officers in their neighbourhood, and there were no serious or long-term effects. Although the treatment complained of was unacceptable, we are unable to find that it attained the minimum level of severity to be classified as "degrading treatment" within the meaning of Article 3 of the Convention. We fear that **the judgment may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers**. Police officers may well be required to exercise self-control in all circumstances, regardless of the behaviour of the person they are dealing with, but this will not prevent incidents in which people behave provocatively towards them – as in the present case – and cause them to lose their temper. (…)To conclude, as the majority have, that in any such incident the State will be responsible for a violation of the victims' fundamental rights (…) is in our view a clear underestimation of the various difficulties that may be encountered in real-life situations. This observation cannot be countered by stating that the prohibition of torture and inhuman or degrading treatment or punishment is absolute, regardless of the conduct of the person concerned. **We too subscribe to the absolute nature of this prohibition. However, it only applies once it has been established that a particular instance of treatment has attained the requisite level of severity**. There is also good ground for thinking that the absolute nature of the prohibition set forth in Article 3 is one of the reasons why the Court has found that this Article will be breached only where the level of severity has been attained. The Court regularly reiterates that it is attentive to the seriousness attaching to a ruling that a Contracting State has violated fundamental rights. This is especially true of a finding of a violation of Article 3, a provision that enshrines "one of the most fundamental values of democratic societies" and requires an absolute prohibition by States. Accordingly, we should avoid trivialising findings of a violation of Article 3. The situation complained of in the present case is far less serious than the treatment inflicted by law-enforcement officers in many other cases that the Court has unfortunately had to deal with. What impact, then, does a finding of a violation of Article 3 still have?'[116]

This thought-provoking analysis of the dissenting judges, once again, emphasises that Article 3 of the Convention is only absolute if a minimum level of severity has been attained (the threshold of application). However, as they rightly point out, setting this minimum threshold to low risks trivialising findings of a violation of Article 3 ECHR and undermines its impact. In this connection, it is the same to say that a standard which is this low would make Article 3 ECHR unworkable. One must be mindful to the fact that also police officers are required to

[116] Jointly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney in *Bouyid v Belgium* (n 67), paras 6 – 7 [emphasis added]

exercise self-control but that, under some conditions, they might lose their temper as well. In that sense, it goes to far to say that solely a slap in the face might amount to a violation of Article 3 ECHR. If we accept a standard this low, Article 3 ECHR risks to set the norm for a utopian world and does not live up with the (unfortunately) sometimes cruel, reality. As a consequence, any considerations of legitimacy which are inherent in the process of contextualisation and the assessment as to whether a minimum level of severity has been attained, would be excluded altogether and risks to deny reality.

Notwithstanding the (academic) criticism on *Bouyid v Belgium*, a similar development unfolded itself in other situations, most notably in health-related issues in deportation cases. In 1997, *D v the United Kingdom*[117] set the standard in this area of law. D (the applicant), a national from the island of St Kitts, was detained in the United Kingdom because of possession of drugs. While in prison, he was diagnosed with Aids and after his detention, D was to be deported back to his motherland.[118] Complaining about the deportation order, D argued that he was in the advanced stage of his terminal illness, that the medical treatment in St Kitss was insufficient for his condition and that he had no social contacts who could take care over him.[119] The Court accepted his complaint considering that in these "very exceptional circumstances" the sudden withdrawal of medical and social care constituted a violation of Article 3 ECHR.[120]

Leaving the meaning and scope of the phrase "very exceptional circumstances" open for interpretation in 1997, *N v the United Kingdom*[121] gave more substance to it. The facts in the *N case* are quite similar to the former case. N was a national from Uganda who resided in London. Being severely ill, she was admitted to the hospital where she was diagnosed with the HIV-virus. Appropriate medical treatment stabilised her (medical) condition. In the meantime, her application for asylum was refused.[122] After having exhausted all local remedies, the case came before the Court. In her pleadings, N alleged a violation of Article 3 ECHR. She held that 'there was a stark contrast between her current situation and what would

[117] *D v the United Kingdom* App no 30240/96 (ECHR, 2 May 1997)

[118] ibid, paras 6 – 21

[119] ibid, paras 40 – 41

[120] ibid, paras 52 – 53

[121] *N v the United Kingdom* (n 8)

[122] ibid, paras 8 – 13

befall her if removed'.[123] All but one of her six siblings died because of the consequences of HIV in Uganda. Different from the medical experts in the United Kingdom, all that what the doctors in Uganda could do was to attempt to alleviate the symptoms. In addition, the hospital in her home town was unable to cope with such a severe disease. Further, due to her poor condition, she was unable to work and could not afford the required medicines. She had no relatives in Uganda left alive and who could take care over her if, as she foresees, her condition would quickly relapse.[124] Different from *D v the United Kingdom*, the Court did not find a breach of Article 3 ECHR. Accepting that her situation, in terms of quality of life and life expectancy, would be affected if she was sent back to Uganda, it did not amount to the required "very exceptional circumstances". The Court argued that the rapid deterioration of her health and access to medical treatment was still speculative and could not impose a positive obligation on the responding State not to send the applicant back.[125] Accordingly, a high level applied which raised, over time, a lot of criticism among the judges of the Court

[123] ibid, para 26

[124] ibid, para 27

[125] ibid, paras 46 – 51. See on the speculative aspect also: Dissenting Judge Bratza in *Bensaid v the United Kingdom* App no 44599/98 (ECHR, 6 February 2001). It could very well be argued that the Court, in its judgment, was influenced by the submissions of the responding government, the United Kingdom. The latter argued that 'The interpretation of the Convention, as with any international treaty, was confined by the consent of the Contracting States. The practical effect of extending Article 3 to cover the applicant's case would be to grant her, and countless others afflicted by Aids and other fatal diseases, a right to remain and to continue to benefit from medical treatment within a Contracting State. It was inconceivable that the Contracting States would have agreed to such a provision. The Convention was intended primarily to protect civil and political, rather than economic and social, rights. The protection provided by Article 3 was absolute and fundamental, whereas provisions on health care contained in international instruments such as the European Social Charter and the International Covenant on Economic, Social and Cultural Rights were merely aspirational in character and did not provide the individual with a directly enforceable right. To enable an applicant to claim access to health care by the "back door" of Article 3 would leave the State with no margin of appreciation and would be entirely impractical and contrary to the intention behind the Convention'. ibid, para 24

themselves.[126] Indeed, in *Yoh-Ekale Mwanje v Belgium*[127], the dissenting judges argued that the very high threshold is difficult to reconcile *'avec la letter et l'esprit de l'article 3'.*[128]

Although some earlier cases indicated that the Court somewhat relinquished its stringent approach[129], it explicitly did so in a case against Belgium. In *Paposhvili v Belgium*[130], the applicant was a Georgian national residing in the responding state. He was diagnosed with leukaemia while he was in prison because of suspected small crimes. Facing the threat of being expelled back to Georgia, he claimed that his deportation would amount to a violation of Article 3 ECHR since his illness reached the most serious stage and that the numerous courses of chemotherapy put him at risk of severe complications which made adequate and regular monitoring in a specialised setting a necessity. In addition, a search was under way for a compatible donor. If he would be expelled, neither the special drug he received, nor the donor would be available to him. Further, it was doubtful whether he would have access to life-saving treatment due to the proven shortcomings in the Georgian health-care system.[131] Being mindful to the difficulties the applicant faces, the Court seemed to revisit the harsh approach followed after the *D case*. Although considering that the new test still corresponds to the high threshold, it remarked that 'the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid

[126] See on the high level: *Bensaid v the United Kingdom* (n 118), para 40; Dissenting Judge Bratza in *Bensaid v the United Kingdom*. Concerning the critique within the Court, see: Dissenting Judges Tulkens, Jočiené, Popovič, Karakaş, Raimondi and Pinto de Albuquerque in *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECHR, 20 December 2011), para 6; Dissenting Judge Pinto de Albuquerque in *S. J. v Belgium* App no 70055/10 (ECHR, 19 March 2015), paras 6 – 12

[127] *Yoh-Ekale Mwanje v Belgium* (n 125)

[128] Dissenting Judges Tulkens, Jočiené, Popovič, Karakaş, Raimondi and Pinto de Albuquerque in *Yoh-Ekale Mwanje v Belgium* (n 125), para 6

[129] See for example: *Aswat v the United Kingdom* App no 17299/12 (ECHR, 16 April 2013)

[130] *Paposhvili v Belgium* (n 56)

[131] ibid, paras 139 – 142

and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.[132]

Accordingly, it introduces the element of "intense suffering or a significant reduction in life expectancy" within the test spelled out in earlier case-law. This new test denotes a more lenient approach followed by the Court and, notwithstanding the fact that the threshold is still high, lowers the minimum level of severity to a significant extent.

In *Selmouni v France*[133], the Court adopted a similar approach *vis-à-vis* the threshold of classification, observing that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.[134] Indeed, Schabas explains that '[o]n the sliding scale between torture and inhuman or degrading treatment the relative proportions may have evolved as the Court has become less demanding in making a finding of torture'.[135] In fact, this sentence summarizes the history of the Court's case-law under Article 3 ECHR since the entering into force of the Convention in 1950. Considering that a detainee who had been subjected to "Palestinian hanging" whereby he was stripped naked with his arms tied together behind his back had been tortured, the Court found, for the first time, a violation of the prohibition of torture in 1996.[136] Since *Aksoy v Turkey*, the Court found a violation of this notion of torture to which a special stigma is attached in international law. It found a violation thereof if the ill-treatment was invoked intentionally[137], if the alleged act caused severe pain and suffering[138], if the treatment is considered to be particularly serious and cruel.[139] In other cases, the Court attached weight to

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[132] ibid, para 183

[133] *Selmouni v France* (n 15). See also: Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 (3) Netherlands Quarterly of Human Rights 385, p 387

[134] *Selmouni v France*, para 101

[135] William A. Schabbas, *The European Convention on Human Rights: A Commentary* (n 25), p 177

[136] *Aksoy v Turkey* App no 21987/93 (ECHR, 18 December 1996). See also: Egbert Myer, 'Human Rights and the Fight against Terrorism: Some Comments on the Case Law of the European Court of Human Rights' in Ana María Salinas De Frías, Katja L.H. Samuel and Nigel D. White (eds), *Counter – Terrorism: International Law and Practice* (Oxford University Press 2012), p 769

[137] *Jalloh v Germany* (n 7), para 106

[138] *Polonskiy v Russia* App no 30033/05 (ECHR, 19 March 2009), para 124

[139] *Ilhan v Turkey* App no 22277/93 (ECHR, 27 June 2000), paras 84 – 87

the gratuitous nature of the act committed.[140] Hence, it can be deduced from these cases that the threshold of torture is much lower than it was hitherto. This is not to say that the Court departs from the special stigma attached to torture since there is still this extra threshold which has to be attained. It is more to argue that, due to shifting thresholds, ill-treatment which was considered to be degrading or inhuman treatment or punishment in the past amounts to torture in accordance with more recent case-law. This observation is important for a puzzle which has become more and more complex over time – that is, the tension between the threshold and the principle of absoluteness. This issue will be at the hearth of the subsequent paragraph.

3.3.2. A complex puzzle: the interaction between a lower threshold and the principle of absoluteness

Over time, both the threshold of application and the threshold of classification set a higher human rights standard. In this connection, the concept of "human dignity" is of utmost importance and gained more and more influence over time. The case of *Bouyid v Belgium*[141] illustrate the weight which the Court attached to this concept. Although a high(er) standard of human rights protection is commendable, it risks undermining the absolute nature of the prohibition of torture. In paragraph 3.2.1 we observed that the process of contextualisation, which allows for considerations of proportionality and legitimate aims, is of determinative significance in order to assess whether the threshold of application has been attained. Once Article 3 of the Convention applies, the applicability parameter teaches us that no proportionality assessment or any legitimate aim may enter the Court's judgment. However, if the Court lowers this threshold of application, less room is left to use these considerations of proportionality and legitimacy within the process of contextualisation and specification. In order to cope with this complex puzzle, several solutions can be put forward.

First, the Court should either leave the path of absoluteness – a solution which runs counter the norm set forth in Article 15 (1) and (2) ECHR, or it should depart from the assessment of proportionality and legitimacy all together. The latter option is unsatisfactory as well. Both the proportionality assessment and considerations of legitimacy are inherent in the process of contextualisation. Though interesting, the adoption of such a draconian measure would make

[140] *Vladimir Romanov v Russia* App no 41461/02 (ECHR, 24 July 2008), paras 66 – 70

[141] *Bouyid v Belgium* (n 67)

Article 3 ECHR unworkable and artificial since both proportionality and justification are part of the process of contextualisation.

Another solution has been put forward by the former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN – SCTorture), Manfred Nowak.[142] Nowak used the second threshold of classification in a thought-provoking way. Reaching the conclusion that Article 3 ECHR is not absolute in practice, he proposes to classify the prohibition of torture as absolute and defining the prohibition of unhuman or degrading treatment or punishment as a relative right. His thoughts on this matter are interesting, not at least because they live up to the special stigma attached to torture.[143] Moreover, it offers a solution to the tension between the lower threshold and the absolute nature of Article 3 ECHR. Nowak's idea sets the threshold of absoluteness at a higher level – that is, the level of torture, thereby leaving more room for considerations of proportionality and the application of legitimate aims in the Court's assessment. Though interesting, Nowak's proposal is, at the same time, problematic. It requires a dramatic chance in the Court's jurisprudence, departing from Article 3 ECHR as an absolute right to accepting only the prohibition of torture as an absolute right. As a consequence, it erodes the absolute nature of Article 3 of the Convention as a whole and undermines the strong prohibition which this provision articulates. Further, applying this proposal only in a European context, a divergence of protection in international human rights law will emerge. While other human rights treaties define all levels of ill-treatment as absolute, the European Convention will only do so with respect to the prohibition of torture. Consequently, the Convention will provide citizens with less protection, a consequence which could not have been the intention of neither the drafters[144] nor that of the Court. Finally, Nowak's proposal is also from a more technical point of view problematic. Article 15 ECHR reads that '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under

[142] Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (n 9), p 688

[143] See more on this in the introduction of Chapter 2

[144] See the proposal of Seymour Cock in Chapter 2: Amendment proposed by Mr S. Cocks, Assembly Document No. 91 (1949) TP 252 – 4. p 236 (n 26)

international law. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or *from Articles 3*, 4 (paragraph 1) and 7 shall be made under this provision'.[145] This provision is clear and unequivocal, no derogation from Article 3 ECHR is allowed, irrespective of the presence of (morally) justifying circumstances. This is at unease with Nowak's notion of an absolute prohibition of torture. As explained, an absolute right is a right from which no derogations are permissible. If we accept the proposal put forward by Nowak, Article 15 (2) ECHR should read as follows: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from torture and Articles 4(paragraph 1) and 7 shall be made under this provision'. As a consequence, Article 3 of the Convention loses effect and its credibility as an absolute right. Moreover, it raises the question what the next step will be. If we allow to erode the absolute nature of Article 3 ECHR by defining only torture as absolute, the next step might be to allow for some relativity in Article 3 ECHR as a whole. This prospect might have detrimental consequences, endangering human dignity which underpins this (absolute) right.

Finally, one could follow Feldman in his approach. Feldman recognizes the principle of absoluteness in the context of Article 3 ECHR but, at the same time, observes that 'a degree of relativism cannot, **in practice**, be entirely excluded from the application of the notions of inhuman or degrading treatment'.[146] The omission of the notion of torture in this citation is however an unfortunate one. It could not be deduced from his writing whether it implies that, as Nowak argues, only torture is absolute in practice and theory. What is however relevant, is that Feldman's observation indicates that, if the Court allows for a certain degree of relativism in the process of contextualisation, it could still adhere to the absolute nature of Article 3 ECHR under the applicability parameter which spells out that once this provision is applicable it denotes an absolute prohibition.

3.4. Conclusions

The present chapter discussed three parameters which are of relevance for a clear understanding of the complex puzzle which has arose over time – that is, the tension between the development of a lower threshold and the principle of absoluteness. Ever since the

[145] Article 15 (1) and (2) of the ECHR [emphasis added]

[146] David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press 2002), p 242 [emphasis added]

adoption of the Convention, the threshold distinguishing between prohibited and unprohibited ill-treatment lowered. This lower threshold leaves less room for considerations of proportionality and legitimacy which are of importance for the process of contextualisation. The fear that they will be excluded from the considerations of the Court all together is a realistic and fundamental one since it would make this provision unworkable and artificial in its application. Several solutions has been put forward, some of which risk trivialising the absolute nature of Article 3 ECHR since these scholars argue that only the notion of torture enshrines an absolute prohibition. From a technical point of view these observations prove to be incorrect. Feldman seems to come close to the best solution: enforcing the absolute prohibition of torture while accepting that some elements of relativity, in the form of considerations of proportionality and legitimacy, are inherent in the process of contextualisation.

4. The application of a balancing approach within the framework of Article 3 ECHR

'[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[147]

The necessity of a fair balance is said to be a common feature of the Convention provisions enshrining a relative right[148] – that is, a right which cannot be limited by consequential considerations. In general, a fair balance has to be struck between the private interest of the applicant and the public interest[149] or the rights of a third party.[150] According to Aileen McHarg, the relationship between human rights and the public interest is one of the most important issues in the human rights discourse. This is not only because it is determinative for the utility of human rights, but also for the settlement of cases which are political or value laden.[151] Although many issues raised under Article 3 of the Convention are indeed political, societal, emotional and value laden, the absolute nature of this provision does, in principle, not allow for a balancing approach. Adopting such an approach would allow consequentialist considerations to enter the scope of the absolute prohibition of torture or inhuman or degrading treatment or punishment. Nevertheless, as McHarg rightly points out, the adoption of a fair balance test is a precondition for the utility of human rights in general and thus for Article 3 ECHR as well. This argument can be illustrated by the practice of the Court; a practice which reveals that it faces several challenges in this area of law. First, in *Soering v*

[147] *Soering v the United Kingdom* (n 8), para 89

[148] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (n 3), p 340. See also: David Harris, Michael O'Boyle and Ed Bates, *Law of the European Convention on Human Rights* (n 103), pp 510 – 511

[149] Examples are: *Maurice v France* App no 11810/03 (ECHR, 6 October 2005), paras 83 – 85; *Dickson v the United Kingdom* App no 44362/04 (ECHR, 4 December 2007), paras 77 – 85; *Evans v the United Kingdom* App no 6339/05 (ECHR, 10 April 2007), para 74; *A, B and C v Ireland* App no 25579/05 (ECHR, 16 December 2010), para 233; *Hämäläinen v Finland* App no 37359/09 (ECHR, 16 July 2014), para 67;

[150] See for example: *Hatton and Others v the United Kingdom* App no 36022/97 (ECHR, 8 July 2003), paras 119 – 125;

[151] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 (5) The Modern Law Review 671, p 695

the United Kingdom[152], the Court spelled out that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'[153], thereby leaving scholars with the dedicated question whether and how this consideration could be reconciled with the principle of absoluteness. Further, the application of law and settled norms in practice could become quite difficult and challenging since reality is often much more complex than theory. This is particularly true in the case of conflicts of rights. Lastly, a general overview of the jurisprudence on Article 3 of the Convention reveals that the Court borrowed several legitimate aims from the second paragraph of the rights enshrined in Articles 8 – 11 of the Convention. The test of a fair balance is inherent therein and finds its place in the assessment whether the interference was necessary in a democratic society.[154] Although we touched upon this element of legitimacy (and proportionality) before, the present chapter will discuss it more in detail in connection with the fair balance test. However, before we come to that, this chapter will elucidate the inherent fair balance and the problematic issue of conflicting rights.

4.1. The inherent fair balance

The citation introducing the present chapter was for the first time heralded by the Court in *Soering v the United Kingdom.*[155] Reiterating the Court, 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[156] In *Chahal v the United* Kingdom[157] the Court clarified this notion of an "inherent fair balance" emphasizing that '[i]t should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition as set out in para, 89 of the *Soering* judgment, that there is any room for balancing the risk of ill-treatment against the reasons for

[152] *Soering v the United Kingdom* (n 8)

[153] ibid, para 89

[154] David Harris, Michael O'Boyle and Ed Bates, *Law of the European Convention on Human Rights* (n 103), pp 510 – 511; Laurens Lavrysen, 'System of Restrictions' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia Ltd 2018), pp 315 – 321

[155] *Soering v the United Kingdom* (n 8)

[156] ibid, para 89

[157] *Chahal v the United Kingdom* App no 22414/93 (ECHR, 15 November 1996)

explosion in determining whether a state's responsibility under Article 3 is engaged'.[158] Recently, the Court confirmed this position, arguing that:

'the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return'.[159]

Accordingly, the Court seems to argue that the concept of an "inherent fair balance" should not be understood as balancing the prohibition of torture of the applicant against the general risk he or she possesses to the community. However, reiterating the same formulation after its powerful position in *Saadi v Italy*, a balancing approach is, without doubt, inherent in the Court's assessment when adjudicating on cases involving an alleged violation of Article 3 ECHR.[160] At this point, the observations and writings of the Danish scholar Christoffersen are interesting. He is critical about this notion of an inherent fair balance and remarks that '[i]t is logically impossible to use the principle of proportionality to delimit the scope of absolute rights. If the fair balance-test were applied, a wider scope of protection would implicitly be recognized, and the right would not be absolute'.[161] He goes even further, saying that the express reference to the requisite fair balance and the proportionality (of the contested extradition) reflect the non-absolute nature of this right.[162]

Indeed, Christoffersen is right in his observation that the notion of an "inherent fair balance" is difficult, and perhaps even impossible, to reconcile with the absolute nature of Article 3 ECHR since an absolute right omits any considerations of justification, balancing and proportionality. Being mindful to the Court's strong words in *Chahal v the United Kingdom* and *Saadi v Italy*, the concept of an "inherent fair balance" might also imply that the scope

[158] ibid, para 81

[159] *Saadi v Italy* (n 23), para 139

[160] See for example: *Čalovskis v Latvia* App no 22205/13 (ECHR, 24 July 2014), para 129; *A.S. v Switzerland* App no 39350/13 (ECHR, 30 June 2015), para 31 and *D.L. v Austria* (n 54), para 52

[161] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (n 5), p 83

[162] ibid, p 9

and absolute protection of Article 3 ECHR could be weighed against other derogable and non-derogable rights. Jurisprudence of the Court reveals that it, indeed, weighed the prohibition of torture or other forms of ill-treatment against other Convention rights, in particular the right to life (Article 2 ECHR). This development can, however, be criticised if one adopts a strict reading of the principle of absoluteness. The next paragraph will elaborate on this dedicated issue and explores whether and how it could be reconciled with the absolute nature of Article 3 ECHR. It does so in the light of the (recent) case-law of the Court.

4.2. Striking a fair balance between conflicting rights

In his thought-provoking analysis on *Gäfgen v Germany*[163], Greer adopted the thesis that the Court was right in its final conclusions – that is, finding a violation of Article 3 ECHR, but that it was so on the wrong grounds.[164] He remarks that the Court overlooked the fact that the case was about a conflict between two rights: the right not to be tortured of the victim, Jakob von Metzler, and the right not to be tortured of the applicant, Magnus Gäfgen. According to Greer, the Court should have tried to strike a balance between these two rights and come to the conclusion that, in this particular case, the right of Jakob prevailed. Though interesting, his thesis proves to be wrong. In principle, the conflict in *Gäfgen v Germany* was not a clash between two absolute rights, but a conflict between an absolute and a relative right, more specific: the right to life (Article 2 ECHR).[165] Nevertheless, apart from the fact that his argument is based on a misunderstanding of the scope of the Court's analysis under Article 3 ECHR, Greer seems to be on something. He is right in his observation that there can be a conflict between two Convention rights, which makes the balancing exercise an unavoidable one. Indeed, case-law of the Court reveals that this is not merely a theoretical brainteaser. Strasbourgian jurisprudence on medical treatment and forced feeding of detainees is illustrative in this respect. As regards the latter, the forced-feeding of detainees, the case of *Nevmerzhitsky v Ukraine*[166] is a case in point. Adjudicating on the forced-feeding of a detainee who started a hunger strike, the Court observed that, after having established that

[163] *Gäfgen v Germany* (n 1). For a more extensive overview of the facts see pp. 15 – 16

[164] Steven Greer, 'Should Police Threats to Torture Always be Severely Punished? Reflections on the *Gäfgen* Case' (2011) 11 (1) Human Rights Law Review 67

[165] See also: Stijn Smet, 'Conflicts between Absolute Rights: A Reply to Steven Greer' (2013) 13 (3) Human Rights Law Review 469

[166] *Nevmerzhitsky v Ukraine* (n 52)

forced-feeding involves degrading elements which in certain circumstances amounts to a violation of Article 3 ECHR, there existed a conflict between one's individual right to personal integrity and the State's positive obligation under Article 2 ECHR (right to life). It observed that this conflict has not been solved by the Convention itself.[167] In the present case, the forced-feeding of the applicant constituted a breach of Article 3 ECHR since the medical necessity of the alleged treatment had not been proven and the applicable standards on forced-feeding had not been complied with. The Court was struck by the way the food was forcibly administered to the applicant: restraints were applied, the applicant was handcuffed, and a mouth-widener was used while a special rubber tube was inserted into the food channel. Moreover, the authorities did not refrain from the use of force which was proportional to the resistance by the applicant.[168] It is striking and interesting that the Court uses the wording "in certain circumstances", This implies that, also here, a process of contextualisation plays an important role: a violation of Article 3 ECHR is based on the circumstances of the case at hand, among which the medical necessity.

Jalloh v Germany[169] concerned and relates to the second element – medical treatment of detainees. This case was about the forced administration of an emetic to the applicant causing him to regurgitate a drug bubble which would, in subsequent judicial proceedings, be used as evidence against him. Though acknowledging that the emetic had been administered primarily to obtain evidence, the responding Government argued that the medical intervention was necessary as there had been a real and immediate risk that the unpackaged drug bubble would leak and poison the applicant.[170] Accordingly, it aimed to convince the Court that it acted in accordance with its positive obligations under Article 2 ECHR; that of medical intervention. The Court, however, adopted a different approach and reiterated that '[w]ith respect to medical interventions to which a detained person is subjected against his or her will, Article 3 imposes an obligation on States to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The person concerned nevertheless remain under the protection of Article 3, whose requirements permit no derogation. A measure which is of therapeutic necessity from the point of view of

[167] ibid, paras 93 – 94 and para 102. See also *Ciorap v Moldova* (n 52), paras 76 – 77

[168] ibid, paras 97 – 99. See more on this: Chapter 5.2

[169] *Jalloh v Germany* (n 7)

[170] ibid, para 69

established principles of medicine cannot, in principle, be regarded and inhuman'.[171] Hence, as is the case with forced-feeding, medical intervention is considered to be inherent in the positive obligations under Article 2 ECHR on the condition that the therapeutic necessity thereof has been proven. As was the case in *Nevmerzhitsky v Ukraine*, the Court was confronted with a conflict between rights which, in principle, requires a balancing approach; a balance which heavily depends on the facts of the case.[172] So, it are the facts which determine whether medical intervention was necessary or not.

Together, these two cases illustrate the tension between real-life situations and the black letter prohibition enshrined in Article 3 of the Convention. In this connection, one must distinguish between two scenarios. First, there can be a conflict between two absolute rights (paragraph 4.2.1.). Second, a conflict might occur between an absolute right and a non-absolute or relative right (paragraph 4.2.2.). The remainder of this section will elaborate on these two dedicated issues and explore how they interact with the principle of absoluteness.

4.2.1. Conflicting absolute rights

Greer calls the principle of absoluteness into question, observing that absolute rights can be in conflict with each other.[173] In his analysis, Greer addresses this conundrum from moral perspective. Referring to the judgment of the Court in *Gäfgen v Germany*, he remarks that '[t]he central moral question, which none of the judged frames, is this: why should the right of a suspect – virtually certain to have been involved in the kidnapping of a child for ransom – to be spared the short-lived psychological suffering caused by the threat of torture to compel him to disclose the whereabouts of his victim, take precedence over the victim's right to avoid the much more severe, and much more prolonged physical and mental suffering and imminent death, occasioned by the kidnapping itself?'.[174] Acknowledging that there is no ideal solution to the dilemma presented, Greer refers to the dissenting judges of the Grand Chamber and German courts, arguing that the absolute prohibition of torture is not as absolute as it was hitherto: the principle of absoluteness could be overridden by competing rights.[175] This

[171] ibid, paras 68 - 69

[172] ibid, para 72

[173] Steven Greer, 'Should Police Threats to Torture Always be Severely Punished? Reflections on the *Gäfgen* Case' (n 163)

[174] ibid, pp 86 – 87

[175] ibid, p 88

argument, however, problematizes the absolute nature of Article 3 ECHR as it explicitly acknowledges its (assumed) non-absolute nature as well. Both Mavronicola[176] and Smet[177] opt for an alternative and more principled approach to this dilemma. They address this issue from a different point of view: a clash between a positive and a negative obligation (under Article 3 ECHR). In this connection, both authors conclude that 'the positive obligations encompassed by an absolute right do not include the obligation to act in a way that infringes the negative obligation of an absolute right (…) positive obligations encompassed by an absolute right may involve a degree of variability and uncertainty in the action required to fulfil them'.[178] Or, as Smet puts it 'negative rights trump positive rights when two instances of the same (absolute) right conflict'.[179] Their observations lead, indeed, to a workable solution to the dilemma which the Court may be confronted with if indeed two obligations under Article 3 ECHR conflict. In this connection, one should however accept that only negative obligations under Article 3 ECHR are absolute and that positive obligations can be overridden.[180] This conclusion implies that Article 3 ECHR is not truly absolute since positive obligations are, in case of conflict, lower in hierarchy than positive obligations under the same provision

4.2.2. Conflicting absolute and relative rights

Besides a conflict between two (positive and/or negative) obligations under Article 3 ECHR, one might think of conflicts between an absolute and a relative right as well. The most likely, and most common, situation is a conflict between the prohibition of torture (Article 3 ECHR) and the right to life (Article 2 ECHR) as exemplified by the cases of *Jalloh v Germany*[181],

[176] Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (n 3), pp 731 – 733

[177] Stijn Smet, 'Conflicts between Absolute Rights: A Reply to Steven Greer' (n 157)

[178] Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (n 3), p 734

[179] Stijn Smet, 'Conflicts between Absolute Rights: A Reply to Steven Greer' (n 157), p 496

[180] This seems to be contrary to the Smet's perspective on this matter who argues that [i]n cases of conflicting absolute tights, where the Court is forced to provide a solution, negative rights are open to balancing against positive rights only if interference with the negative rights does not involve treating a person as a means. As soon as this last criterion is not met, there can be no question of balancing'. Ibid, p. 496

[181] *Jalloh v Germany* (n 7)

Ciorap v Moldova[182] and *Nevmerzhitsky v Ukraine.*[183] In order to solve this conundrum, one might propose a hierarchy between rights with non-derogable (not absolute) rights as superior rights. This is not as axiomatic as it seems and this presumption does not reflect the Court's jurisprudence on this matter. In, for example, *Ciorap v Moldova*[184] the Court reiterated that 'a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food'.[185] Here, the Court, in express terms, remarks that the right to life (saving the life of a particular detainee) prevails. In fact, it circumvents the question as to whether the right to life outweighs inhuman or degrading treatment but, instead, it considers that it, in principle, does not amount to such a treatment at all. This is a peculiarity since the Court, at the outset, confirmed that the forced-feeding of a person does involve degrading elements which can be regarded as prohibited by Article 3 ECHR.[186] Most probable, the Court was, and still is, mindful to the potential of this formulation to undermine the principle of absoluteness emphasizing that the manner in which the detainee was subjected to force-feeding should not trespass the threshold of application.[187] Indeed, should the Court have included the same phrase after having considered that the minimum threshold of severity was infringed, it had to allow for a balancing approach within the scope of Article 3 ECHR which, without doubt, undermines its absolute nature. This is not to say that the approach, adopted by the Court, is a convincing and commendable one. What the Court actually does is allowing for a balance between a relative and an absolute right before it decides whether Article 3 of the Convention applies. This approach implies that Article 3 ECHR can be outweighed by the right to life, but it does so before it is applicable. If this provision was truly absolute, any considerations of balancing between the right to life and the prohibition of torture should be left out the process of adjudication. That solution would, however, lead to the unsatisfactory result that the Court has to be blind to the circumstances of the case and hence it has to depart from the process of contextualisation. Such an approach would make Article 3 ECHR artificial. Hence, a clear

[182] *Ciorap v Moldoba* (n 52)

[183] *Nevmerzhitsky v Ukraine* (n 52)

[184] *Ciorap v Moldova* (n 52)

[185] ibid, para 77

[186] ibid, para 76

[187] ibid, para 77

and satisfying answer to the conundrum encompassing a conflict between Article 2 and Article 3 ECHR does, in fact, not exist. None of the solutions is ideal. In principle, the approach of the Court, though unsatisfactory, seems to come close to the ideal option.

The situation is however different if the absolute prohibition of torture conflicts with other relative rights, in particular those enshrined in Articles 8 – 11 of the Convention. These rights allow for express exceptions in their second paragraph. The absolute prohibition of torture can be incorporated as one of the exemptions, for example the legitimate aim protecting the public interest. Even more, all other rights, though important, do not raise questions with respect to the life of a person. In this connection, the presumption of a hierarchy, as proposed by Mavronicola, between rights might apply entailing that Article 3 of the Conventionis superior over the other rights.

To conclude, the conflict between absolute rights and a relative and absolute right is a complex puzzle. In the case of conflicting absolute rights, one might adhere to the principle that negative Convention obligations are the trump card and hence prevail over positive obligations. Once, there is a conflict between the right to life and the prohibition of torture it becomes even more difficult and the Court should enter into moral reasoning including elements of justifications, e.g. saving the life of a detainee. Nevertheless, once Article 3 ECHR conflicts with any other relative right, one might adhere to the presumption that there exists a hierarchy between rights, absolute rights being superior.

4.3. Borrowing elements from the relative approach: legitimate aims and proportionality

Besides the concept of balancing conflicting rights, the Court seems to borrow some elements of relative rights as well. A common feature of Articles 8 – 11 ECHR is that all of them make provision for express limitations, provided that certain qualifying conditions are satisfied.[188] First, there must be a legal basis for the interference complained of ("provided for by law"). Second, one or more of the specified legitimate aims has to be met. Examples are: national security or public safety; the prevention of disorder of crime; public health or morals and the protection of rights and freedoms of others. Finally, the interference must be "necessary in a democratic society". This notion of necessity implies that 'an interference corresponds to a

[188] David Harris, Michael O'Boyle and Ed Bates, *Law of the European Convention on Human Rights* (n 103), p 340

pressing social need and, in particular, that it is proportionate to the legitimate aim pursued'.[189] In this connection, the doctrine of the "margin of appreciation" is of significance as it allows for a certain degree of diversity in human rights protection among the member states.[190] The process of balancing is inherent therein; a process which, as illustrated in the preceding chapters, is at unease with the principle of absoluteness.

Leaving the requirement of legality ("provided for by law") for what it is, the remainder of this paragraph aims to demonstrate that the Court borrowed the second and the third requirement from the scheme of express limitations and adopts the proportionality test – which is inherent in the "necessary in a democratic society" assessment – when it adjudicates on Article 3 cases. In addition, this section explores whether this development undermines the principle of absoluteness.

As regards the application of legitimate aims and the adoption of a proportionality test, the *Wenner v Germany* judgement[191] is illustrative. The striking facts of the case are as follows. The applicant, Wenner, was a drug addict for over more than fifty years. In addition, he suffered from Hepatitis C and was diagnosed as HIV positive. Prior to his detention, the applicant was treated with a supervised Drug Substitution Treatment (DST) which was considered to be the only effective medical therapy for him. After the applicant's arrest, his DST was suddenly terminated against his will. While in detention, he suffered chronic pain because of which he spent most of his time in bed. His pain was treated with painkillers. Several times, the applicant requested the prison authorities to treat him with DST. Despite the positive indication from some experts, the prison authorities and the relevant courts rejected his requests. They argued that DST was neither necessary nor suitable for his rehabilitation.[192]

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[189] *The Sunday Times v the United Kingdom (no 2)* App no 13166/87 (ECHR, 26 November 1991), para 50; *Campbell v the United Kingdom* App no 13590/88 (ECHR, 25 March 1992), para 44; *Kutzner v Germany* App no 46544/99 (ECHR, 26 February 2002), para 60; *Pretty v the United Kingdom* (n 44), para 70 and *Paradiso and Campanelli v Italy* App no 25358/12 (ECHR, 24 January 2017), para 181

[190] See more on this doctrine: Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. *Human Rights Files No. 17* (Council of Europe Publishing 2000)

[191] *Wenner v Germany* (n 7)

[192] ibid, paras 6 – 24

Reaching the conclusion that the applicant's rights under Article 3 ECHR were violated, the Court allows for several legitimate aims to enter its judgment. Confirming that it is aware that medical treatment in a prison context may entail additional difficulties and challenges – in particular, those related to security concerns – it continues, by articulating that DST 'would help prevent the spread of infectious diseases such as HIV and Hepatitis C from which the applicant suffered in the interest of his fellow prisoners and the community as a whole. The Court further accepts that the provision of such treatment may serve to diminish the trafficking and uncontrolled consumption of illegal drugs in prison'.[193] Accordingly, it is beyond doubt that two legitimate aims could be read into this consideration: the protection of public health and protection against crime. Besides these implied legitimate aims, the Court explicitly allowed for such an aim, articulating that it:

'[f]urther considers that its above findings are not called into question by the Government's argument that drug substitution therapy would run counter to the aim of rehabilitating the applicant by making him overcome his drug addiction in prison and thus enabling him to lead a life free of illegal drugs outside prison. The Court considers that this objective is, in principle, **a legitimate aim which may be taken into account in the assessment of the necessity** of the medical treatment of a drug addict. However, the Court notes that in the applicant's case, the authorities themselves had considered, prior to refusing the applicant drug substitution treatment in the proceedings at issue, that having regard to his history of drug addiction, this aim could not reasonably be expected to be attained'.[194]

Here, the Court explicitly allows for the legitimate aim to lead a life free of illegal drugs (implicit in the aim of the protection of health) to enter the scope of Article 3 ECHR. This aim is incorporated in the Court's findings on the necessity of the treatment – an assessment which is carried out in the process of contextualisation. In combination with the former aims, one cannot but conclude that the application of legitimate aims is inherent in the adjudication process in Article 3 cases.

One must be aware of the fact that the *Wenner v Germany* judgement does not stand on its own but, instead, reflects the Court's approach in previous cases. Already in 1989, the Court

[193] Ibid, para 74

[194] ibid, para 71

used formulations which came close to the implicit recognition of legitimate aims in its considerations. In *Soering v the United Kingdom*[195], the Court heralded that it could

'not overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in **combating crime. The purpose for which his removal to the United States was sought [….] is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished** as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case'.[196]

This citation reveals that the Court took several (legitimate) aims and objectives into account while adjudicating on this difficult issue. Moreover, it adopted a balancing approach and a proportionality test in the application of an absolute right. The reference thereto seems to reflect the non-absolute protection of Article 3 of the Convention and in an unequivocal manner undermines the principle of absoluteness in express terms.[197]

4.4. Conclusions

The present chapter revealed that the absolute nature of Article 3 ECHR is at unease with the possibility of conflicting rights. Once two obligations under Article 3 of the Convention are in conflict, it is difficult, and even impossible, to uphold the mantra that Article 3 ECHR enshrines an absolute right. Both case-law of the Human Rights Court and legal scholarship demonstrate that negative obligations prevail over positive obligations under the same provision, *in casu* Article 3 ECHR. Even though this solution is commendable, it reveals one of the most striking flaws in the principle of absoluteness: would the prohibition of torture be truly absolute, then it could not be overridden at all irrespective of whether it concerns a positive or a negative obligation.

Besides the conundrum on the conflict of rights and/or obligations under Article 3 of the Convention, this chapter touched upon the incorporation of legitimate aims and the adoption of a proportionality and balancing test in Article 3 cases. In particular, the objectives to

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[195] *Soering v the United Kingdom* (n 8). See for the facts of the case: p 29

[196] ibid, para 110 [emphasis added]

[197] See on this: Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (n 5), p 90

combat crime and to secure prison safety and order found their way in the Court's jurisprudence. Although it is legitimate to argue that this illustrates a relative approach *vis-à-vis* Article 3 of the Convention, one should keep in mind that the incorporation of these elements takes place in the process of contextualisation (see Chapter 3). Hence, they are not within the scope of this (absolute) provision yet. Nevertheless, it illustrates, once again, that the line between absoluteness and relativity is a thin one which easily risks becoming blurred. That this risk exists not only in legal theory but also in practice has been illustrates by the European Court of Human Rights in its own case-law as well as the academic debate about the principle of absoluteness. Elements of relativity are inherent in the process of contextualisation but are, at the same time, detrimental for the principle of absoluteness.

5. Implied legitimacy in the context of punishment and the use of force by state authorities

'In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'.[198]

5.1. Introduction

A careful analysis of the case-law under Article 3 of the Convention reveals that both the concepts of punishment and the use of force by the police are based on a presumption of "pre-conceived legitimacy" – that is, undesirable acts are justified because of the context in which they take place. This means that, with respect to the former, judicial punishment is legitimately punitive in the sense that it is legitimately undesirable and a response to unacceptable behaviour.[199] As regards the latter – the use of force, force inflicted by state authorities which is considered to be necessary in the specific situation at hand is legitimate if it is 'indispensable and not excessive in the particular circumstances'.[200] In other words, force could be a means to achieve a certain result, e.g. the arrest of a suspect or to maintain order in prison. Nevertheless, this concept of "preconceived legitimacy" might weaken the absolute nature of Article 3 ECHR as it, in some cases, requires for balancing. In addition, as explained in chapter 2, it requires a distinction between legitimate and illegitimate treatment – a distinction which depends on the facts of each single case. This chapter elucidates this presumption of "pre-conceived legitimacy" inherent in these two concepts and revisits the question of how they could be reconciled with the absolute character of Article 3 of the

[198] *Ramirez Sanchez v France* (n 23), para 119; *Khider v France* App no 39364/02 (ECHR, 9 July 2009), para 102; *Enea v Italy* App no 74912/01 (ECHR, 17 July 2009), para 56; *Karachentsev v Russia* App no 23229/11 (ECHR, 17 April 2018), para 47

[199] Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15 (4) Human Rights Law Review 721, p 726. See also Separate Opinion Judge Fitzmaurice in *Tyrer v the United Kingdom* App no 5856/72 (ECHR, 25 April 1978), para 8

[200] *Tadić v Croatia* App no 10633/15 (ECHR, 23 November 2017), para 54; *Ksenz and Others v Russia* App nos 40544/16, 18796/08, 49158/09,63839/09, 24455/10 and 36295/10 (ECHR, 12 December 2017), para 94

Convention. In addition, it reflects upon the principle of proportionality within the context of punishment.

5.2. Punishment and pre-conceived legitimacy

In the context of punishment, the Court has constantly held that

'[i]n order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that **inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'**.[201] This formulation implies that judicial punishment is inherently legitimate.[202]

It is this concept of "pre-conceived legitimacy" which distinguishes punishment from inhuman or degrading treatment and torture.[203] Here, the Court seems to adopt a circular test: treatment is only illegitimate if it goes beyond a given form of inevitable legitimate treatment or punishment. This so-called "legitimacy loop"[204] enables the Court to allow for considerations of legitimacy and justifications in a right which is considered to be absolute, while, at the same time, it calls it absolute nature into question. If the analysis is carried out before the "minimum threshold of severity" (the "threshold of application")[205] has been trespassed, the inherent legitimacy does not erode the absolute nature of Article 3 of the Convention. However, if it is applied once the situation at hand is already within the scope of Article 3 ECHR, the absoluteness of that provision can be considered to be a relative one which is dependent on the legitimate nature of the act complained of. Below, two examples (detention conditions and treatment of detainees and solitary confinement) illustrate how the Court applies the concept of punishment within its case-law. These examples show that the Court faces several challenges when adjudicating on these issues and is at unease when it has to apply Article 3 ECHR in an absolute manner. Moreover, they deduce some elements of relativity in the Court's reasoning.

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[201] *Tyrer v the United Kingdom* App no 5856/72 (ECHR, 25 April 1978), para 30; *Ramirez Sanchez v France* (n 23), para 119; *Svinarenko and Silyadnev v Russia* App nos 32541/05 and 43441/08 (ECHR, 17 July 2014), para 116 (emphasis added)

[202] *Ramirez Sanchez v France* (n 23), para 119

[203] Mavronicola (n 14), p 726

[204] ibid, p 727

[205] See more on this in Chapter 3

5.2.1. Example 1: deprivation of liberty and prison conditions

When adjudicating on cases in which the applicant alleges that the conditions of imprisonment fell below the settled standard of "compatibility with human dignity", the Court adopted the following approach:

'[T]he suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that deprivation of liberty in itself raises an issue under Article 3 of the Convention. Nevertheless, under that Article the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him **to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention** and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance'.[206]

Here, the Court clearly aims to avoid falling foul of the circular test which is very well illustrated in its considerations cited above. Indeed, accepting that the deprivation of liberty may very often involve an inevitable element of suffering which is inherent in detention (the circular test), it, at the same time, clarifies that this does not raise an issue under Article 3 ECHR *per se*. In order to do so, the facts of each single case are of relevance: it is the context which determines whether suffering and humiliation went beyond that inevitable element of suffering (the process of contextualisation). So, in *Akimenkov v Russia*[207], the Court considered that although the conditions of detention fell short of the accepted minimum standard rules for the treatment of prisoners, the minimum threshold of severity had not been trespassed since the applicant was only detained in that cell for a month and a half.[208] But, in another case the conditions of imprisonment amounted to a breach of Article 3 ECHR.[209] The Court defined the conditions as "totally unacceptable", having regard to the excessive number of persons detained in one single cell and the fact that the applicant was subjected to

[206] *Kudla v Poland* (n 62), paras 93 – 94; *Poltoratski v Ukraine* App no 38812/97 (ECHR, 29 April 2003), para 132; *Stanev v Bulgaria* App no 36760/06 (ECHR, 17 January 2012), para 204; *Yaroslav Belousov v Russia* App nos 2653/13 and 60980/14 (ECHR, 4 October 2016), para 92; *Zabelos and Others v Greece* App no 1167/15 (ECHR, 17 May 2018), para 75

[207] *Akimenkov v Russia* (n 62)

[208] ibid, para 79

[209] *Nevmerchitsky v Ukraine* App no 54825/00 (n 52)

disciplinary punishment.[210] Finally, in *M.S. v the United Kingdom*[211], the personal circumstances of the applicant were of relevance. The applicant, who was detained after an alleged assault on his aunt, had been diagnosed with mental impairment and resided in several psychiatric hospitals prior to the facts which gave rise to the alleged assault. Although he was in need of medical treatment, it was only after four days that he received the required therapy. Due to this delay, his personal medical conditions deteriorated (rapidly) and constituted a violation of Article 3 ECHR since it ran counter the notion of "respect for human dignity".

Although considerations of legitimacy are, according to the Court, immaterial to its adjudication on poor prison conditions since it holds that each state 'is required to organise its penitentiary system in such a way as to ensure respect for the dignity of the detainees, regardless of financial or logistical difficulties'[212], the judgment of *Khlaifia and Others v Italy*[213]seems to weaken this position since the Court was unable to find a violation while having regard to the difficulties by the enormous influx of migrants entering the Italian borders. The Court considered that Italian authorities were 'burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people to maintain law and order'.[214] While reiterating that the prohibition enshrined in Article 3 of the Convention is absolute, it emphasized that 'it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose'.[215] Notwithstanding that the difficult situation in which Italy found itself is, as confirmed by the Court, context related and hence part of the process of contextualisation, the Italian case illustrates the fine line between accepted and unaccepted legitimate aims. It would, in the words of the Court, indeed be artificial to be blind for the context in which the facts arose, but it, at the same time, allows considerations of legitimacy to enter the Court's reasoning. This is at unease with a strict definition of the principle of absoluteness. That a similar development

[210] ibid, para 86

[211] *M.S. v the United Kingdom* App no 24527/08 (ECHR, 3 May 2012). See on medical necessity in prison conditions also: *Blokhin v Russia* App no 47152/06 (ECHR, 23 March 2016)

[212] *Mamedova v Russia* App no 7064/05 (ECHR, 1 June 2006), para 63

[213] *Khlaifia and Others v Italy* (n 29)

[214] ibid, para 183

[215] ibid, para 185

occurred in the context of punishment with respect to the proportionality test will be demonstrated by the following example on solitary confinement.

5.2.2. Example 2: solitary confinement

The issue of solitary confinement within the context of Article 3 ECHR is a contested one as the Court seems to allow for a balancing test. Smet, for example, takes the stance that in cases concerning solitary confinement 'the Court has explicitly used language identical to the proportionality language it uses when applying relative Convention rights'[216] and considers the approach adopted by the Court to be at odds with its mantra that the prohibition of torture or inhuman or degrading treatment or punishment is absolute.[217] These conclusions are drawn from his observations that the Court allows solitary confinement if there are justifying reasons.[218] Indeed, in *Ilaşcu and Others v Moldova and Russia*[219] the Court confirmed that solitary confinement and segregation constitute not in themselves a violation of Article 3 ECHR but that it is permissible for security reasons or if it is imposed in order to protect the segregated detainee from other prisoners or *vice versa*.[220] Nevertheless, this is not to say that solitary confinement is unconditionally permitted. Even though the imposition thereof was based on several legitimate aims, the Court still has to satisfy itself that the conditions were in compliance with human dignity. In the present case, the applicant was detained for eight years in very strict isolation. He was completely prevented from any contact with the outer world and his cell conditions were pathetic. In connection with the (rapid) deterioration of his state of health – due to the lack of medical health care – these facts amounted to torture.[221] Moreover, the Court reiterates again and again that complete solitary confinement coupled with total social isolation is, in all cases, incompatible with human dignity and, in itself, a violation of Article 3 ECHR as it can destroy the personality of the individual concerned.[222] In

[216] Smet 'The Absolute Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' (n 3), p 280

[217] ibid, p 281

[218] David, Michael O'Boyle and Ed Bates, *Law of the European Convention on Human Rights* (n 103), p 264

[219] *Ilasçu and Others v Russia and Moldova* (n 27)

[220] ibid, para 432

[221] ibid, paras 433 – 441

[222] ibid, para 432. See among other authorities: *Van der Ven v the Netherlands* App no 50901/99 (ECHR, 4 February 2003), para 51; *Matthew v the Netherlands* App no 24919/03 (ECHR, 9 September 2005), para 198

Messina v Italy[223], the prolonged detention and solitary confinement of a detainee who was sentenced to seven years of imprisonment and the payment of a fine because of smuggling drugs and his membership of a Maffia-type organisation, was justified in order to preclude him form re-establishing links with external criminal contacts and organisations (more specific: the mafia-type organisation).[224] Besides the use of legitimate aims a proportionality test was carried out in *Ramirez Sanchez v France*[225], a case about the detention of a notorious terrorist on the international stage. Adjudicating on his prolonged detention and accepting the aim to prevent him from escaping an to preserve order and security within the detention centre, the Court considered it to be necessary to carry out

> 'in view of the length of that period, a rigorous examination […] to determine whether it was justified, whether the measures taken were necessary and proportionate compared to the available alternatives, what safeguards were afforded the applicant and what measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his continued solitary confinement. Reasons for keeping a prisoner in solitary confinement are required by the circular of 8 December 1998 which refers to "genuine grounds" and "objective concordant evidence of a risk of the prisoner causing ... serious harm". In the instant case, the reasons given for renewing the measure every three months were his dangerousness, the need to preserve order and security in the prison and the risk of his escaping from a prison in which general security measures were less extensive than in a high-security prison'.[226]

This citation illustrates that solitary confinement must be both necessary and proportionate to the aim pursued. As elaborated on in Chapter 4, this comes close to the legitimate aims enshrined in- and the proportionality test carried out under Articles 8 – 11 of the Convention and hence calls the absolute nature of Article 3 ECHR into question.

5.2.3. Concluding thoughts on punishment and the absoluteness puzzle: a game of mind

The previous examples demonstrated that the context of a single case is of utmost importance in order to determine whether a given form of punishment was legitimate or not. They revealed that even if prison conditions fell far below the accepted standards, the short period of residence in a cell appears to be a mitigating fact and hence no breach could be found in that particular case. The outcome would have been different if the applicant had to stay there

[223] *Messina v Italy* App no 25498/94 (ECHR, 8 June 1999) (Decision on its admissibility)

[224] ibid, para 1

[225] *Ramirez Sanchez v France* (n 23)

[226] ibid, paras 136 – 137

for a considerable period of time. Moreover, in the *Khlaifia and Others* judgment, the incorporation of legitimate aims in the Court's reasoning was evident. In a similar vein, the *Ilascu* case revealed that legitimate aims are, undeniably, necessary for the imposition of solitary confinement as a form of (legitimate) punishment. Notwithstanding the established principle of the Court that certain forms of punishment – e.g. complete solitary confinement with total social isolation[227] or life imprisonment without a prospect of the prisoner's release and the possibility of a review of the sentence[228], are prohibited *per se*, this line of case-law seems to undermine the absolute nature of Article 3 of the Convention. However, as noted in the introduction to the present chapter, the adoption of a legitimate aim test and a proportionality assessment is undeniably intertwined with the concept of punishment within the meaning of the Court's notion. Article 3 ECHR prohibits only punishment which is illegitimate or disproportionate. In order to ascertain whether that is the case, a proportionality assessment and a legitimacy test should be carried out. The spirit of Article 3 ECHR and the Convention as a whole entails that solely punishment in a strict sense is prohibited – that is punishment which is illegitimate. Accepting a broad definition of this concept of "punishment" runs counter the meaning of Article 3 ECHR as it would cover legitimate punishment as well – that is, punishment which is justifiable and proportionate to the alleged act or to the situation at hand. The adoption of a broad definition would render the protective nature of Article 3 of the Convention meaningless and without tooth. Indeed, it would, in the most extreme case, leave unacceptable behaviour without any penal consequences since punishment would be acceptable in all terms. Hence, this game of mind illustrates that the application of legitimate aims and a proportionality assessment is, and should be, inherent in the concept of punishment.

5.3. The use of force by the police

It is settled case-law that 'the use of force by the police in the course of arrest operations will only not be in breach of Article 3 of the Convention, if indispensable and not excessive'.[229] In

[227] *Ilascu and Others v Moldova* (n 27), para 432

[228] *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECHR, 9 July 2013), paras 109 – 114; *Murray v the Netherlands* App no 10511/10 (ECHR, 26 April 2016), para 99; *Hutchinson v the United Kingdom* App no 57592/08 (ECHR, 17 January 2017), para 42

[229] *Devyatkin v Russia* App no 40384/06 (ECHR, 24 October 2017), para 35; *Ksenz and Others v Russia* (n 199), para 94

addition, the Court has held that 'in respect of a person deprived of his liberty, any recourse to physical force which has not been strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of Article 3'.[230]

Thus, in the context of recourse to the use of force by the police or prison authorities, the general principle is this: the use of (physical) force is prohibited under Article 3 of the Convention. Nevertheless, there are two accepted general justifications to this leading principle: if the use of force was indispensable and not excessive in the course of arrest operations; and if, in the context of deprivation of liberty, it was made strictly necessary by the detainee him or herself. These two exemptions are, in principle, legitimate aims since they turn illegitimate treatment into legitimate treatment. Moreover, a proportionality test must be carried out in order to assess whether the alleged act was indispensable and not excessive or strictly necessary.

The *El-Masri* judgement[231] is an example of a case in which the use of force in the context of arrest was totally disproportionate. The applicant was interrogated while he was on his way to Skopje. He was blindfolded and subject to the use of force. The Court considered that the use of force was excessive since the applicant did not pose any threat to his captors who clearly outnumbered him.[232] In addition, in *Raninen v Finland*[233], the Court noted that the handcuffing of the applicant was not made strictly necessary by his own conduct since he did not resist his arrest, nor did he cause injury, abscond or supressed any evidence. This latter case clearly illustrates that the use of force should, indeed, have been based on a legitimate aim: prevent others from being injured, to prevent the suppression of evidence, et cetera. The former case reveals that the context in which the use of force takes place is of significance as well.

Hence, as is the case with the concept of "punishment", both a blanket leave and a total ban on the use of force will run counter the spirit of Article 3 ECHR. A blanket leave will, although the use of force amounted under certain conditions to ill treatment, be detrimental to

[230] *Ribitsch v Austria* App no 18896/91 (ECHR, 4 December 1995), para 83; *Vladimir Romanov v Russia* (n 139), para 57

[231] *El-Masri v the former Yugoslav Republic of Macedonia* App no 39630/09 (ECHR, 13 December 2012)

[232] ibid, para 207

[233] *Raninen v Finland* App no 20972/92 (ECHR, 24 October 1994), paras 53 – 57

the protection of citizens and hence be in conflict with what the Convention, and Article 3 thereof in particular, aims to protect: human dignity. It will allow recourse to the use of force under all circumstances as it does not distinguish between legitimate and illegitimate use of force. On the other hand, a total ban n the use of force by state agents will lead to morally unacceptable situations which could never have been the intention of the drafters of the Convention. It would, for example, risk to leave resistant suspects of serious crime unpunished since, in that particular situation, the use of necessary force in the case of an arrest was not allowed. In the most extreme case, the suspect will escape, and no right will be done to justice after all. From a moral point of view, this outcome is unacceptable. Both, although very theoretical, examples illustrate that both an assessment on the proportionality of the use of force and the incorporation of a legitimate aim test in the Court's reasonings is necessary to apply Article 3 of the Convention to real life situations.

5.4. Conclusions

The former analysis reveals that the concepts of "punishment" and "use of force by state authorities" within the context of Article 3 can be problematic for the upholding of the absolute character of this right. Both concepts are based on the presumption of a pre-conceived legitimacy and that the adoption thereof is necessary. Both case-law and (moral) theoretical thinking reveal that a total ban on punishment and the (legitimate) use of force leads to an unacceptable situation of which the consequences would be deplorable, in particular from a human rights perspective. In other words, we have to accept that inherent in the concept of "punishment" within the meaning of Article 3 of the Convention there is a distinction between legitimate and illegitimate punishment. A similar approach should be adopted *vis-à-vis* the concept of "the use of force" as developed and articulated by the Court in its own case-law on the prohibition of torture or inhuman or degrading treatment or punishment. Any other solution would, indeed, make Article 3 ECHR unworkable in its practical application.

6. Conclusions and recommendations for the future

The preceding chapters, which constituted the main body of the present research, elaborated on the theory and practice of the absolute nature of Article 3 of the Convention. They set up the theoretical framework, defined the underlying principles and concepts and elaborated on the case-law of the European Court of Human Rights. It is the aim of the present chapter to summarise the main findings and to bring them together. Moreover, it highlights the main problem which underlies the academic debate on the principle of absoluteness and provides the Court with some recommendations.

6.1. A question of definition and interpretation

The analysis of the Court's case-law on Article 3 ECHR reveals that this important human rights institution articulates an ambiguous message in its jurisprudence on the absolute nature of this provision. While it preaches the principle of absoluteness in (almost) every single case, it, at the same time, seems to allow for some elements of relativity. The word "seems" has been carefully chosen since both the principle of absoluteness and the academic critique on relativity are not as axiomatic as they pretend to be.

Indeed, there are some flaws in the Court's case-law *vis-à-vis* the principle of absoluteness. The incorporation of legitimate aims and the adoption of a proportionality test is inherent in the concept of punishment and the Court's definition of the acceptable use of force by state authorities. Theoretical thinking demonstrated that this is – from both a moral point of view and in the light of the spirit of the Convention as a whole – necessary for the practical application of Article 3 ECHR even though it is at unease with the absolute nature of this provision (see Chapter 5). In addition, the analysis adopted in Chapter 4 showed that the absolute nature of Article 3 ECHR is difficult, or even impossible, to uphold when two rights or obligations under that provision are in conflict. Since on of them has to prevail, the other right cannot be considered to be truly absolute. Finally, the Court uses elements borrowed from the relative rights enshrined in Articles 8 – 11 ECHR while adjudicating on the prohibition of torture or inhuman or degrading treatment or punishment. Hence, legitimate aims are included in a right which is considered to be absolute.

However, adherents to the principle of absoluteness use the concepts of a "threshold of application" and the "process of contextualisation" to chop off the legs of this argument. It is, indeed, convincing and even justifiable to argue that all considerations of legitimacy,

proportionality and balancing find their way in the process of contextualisation, thus before the threshold of application has been trespassed. Accepting the definition that an article, only once it applies, does not allow for consequential considerations, the adoption of these elements in the process of contextualisation doe not undermine the principle of absoluteness. This argument is convincing since, as has been demonstrated in Chapter 3, these elements of legitimacy, proportionality and balancing are related to the context of each specific case which is, in itself, determinative for the question as to whether the minimum level of severity (the threshold of application) has been attained. Nevertheless, it has been demonstrated that this threshold is not set in stone and changes over time. Recent case-law illustrates the development to a lower, and according to some of the judges in Strasbourg even to low, minimum level of severity. This development delimits the application of legitimate aims and the assessment of proportionality in the process of contextualisation which risks to render the practical relevance of Article 3 of the Convention meaningless. Although this doctrine is preferable, it does not provide for an answer to the conundrum of conflicting rights which has been discussed in Chapter 4.

The former paragraphs reveal that the question of absoluteness is, in principle, one of definition and interpretation. It is so in two ways. First, the principle of absoluteness depends, to a large extent, on the question what it means for a right to be absolute. One might adopt either a strict reading of this principle (paragraph 6.2.1) or one could support a broader definition of the principle of absoluteness (paragraph 6.2.2). Regardless of the view one adopts, there are, in general, two ways of how the Court could respond to the debate surrounding the question whether Article 3 ECHR is truly absolute (paragraph 6.3). It could choose the draconian option and leave the principle of absoluteness all together. Or, the Court should clarify and define what it means for a right, such as Article 3 of the Convention, to be absolute. It should elaborate on the (practical) conditions and the consequences of this definition.

6.2. Defining and unravelling the "principle of absoluteness"

Neither the Convention itself, nor the Court, defines the so-called "principle of absoluteness" in the context of Article 3 ECHR. As a consequence, the scope of the absolute prohibition of torture or inhuman or degrading treatment or punishment is still undefined and remains rather vague. In general, one could distinguish between two theses which aim to define this principle: the "strict absoluteness theorem" and the "broad absoluteness theorem".

6.2.1. The "strict absoluteness theorem"

The strict absoluteness theorem takes the position that an absolute right may under no conditions or circumstances allow for any considerations of legitimacy or enable an assessment of proportionality or balancing to enter the Court's judgment. Instead, the Court should refrain form any of these elements in its reasoning, irrespective of the phase the Court finds itself (contextualisation or classification). In other words: elements of legitimacy, proportionality and balancing should be excluded from the process of contextualisation as well. Fervent adherents to this theorem would, in the light of recent case-law of the Court, conclude that Article 3 of the Convention is not absolute but relative. The previous chapters demonstrated that the Court uses considerations of legitimacy, allows for a proportionality test and adopts a fair balance test in its assessment. This would, in accordance with this theorem, undermine the principle of absoluteness and, as a consequence thereof, Article 3 ECHR should be considered to enshrine a relative right. Although the Court articulates the principle of absoluteness in (almost) every case, it would be problematic if it is, or becomes, a fervent adherent of this theorem. This theorem risks to make the absolute prohibition of torture or inhuman or degrading treatment or punishment an artificial one. Indeed, as has been demonstrates, considerations of legitimacy and proportionality are inherent in the context of a case and hence in the process of contextualisation. In addition, this view is problematic to the concept of "punishment" and the use of force within the meaning of Article 3 ECHR since they are based on the concept of "pre-conceived legitimacy".

6.1.2. The "broad absoluteness theorem"

The "broad absoluteness theorem" encompasses the notion that Article 3 of the Convention is only absolute once the threshold of application has been trespassed. Accordingly, it allows for considerations of legitimacy, proportionality and balancing in the process of contextualisation. In a similar vein, it does not condemn the Court's definition of "punishment" and the "use of force" since the legitimate and proportionate character thereof has been assessed before the minimum level of severity has been attained. Hence, it allows the Court to differentiate between legitimate or illegimate punishment and the proportionate or disproportionate use of force. An overview of the Court's case-law indicates that the Court follows this line of legal reasoning. Nevertheless, even though this theorem comes close to a morally legitimate and (from a practical point of view) workable definition of the principle of absoluteness it does not address neither solve the conundrum of conflict between absolute

rights or obligations under Article 3 of the Convention. In this connection, one has to accept that this theorem is not able to solve this puzzle after all. Although risking to enter into circular reasoning, absolute means that a right is already absolute and hence trespassed the threshold of application. Accordingly, the puzzle of conflicting rights cannot be solved within the process of contextualisation. This outcome means that this broad definition applies only to negative obligations under Article 3 ECHR which in accordance with the principles outlined in the present paragraph enshrines an absolute right.

To conclude, in accordance with the "broad absoluteness theorem" Article 3 ECHR is not truly absolute. If it would be fully absolute, both negative and positive rights and/or obligations should be absolute. However, in accordance with the "broad absoluteness theorem" only negative rights or obligations can be considered to be absolute since they, in the case of conflicts between rights or obligations under Article 3 ECHR, prevail over positive rights or obligations.

6.3. Recommendations to the European Court of Human Rights

The preceding paragraphs summarised the findings of the present research and distinguished between the broad and the strict absoluteness theorem. The present, and the last, paragraphs are devoted to some recommendations to the Court. In general, there are two: either the Court should leave the principle of absoluteness all together or it should start to clarify this principle in its case-law.

6.3.1. The draconian measure

It has been illustrated and demonstrated that although the Court is a staunch advocate of the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment, it is, in practice, not faithful to this principled rhetoric. Even if it adopts, as it seems to do, the definition of absoluteness as articulated in the broad absoluteness theorem, it could not live up to a full absoluteness principle since that doctrine does not apply to positive rights or obligations under Article 3 ECHR. Hence, it could decide to leave the principle of absoluteness all together, which would amount to an enormous change in its case-law and this solution is, in principle, not commendable at all. First, it risks undermining the protective nature of Article 3 of the Convention since it leaves state with a blanket leave. States will, to easily, take recourse to the argument that they acted in accordance with the aim to combat terrorism, crime or that they faced financial problems according to which they could not

provide for proper prison conditions. This runs counter the general aim of Article 3 ECHR which is respect for "human dignity". Moreover, it would lead to non-compliance with other international human rights instruments which still adhere to the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment.

Accordingly, the consequences of following this (draconian) path are to harsh and detrimental to the protection of human dignity that it is not commendable after all. The preferable solution, which will be discussed below, is that the Court devotes some of its time to define the principle of absoluteness.

6.3.2. Clarifying the "principle of absoluteness"

Paragraph 6.2. revealed that the academic debate surrounding the question as to whether Article 3 of the Convention is truly absolute is one of definition. If one adopts the approach articulated by the strict absoluteness theorem, it would be difficult to uphold that the Court is faithful to the absolute nature of Article 3 ECHR. However, if one follows the broad absolute theorem in its approach, there remains only one problem left *vis-à-vis* the principle of absoluteness – that is, the conundrum of conflict of rights or obligations. If the Court wants, and still aims, to adhere to the absolute nature of Article 3 of the Convention and do justice to "respect for human dignity", it should start with providing for a proper definition of the principle of absoluteness. That is, a definition which contains the following elements:

I. Article 3 ECHR is absolute once it applies – that is, after the threshold of application has been trespassed;
II. Article 3 ECHR allows for considerations of legitimacy, proportionality and balancing in the process of contextualisation (hence, before the minimum level of severity has been attained);
III. Article 3 of the Convention accepts that, inherent in the concept of "punishment" and the notion of "the use of force" as developed in the case-law of the Court, there is a distinction between legitimate and illegitimate and proportionality and disproportionality; and
IV. The principle of absoluteness applies only to negative rights or obligations under Article 3 ECHR, in the case of conflicts between rights, negative rights or obligations are the trump card.

Accordingly, a proper and commendable definition of Article 3 ECHR would be “an absolute right is a negative right or obligation which does not allow for any consequentialist considerations after the threshold of application has been attained, while, at the same time accepting, that principles of legitimacy, proportionality and balancing are inherent in the process of contextualisation and the concepts of punishment and the use of force”. This definition does also live up with Article 15 of the Convention which enshrines that, under no conditions, a state may derogate from its obligations in times of war or any other public emergency threatening the life of the nation.

In addition to these elements and the former definition which is recommended to the Court, the Court should not take down the minimum level of severity to a level which is to low. That would risk making Article 3 ECHR an unworkable and almost utopian provision.

6.4. Final observations

To conclude, the answer to the question as to whether Article 3 of the Convention enshrines an absolute prohibition of torture or inhuman or degrading treatment or punishment is a question of definition. As the law stands, Article 3 ECHR cannot be considered truly absolute since it does not solve the conundrum on the question of conflicting rights and/or obligations under this provision. However, a new definition on what it means for a right to be absolute in the context of Article 3 ECHR has been put forward, and recommended to the Court, in the present dissertation. Although it excludes positive obligations, it lives up with the principle of absoluteness and would provide the Court with a workable definition which lives up with its case-law under Article 3 of the Convention.

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7.2.3.4. Grand Chamber judgments

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7.3. Council of Europe documents

Assembly Document No. 91 (1949) TP 252 – 4.