Heri, Corina. "Substantive Scene-Setting – The Prohibition of Torture and Inhuman and Degrading Treatment." *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*. Oxford: Hart Publishing, 2021. 5–21. Modern Studies in European Law. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509941261.ch-001>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 10:47 UTC.

Copyright © Corina Heri 2021. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

1

Substantive Scene-Setting – The Prohibition of Torture and Inhuman and Degrading Treatment

Chapter Summary

Evaluating the impact of the Court's vulnerability concept on its case law under Article 3 ECHR requires, as its basis, an understanding of that provision itself and of its application by the Court. The present chapter provides just that. It will first sketch the general background against which the prohibition of torture – and its definition – evolved, and then turn specifically to the approach of the ECtHR. In particular, it will touch on three aspects of the Court's approach that are of relevance of the further analysis: first, that the prohibition of torture and inhuman and degrading treatment (IDT) is (relatively) absolute; secondly, that the concept of what constitutes proscribed ill-treatment has evolved over time, and adapts to changing circumstances and understandings; and, thirdly, that the ECtHR takes a context-responsive approach to the severity test under Article 3 that determines whether a given treatment is compatible with respect for human dignity.

Keywords: Article 3 ECHR, prohibition of torture, inhuman and degrading treatment, evolutive interpretation, relativity and absoluteness, history of torture, threshold of severity test, positive obligations.

I. The Evolving Prohibition of Torture

In order to analyse the effects of vulnerability reasoning on the ECtHR's approach to the prohibition of torture and inhuman and degrading treatment, the following will explore key aspects of the scope of this prohibition, and how it came to be.

What constitutes prohibited ill-treatment has continually changed and expanded over time, and acts understood as torture have been inflicted, discussed, and legally defined for millennia.¹ For example, Ancient Greek, Roman and Egyptian civilisations allowed such treatment to be inflicted on persons lacking

¹Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP, 2008), 1–2.

full legal personality, such as foreigners and slaves.² In Europe, torture was notoriously commonplace until the Enlightenment, when increasing respect for human dignity and recognition of the unacceptable brutality and doubtful efficacy of torture coincided with its prohibition in many parts of Europe.³

Moral disgust with the idea of torture was revived after the Second World War.⁴ Those experiences meant that the nascent international protection of human rights concerned itself extensively with the prohibition of torture and inhuman and degrading treatment. A corresponding provision was integrated first into the Universal Declaration of Human Rights of 1948.⁵ This was soon followed by the ECHR, which in its Article 3 created the first binding human rights norm prohibiting torture and IDT, stating succinctly that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Similar prohibitions in other regional and international human rights instruments followed.⁶

The scope of what constitutes torture has evolved dramatically over time and continues to be controversial. At the same time, the relevant regional and international adjudicators and bodies have regularly referred to and drawn upon each other's work and on that of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, in effect creating a certain convergence in how they interpret and expand the scope of the prohibition. For example, when the Special Rapporteur first asserted, in 1986, that rape can constitute torture,⁷ this idea was quickly taken up by other bodies. Twelve years later, the ICTY, the ICTR, the IACHR and the ECtHR had all found that the prohibition of torture and ill-treatment had been violated by acts of rape.⁸ In this sense, while it may be

² Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, 3rd edn (OUP, 2009), 8.

³ Rodley and Pollard (n 2), 8–9.

⁴ Fatima Kola, 'Assessing and Revising the Absolute Prohibition of Torture: An Examination of Its Purpose, Philosophical Justification and Structural Elements' (Dissertation, University College London, 2011), 44.

⁵ UDHR, Art 5.

⁶ Selected examples include Art 7 ICCPR; Art 5 of the American Convention on Human Rights, adopted on 22 November 1969, in force since 18 July 1978, OAS Treaty Series No 36, 1144 UNTS 123, 25 states parties; Organization of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, entered into force on 21 October 1986, CAB/LEG/67/3 rev 5 (1982) 21(1) *International Legal Materials* 58–68, 53 states parties, Art 5; Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, in force since 28 February 1987, OAS Treaty Series, No 67, 18 states parties; and Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, in force since 1 February 1989, ETS 126, 47 states parties.

⁷ Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28(4) *Human Rights Quarterly* 809–41, citing Peter Kooijmans, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', UN Doc E/CN.4/1986/15, 19 February 1986, para 119.

⁸ Nowak (n 7), 3–4; citing *Aydin v Turkey* App no 23178/94, Judgment (GC) of 25 September 1997, Reports 1997-VI; Inter-American Commission on Human Rights, *Martín de Mejía v Peru*, Case 10.970, Report No 5/96, 1 March 1996; ICTY, *Prosecutor v Furundžija* (Judgment), ICTY IT-95-17/1-T, 10 December 1998 (1999) 38(2) *International Legal Materials* 317–393, paras. 163, 171; ICTR, *Prosecutor v Akayesu* (Judgment), ICTR-96-4-T, 2 September 1998 (1998) 37(6) *International Legal Materials* 1399–1410, para 597. See also Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) *International and Comparative Law Quarterly* 565–95, 565.

difficult to identify a single definition of torture and IDT, the relevant international standards have nevertheless converged significantly to date.

II. The ECtHR's Interpretation of Article 3 ECHR

Article 3 ECHR was the first binding, albeit regional, prohibition of torture under international human rights law. The provision is succinct, and does not define torture or IDT. Today, by means of the Court's jurisprudence, it has become a multifaceted set of state obligations, which are affected by the vulnerability of an individual applicant or a group to which they belong. To preface the discussion of what vulnerability does here, the following will detail certain aspects of the evolution of that provision and its scope as it currently stands.

A. The Threshold of Severity Test

The test for determining whether Article 3 ECHR has been violated, as created and applied by the Court, is one of degree and of circumstance. To violate Article 3, ill-treatment must reach a 'minimum level of severity'. Because of the absolute nature of the provision, there can be no justification of ill-treatment that passes this threshold.

The *de minimis* threshold is relative: as the Court found in the 1978 *Ireland v United Kingdom* judgment, '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, etc.'⁹ Although Article 3 standards have continued to evolve since then, the *Ireland* judgment indicates that – as early as 1978 – the Court was prepared to adopt a differentiated and victim-specific or contextual understanding of the provision.

This 'de minimis' rule has been reiterated countless times in the Court's subsequent jurisprudence.¹⁰ In *Soering v United Kingdom*, the Court supplemented it by finding that the severity of ill-treatment depends not only on the factors listed in *Ireland*, but also on 'all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution.'¹¹ This has continued to evolve, and the Court has now developed a standard formula for applying the threshold of severity. This describes a test that is 'relative; it depends on all the circumstances of the case, such as the nature and context of

⁹ *Ireland v United Kingdom* App no 5310/71, Judgment of 18 January 1978, Series A, No 25, para 162.

¹⁰ Aisling Reidy, 'The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights' 6 *Human Rights Handbooks* (Council of Europe 2002), 10–11.

¹¹ *Soering v United Kingdom* App no 14038/88, Judgment of 7 July 1989, Series A161, para 100; Reidy (n 10), 10.

the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.¹² In addition, as clarified in *Khlaifia and Others* in 2016, the Court takes into consideration three factors: 1) the purpose of ill-treatment and the intention and motivation behind it, 2) its context, 'such as an atmosphere of heightened tension and emotions', and 3) the vulnerability of the victim.¹³

In other words, the Court takes the whole context of a given act of ill-treatment into account, and its assessment is relative to the situation, to the ill-treatment, and to traits specific to the victim. Vulnerability reasoning informs this context-sensitive assessment because it relates to the situation concerned (for example, detention), to the ill-treatment (with some acts, for example rape, exploiting vulnerability or causing victims to feel particularly vulnerable), and to the traits of a given victim (for example, young age or disability). Chapter four will show that vulnerability can also have various other effects, but its ability to affect the threshold of severity test, and thereby the scope of Article 3, is certainly a key one.

B. A Typology of Prohibitions under Article 3

Article 3 textually prohibits different types of acts. It can, strictly speaking, be dissected into five possible prohibitions, namely the prohibitions of torture, of inhuman treatment, of inhuman punishment, of degrading treatment and of degrading punishment. While the Court does not always make clear distinctions between these different prohibited behaviours, it has established criteria for distinguishing three types of acts.

i. The Court's Early Case-Law: Torture versus Inhuman and Degrading Treatment and Punishment

Although the Court long shied away from defining torture itself, and instead referred to the definition in Article 1 UNCAT,¹⁴ it did develop its own case law, including its own standards for delimiting torture from other types of ill-treatment. Already in the 1969 '*Greek Case*', the Commission delineated the levels of severity of the different types of ill-treatment under Article 3 into a hierarchy by stating that 'all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.'¹⁵ It then defined these concepts for the first time.

¹² See *Bouyid v Belgium* App no 23380/09, Judgment (GC) of 28 September 2015, Reports 2015, para 78.

¹³ *Khlaifia and Others v Italy* App no 16483/12, Judgment (GC) of 15 December 2016, Reports 2016 (extracts), para 160.

¹⁴ *Gäfgen v Germany* App no 22978/05, Judgment (GC) of 1 June 2010, Reports 2010, para 90.

¹⁵ *Governments of Denmark, Norway, Sweden and the Netherlands v Greece ('the Greek Case')* App nos 3321/67 ..., Report of 5 November 1969, part II, *Yearbook of the ECHR*, 12 (1969), 186, para 2.

In doing so, it specified that 'inhuman treatment' means 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable'.¹⁶ It also held that 'torture' was an aggravated form of inhuman treatment because it has an added element, and namely a specific purpose, 'such as the obtaining of information or confession, or the infliction of punishment'.¹⁷ Degrading treatment or punishment, it held, 'grossly humiliates [the affected individual] before others or drives him to act against his will or conscience'.¹⁸

The next important milestone came in 1978, with the above-mentioned *Ireland* case. There, the Court examined whether five techniques of interrogation employed by the United Kingdom's government had violated the rights of the suspected terrorists on whom they were inflicted.¹⁹ In light of the particular stigma attached to a finding of torture, and the insufficient intensity of the victims' suffering, the Court found that the treatment in question did not constitute torture, but was instead inhuman treatment.²⁰ The Court also elaborated on the meaning of 'inhuman' and 'degrading' treatment, emphasising 'intense physical and mental suffering' in regard of the former and 'feelings of fear, anguish and inferiority capable of humiliating and debasing [its victims] and possibly breaking their physical or moral resistance' in regard of the latter.²¹

With this judgment, the Court indicated that the decisive issue in differentiating between torture and inhuman and degrading treatment is the intensity of the suffering caused, and not the purpose of the acts concerned. The severity criterion has been repeated countless times in the jurisprudence that followed, although the Court's approach has been contested as overemphasising the outcomes of torture and failing to appreciate its qualitative and relational wrongfulness.²²

With time, the Court began to expand the scope of what constitutes torture, as it predicted that it would do in *Selmouni v France*.²³ However, the elements of intent and purpose were not erased from the Court's jurisprudence, neither by *Ireland* nor by the Court's later case law. For example, in *Aksoy v Turkey*, in 1996, when the Court found that an act had constituted torture for the first time in its history, it based its reasoning on those elements. It accordingly held that a 'deliberately inflicted' act of 'Palestinian hanging' perpetrated with premeditation in order to extract information from the victim was so serious and cruel that it could only be described as torture.²⁴

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ *Ireland* (n 9), paras 165–68. See also Anja Katarina Weilert, *Grundlagen und Grenzen des Folterverbotes in verschiedenen Rechtskreisen* (Springer, 2009), 18.

²⁰ *Ireland* (n 9), paras 167–68.

²¹ Ibid, para 167.

²² Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart, 2021), 71.

²³ *Selmouni v France* App no 25803/94, Judgment (GC) of 28 July 1999, Reports 1999-V, para 101.

²⁴ *Aksoy v Turkey* App no 21987/93, Judgment of 18 December 1996, Reports 1996-VI, para 64.

In general terms, a finding of torture under the ECHR is understood as entailing a special stigma and requires, in addition to an element of severity, an element of intent and one of purpose to this day.²⁵ However, there have been some divergent strands of case law in this regard.²⁶ In some instances, the Court has focused more on the gratuitous nature of the violence used, rather than on a particular intent.²⁷ In others, it has focused on the severity and type of suffering inflicted.²⁸ In yet other cases, the Court has taken as a primary consideration whether the ill-treatment had long-lasting after-effects for the health of the victims.²⁹

ii. Inhuman versus Degrading

Situations that do not meet the definition of torture may nevertheless fall under Article 3 by constituting inhuman or degrading treatment. Some of the Court's early case law indicated a hierarchy between these two, with degrading treatment being described as the less severe form of ill-treatment.³⁰ This distinction may not be all that relevant anymore. For one, Natasa Mavronicola has made a convincing argument for the fact that the distinction is qualitative one.³¹ In addition, the Court does not make an explicit distinction between inhuman and degrading treatment in every case. It sometimes contents itself with a finding that a given treatment has 'at least' constituted inhuman treatment³² or that treatment has been inhuman and degrading.³³ Sometimes it fails even to indicate anything beyond the fact that a violation of Article 3 has taken place.³⁴

That is not to say that inhumanity is indistinguishable from degradation. In defining inhuman treatment or punishment, the Court has referred to treatment that 'was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering'.³⁵ By contrast, degrading treatment or punishment is 'such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.³⁶ However, in both cases, the de

²⁵ *El-Masri v the former Yugoslav Republic of Macedonia* App no 39630/09, Judgment (GC) of 13 December 2012, Reports 2012, para 197. See also *Ilhan v Turkey* App no 22277/93, Judgment (GC) of 27 June 2000, ECHR 2000-VII, para 85.

²⁶ Mavronicola (n 22).

²⁷ *Cestaro v Italy* App no 6884/11, Judgment of 7 April 2015, para 174.

²⁸ *Erdal Aslan v Turkey*, nos 25060/02 and 1705/03, Judgment of 2 December 2008, para 73.

²⁹ *Cestaro* (n 27), paras 176, 178.

³⁰ *Tyrer v the United Kingdom* App no 5856/72, Judgment of 25 April 1978, Series A26, para 29; *The Greek Case* (n 15), para 2.

³¹ Mavronicola (n 22), 90.

³² *Süheyra Aydın v Turkey* App no 25660/94, Judgment of 24 May 2005, para 197.

³³ *Ribitsch v Austria* App no 18896/91, Judgment of 4 December 1995, Series A336, para 39; *Algür v Turkey* App no 32574/96, Judgment of 22 October 2002, para 46.

³⁴ *Ayşe Tepe v Turkey* App no 29422/95, Judgment of 22 July 2003, para 42.

³⁵ See, for example, *Kudła v Poland* App no 30210/96, Judgment (GC) of 26 October 2000, Reports 2000-XI, para 92; *Gäfgen* (n 14), para 89.

³⁶ *Ireland* (n 9), para 167.

minimis threshold must be reached and '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.'³⁷

In addition, in order to determine whether a treatment or punishment is degrading, the Court often examines the object of the alleged ill-treatment in order to determine whether it aimed to 'humiliate and debase' the victim – even though the lack of such an intention does not rule out a violation of Article 3³⁸ – and whether 'it adversely affected his or her personality in a manner incompatible with Article 3'.³⁹ Publicity is not a precondition here: 'it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others'.⁴⁰

iii. Treatment versus Punishment

In the past, the Court has occasionally taken the distinction between 'treatment' and 'punishment' very seriously. For example, in one case, it held that the findings on inhuman and degrading treatment made in *Ireland* did not apply to a case on 'punishment'.⁴¹ However, this rigid distinction seems to have softened with later case law. In many cases, the Court now makes general findings about treatment and punishment.⁴² At the same time, there is a conceptual specificity to 'punishment', which requires the distinction of legitimate punishment and that which goes beyond. In the detention context, the Court has issued extensive jurisprudence on the suffering and humiliation that goes beyond what is necessarily involved in a carceral sentence.⁴³ This is discussed more in depth in the context of the vulnerability of detainees.

C. Types of State Obligations Regarding Ill-treatment

Along with prohibiting different types of ill-treatment, Article 3 also imposes different types of obligations on states, namely both positive and negative ones.⁴⁴

³⁷ Kudla (n 35), para 92.

³⁸ Price v United Kingdom App no 33394/96, Judgment of 10 July 2001, Reports 2001-VII, para 24.

³⁹ Raninen v Finland App no 20972/92, Judgment of 16 December 1997, Reports 1997-VIII, para 55.

⁴⁰ Ibid.

⁴¹ Tyrer (n 30), para 29.

⁴² Keenan v United Kingdom App no 27229/95, Judgment of 3 April 2001, Reports 2001-III, para 116.

⁴³ Mavronicola (n 22), 113–25.

⁴⁴ See Stijn Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' in Eva Brems and Janneke H Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 273–93, 278. On positive obligations under Art 3 and the Convention in general, see Lavrysen Laurens, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016).

In general terms, the negative obligations require states to refrain from subjecting anyone to torture and inhuman or degrading treatment. As a complement to this, the positive and investigative obligations under Article 3 require states to protect and fulfil individual rights or, in other words, to prevent a risk of ill-treatment from materialising.⁴⁵

The positive limb of Article 3 applies where ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party’, and failed to take reasonable measures.⁴⁶ The fact that states can violate their positive obligations under Article 3 where they *should have known* of a risk of ill-treatment, ie where knowledge can be imputed, implies that they should conduct due diligence to identify such risks.⁴⁷ Additionally, Article 3 does not require proof that ill-treatment would not have happened ‘but for’ a state failure to take measures. It is sufficient to prove that the state failed to take measures that were reasonably available, and which had ‘a real prospect of altering the outcome or mitigating the harm.’⁴⁸

Positive obligations on the part of the state may have socio-economic implications. Budgetary considerations cannot, however, a priori free states from their obligations under Article 3 ECHR. For while these obligations should not place a disproportionate burden on states, they must at least provide ‘effective protection’ to vulnerable individuals and ‘include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.’⁴⁹ In short, the Court has held that the allocation of limited state resources should prioritise the needs of those deemed most vulnerable. While this provides a certain minimum content of states’ positive obligations, even this is limited – in light of ‘the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources’ – so as not to create ‘an impossible or disproportionate burden’ on the state.⁵⁰ Furthermore, as discussed in chapter eight of this volume, this raises questions about whether prioritising the protection of certain individuals over those of others on the basis of generalised attributes or dependencies generates new inequalities.

States’ positive obligations under Article 3 have also given rise to the provision’s procedural aspect. In order to satisfy these procedural obligations, states must institute ‘an effective official investigation ... capable of leading to the identification and punishment of those responsible.’⁵¹ However, the investigative obligation

⁴⁵ *Đorđević v Croatia* App no 41526/10, Judgment of 24 July 2012, Reports 2012, para 138.

⁴⁶ *Ibid*, para 139.

⁴⁷ Lavrysen (n 44), 169, with further references.

⁴⁸ *E and Others v United Kingdom* App no 33218/96, Judgment of 26 November 2002, para 99.

⁴⁹ *O’Keeffe v Ireland* App no 35810/09, Judgment (GC) of 28 January 2014, Reports 2014 (extracts), para 144.

⁵⁰ *Ibid*.

⁵¹ *Assenov and Others v Bulgaria* App no 24760/94, Judgment of 28 October 1998, Reports 1998-VIII, para 102.

under Article 3, which has evolved into a separate and autonomous duty, is 'not an obligation of result, but of means'.⁵² Accordingly, an investigation need not be successful in order to satisfy state obligations, but it should be *capable* of succeeding. In other words, it must make 'a serious attempt' to establish the facts, identify the responsible parties and lead to their punishment.⁵³ It should also enjoy independence from the executive in institutional and practical terms, and should permit the victim to participate effectively.⁵⁴

D. The Court's Contextual Severity Assessment

Both the *de minimis* threshold that determines the applicability of Article 3 and the thresholds between the various categories of proscribed ill-treatment are responsive to the facts of a case and to victim-specific circumstances, and have been for decades. Nevertheless, the Court's case law under Article 3 has not always been characterised by the same context-sensitivity as it displays today. While the Court already used the 'level of severity' test in 1978, holding that this level was relative and dependent on the circumstances and specifics of a case,⁵⁵ the level of context-responsiveness used by the Court today did not evolve until later.

Beginning with *Selmouni*, in 1999, the Court clarified that Article 3 must be understood in light of modern-day conditions, and also explained that the severity of violence inflicted on an alleged victim is relative, finding that 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, etc'.⁵⁶ *Selmouni* thus meant that the Court would not bind itself to its own previous interpretations of the threshold of severity, and carved out room for flexibility in future cases. At the same time, the Court found that the treatment at issue 'would be heinous and humiliating for anyone, irrespective of their condition'⁵⁷ – a characterisation it later used as a basis for its finding that Mr Selmouni had been tortured.⁵⁸ In this regard, Aisling Reidy observed two decades ago that while the 'subjective' criteria of gender, age and health 'are relevant' in determining the intensity of suffering, 'the mitigating weight that such relative factors are given ... must be minimal. Acts which objectively inflict sufficient severity of pain will be considered torture, whether or not a person is male or female, or of particularly strong constitution or not'.⁵⁹

⁵² *Stanimirovic v Serbia* App no 26088/06, Judgment of 18 October 2011, para 28.

⁵³ *Aslakhanova and Others v Russia* App nos 2944/06 ..., Judgment of 18 December 2012, para 144; *El-Masri* (n 25), paras 182–85.

⁵⁴ *El-Masri* (n 25), paras 182–85.

⁵⁵ *Ireland* (n 9), para 162.

⁵⁶ *Selmouni* (n 23), para 100.

⁵⁷ *Ibid.*, para 103.

⁵⁸ *Ibid.*, para 105.

⁵⁹ Reidy (n 10), 12.

Reidy's analysis might look a bit different if conducted today. Regard for context in the Court's ill-treatment jurisprudence has evolved from a mitigating factor to the core of the test that determines whether Article 3 has been violated. Contextual severity assessment has allowed the Court to move past definitional straitjackets and towards a holistic test that determines when a given treatment or punishment is incompatible with human dignity.

This approach is, however, not without its critics.⁶⁰ This has been due to the difficulty of measuring the intensity of a victim's suffering and the fact that using a flexible diagnostic standard might undermine the significance of the fact that all of the categories of treatment proscribed under Article 3 are absolutely prohibited.⁶¹ These criticisms are particularly acute in the vulnerability context, and will be taken up in the fifth chapter of this volume.

E. Article 3 between Absoluteness and Relativity

Article 3 ECHR is famously an absolute right. This distinguishes it from, for example, the right to respect for private and family life under Article 8 ECHR, which guarantees physical and psychological integrity and can thus potentially overlap with Article 3, or cover situations where Article 3 leaves off.⁶² In other words, and as made clear by its text, Article 3 ECHR does not permit limitations. This is true for acts amounting to torture but also for inhuman and degrading treatment or punishment.⁶³ Thus, the provision does not permit a balancing of interests: it demands absolute application, even in the presence of important reasons relating to the maintenance of law and order.⁶⁴ In this sense, the Court has held that Article 3's protection may not be waived 'under any circumstances, even the most difficult', and that its 'philosophical basis ... does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.'⁶⁵

⁶⁰ For an incisive discussion of the relative and absolute approaches to Art 3, see Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute?: The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76(3) *Modern Law Review* 589–603; Mavronicola (n 22).

⁶¹ Walter Kälin, 'Filling the Gaps: Contributions by the Human Rights Committee to the Fight Against Torture' in Walter Kälin et al (eds), *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Martinus Nijhoff, 2010) 169–80, 178, referring to the ECtHR's judgment in *Ireland* (n 9), para 167. See also Nigel S Rodley, 'The Prohibition of Torture: Absolute Means Absolute' (2006) 34(1) *Denver Journal of International Law and Policy* 145–60, 154–57.

⁶² See *Söderman v Sweden* App no 5786/08, Judgment (GC) of 12 November 2013, Reports 2013, paras 80–81; *Stubbings and Others*, Nos 22083/93 and 22095/93, Judgment of 22 October 1996, Reports 1996-IV, para 61.

⁶³ *Gäfgen* (n 14), para 107.

⁶⁴ *Tyrer* (n 30), para 38.

⁶⁵ *Gäfgen* (n 14), para 107.

This special 'philosophical basis' is evident not only in the Court's approach to the merits of complaints under Article 3, but also regarding the awards granted upon a finding of a violation.⁶⁶

At the same time, there is certainly a degree of discretion and interpretation involved in the application of Article 3. This is true for the positive obligations contained in the provision, given that these are duties of means and not result, and also for the negative obligation under Article 3, given that the minimum level of severity is relative.⁶⁷ While the prohibition of torture and IDT does not permit any balancing of interests, a certain test of proportionality does enter into play here. This is the test that for example distinguishes legitimate uses of potentially lethal police force from ill-treatment, and requires an evaluation of whether the treatment was appropriate to its context.⁶⁸

If we understand the assessment that takes place under Article 3 as context-responsiveness instead of as relativity, then this does not necessarily undermine the absolute nature of Article 3, but instead makes it possible to apply the provision to real-life situations. In this vein, Natasa Mavronicola and Francesco Messineo have argued that the Court's key concerns when determining whether a case falls under Article 3 are applicants' agency and dignity.⁶⁹ These concepts are key elements of personhood, which chapter four of the present volume will provide an opportunity to explore in greater depth.

In the same vein, Manfred Nowak has argued that the insidiousness of torture lies not or not only in the gravity of the force used and the injuries caused, but primarily in the victim's powerlessness and vulnerability.⁷⁰ That is why a use of force as light as a slap to the face of a detained suspect would violate Article 3,⁷¹ though the provision would potentially not be violated by much more severe force applied under different circumstances. In other words, the threshold under Article 3 responds to context, and takes a victim's position vis-à-vis the perpetrator into account along with all of the circumstances of a case, including – as the Court has so often stated – 'the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.'⁷² Understanding this relativity is, in a sense, the purpose of the present volume.

⁶⁶ *Bureš v Czech Republic* App no 37679/08, Judgment of 18 October 2012, para 81.

⁶⁷ Natasa Mavronicola, 'Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17(3) *Human Rights Law Review* 479–98.

⁶⁸ *Torture and Other Cruel, Inhuman or Degrading Treatment*, Report of the Special Rapporteur on the Question of Torture, Manfred Nowak, UN Doc E/CN.4/2006/6, 23 December 2005, 14–15, fn 2.

⁶⁹ Mavronicola and Messineo (n 60), 594.

⁷⁰ Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23(4) *Netherlands Quarterly of Human Rights* 674–88, 678.

⁷¹ *Bouyid* (n 12).

⁷² *Kudla* (n 35), para 91; Smet (n 44), 276; 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* 510–24, 511, 522.

F. Attempts to Rationalise or Justify Ill-treatment

The ECtHR has unequivocally established that Article 3 is absolute. The right is also non-derogable as per Article 15 ECHR. At the same time, discussions about rationalising or justifying ill-treatment recur regularly. This includes debates about the *jus cogens* status of the prohibition of torture and IDT.⁷³ In this context, in recent years, states have overtly challenged the scope and application of the peremptory norm around torture.⁷⁴ The fact that inhuman and degrading treatment or punishment is considered to be less severe than torture has led to arguments that these types of ill-treatment can be justified or that their prohibition does not constitute *jus cogens*.⁷⁵

Attempts to crack open the door to justifying ill-treatment are many, and they range from ‘ticking bomb’ scenarios – which portray torture as a moral necessity, for example to stop a terrorist’s bomb from exploding or to save a child’s life by torturing his abductor⁷⁶ – to ideas of punitive, educational, interrogational or voluntary torture as permissible in certain circumstances.⁷⁷

Though these scenarios can be seductive, they are also misleading.⁷⁸ Torture is a question of extremes: either it is employed in a society or not, but it cannot be employed just a little bit under the perfect circumstances.⁷⁹ In the same vein, human dignity cannot be set aside only slightly. There is, in other words, a strict and necessary distinction to be made between contextually identifying ill-treatment and justifying that treatment. In this regard, consent and context matter – they can make the difference, for example, between voluntary extreme body modifications and ill-treatment, and between sexual violence and consensual sexual encounters.⁸⁰ Here, context reigns supreme: while consent matters, its ability to justify a given type of treatment should be approached with increasing caution as the treatment concerned becomes more painful, dehumanising, traumatising or terrifying.⁸¹

While consent, necessity and exigency thus all have the potential to appear to bring treatment below the threshold of severity in certain circumstances, these considerations also have the potential to hollow out the prohibition of ill-treatment. A contextual analysis must accordingly be applied in the awareness

⁷³ On this concept, see Rodley (n 61), 155–58; ICTY, *Prosecutor v Furundžija* (n 8), paras 153–57.

⁷⁴ Andrea Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19(3) *European Journal of International Law* 491–508, 505–06.

⁷⁵ Yuval Shany, ‘The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute Be Relativized under Existing International Law?’ (2007) 56(3) *Catholic University Law Review* 837–70, esp 840.

⁷⁶ *Gäfgen* (n 14), paras 84, 95, 107, 175, 177.

⁷⁷ Peter Brian Barry, ‘The Kantian Case Against Torture’ (2015) 90(4) *Philosophy* 593–621, 597, 602–04.

⁷⁸ Henry Shue, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ (2006) 37(2) *Case Western Reserve Journal of International Law* 231–39, 231.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at 601 and throughout.

⁸¹ *Ibid.*, 606.

that, while some acts may not constitute ill-treatment, there can be no justification for those that do.⁸² In this regard, the Court's practice indicates that ill-treatment must be absolutely prohibited because torture and ill-treatment violate inner life and deprive the victim of moral standing.⁸³ Even where the physical suffering inflicted is at a relatively low level, for example that of a slap in the face, it can show a fundamental disrespect for the dignity and worth of one's person in context, for example during an interaction with the police.⁸⁴ In this sense, ill-treatment dehumanises victims and removes barriers to further harming their agency and dignity.⁸⁵ This loss of moral standing can also stem from social processes such as dehumanisation, stereotyping and the objectification of an out-group, which can all make individuals more vulnerable to torture.⁸⁶

III. Vulnerability and the Evolutive Interpretation of Article 3 ECHR

Making sense of how the Court interprets the standards outlined in the previous sections, especially the severity of a given treatment and the concept of vulnerability, means understanding the Court's approach to the interpretation of the ECHR overall, and Article 3 in particular.

One key element here is the living instrument approach. As mentioned above, in *Selmouni v France*, the Court applied that approach to find that the scope of what constitutes 'inhuman and degrading treatment' as opposed to 'torture' could grow in the future.⁸⁷ And indeed, over time, the scope of Article 3 has grown to include cases that the Court arguably would not have considered in violation of Article 3 in its early jurisprudence. Some scope-extending examples include a village public official who suffered injuries when a villager punched him in the face;⁸⁸ a detainee who had been granted access to inadequate heating and to only two showers per week;⁸⁹ and an injury caused by a negligent automobile accident, which some judges considered to highlight a 'drift into the trivialization of Article 3 rights'.⁹⁰ These cases might once ostensibly have fallen under the right to physical

⁸² See *Smet* (n 44), 274, 276–77.

⁸³ *Bouyid* (n 12), paras. 3, 10–11, 87–90.

⁸⁴ *Ibid.*

⁸⁵ Herbert C Kelman, 'The Policy Context of Torture: A Social-Psychological Analysis' (2005) 87(857) *International Review of the Red Cross* 123–34, 123 and 126–33.

⁸⁶ *Ibid.*, 133; Susan T Fiske, 'From Dehumanization and Objectification, to Rehumanization: Neuroimaging Studies on the Building Blocks of Empathy' (2009) 1167 *Values, Empathy, and Fairness Across Social Barriers: Annals of the New York Academy of Sciences* 31–34, 81–82.

⁸⁷ *Selmouni* (n 23), paras 95, 101.

⁸⁸ *Ibrahim Demirtaş v Turkey* App no 25018/10, Judgment of 28 October 2014, paras 6 and 8. See also the Joint Dissenting Opinion of Judges Sajó and Keller, esp para 14.

⁸⁹ *Apostu v Romania* App no 22765/12, Judgment of 3 February 2015, paras 40, 44, 82.

⁹⁰ *Kraulaidis v Lithuania* App no 76805/11, Judgment of 8 November 2016, esp the Concurring Opinion of Judges Sajó, Tsotsoria, Wojtyczek and Kucsko-Stadlmayer, paras 2, 7.

and moral or psychological integrity under Article 8 ECHR, which applies to treatment that does not reach the threshold of Article 3.⁹¹ Alternatively, in the past they might have been seen as falling outside the scope of the Convention altogether. Occasional though they may be, remarkable cases like these indicate that there may be a downward drift going on in relation to Article 3's threshold of severity.

George Letsas's account of the interpretation of the Convention as a whole can provide some clarification here. He argues that, by applying the 'living instrument' doctrine, the Court jettisons traditional forms of treaty interpretation, including the opinion of the Convention's drafters and the public and authorities in the Member States, and instead searches for the 'truth' of Convention rights.⁹² In other words, he argues that the Court fleshes out legal human rights with new content derived from existing moral human rights.

By way of example, Letsas cites *Tyrer v United Kingdom*. That case concerned the issue of public birching, a punishment involving the beating of a victim's bare posterior with a birch rod. Although this treatment was endorsed by local law and public opinion, the Court held that this could not replace its own determination of whether birching constituted inhuman or degrading treatment. After all, the Court held, this treatment could potentially even be socially accepted *because* it was inhuman or degrading.⁹³ The Court ultimately found a violation of Article 3, given that birching assaulted 'precisely that which it is one of the main purposes of Article 3 ... to protect, namely a person's dignity and personal integrity'.⁹⁴ The case thus not only marked the introduction of the living instrument approach, but also the Court's first reference to the concept of human dignity, which has since served to give content to Article 3.⁹⁵

Since *Tyrer*, the Court has continued to flesh out the standards under Article 3 – in Letsas's terms, getting closer to the 'truth' of the provision.⁹⁶ The Court's interpretive techniques concerning Article 3 relate to the normative principles that underlie the right, as indicated by the Court's references to human dignity and personal integrity.⁹⁷ According to Letsas, the Court's method is furthermore justified by the counter-majoritarian nature of human rights.⁹⁸ A moral reading of the ECHR is therefore, he argues, indispensable if the Court is

⁹¹ *Botta v Italy* App no 21439/93, Judgment of 24 February 1998, Reports 1998-I, para 32.

⁹² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), 74–76, esp 75; George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013) 106–41, 123.

⁹³ See *Tyrer* (n 30), para 31, as discussed in Letsas, *Theory of Interpretation* (n 92), 75.

⁹⁴ *Tyrer* (n 30), para 33.

⁹⁵ *Ibid*, paras 33 and 35.

⁹⁶ Letsas, *Theory of Interpretation* (n 92), 74–77, esp 75.

⁹⁷ George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) *European Journal of International Law* 509–41, 528.

⁹⁸ Letsas, 'Living Instrument' (n 92), 123–24, with further references to the Court's case law.

to perform its function of protecting the human rights that people really have, as opposed to the ones that states consider them to have.⁹⁹

Of course, the idea of the rights that citizens ‘really’ have is a polemic concept that leans towards natural law and is constantly in flux. From a positivist standpoint, this approach raises legitimacy problems and impinges on state sovereignty. Letsas counters this critique by arguing that, as the Convention’s authoritative interpreter, the Court will not lose legitimacy as long as it reasons consistently and in good faith – thus, seeks to identify and apply the principles underlying human rights – and justifies its decisions according to principles that represent a vision of justice that is both intelligible and coherent.¹⁰⁰ While intelligibility, coherence, and good faith are certainly important, it is questionable whether this suffices to convince states and their polities to accept all developments in the Court’s case law. However, at the same time, failing to adapt the Convention’s requirements to present-day conditions would mean that the ECHR would lose relevance over time as its guarantees age; such a wooden approach to the Convention cannot be in the interest of effectively protecting human rights, either.

In short, the Court’s interpretation of Article 3 ECHR operates between these poles. Its approach has not only caused the scope of the provision to grow over time, but it has also rendered the Court willing to consider a variety of circumstances in determining whether a violation has taken place, delving into assessments of the cumulative effect of various factors on applicants and on the emotional effect of a given treatment. *Ad absurdum*, though, Letsas’s formula seems to imply that the Court can expand the scope of Article 3 to encompass any sort of treatment as long as it does so in adherence to the requirements he has identified. This is difficult to accept given that, in the particular context of Article 3 and in light of the provision’s absolute nature, its scope must be not only clear but also relatively narrow.¹⁰¹

In most cases, lower-severity violations of the Convention patently offend modern conceptions of justice, equality, human dignity, and non-discrimination. However, there must be a threshold between these lower-severity violations of Article 3 and instances of injustice, inequality, indignity, and discrimination that do *not* fall under the provision, for example microaggressions between private parties.¹⁰² In other words, Article 3 cannot be used to address human suffering

⁹⁹ Ibid, 124, citing Letsas, *Theory of Interpretation* (n 92).

¹⁰⁰ Letsas, ‘Living Instrument’ (n 92), 136–38, drawing on Ronald M Dworkin, *Law’s Empire* (Belknap Press, 1986).

¹⁰¹ Addo and Grief (n 72), 516; Alexander Green, ‘An Absolute Theory of Convention Rights: Why the ECHR Gives Rise to Legal Rights That Cannot Conflict with Each Other’ (2010) 16 *UCL Jurisprudence Review* 75–93, 78; Natasa Mavronicola, ‘Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg’s Discourse on the Justified Use of Force’ (2013) 76(2) *The Modern Law Review* 370–82, 374.

¹⁰² Microaggressions are defined as subtle and often unconscious denigrating messages sent to members of minorities during commonplace exchanges. See Derald Wing Sue et al, ‘Racial Microaggressions in Everyday Life: Implications for Clinical Practice’ (2007) 62 *American Psychologist* 271–86, 273.

and injustice in its every permutation, not because this suffering and injustice is not morally wrong, painful, or unjust, but because a widely inclusive reading of the provision would deprive findings of a violation of their gravity and significance, and the provision of its authority; it would also make the provision unenforceable in practice.¹⁰³

In this regard, it could be argued that Article 3 cannot be a panacea for omnipresent harms. To this, it can be replied that Article 3 violations are exceedingly common today. Indeed, in 2019, 19 per cent of the violations of the Convention found by the Court concerned Article 3.¹⁰⁴ At the same time, it is important to allow the prohibition to retain its contours while embedding it within broader efforts to combat the systems and situations that create, allow, foster and reinforce injustice.

Based on the case law evaluated by this analysis, it appears that fears about an excessive relaxing of standards under Article 3 due to vulnerability reasoning are misplaced. There undoubtedly comes a point when relaxing the standards under Article 3 – be it vis-à-vis all potential victims or only with regard to vulnerable individuals and groups – causes a loss of significance of the provision and creates setbacks for the seriousness with which findings of a violation are treated. However, generally speaking the Court maintains a relatively high severity threshold in vulnerability-related cases, albeit in a sometimes rather piecemeal fashion. Thus, vulnerability does not automatically mean that the threshold of severity has been met.¹⁰⁵ A more confusing strand of the Court's jurisprudence concerns cases in which it recognises the vulnerability of an applicant but then finds that, as the applicant was not particularly helpless, there has been no violation of Article 3.¹⁰⁶ This seems to introduce a further – and also vague – criterion into the Court's determination of what vulnerability means and what it does. The helplessness criterion may be used because the Court is apprehensive about the widescale effects that a case could otherwise have.

In this regard, and precisely given cases that, despite the application of a very low threshold of severity did not concern a vulnerable applicant, the standard required concerning vulnerable individuals and groups is in fact rather high. Any 'loosening' of standards under Article 3 cannot be traced to the introduction of vulnerability reasoning into the Court's case law. Quite to the contrary, vulnerability reasoning allows the Court to provide protection that is primarily more context-sensitive and inclusive, but not necessarily broader as concerns the severity aspect.

¹⁰³ *İbrahim Demirtaş* (n 88), Joint Dissenting Opinion of Judges Sajó and Keller, para 2.

¹⁰⁴ ECtHR, 'Annual Report 2019', www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf, 131.

¹⁰⁵ *Kudła* (n 35), paras 99–100; *Zarzycki v Poland* App no 15351/03, Judgment of 12 March 2013, para 125; *Ostrowski v Poland* App no 26945/07, Decision of 1 September 2015, paras 76–77; *Mahamed Jama v Malta* App no 10290/13, Judgment of 26 November 2015, paras 100–01; *Giorgini v Italy* App no 20034/11, Decision of 1 September 2015, para 57.

¹⁰⁶ Compare, for example, *Jaeger v Estonia* App no 1574/13, Judgment of 31 July 2014, para 42, or *Julin v Estonia* App nos 16563/08 ..., Judgment of 29 May 2012, para 189.

IV. Interim Conclusion

The above has shown that the prohibition of torture and degrading treatment and punishment is understood as a prohibition of the ‘worst of the worst’ – torture – along with less severe forms of ill-treatment, and has hinted that the prohibition protects two foundational elements of inner life, namely dignity and agency. Once considered a permissible form of treatment for persons with perceived reduced moral standing, such as slaves, non-citizens or traitors, torture today has emerged as an absolutely prohibited act that cannot be justified vis-à-vis any class of human individuals.

The understanding of what types of treatment can constitute torture – and what constitutes inhuman and degrading treatment and punishment – has evolved over time, as has the practical reality of ill-treatment, which today generally speaking no longer entails gruesome medieval forms of mutilation but takes subtler and often psychological forms. The potential for gradual adjustment of the prohibition of torture and inhuman and degrading treatment is also visible under Article 3 ECHR. Compliance with the article, which prohibits different types of treatment and punishment, is measured by means of the ‘degree of severity’ test. Certain factors – such as the age and state of health of the victim – may aggravate or mediate the type of ill-treatment at issue or raise treatment that would not otherwise fall under Article 3 to meet the threshold of severity for the provision’s application.

Some commentators have argued that establishing whether Article 3 has been violated requires a degree of nuance and proportionality analysis that undermines its absolute nature. Others have contested the scope of Article 3 today as overly broad. Considering how ill-treatment works – namely the fact that it attacks the dignity and agency of the victim, who is likely othered and dehumanised in the eyes of the perpetrator – has here been suggested as an essential element of analysing whether that threshold has been met and countering these critiques to some degree. It has also been noted that many of the cases flagged for their excessively broad understanding of Article 3’s scope are not vulnerability-related cases. Indeed, vulnerability reasoning levels the playing field for vulnerable applicants in this regard, but it has not led the charge in terms of lowering the threshold of severity.