
Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?

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Abstract

Article 3 of the European Convention on Human Rights, which prohibits torture and other forms of ill-treatment, does not expressly provide that its terms are absolute. Nevertheless, the idea that Article 3 contains absolute rights is generally accepted. This article explores the concept of absolute rights in Article 3, both with reference to theoretical considerations and in the light of Strasbourg case law. It concludes that the notion of absolute rights is nebulous because it involves an assessment of subjective factors and that it is best understood within the wider context of the Convention as a whole.

1 Introduction: The Scope of Article 3

The brevity of Article 3 of the European Convention on Human Rights¹ (ECHR or 'the Convention'), which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, masks the volume and variety as well as the complexity of the issues engendered by its terms.² Of course, this is not unusual for a treaty which sets normative standards. It is to be expected that skeletal norms will be fleshed out through subsequent state practice, the adoption of more specific treaties such as the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,³ and especially judicial elaboration.

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, text reprinted in I. Brownlie, *Basic Documents on Human Rights* (1992), at 236.

² See F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (1996), at Ch. 5.

³ Text reprinted in Brownlie, *supra* note 1, at 383. See further Evans, 'The European Convention for the Prevention of Torture: Operational Practice', 41 (1992) *ICLQ* 590; Evans and Morgan, 'The European Convention for the Prevention of Torture: 1992-1997', 46 (1997) *ICLQ* 663.

Through judicial elaboration it has been established that the three broad areas of prohibition in Article 3 are distinct but related. According to the Commission of Human Rights in the *Greek Case*,⁴

It is plain that there may be treatment to which all these descriptions⁵ apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.

The word 'torture' is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.⁶

In the exercise of their supervisory jurisdiction involving Article 3,⁷ the Court and the Commission of Human Rights have dealt with a variety of matters which could not have been predicted by the architects of the Convention.⁸ However, the nature of the subject-matter alone is not enough to bring ill-treatment within the scope of Article 3. Ill-treatment must attain a minimum level of severity in order to trigger the provision's application. Inevitably, the threshold is relative. The Court has held that it 'depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.⁹

The infringement of Article 3 can involve a wide range of acts, from those which humiliate the victim to acts of extreme brutality. The distinction between the three categories of infringement identified in Article 3 is useful for the purpose of applying the appropriate label to a particular form of abuse. It may also affect the amount of

⁴ 12 (1969) *YECHR*.

⁵ That is, 'torture or inhuman or degrading treatment or punishment'.

⁶ *Ibid.* at 186. Similar elaboration can be found in Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the text of which is reprinted in Brownlie, *supra*, note 1, at 38.

⁷ See further Addo and Grief, 'Is There a Policy behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?', 20 *ELRev.* (1995) 178.

⁸ Article 3 has covered the following:

a) ill-treatment in custody (*Tomas v. France*, Judgment of 27 August 1992, Series A, No. 241; (1993) 15 EHRR 1);

b) detention (Application No. 8463/78, *Kröcher and Möller v. Switzerland* (1982) 26 D&R. 24);

c) corporal punishment (*Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A, No. 26; 2 EHRR 1; Applications Nos. 9114/80, 9403/81 and 10592/83, *Three Corporal Punishment Cases v. United Kingdom*, (1987) 30 *YECHR* 84);

d) immigration and refugees (Application No. 4626/70, *35 East African Asians v. United Kingdom* (1979) 13 D&R. 5, *Cruz Varas v. Sweden*, Judgment of 20 March 1991, Series A, No. 201; (1992) 14 EHRR 1);

e) extradition (*Cruz Varas v. Sweden*, *loc. cit.*; *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; (1989) 11 EHRR 439, *Chahal v. United Kingdom*, Judgment of 15 November 1996; (1997) 23 EHRR 413); and

f) HIV and AIDS (*D v. United Kingdom*, Judgment of 2 May 1997; (1997) 24 EHRR 423).

⁹ *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25; (1978) 2 EHRR 25, para. 162.

compensation awarded under Article 50.¹⁰ Nevertheless, all forms of ill-treatment which fall within the scope of Article 3 are prohibited with equal force no matter which end of the spectrum they fall. It covers physical as well as mental ill-treatment¹¹ in both official and private contexts.¹² However, 'torture' has been isolated as a specific form of infringement which involves not only intense suffering but also a purpose, such as extracting information or a confession or subduing a detainee's resolve.¹³ This emphasis by the Commission on 'a purpose, such as the obtaining of information or confessions . . .' may have contributed to the confusion as to whether torture as such (*vis-à-vis* other forms of ill-treatment) can take place in an unofficial (non-institutional) context.¹⁴ The subject has not generated any significant debate, although there is a consensus of opinion, at least within the context of the ECHR to the effect that a narrow and limited interpretation is unhelpful. According to one author: 'Provided that the sadistic infliction of suffering can be regarded as being for a purpose, this additional requirement probably makes no difference in practice.'¹⁵ This unimportance of an official or institutional purpose to trigger a breach under Article 3 would seem to be borne out by the Court in its view that the distinction between torture and inhuman and degrading treatment 'derives principally from a difference in the intensity of the suffering inflicted'.¹⁶ Similarly, in recent consistent line of juridical thinking, the Commission has indicated unequivocally that the infliction of pain and suffering which is contrary to Article 3 is unacceptable 'whoever were to inflict the punishment, be it parent or teacher'.¹⁷

2 The Notion of an Absolute Right

An important characteristic of Article 3 is the identification of its prohibitions as absolute. It is true that Article 3 itself does not state that they are absolute; nor does the Convention employ terms such as 'absolute right' or 'absolute prohibition'. The characterization of the prohibitions in Article 3 as absolute has emerged from general

¹⁰ Compensation for damage is awarded on an equitable basis. See e.g. *Tsirilis and Kouloumpas v. Greece*, Judgment of 29 May 1997.

¹¹ See D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), at 61 and the cases referred to therein.

¹² For ill-treatment in an official context, see *Ireland v. United Kingdom*, *supra* note 9, and *Tomasi v. France*, *supra* note 8; in a private context, see *Costello-Roberts v. United Kingdom*, Judgment of 25 March 1993, Series A, No. 247-C; (1995) 19 EHRR 112.

¹³ See the definition in the *Greek case*, *supra* note 4, at 186 and also the Report of the Commission in Application No. 5310/71, *Ireland v. United Kingdom*, 25 January 1976, Series B, No. 23-I, at 388.

¹⁴ Indeed, an analogous definition in Article 1(1) of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) defines torture as severe pain and suffering . . . "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

¹⁵ Harris, O'Boyle and Warbrick, *supra* note 11, at 60.

¹⁶ *Ireland v. United Kingdom*, *supra* note 9, para. 167.

¹⁷ See the Report of the Commission in *Y v. United Kingdom* in Series A, No. 247-A; (1992) 17 EHRR 238, para. 44 and Application No. 25599/94, *A v. United Kingdom*, Report of the Commission adopted on 18 September 1997, para. 40.

human rights discourse and litigation before the Strasbourg supervisory organs.¹⁸ Unfortunately, neither the Court nor the Commission has devoted much time to defining the notion of an absolute right. In practice, the tendency has been for practitioners and academic writers¹⁹ to assume that the absence of permissible limitations, exceptions or derogations provides a sufficient basis for the conclusion that the prohibitions are absolute. Indeed, reading Articles 3 and 15(2) together clearly suggests that the drafters of the Convention intended the rights enshrined in Article 3 to be superior in that they are not subject to exception or derogation, even in time of war or other public emergency threatening the life of the nation. This conclusion, which is reflected in the debates and the eventual consensus within the Consultative Assembly,²⁰ has been confirmed by the Court of Human Rights.²¹ In *Ireland v. United Kingdom* it declared:

The Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefore even in the event of a public emergency threatening the life of the nation.²²

Although this manner of identifying the absolute nature of Article 3 has proved adequate and workable before the supervisory organs, its success may be attributable to the fact that no litigant has contested the concept of 'absolute right' or 'absolute prohibition'. That the absolute nature of the prohibitions in Article 3 is inferred or assumed rather than properly established can create insecurity. Moreover, a number of issues associated with the concept of 'absolute right' remain unaddressed. For example, one might ask how the notion of 'absoluteness' affects each of the prohibitions in Article 3. Could the notion of 'absolute right' be diminished because of the differences between degrading treatment and torture? How should the doctrine of 'absolute right' be conceptualized so as to make it applicable to all aspects of Article 3? Similarly, it is unclear from the present working definition of 'absolute right' whether such a definition can be used as a framework for defining or distinguishing other absolute rights or absolute dimensions of other rights. Could it be that every candidate for absolute status must be assessed by its own, probably different, standard?

Even the approach adopted by the Court in the *Irish Case* does not seem to be fully borne out by the case law relating to Article 3. In reality, the notion of 'absolute right'

¹⁸ Under the terms of Protocol No. 11, the Strasbourg Commission and Court will be merged to form a single, permanent Court of Human Rights and the Committee of Ministers will no longer decide cases. See Schermers, 'The Eleventh Protocol to the European Convention on Human Rights', 19 *ELRev.* (1994) 367; Mowbray, 'A New Court of Human Rights', [1994] *PL* 540.

¹⁹ See e.g. Harris, O'Boyle and Warbrick, *supra* note 11, at Ch. 3.

²⁰ Council of Europe, *Collected Edition of the Travaux Préparatoires* (1975), vol. I at 252–254, and vol. II at 4, 10, 14, 38 and 84.

²¹ See e.g. *Soering v. United Kingdom*, *supra* note 8, para. 89; *Tyrer v. United Kingdom*, *supra* note 8, para. 30; *Chahal v. United Kingdom*, *supra* note 8, para. 79 and *D v. United Kingdom*, *supra* note 8, paras 46–54.

²² *Supra* note 9, para. 163.

has proved rather imprecise and the supervisory organs still seem unsure about its scope. The case law gives an impression of shifting boundaries as regards the character and scope of the absolute nature of the prohibitions in Article 3. The Court is guided in its decision-making by such principles as 'effective protection' and 'margin of appreciation' through which relativity is injected into its thinking. Its practice under Article 3 is based not on objective criteria but on the effects of various subjective factors on the particular facts of each case, leading to decisions which can be hard to reconcile at least at first sight. Indeed, that may be the only realistic way of addressing the various issues which can arise under Article 3.

The philosopher Alan Gewirth has attempted to conceptualize the notion of 'absolute rights' and in so doing addresses some of the concerns regarding Article 3 of the European Convention. In an article aptly titled 'Are There any Absolute Rights?',²³ he endorses the working definition used by the Court of Human Rights by defining an absolute right as one which cannot be overridden in any circumstances, so that it can never be infringed and must be fulfilled without exception.²⁴ He expands on this idea by observing that given the possibility of conflicting rights situations, not all rights can be absolute. Only those rights which survive conflicts with other rights are credible candidates for the label 'absolute'. In other words, absolute rights demonstrate a superior claim to be respected.²⁵ On this basis he distinguishes three levels at which rights may be said to be absolute:

i) At the level of principle (Principle Absolutism), according to which it is some general moral principle relating to rights which is absolute. Because of the general nature of such a principle, it fails to distinguish between the beneficiaries (subjects), the duty bearers (respondents) and individual rights (objects). The assertions that rights are a matter of international concern and that respect for human rights is indispensable to any credible notion of democracy, are good examples of general principles of human rights which may be regarded as beyond dispute and for that reason absolute.²⁶ The absence of differentiation between different types of rights makes such principles no more than general formulae from which one may draw other forms of absolutism. It is arguable that the prohibition of torture and other forms of ill-treatment as part of the political morality of a community such as the Council of Europe can be presented as absolute. As a statement of principle which does not distinguish between different forms or levels of ill-treatment, it provides an unchallengeable normative standard by which subsequent practice is to be guided. The terms of Article 3 of the European Convention fall squarely within this categorization of absolute rights.

ii) At the level of legal rules (Rule Absolutism), absolute rights may be identified as part of a legal structure in which specific rights (objects), such as the prohibition of

²³ A. Gewirth, *Human Rights: Essays on Justification and Applications* (1982), at Ch. 9.

²⁴ *Ibid.*, at 219.

²⁵ *Ibid.*, at 220.

²⁶ Gewirth's examples of principle absolutes include Kant's categorical imperative, the utilitarian notion of utility and his own principle of generic consistency. On this see A. Gewirth, *Reason and Morality* (1978).

torture or other forms of ill-treatment, are identified as absolute. Rule Absolutism, in identifying the rights which are absolute, also specifies their subjects (beneficiaries) and the correlative respondents (duty bearers). The codification of the prohibition of torture and other forms of ill-treatment in Article 3 represents different forms of Rule Absolutism. In the context of the Convention, the absolute nature of Article 3 emerges from reading that provision in the light of other provisions such as Articles 1²⁷ and 15. According to Gewirth, 'the rights whose absoluteness is considered at the level of Rule Absolutism may vary in degree of generality, in that their objects, subjects and respondents may be given with greater or lesser specificity'.²⁸ Applying this to the prohibitions in Article 3, 'degrading treatment or punishment' is the most general and 'torture' the most specific form of abuse. Similarly, one can appreciate the variable nature of the severity thresholds which apply in the context of Article 3.²⁹ Rule Absolutism represents a deliberate choice by a particular society to identify a particular right (or rights) as absolute and therefore untouchable. This characteristic makes Rule Absolutism subject to changing moral standards and therefore somewhat unstable. Rule Absolutism is nevertheless attractive because it reflects the autonomy of communities as well as the dynamic nature of human rights.³⁰

iii) At the individual level (Individual Absolutism), rights are said to be absolute when a person has an absolute entitlement to a particular right and any conditions for overriding it have been overcome or otherwise eliminated. According to Gewirth, it is not necessary, in the context of Individual Absolutism, to know in advance the criteria for overriding other rights in the event of a conflict. The entitlement of every person not to be subjected to torture or other forms of ill-treatment may be said to represent absolutism at the individual level.

Gewirth's analysis is invaluable in assessing the notion of 'absolute right' in relation to Article 3 of the Convention. Article 3 can be said to be absolute in all senses of Gewirth's framework of analysis. However, such classifications remain at the level of generality. When attempting to apply them to specific circumstances, one has to take into account any factual and personal distinctions. These differences must be seen as issues of definition rather than as exceptions to the absolute nature of the rights under

²⁷ 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

²⁸ 'Are There any Absolute Rights?', *supra* note 23, at 221. In relation to the right to life, Gewirth points out that there is greater specificity as we move along the following scale: the right of all persons to life, the right of all innocent persons to life, the right of all innocent persons to an economically secure life, the right of children to receive an economically secure and emotionally satisfying life from their parents, and so forth.

²⁹ See the Court's statement of principle in the *Irish Case*, *supra* note 9, para. 162; and the *Greek Case*, *supra* note 4, where the Commission attributed different severity thresholds to the ill-treatment of political detainees on the one hand and partisan activists on the other. In *Tomasi*, *supra* note 8, para. 114, the French Government argued unsuccessfully that because of the applicant's youth and good health, the moderate length of the interrogations, the particular circumstances obtaining in Corsica and the fact that the applicant had been suspected of participating in a terrorist attack resulting in the death of one man and grave injuries to another, the Court should consider applying a higher threshold of severity.

³⁰ In this regard, note the Court's reaction to emerging moral standards relating to HIV and AIDS in *D v. United Kingdom*, *supra* note 8.

consideration. This is the approach taken by the Convention's supervisory organs, especially in relation to issues such as the level of ill-treatment which is considered to be justifiable.³¹

In view of the importance of the prohibition of torture and other forms of ill-treatment within the political morality which emerged after World War II and in the interests of legal certainty, it is essential that the notions of 'absolute right' and 'absolute prohibition' should be defined as precisely as possible. In the light of Gewirth's analysis, an absolute right or absolute prohibition can be expected to possess certain conceptual characteristics. Besides not admitting of exceptions, limitations or derogations, even in time of war or public emergency, one would expect an absolute right to be protected as rigorously as possible.³² Ideally, an absolute prohibition or an absolute right should leave no room for doubt about its scope; if for any reason doubts emerge, the benefit of such doubts must always be given to the victim.³³ Equally, the notion of 'absolute right' conveys the impression that potential violators such as governments and their agents should enjoy only limited discretion in respect of such a right. In this sense allegations that the rights in this category have been violated demand rigorous investigation without question. The value of such an investigation, even if it does not confirm a violation, is to assuage any psychological concerns regarding the inviolability of the rights in question. Above all, the violation of an absolute right must be followed by suitable redress: full and effective redress covering both direct and indirect aspects of the infringement.³⁴ These characteristics of an absolute right complement and indeed flesh out the skeletal definition used by the Court and the Commission, based on the mere absence of exceptions and the impermissibility of derogation. By analogy, it is to be expected that an absolute right will constitute *ius cogens*, a peremptory norm of general international law.³⁵ An absolute right cannot be subject to reservations³⁶ and in the event of conflict between an absolute right and other rights the latter must always give way. In other words, an absolute right must be superior to other rights which do not bear a similar label.

The above characteristics represent a theoretical ideal, aspects of which should be reflected in the practice of the Strasbourg organs. In a dynamic human rights regime, and particularly since Article 3 does not define precisely the conduct which it prohibits, the Convention's supervisory organs must determine its scope with reference to the facts of each case. Inevitably, it is a process which does not lend itself

³¹ For Gewirth's view on this matter, see, Gewirth, 'Are There any Absolute Rights?', *supra* note 23, at 222.

³² In *Chahal v. United Kingdom*, *supra* note 8, para. 96, the Court declared that its examination of allegations of ill-treatment must be rigorous. See also *Vilvarajah v. United Kingdom*, Judgment of 20 October 1991, Series A, No. 215; (1992) 14 EHRR 248, para. 108, and *D v. United Kingdom*, *supra* note 8, para. 49.

³³ See *Chahal v. United Kingdom*, *supra* note 8 and *D v. United Kingdom*, *supra* note 8 and *Ahmed v. Austria*, Judgment of 17 December 1996; (1997) 24 EHRR 278.

³⁴ The application of Article 3 in cases concerning refugees, immigrants and extradition illustrates this. See also its recent application to HIV and AIDS in *D v. United Kingdom*, *supra* note 8.

³⁵ See Article 53 of the Vienna Convention on the Law of Treaties (1969).

³⁶ See e.g. Article 21 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987): 'No reservation may be made in respect of the provisions of this Convention.'

to objective analysis. The Commission and the Court have always operated on the basis that whilst the prohibitions in Article 3 are absolute and in principle not negotiable, assessment of the specific conduct under consideration can only be subjective. This approach underlies the decisions and judgments concerning Article 3.

A good indication of the flexible nature of the processes for assessing compliance with Article 3 can be found in the Commission's opinion in the *Greek Case*. Seeking to define the scope of Article 3, the Commission relied heavily on concepts which are by nature imprecise and contextually dependent. For example, it referred to 'treatment as deliberately causes severe suffering ... which, in the particular situation, is unjustifiable'.³⁷ The question whether suffering is severe and unjustifiable will depend largely upon the particular context in which it occurs. Similarly, what humiliates one person may not humiliate another. Above all, the Commission stressed that not every sort of ill-treatment would be considered a violation of the Convention:

It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. Such roughness may take the form of slaps or blows of the hand on the head or face. This underlies the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.³⁸

The practical effect of this imprecision as to what amounts to a prohibited level of ill-treatment was the Commission's conclusion that the conditions of detention violated Article 3 mainly because the prisoners were not common criminals but political detainees.³⁹ It seems that a higher threshold would have been applied if the prisoners had been common criminals.

The subjective nature of the determining factors to be assessed in Article 3 cases (for instance, severity, justifiability) has already been mentioned in the context of the *Irish Case*.⁴⁰ The differences between the conclusions of the Commission and the Court in that case as regards the specific type of infringement occasioned by the facts provide a good illustration of the subjectivity of the process. On the basis of the facts presented by the applicant government, the Commission unanimously concluded that the premeditated use of the five techniques for hours at a stretch was sufficiently severe to constitute torture,⁴¹ whereas the majority of the Court concluded that the same techniques did not occasion suffering of the particular intensity and cruelty implied by

³⁷ *Supra* note 4, at 186.

³⁸ *Ibid.*, at 501.

³⁹ *Ibid.*, at 489: 'The Sub-Commission finds that in several respects, namely: the complete absence of heating in winter, the lack of hot water, the poor lavatory facilities, the unsatisfactory dental treatment and the close restriction of letters and visits to prisoners, the Red Cross reports and the prisoners' memoranda are in substantial agreement. The Sub-Commission considers that this ... reveals a combination of conditions of detention of political offenders which is unjustifiable and amounts to a breach of Article 3.' That conclusion was confirmed by the Commission, *ibid.*, at 505.

⁴⁰ *Supra* note 9.

⁴¹ Application No. 5310/71, *Ireland v. United Kingdom*, Commission Report, *supra* note 13, at 402.

the word 'torture'.⁴² More notable still is the separate opinion of Judge Fitzmaurice, to the effect that the five techniques, even when used in combination, could not amount to inhuman treatment. In fact, he went so far as to suggest that the ill-treatment in question was not even degrading:

where exactly [is] the degradation . . . in being deprived of sleep and nourishment for limited periods, in being placed for a time in a room where a continuous noise is going on, or even in being hooded — (after all, it has never been suggested that a man is degraded by being blindfolded before being executed although, admittedly, this is supposed to be for his benefit).⁴³

That part of Judge Fitzmaurice's opinion is certainly extreme and arguably unsustainable, but it provides a good illustration of the subjectivity of the process involved in determining whether a particular act or series of acts is in breach of the guarantees enshrined in Article 3.

By the very nature of the assessment process, therefore, there is a serious risk of inconsistency in Article 3 decisions. Being guided by the practical circumstances of each case coupled with the principle of effectiveness,⁴⁴ the Commission and the Court have refused to be tied down by theoretical considerations. In other words, they do not seem to be unduly concerned about potential inconsistencies in the case law as long as they succeed in protecting human rights effectively in practice. In comparing the *Tyrer*⁴⁵ and *Costello-Roberts*⁴⁶ cases, for example, one is struck by the factual similarities rather than by their differences. Yet the Court reached opposite conclusions in the two cases. It distinguished *Costello-Roberts* from *Tyrer* as follows:

Mr. Costello-Roberts was a young boy punished in accordance with the disciplinary rules in force within the school in which he was a boarder. This amounted to being slipped three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private. Mr. Tyrer, on the other hand, was a young man sentenced in the local juvenile court to three strokes of the birch on the bare posterior.⁴⁷

The one real difference between the two cases lay in the fact that *Tyrer* was sentenced by a court and *Costello-Roberts* by his headmaster. The other factors were either similar or only superficially different. This being so, the different conclusions must have been based upon the weight attached to the body or person responsible for authorizing the punishment. The *Tyrer* case exemplified a vertical (state versus individual) violation of Article 3 by a state institution (the juvenile court), whereas *Costello-Roberts* involved a horizontal (inter-individual) violation. It is easier to hold the government responsible for violations arising from the actions of a state institution. Similarly, in terms of the magnitude of the threat posed to human rights

⁴² *Supra* note 9, para. 167.

⁴³ Separate Opinion of Judge Fitzmaurice in *Ireland v. United Kingdom*, *ibid.*, at 135, para. 27.

⁴⁴ See J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (1990), at Ch. 5.

⁴⁵ *Supra* note 8.

⁴⁶ *Supra* note 12.

⁴⁷ *Costello-Roberts v. United Kingdom*, *supra* note 12, para. 31.

protection by the two types of violation, the *Tyrer* situation was arguably more disturbing and therefore in need of a 'firmer hand' than the *Costello-Roberts* situation. This may well be the Court's view based on the notion of effective protection⁴⁸ at that point in time of its development of the case law, and hence must be judged as consistent. However, recent cases in this field of corporal punishment are increasingly moving away from the distinction between institutional and private violence.⁴⁹ This approach may represent the new standard, and probably better definition of the notion of effective protection in the context of the absolute nature of Article 3.

In the recent case of *D v. United Kingdom*,⁵⁰ the Court was even more unequivocal in its refusal to be constrained by theoretical technicalities likely to undermine the absolute nature of the prohibitions in Article 3. When the applicant in that case, a national of the Caribbean island of St. Kitts, was arrested on arrival in the United Kingdom for carrying Class A drugs, he was prosecuted and sentenced to a term of imprisonment. While in prison he was diagnosed as HIV positive and as suffering from AIDS. His request for leave to remain in the United Kingdom on compassionate grounds was refused and he was recommended for deportation. In his application to the Commission he argued that his removal to St. Kitts, where he was unlikely to receive the medical treatment and support to which he had become accustomed in the United Kingdom, would constitute inhuman and degrading treatment in breach of Article 3. The respondent government relied on the distinction in its domestic law between leave to enter the United Kingdom (for which the public authorities are invested with wide discretionary powers) and leave to remain in the United Kingdom (for which discretion is relatively circumscribed). Since the applicant had never been granted permission to enter the United Kingdom, his application was for leave to enter rather than for leave to remain. The Court, after reiterating a state's entitlement under international law to control the entry, residence and expulsion of aliens, observed that states must nevertheless have regard to the absolute nature of Article 3, which is applicable to cases of extradition, expulsion and deportation of individuals to third countries.⁵¹ Accordingly:

Regardless of whether or not he ever entered the United Kingdom in the technical sense it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention.⁵²

More importantly still, the Court held that although Article 3

has so far been applied . . . in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of public authorities in the receiving country or from those of non-State bodies in that country when the

⁴⁸ Effective protection is not synonymous with total protection.

⁴⁹ See on this point, *Y v. United Kingdom*, and *A v. United Kingdom*, *supra* note 17 where the Commission has argued that the infliction of Article 3 level pain and suffering is unacceptable 'whoever were to inflict the punishment, be it a parent or teacher'.

⁵⁰ *Supra* note 8.

⁵¹ *Ibid.*, para. 47.

⁵² *Ibid.*, para. 48.

authorities there are unable to afford him appropriate protection. ... It [the Court] is not prevented from scrutinising an applicant's claim under Article 3 where the source of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.⁵³

3 Speculative Ill-treatment

The Court's judgment in *D v. United Kingdom* also illustrates the complex questions which can be raised in cases involving ill-treatment that has yet to occur. These speculative ill-treatment cases, such as those involving extradition to countries where there is a serious risk of 'Article 3' treatment,⁵⁴ illustrate the flexible nature both of the notion of ill-treatment and of the relevant threshold. With regard to the concept of 'permissible roughness of treatment',⁵⁵ treatment or punishment can only be adjudged to be in breach of Article 3 *ex post facto*, essentially because it is only then that all the relevant circumstances can be considered. To reach firm conclusions as to the nature and effect of treatment or punishment before it occurs clearly departs from the principle of assessment after the event. Whilst endorsing that principle in *Soering*, the Court indicated that a departure from it may be appropriate in certain cases:

It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from the principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by the Article.⁵⁶

Such a departure is justified on a number of grounds, besides the risk of serious and irreparable suffering. They include the principle of effective protection, the belief that the Convention is designed to promote and maintain democratic ideals, the fact that Article 3 admits of no exceptions or derogations⁵⁷ and, more to the point, that Article 3 represents an absolute standard. In the particular circumstances of *Soering*, the Court concluded that the effects of the death-row phenomenon were such as to warrant an exception to the principle of assessment after the event.

Evidently, the Court's approach to Article 3 in *Soering* was rather liberal, but it cannot

⁵³ *Ibid.*, para. 49.

⁵⁴ See e.g. *Chahal v. United Kingdom*, *supra* note 8; Application No. 10308/83, *Altun v. Federal Republic of Germany* (1983) 36 D&R., at 209–235; Application No. 0078/82 *M v. France* (1984) 41 D&R., at 103; Application No. 0479/83, *Kirkwood v. United Kingdom* (1984) 37 D&R., at 158–191. See also *Cruz Varas v. Sweden*, *supra* note 8 and *Vilvarajah v. United Kingdom*, *supra* note 32. Cf. *Vijayanathan and Pusparajah v. France*, Judgment of 27 August 1992, Series A, No. 241-B; (1993) 15 EHRR 62, where the French government successfully argued that because the applicants' removal was not imminent they were not 'victims' within the meaning of Article 25.

⁵⁵ See the *Greek case*, *supra* note 4, at 501.

⁵⁶ *Soering v. United Kingdom*, *supra* note 8, para. 90.

⁵⁷ *Ibid.*, paras 87 and 88.

be suggested that its interpretation was without a suitable basis in the Convention. There are important characteristics in such cases which justify an exception to the general rule of *ex post facto* assessment. The exception should only be applied in cases where the nature and effects of the ill-treatment in question are known, from previous experience, to violate the guarantees of Article 3.⁵⁸ Any speculation is therefore limited to the question of whether the ill-treatment in question is likely to occur. In *Soering*, the United Kingdom Government argued that speculative ill-treatment is prohibited under Article 3 only if it is certain and imminent.⁵⁹ Such a standard can be achieved only where the treatment is required by law and its occurrence is not simply a matter of speculation. Accordingly, since the death penalty and the death-row phenomenon were not necessarily automatic and inevitable,⁶⁰ the exception was not to be applied in that case. The Court disagreed. It concluded that a real risk of exposure to the known ill-treatment was sufficient,⁶¹ although a mere possibility of ill-treatment in such circumstances was not sufficient.⁶² The accepted standard, which lies somewhere between certainty and possibility, can be fairly high provided that it accords with the wider principles of effective protection and the prevention of irreparable damage.

In *Soering* the Court sought to pass judgment on the effects of an event which had not yet occurred. Such an approach can create confusion and uncertainty because the actual impact of the anticipated ill-treatment on the victim is necessarily unknown. However, it is important to observe that the Convention organs cannot and do not seek to determine whether there has been a violation, but rather to declare that a Contracting State would be in breach of the Convention if it were to act in a particular way. This was recognized by the Commission in its opinion in *Soering*:

the Commission in the present case is not confronted with a claim that the alleged breach of the Convention has actually taken place. The Commission's examination of the case must address the question of whether a breach of the Convention would occur on the implementation of the decision of the respondent Government to extradite the applicant to the United States. The issue before the Commission is thus anticipatory in nature and the Commission's conclusion to the question of whether there is a breach of the Convention must necessarily be conditional upon a decision to extradite to the United States.⁶³

In reality, a declaration of the legal implications of a state's future conduct has minimal legal significance and it is for the state to decide whether to heed the declaration. This is what happened after the *Soering* judgment when the United Kingdom extradited Mr Soering to the United States to stand trial on charges to which

⁵⁸ It is now clear, for instance, that the five techniques discussed in the *Irish* case are in breach of Article 3. Similarly, other forms of ill-treatment, such as the application of electric shocks, the extraction of finger nails, beating the soles of feet and immersion in excrement, are known to be contrary to Article 3.

⁵⁹ *Supra* note 8, para. 83.

⁶⁰ *Ibid.*, paras 95–96.

⁶¹ *Ibid.*, para. 98.

⁶² See *Vilvarajah v. United Kingdom*, *supra* note 32, para. 11.

⁶³ See the Opinion of the Commission in *Soering v. United Kingdom*, *supra* note 8, paras 107–108.

the death penalty did not apply.⁶⁴ In truth, it was a somewhat awkward judgment in that the Court was anticipating future events over which it had no control. However, the weaknesses in the Court's approach are only evident from a doctrinal perspective. In practice, the Court was absolutely correct in seeking to prevent the occurrence of acts likely to breach Article 3. Such an approach is justifiable on account of the absolute nature of the prohibitions.

Despite the juridical certainty of the alternative (*ex post facto*) approach, it is not to be recommended because it defeats the essence of preventive protection. It is the risk of ill-treatment which is sought to be prevented, not the fact of ill-treatment. A respondent state which removes an applicant from its jurisdiction against the better judgment of the Court of Human Rights has clearly failed to abide by the judgment as required by Article 53 of the Convention, even if the feared risk of ill-treatment never actually materializes. Preventive protection is the better of the two approaches because it does not expose the person to speculation and seeks to forestall any risk of occurrence altogether.

4 Justifiability

The reference to 'unjustifiable' ill-treatment is a further indication of the subjective processes involved in the application of Article 3. The use of this term for the first time in the *Greek Case* caused understandable concern in that it created an impression, albeit false and unintended, that certain breaches of Article 3 could be justified. In *Ireland v. United Kingdom* the Commission felt compelled to clear up the confusion by affirming that there could be no justification for treatment in breach of Article 3.⁶⁵ The impression which emerges from the Commission's explanation is that the facts of Article 3 cases must be assessed in the context in which they occur. In the particular circumstances of the *Irish Case*, the effects of the ill-treatment were reviewed in the context of the emergency situation in Northern Ireland. Even within that context, the ill-treatment was excessive and therefore in violation of Article 3. Once that conclusion had been reached, no justification or excuse was permissible. The notion of 'justifiability' therefore applies only to the assessment of individual facts in the particular context in which they occur and not to the determination of a violation of Article 3 as such. Justifiability is a yardstick for assessing the weight to be attached to factors such as the nature of the victim and the circumstances in which the ill-treatment is said to have arisen. Case-by-case assessment of this kind can lead to uncertainty in the jurisprudence of the supervisory organs, but this must be regarded as an inevitable part of the decision-making process. Provided that the Strasbourg organs are not unduly influenced by surrounding factors such as the political dimensions of the events being investigated, their conclusions cannot be faulted.

⁶⁴ J. P. Gardner (ed.), *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (1993), at 114.

⁶⁵ *Supra* note 13, at 378.

Unfortunately, by its very nature the process of investigating Article 3 cases continues to carry this risk.

The principle of justifiability played a particularly important role in the Commission's opinion in *Soering*, where one of the questions was whether the death-row phenomenon attained the necessary level of severity to violate Article 3. The Commission concluded that the threshold was not reached, mainly because

the inmate on death row is not a victim of an unjust system which permits those who have been sentenced to death to languish in prison until the State decides to implement the sentence. On the contrary, a significant part of the delay which forms the basis of the present complaint derives from a complex of procedures which are designed to protect human life and to protect against the arbitrary imposition of the death penalty.⁶⁶

Thus, the Commission concluded that the death-row phenomenon was justified by the principle of due process and could therefore be beneficial to the victim. Its reasoning is attractive in principle, but in practice it is more difficult to sustain. Since no two cases are the same, to conclude that the death-row phenomenon is beneficial is rather sweeping, because the benefit, if any, of the phenomenon is not objectively verifiable. In the particular circumstances of *Soering* there were various factors, such as the uncompromising attitude of the prosecutors, the powerlessness of the federal authorities upon whom the United Kingdom Government sought to rely and the publicity attached to the antecedent events in the case.

5 Conclusions

While it is now generally accepted that Article 3 of the European Convention on Human Rights guarantees absolute rights on account of the impermissibility of limitations or derogations, Strasbourg case law has not yet defined precisely the concept of 'absolute right'. Although there is evidence to suggest that the guarantees in Article 3 are special and that they are treated as such by the supervisory organs, their precise scope remains unclear. 'Absolute right' must mean more than the impermissibility of limitations, exceptions and derogations. However, it is a nebulous concept involving the assessment of various subjective factors. The interrelationship of these factors and their effect on final decisions and judgments in Article 3 litigation is guided by the principle of effective protection⁶⁷ and the aim of upholding European public order. In other words, 'absolute right' is a term of art which is by nature imprecise and its evaluation can best be understood only in the particular context. For this reason a superficial comparison of its application in different cases can often yield what appear to be contradictory results. Yet it would be unfair to conclude that Strasbourg's supervisory organs do not respect the absolute character of the guarantees in Article 3.

Nevertheless, there is room for improvement. For example, it is arguable that the severity thresholds are unduly high. Similarly, in the context of physical ill-treatment

⁶⁶ *Supra* note 8, para. 128 of the Commission's Opinion.

⁶⁷ Merrills, *supra* note 44, at Ch. 5.

(so-called 'permissible roughness') a variable and subjective standard can mean breaches of Article 3 are not always upheld. Where there is doubt, it appears that the benefit is not always given to the victim. The judgment of the Court in *Klaas v. Germany*⁶⁸ provides a good illustration of this. One of the main issues in that case was whether the injuries sustained by the applicant during a routine arrest were evidence that excessive force had been used by the police in breach of Article 3. The evidence as to how the injuries were sustained turned out to be inconclusive and on that basis the Court, following the decision of the national courts but departing from the opinion of the Commission, held that there had been no violation.⁶⁹ This represented a departure from what had seemed established policy and practice as elaborated in *Tomasi v. France*,⁷⁰ that in cases where an individual sustains injury while under government (police) control, the onus lies on the respondent government to rebut the presumption that the injury was inflicted by public officials. The *Klaas* decision was unfortunate, to say the least, not only because of its impact on the burden of proof but also because it undermined the spirit of 'absolute guarantee' in Article 3. In their convincing dissenting opinions, Judges Pettiti, Walsh and Spielmann stressed that the majority of the Court had failed to appreciate the creeping effect of official brutality.

The doubts expressed above in relation to the severity threshold can be extended *mutatis mutandis* to the other subjective factors involved in determining Article 3 cases. However, criticism may not be entirely fair in view of the imprecise nature of the concepts involved and the differences in the circumstances of individual cases. Any assessment of the practice of the Strasbourg organs in relation to Article 3 must be based on a careful analysis of individual decisions and judgments, taking into account all relevant distinguishing factors.

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⁶⁸ Judgment of 22 September 1993, Series A, No. 269; (1994) 18 EHRR 305.

⁶⁹ *Ibid.*, para. 30.

⁷⁰ *Supra* note 8.