

THE LACUNA IN ARTICLE 3 OF THE ECHR AND THE SCOPE FOR TORTURE IN A ‘TICKING TIMEBOMB’ SCENARIO

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ABSTRACT

The principled rhetoric of the European Court of Human Rights has been to state that the prohibition against torture, as well as other forms of inhuman and degrading treatment, as enumerated in Article 3 of the European Convention on Human Rights (ECHR) is an absolute protection.

Part I of this paper will analyze whether Article 3 of the ECHR, while being formally unqualified, is in practice, truly an ‘absolute right’ or not. In attempting to answer this question, the paper will rely upon principles of statutory interpretation as well as, numerous judicial pronouncements which indicate that Courts have resorted to ‘proportionality’ and ‘necessity’ based reasoning in various cases while reaching a conclusion on whether there have been violations of Article 3 of the ECHR. This, in turn will signify that the theoretical ideal of ‘absoluteness’ is far from being consistently reflected in the decisions of the Strasbourg organs.

Having established that the protection enumerated in Article 3 of the ECHR is not ‘absolute’, Part II of this paper will then focus on whether in certain ‘ticking timebomb’ scenarios, it should be justifiable to violate Article 3 of the ECHR. Acknowledging the intuitively appealing pull of utilitarianism and its conflict with certain fundamental rights that are established via positive as well as natural law, this part will highlight the numerous reasons for as to why, even in a ‘ticking timebomb’ scenario, the protection that is guaranteed via Article 3 of the ECHR, should not be violated.

Provoked by the Holocaust, as well as numerous other forms of atrocities that had taken place during World War II, there was a pressing need felt to classify torture as being wrong in every given situation, regardless of any other confounding variables.

The European Convention on Human Rights (ECHR), which came into force as early as 1953, attempted to address the issue via Article 3 of the Convention, which states, “No one shall be subjected to torture or to inhuman or degrading treatment.” A core saying that soon developed was therefore, that, protection awarded from torture and other acts that classify as being cruel, inhumane and degrading was an ‘absolute right’ and hence, was widely believed that there are no legal or moral justifications for violating this protection that was enshrined in the text of Article 3. ⁱ

At this stage it would be appropriate to discuss what an ‘absolute right’ means in the context of this paper. An absolute right is a right that is not made subject to any exceptions. Regardless of the circumstances, an absolute right is supposed to trump all other obligations which may appear to be in conflict with this right. ⁱⁱ

FORMALLY UNQUALIFIED, YET NOT EXPRESSLY ‘ABSOLUTE’

A widely stated reason for believing that Article 3 is an absolute right is centred on the manner in which it is drafted. It is argued, whenever provisions that confer rights on people are not meant to be absolute, they expressly provide for situations in which there could be restrictions placed on the enjoyment of the right. Extension of this logic suggests that, since Article 3 of the ECHR is not barricaded by any restrictions and is entirely unqualified, the protection that it grants is ‘absolute’ in nature. While, adopting statutory interpretation along such a line of reasoning is no doubt persuasive, it doesn’t always reflect the law as it stands and is interpreted. ⁱⁱⁱ

The absence of any qualifiers in Article 3 has several consequences. Any rights that this Article gives birth to, will only be implied rights. The ambit of implied rights, as well as their limits becomes primarily a matter of interpretation, attribution and in certain cases even choice, rather than being determined by certain prescriptions that are coherently dictated by the statutory provision. ^{iv}

THE COURT'S INTERPRETATION OF ARTICLE 3

The case for Article 3 of the ECHR as an absolute right becomes significantly weaker upon analysis of the case law pertaining to the provision. Article 3 of the ECHR neither defines 'torture', nor does it define inhuman or degrading treatment'. There is nothing in the text of the Article to suggest that the conception of this supposedly 'absolute right' should be diminished, keeping in mind the differences between torture and what could be classified as degrading treatment.^v

In practice, the theoretical ideal of absoluteness is far from being consistently reflected in the decisions of the Strasbourg organs. Considering the imprecise definition that Article 3 provides, the supervisory organs of the Convention are compelled into resorting to facts of each case to determine whether there has been a violation of Article 3.^{vi}

To begin with, the inconsistencies in the interpretation of the nature of rights enshrined in Article 3 were visible from the decision in *The Greek case*^{vii}. The Court stated that "*Inhuman treatment, covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.*" This decision raised the question of whether in certain exceptional situations, such as those of public emergency as envisaged in a 'ticking time bomb scenario', whether torture or other forms of ill treatment under Article 3 could be justified, and hence, not be labelled as a breach of obligations under International law.^{viii}

In subsequent judgments, such as the landmark case of *Ireland v. United Kingdom*,^{ix} that dealt with various methods of interrogation of suspects who had been detained and involved the combined application of certain techniques such as 'wall standing', 'sleep deprivation', 'hooding', 'deprivation to food and drink' and 'subjection to noise' the Court however, ruled out the purposive element of analysis while coming to a conclusion on whether Article 3 of the ECHR had been violated in the given circumstances. The judgment went as far as to state that the prohibition of certain acts mentioned in Article 3 of the European Convention was "*absolute and that there can never be under the Convention or under International Law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment.*" Similarly, in the case of *Tomasi v France*, wherein an individual was suspected of being criminally involved with a particular terrorist outfit, the court refused to place limits on the protection guaranteed by Article 3 and stated that,

“the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”^x

A TWO STAGED MODEL OF ADJUDICATION?

With regard to Article 3, it appears to be the principled rhetoric for the ECtHR to state that the prohibition against torture and other forms of inhuman and degrading treatment is absolute. This however, is far from being the settled approach and, if it were to have actually been an absolute right, as often cited in judgments, Article 3 should never entail a two-staged framework of adjudication of human rights, wherein the first stage involves establishing whether the right has been breached or interfered with and the second stage involves an enquiry into whether such interference was justifiable, or necessary in order to achieve a legitimate aim. Application in cases wherein an ‘absolute’ right has been supposedly interfered with, involves only one stage of enquiry, that being, whether a certain threshold has been met and Courts are expected to exclude considerations of proportionality of responses or balancing against the rights of others.^{xi}

With the above principles in mind, analysing certain judicial pronouncements of the ECtHR, provides strong evidence highlighting that Article 3 is not an absolute right. The ECtHR has stated that the purpose for which a person is illtreated, is not a decisive factor but is definitely a relevant factor while adjudicating upon a violation of Article 3. Case law suggests that a pattern develops depending upon whether the treatment that was inflicted was for a legitimate objective or for certain other illegitimate purposes.^{xii}

A domain, wherein treatment that is associated with punishment, is also accompanied by justificatory reasoning is that of solitary confinement. It has been stated that solitary confinement could lead to total social as well as sensory isolation and has been classified as a violation of Article 3 of the ECHR for being a form of inhuman treatment.^{xiii}

It must be noted that the decisions in cases such as *Khider v France*, the stance taken by the Court is somewhat worrisome. The case dealt with a prisoner who had made numerous attempts to escape from prison, and even succeeded on a few counts, and therefore had been classified as being a “high risk prisoner”. He had been placed in solitary confinement for a cumulative period of seven years. Relying upon Article 3, he challenged his period of solitary confinement as having violated his rights. In its decision the court however went into a detailed analysis of the necessity for solitary confinement in this particular case and stated that solitary confinement, for reasons of security, protection of others and discipline did not classify as a form of treatment that was inhuman. This is indicative of the fact that the Court, at face value did not look at Article 3 as being an absolute right.^{xiv}

Likewise, in *AB v Russia*, wherein the concerned individual who had been subjected to solitary confinement was a suspect of a non-violent crime, and as per the government records, “did not pose a risk to himself or others”, the Court came to the conclusion that subjecting him to solitary confinement was a violation of his rights guaranteed under Article 3. The Court in its reasoning repeatedly referred to the security risk, or lack thereof that the prisoner posed, while coming to a conclusion on whether the security measures that were adopted by the prison authorities were implemented primarily for containing the risk posed or whether they went beyond that.^{xv}

In fact, in the case of *Ramirez Sanchez v France*, the Court went as far as to say that, measures that are taken, must be for the attainment of a particular legitimate aim and that it is for the Court to come to a conclusion of whether in a certain case, solitary confinement is necessary, justified and proportionate.^{xvi}

The Court therefore, in the cases of *Khider v. France*, *AB v. Russia* as well *Ramirez Sanchez v. France* appears to have done indirectly, what it was not supposed to do directly, i.e. resort to proportionality and necessity-based reasoning in order to reach a conclusion pertaining to violation of Article 3. Rather than analysing the conditions of solitary confinement, the Court seems to burden itself with an analysis of the proportionality of the imposition of solitary confinement.^{xvii}

The primary aim of declaring a particular right to be ‘absolute’ is to actually ensure that in practice, it is shielded from any form of proportionality review or balancing of rights, regardless of the circumstances, while determining whether the threshold for establishing a

violation of the right has been met. It can therefore be said that the picture that is painted by the judicial pronouncements of the Strasbourg supervisory organs is certainly at odds with the principled rhetoric regarding an absolute prohibition of torture or inhuman or degrading treatment being enshrined within Article 3 of the ECHR. ^{xviii}

‘TICKING TIME BOMB’ SITUATIONS AND CIRCUMVENTION OF ARTICLE 3

The classical ‘ticking time bomb scenario’ is a hypothetical situation wherein a bomb has been placed, a terrorist has been captured and the interrogator is under the impression that the terrorist knows the exact location of this bomb, but is refusing cooperate and is unwilling to disclose the information which could possibly save hundreds or maybe even thousands of lives of innocent people. ^{xix}

The ‘ticking time bomb’ scenario raises fundamental questions such as, whether the government is not obliged to protect and prioritize lives of innocent citizens over those of terrorists? Such cases boil down to what is termed as ‘lesser evil ethics’, wherein situations lead to a conflict between certain fundamental rights that are established via positive as well as natural law and what appear to be certain clear-cut principles of utilitarianism. This is based upon the idea of trying to achieve the greatest good for the greatest number of people. In practice, however liberal, political leaders will find it extremely difficult and there is a high likelihood they’ll be unable to sacrifice the lives of hundreds of innocent civilians solely to protect the rights of a terrorist ^{xx}

However, there are numerous reasons for as to why a departure from Article 3 should not be permitted, even in a ‘ticking time bomb scenario’. To begin with, evidence that torture and other forms of ill treatment that are inhumane and degrading work successfully in the extraction of credible evidence, is not conclusive. While there have been a few instances wherein information that may be termed as being important or even crucial has been extracted by resorting to torture or other forms of ill treatment that is inhumane and degrading, one must never lose sight of the fact that there have been several other instances where resorting to such methods did not lead to extraction of relevant information and yielded no significant results and hence, the effectiveness of such methods, at best, remains uncertain. ^{xxi}

Secondly, use of such means implies breaching the inalienable jus in bello principles that deal with non-combatant immunity. In such situations, torture and other forms of ill treatment that are inhumane and degrading involve harming an individual who has ceased to be a combatant as has been captured. When a suspect is taken in as a prisoner, it must be noted that they cease to be combatants themselves and their own physical presence no longer poses a threat. Such cases, when analysed through the lens of morality as well as international law, shed light on the fact that torture would be incorrect for the very same reasons that terrorism is, namely, the harming of non-combatants. ^{xxii}

Likewise, in a case wherein torture and other forms of ill treatment that are inhumane and degrading is permitted, it could lead to slippage. Taking any other stance will classify as nothing short of being historically myopic in view, as would be evidenced most prominently from the French experience in the territory of Algeria, where this danger of slippage, very soon transformed into normalization of the methods. In cases wherein the judicial system starts carving out exceptions and accepting instances that entail resorting to inhumane, and degrading treatment, which in certain cases even escalates as far as torture, the systemic framework has the potential of getting infected and developing a tolerance towards these forms of human rights abuses. The Algerian experience very appropriately elucidates the threat of permitting torture in ‘exceptional situations. While initially, it may be resorted to only in such ‘ticking time bomb scenarios’, with time the practice becomes more normalized and the threshold of what constitutes an exceptional scenario often drops significantly. It becomes easy to justify the resort to such means, even in cases that would rationally speaking, not classify as a ‘ticking time bomb scenario’ and such treatment very often ends up making its way into the arena of other cases as well wherein information needs to be extracted. ^{xxiii}

Fourthly, it would be pertinent to note that even a rule utilitarian argument would in actuality emphasise that the greatest good would be achieved by observing Article 3 of the ECHR as enshrining an ‘absolute’ prohibition. Rule utilitarianism up here would focus upon a certain amount of moral consistency as well as the role of reciprocity. There happen to be at least a few compelling reasons that are provided by scholars of this school of thought for taking such an approach. To begin with, as is obvious from the historical records from across the globe, torture and the other forms of inhumane and degrading treatment are more often than not resorted to for pernicious motives, such as those of silencing any form of opposition to

governments in power. An absolute prohibition against such forms of treatment would only work towards strengthening the core values of democracy. Secondly, relying on the principle of reciprocity, an interpretation of Article 3 of the ECHR would benefit all parties as a rule prohibiting one party from torturing another would also potentially benefit the former at a later time. If we torture an enemy today, there will be no reason for the enemy to not subject soldiers of our country to treatment of a like nature if they were to get captured.

It must be therefore noted that, although certain loopholes may be found in certain treaties, the prohibition that is enshrined in Article 3 of the ECHR, must be treated as being absolute. The above mentioned four arguments form a strong reason to have in place, a blanket prohibition on the use of inhumane, degrading treatment as well as acts that would classify as being torture. More importantly, the argument in favour of torture in certain ‘exceptional’ situations such as those of a ‘ticking time bomb scenario’ is an attempt at advancing an argument that cannot be made without taking a highly immoral position which would further, inevitably produce a series of never-ending troubling effects.^{xxiv}

CONCLUSION

It is important to keep in mind that while there are numerous decisions of the ECtHR, wherein the Court has stated that Article 3 is an absolute right and in fact explicitly refrained from resorting to the two staged model of adjudication, unfortunately, this fails to be reflected in a consistent manner in the decisions of the European Court. Determination regarding the impermissibility of derogations or limitations placed on Article 3 and its precise scope of applicability continues to be unclear and it would be incorrect to state that the interpretation of this Article has not been a nebulous concept.

Utilitarianism happens to have a very strong pull, and is intuitively appealing. These principles of utilitarianism, in such ‘ticking timebomb scenarios’, are worrisome, considering, the protection that is offered by Article 3 of the ECHR is, in practice is not always treated as being ‘absolute’. The fact that the Courts have resorted to a two staged model of adjudication when it comes to violations of this Right could be treated as an opportunity by numerous countries to resort to violations and justify it on the basis of certain “exceptional circumstances” and

principles of “necessity”. This could lead to an extremely slippery slope, with occurrences of violations of Article 3 becoming more and more routine and normalised, and eventually becoming a major setback in the development of International Human Rights Law. It is therefore imperative, that the judicial organs recognize the looming threat and begin to reinforce in a consistent manner, the ‘absolute’ nature of Article 3 of the European Convention on Human Rights, in order to fortify the most basic protection that has been afforded to individuals as well as, prevent its abuse.

REFERENCES

- ⁱ Steven Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?" 15 HUM RTS. L. REV. 2. (2015)
- ⁱⁱ Natasa Mavronicola, "What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights" 12 HUM RTS. L. REV 724 (2012)
- ⁱⁱⁱ M. K. Addo and N. Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?" (1998) 9 European Journal of International Law 512 (1998).
- ^{iv} Steven Greer, *supra* note 1, at 11.
- ^v Addo and Grief, *supra* note 3, at 516.
- ^{vi} *Id* at 516- 517.
- ^{vii} The Greek Case, 1969 12 Y.B. Eur. Conv. on H.R. 71-72 (Eur. Comm’n on H.R.)
- ^{viii} M Addo and Grief, *supra* note 3, at 517.
- ^{ix} Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 25 at 58 (1978).
- ^x Addo and Grief, *supra* note 3, at 522.
- ^{xi} Stijn Smet, "The ‘Absolute’ Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?", SSRN (Sep. 14, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999518
- ^{xii} *Id.*
- ^{xiii} Natasa Mavronicola, "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context" 15 HUM RTS L. REV. 733-734 (2015).
- ^{xiv} European Court of Human Rights Press Release 311 (2013), Applicant’s treatment in detention did not violate the Convention (October 25, 2013).
- ^{xv} Mavronicola, *supra* 13 at 733.
- ^{xvi} Smet *supra* note 11 at 9-10.
- ^{xvii} *Id.*
- ^{xviii} *Id.*
- ^{xix} Simon Chesterman, Why Not Torture? SSRN (December 17, 2014). <https://ssrn.com/abstract=2539021>
- ^{xx} Alex J. Bellamy, "No pain, no gain? Torture and ethics in the war on terror" 82 INTERNATIONAL AFFAIRS 124 (2006).

^{xxi} Alex J. Bellamy, "No pain, no gain? Torture and ethics in the war on terror" 82 *INTERNATIONAL AFFAIRS* 137-138 (2006).

^{xxii} *Id* at 137-139.

^{xxiii} *Id* at 140

^{xxiv} *Id* at 141.

