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What is an 'absolute right'? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights

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Abstract

The answer to the question of what it means to say that a right is absolute is often taken for granted, yet still sparks doubt and scepticism. This article investigates absoluteness further, bringing rights theory and the judicial approach on an absolute right together. A theoretical framework is set up that addresses two distinct but potentially related parameters of investigation: the first is what I have labelled the 'applicability' criterion, which looks at whether and when the applicability of the standard referred to as absolute can be displaced, in other words whether other considerations can justify its infringement; the second parameter, which I have labelled the 'specification' criterion, explores the degree to which and bases on which the content of the standard characterised as absolute is specified. This theoretical framework is then used to assess key principles and issues that arise in the Strasbourg Court's approach to Article 3. It is suggested that this analysis allows us to explore both the distinction and the interplay between the two parameters in the judicial interpretation of the right and that appreciating the significance of this is fundamental to the understanding of and discourse on the concept of an absolute right.

Keywords: absolute rights – meaning of absoluteness – Article 3 European Convention on Human Rights – applicability – specification – judicial interpretation

Reference to 'absolute rights' abounds in adjudication and academic commentary.[1] Nonetheless, the *meaning* of absoluteness as a characteristic of (certain) human rights has not been explored in sufficient depth and causes significant uncertainty. This article seeks to investigate the meaning and implications of absoluteness, to better understand the uncertainty and problems surrounding it. The aim is to unpack the notion of an absolute right through setting out a theoretical framework and looking at the European Court of Human Rights'[2] approach to Article 3 of the European Convention on Human Rights[3] (ECHR) in light of this framework. The article begins by clarifying and explaining the focus of analysis; the controversy surrounding the concept of an 'absolute right' is then briefly outlined; it is then addressed by means of a theoretical framework consisting of two parameters: applicability and specification. These are considered in turn, with discussion of their role and significance in theory and in ECtHR discourse.

Deciphering 'absoluteness'

There is very little discussion of the meaning of the concept of 'absolute right'. Much of the academic interest on the topic has revolved around the moral debate: Are there any absolute *moral* rights? This translates into a debate of whether there *should* be any absolute legal rights. Instances of the normative debate abound,[4] encompassing also the moral divide between deontological and consequentialist positions and the more specific but widespread debate surrounding emergency constitutions (including arguments in favour of the legalisation of torture).[5] Yet the article's investigation is both antecedent and posterior to the

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[1] For instance, the Grand Chamber of the European Court of Human Rights refers to 'absolute rights such as those guaranteed by Articles 2 and 3 of the Convention' in *Ilaşcu v Moldova and Russia* 2004-VII; 40 EHRR 46 at para 334. Courts often refer to rights' non-absolute nature. For instance, the assertion in a recent Supreme Court judgment that '[t]he privilege against self-incrimination is not an absolute right': see *Ambrose v Harris* [2011] UKSC 43 at [34] and [56] (*per* Lord Hope). Commentary often alludes to the significance of absoluteness without explaining it fully. See, for instance, Letsas, 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) 21 *European Journal of International Law* 509 at 510: 'Naturally, the reasoning that figures in the interpretation of qualified rights (e.g., the principle of proportionality) will often differ from that of absolute rights.'

[2] ECtHR, 'the Strasbourg Court' or 'the Court'.

[3] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS 5 (ECHR or 'the Convention').

[4] See, for example, the discussion between Gewirth and Levinson: Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1; Levinson, 'Gewirth on Absolute Rights' (1982) 32 *The Philosophical Quarterly* 73; and Gewirth, 'There are Absolute Rights' (1982) 32 *The Philosophical Quarterly* 348.

[5] See, for example, Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029; and Dershowitz, 'Tortured Reasoning', in Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press,

question of whether the law should provide for absolute rights. It explores a question which is certainly antecedent to the debate: what *is* an absolute right? At the same time, it does so in light of judicial discourse in the interpretation of what jurists confirm to be an absolute right at law.

The starting point here is that Article 3 is absolute at law: it is labelled as 'absolute' and declared to be applied as such by the ECtHR, 'the authentic representatives, the mouthpiece of the law'.[6] Thus this article is not normative, prescriptive or justificatory insofar as it does not seek to answer questions as to whether there are absolute moral rights or whether there should be absolute legal rights. Instead, it asks what absoluteness means. In doing so, a theoretical framework is set up to facilitate clarity of analysis in relation to two key parameters: that of applicability and that of specification (explained further below). However, it does not purport to elide the implications of normative standpoints on the theoretical framework against which the Court's discourse is evaluated.[7]

It is important to distinguish this project from that pursued by Addo and Grief in their article: 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?'[8] Addo and Grief appear to take a certain theoretical approach to the meaning of absolute right as a given – borrowed entirely from Gewirth's discussion on morally absolute rights[9] – and proceed to assert its quasi-/overall fulfilment but also its limitations[10] through analysis of the case law on Article 3. Their analysis does not explore in depth what it means for a right to be absolute, but rather investigates to what extent Article 3 fulfils the description of a particular theory of absolute rights. More importantly, they do not explain exactly why and how the 'factual and personal distinctions'[11] involved in Article 3's interpretation impact on absoluteness: in particular, they hint at – but do not fully elaborate on – the significance of the distinction but also of the potential interplay between the applicability and specification of the right, which is examined closely here, with a view to

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2004); cf Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 *Yale Law Journal* 1753. See also Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; and the wider debate on torture in Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

[6] Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 *Oxford Journal of Legal Studies* 123 at 131.

[7] There is ample debate on whether there can be any purely descriptive analysis of law. For a critical exposition, see Eng, 'Fusion of Descriptive and Normative Propositions. The Concepts of `Descriptive Proposition' and `Normative Proposition' as Concepts of Degree' (2000) 13 *Ratio Juris* 239.

[8] Addo and Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 *European Journal of International Law* 510.

[9] Gewirth, 'Are There Any Absolute Rights?', supra n 4.

[10] Addo and Grief, 'Does Article 3 ECHR Enshrine Absolute Rights?', supra n 8 at 515-6.

[11] Ibid. at 515.

addressing some of the uncertainty and scepticism surrounding the concept of an absolute right, as explained below.

The choice of right and scope of analysis

Article 3 of the ECHR is the choice of focus for a number of reasons. Crucially, it has been expounded to be an 'absolute right' by the judicial institution interpreting the ECHR, the ECtHR,[12] over a significant length of time,[13] producing a rich body of case law[14] dealing with Article 3's application in a range of situations. This means that it provides fertile ground for an exploration of judicial discourse on what it means for a right to be absolute.

Moreover, such focus enables consideration of a right recognised as an 'absolute' *human* right, lying outside the isolated constitutional discourse and experiences of a particular country. An example of a constitutional 'absolute right' would be Germany's right to dignity, found in Article 1(1) of the Grundgesetz.[15] Yet an analysis of this right would inevitably take us down the path of constitutional theory, not least German constitutional theory, and away from the notion of absolute *human* rights.

If the aim is to explore the notion of an absolute *human* right, why select a regional system of rights protection? The answer lies in the idea of exploring it in judicial discourse. The ECHR system, operating within the Council of Europe and applicable in 47 Contracting States, is unique in the adjudicatory model it provides. Its special nature lies in three key attributes. The first is the existence of a permanent, full-time Court with automatically compulsory jurisdiction. Protocol No. 11 has made the Court a permanent institution with full-time judges, replacing the European Commission of Human Rights and the original Court,

[12] The wording used by the Court varies, with the oft-repeated statement being that '[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment' (*Ireland v United Kingdom* A 25 (1978); 2 EHRR 25 at para 163). The Court also refers to 'the absolute character of Article 3' (*Chahal v United Kingdom* 1996-V; 23 EHRR 413 at para 96) and to Article 3 as an 'absolute right' (*Al-Adsani v United Kingdom* 34 EHRR 11 at para 59).

[13] The first finding of a breach of Article 3 by the Strasbourg Court was in 1978, in *Ireland v United Kingdom*, ibid.; but see also *De Wilde, Ooms and Versyp v Belgium* A 12 (1970); 1 EHRR 373 (no breach of Article 3 found for disciplinary punishments) and the Commission Report in *The Greek Case* (*Denmark, Norway, Sweden and the Netherlands v Greece)* (1969) 12 Yearbook 186.

[14] This includes over 850 findings of violation of Article 3, based on *50 YEARS OF ACTIVITY: The European Court of Human Rights – Some Facts and Figures* (provisional edition, Strasbourg: April 2010) at 14-15, available at: http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf [last accessed 4 July 2012].

[15] Article 1(1) Grundgesetz (the German Basic Law) provides: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.'

making the ECHR process 'wholly judicial'.[16] The second, related attribute is the right of individual petition, allowing for direct access to the Court for over 800 million people within the jurisdiction of the Contracting States.[17] Thirdly, the system benefits from robust implementation mechanisms. Formal oversight of implementation is conducted by the Committee of Ministers[18] while the Directorate General of Human Rights offers assistance and advice on compliance through close co-operation with State authorities. The final 'stick in the cupboard' is expulsion from the Council of Europe, which could cause great difficulties for a State seeking, or seeking to maintain, European Union membership.[19]

Thus a focus on Article 3 allows us to assess the notion of 'absolute right' in a *sui generis* sphere, as an absolute *human* right whose interpretation has been the subject of rich judicial 'output'. For the purposes of this article, the focus is on Article 3 as a legally absolute right strictly within – and not beyond – the legal order of the ECHR, as identified by the Strasbourg Court.[20] The article does not purport to explain notions that may be considered related to the concept of an absolute right at a broader international law level, such as peremptory norms of international law or norms comprising *erga omnes* obligations, although aspects of the discussion below may be of interest to those analysing such norms.

Another question may well be: why select Article *3* of the ECHR and not another right enshrined in the ECHR? The answer is that Article 3 is prominently referred to as absolute by academics,[21] by domestic institutions (ranging from courts[22] to ministries[23]) of

[16] European Court of Human Rights: Annual Report 2009 (Registry of the European Court of Human Rights, Strasbourg, 2010) at 10, available at: http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/2009_Annual_Report_Final.pdf [last accessed 4 July 2012].

[17] The right of individual petition was originally an option. Gradually, it became recognised by all Contracting States. Protocol No 11 rendered the recognition of the right of individual petition compulsory. This right pertains to natural and legal persons, groups of individuals and to non-governmental organisations.

[18] See Article 46(2) ECHR.

[19] Article 2 of the Treaty on European Union (European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01) provides that the European Union (EU) is founded on the values, *inter alia*, of 'respect for human rights'. Moreover, the EU's accession to the ECHR has been enabled through Article 6(2) of the Treaty on European Union. Lastly, Article 6(3) of the same provides: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms…shall constitute general principles of the Union's law.'

[20] On this issue, see *Loizidou v Turkey* 1996-VI; 23 EHRR 513, *Banković and Others v United Kingdom* 2001-XII; 44 EHRR SE5. See also *Behrami and Another v France and Saramati v France, Germany and Norway* 45 EHRR SE10 and the recent decisions in *Al-Skeini and Others v United Kingdom* 53 EHRR 18 and *Hirsi Jamaa and Others v Italy* Application No 27765/09, Merits, 23 February 2012.

[21] See, for example, Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford: Oxford University Press, 2002) at 242; Foster, *Human Rights & Civil Liberties*, 2nd edn (Essex: Pearson Education, 2008) at 27; White and Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 5th edn (Oxford: Oxford University Press, 2010) at chapter 9.

[22] See, for example, *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72 at [40] (*per* Lord Scott).

[23] See, for example, *The Human Rights Framework as a Tool for Regulators and Inspectorates* (Ministry of Justice, UK 2009) at 12, available at:

Contracting States such as the United Kingdom and in the Strasbourg Court's case law itself.[24] With regard to Article 3, the label 'absolute' is almost always the starting point, even if to be challenged. Other rights do not seem to attract the same label or attention with such consensus.

Nonetheless, while the choice of focus is Article 3 due to its prominence in 'absolute rights' discourse and case law, I do not wish the above to be seen as a dismissal of the possibility of envisaging other rights under the ECHR as absolute. Indeed, the theoretical framework provided below can be used to explore whether and on what basis other rights within the ECHR can be seen to be absolute.

Applicability and specification: theory and case law

Discourse on the concept of an 'absolute right' is bedevilled by an uncertainty and scepticism that is not easy to penetrate at first sight. For instance, although Feldman states that the obligations of states under Article 3 are 'absolute, non-derogable and unqualified',[25] he remarks that 'a degree of relativism cannot, in practice, be entirely excluded from the application of the notions of inhuman or degrading treatment'.[26] Fenwick goes as far as to assert that '…[the standard of treatment that qualifies as Article 3 ill-treatment] does not connote an absolute standard and, in its application, it allows for a measure of discretion'.[27] Such commentary raises the question of how 'relativism' and the delimitation of a right relate to absoluteness. Crucially, it also highlights the preliminary need for conceptual clarity.

The controversy surrounding the concept of an 'absolute right' can be distilled into three rather interwoven questions:

1. What are the key implications of a right's 'absoluteness' on the obligations it comprises?
2. How does a right's 'absoluteness' affect the substance of what it prohibits or requires?
3. What is the role of 'relativism' in the interpretation of an 'absolute' right?

The formulation of a theoretical framework to help address these questions can be facilitated through a distinction between two criteria or parameters.[28] The first, which focuses

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http://www.equalityhumanrights.com/uploaded_files/humanrights/HRO/moj_guide_regulators_inspectorates.pdf > [last accessed 4 July 2012].

[24] See, for example, *Chahal v United Kingdom*, supra n 12 at paras 79-80.

[25] Feldman, *Civil Liberties and Human Rights*, supra n 21 at 242.

[26] Ibid.

[27] Fenwick, *Civil Liberties and Human Rights*, 3rd edn (London: Cavendish Publishing, 2004) at 44-5.

[28] The word 'criterion' and 'parameter' will be used interchangeably.

on the question of whether and when the applicability of a standard[29] can be lawfully 'displaced' by other considerations, can be labelled the *applicability* criterion. The second, which focuses on the question of the level and bases of specification[30] of a standard, can be labelled the *specification* criterion. In essence, the latter element focuses on the definition and delimitation of a standard. Drawing this distinction does not mean to suggest that there is never any interplay between these two criteria, but is rather used as a classification of two different levels at which analysis of absoluteness can lie. Indeed, specification, which consists of defining and delimiting the standard, is what determines if it applies. The applicability criterion then determines whether its requirements can be lawfully displaced or not by conflicting or competing considerations. The potential interplay between the two criteria will be explored below.

The applicability parameter: theory

Both theorists who support and those who dispute the existence of absolute moral rights, or rights that should be recognised as absolute at law, take a particular stance on the applicability parameter of the right. This is encapsulated by Gewirth as follows: 'A right is *absolute* when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.'[31]

Gewirth analyses this in the following way: The starting point is that, as per the Hohfeldian model,[32] the absoluteness pertains to claim-rights, that is, justified entitlements to the performance of correlative duties. Applying this to human rights discourse, the entitlements can be said to be to the performance of correlative duties by the state. The right is fulfilled when its correlative duty is performed (including a duty to refrain from a particular act) and is infringed when its correlative duty is not carried out. The right is violated when it is *unjustifiably* infringed. Lastly, the right is *overridden* when it is justifiably infringed. Thus, absolute rights can never be justifiably infringed, according to Gewirth. In other words, no considerations can displace them once they are found to apply: if they apply,

[29] I use the word 'standard' here to allow room for exploring the way rights and correlative duties interact with matters of applicability and specification.
[30] The term 'specification' is here taken to refer to specifying, in the sense of identifying clearly and definitely as per the definition in Soanes (ed), *The Paperback Oxford English Dictionary*, (Oxford: Oxford University Press, 2002) and not to any other technical or legal term.
[31] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 2.
[32] See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

they must be fulfilled, and infringement automatically amounts to a *violation*,[33] which is unlawful.

Thus, to give an (imaginary) example, an absolute legal right not to be killed would encompass an obligation on State agents not to kill anyone; no consideration, including one of necessity or self-defence, could operate to override the right; any killing by State agents would amount to a violation of the right and would be unlawful. A consequentialist approach – broadly looking at the (undesirable) consequences of not interfering with the right or the (desirable) consequences of interfering with it – would have no place in determining the lawfulness of infringing the right.

This can be further clarified by contrasting it with a right not considered to be absolute. If a right – say, for example, the right to freedom of expression – provides that it can be lawfully interfered with in pursuit of the protection of reputation or can be derogated from in particular circumstances, this means that certain considerations can operate to override the right – not all restrictions on freedom of expression would amount to violations and therefore be unlawful.

This approach to the criterion of applicability is adopted by many others. For instance, it is taken for granted by Levinson,[34] who attacks Gewirth on the moral question (are there any absolute moral rights?) without disputing his approach to the applicability criterion of absoluteness. Dershowitz, prominent in his critique on the absolute prohibition of torture, appears to be taking the prohibition as legally non-displaceable and condemn this state of affairs.[35] Similar approaches are taken in legal textbooks. Foster, for instance, describes absolute rights as 'those rights that cannot be interfered with whatever the justification'.[36] Commentators thus appear to agree that on the applicability criterion, absoluteness entails that nothing can override the right insofar as it applies in a given situation. This can be

[33] The analysis here adopts Gewirth's approach but places it strictly within a legal theoretical framework, so that 'infringement' means interfering with or acting contrary to a right and 'violation' means doing so unlawfully. Thus it is necessary to read Jarvis Thompson's perspective on infringement and violation substituting the adverb 'unlawfully' for the adverb 'wrongly': '[s]uppose that someone has a right that such and such shall not be the case. I shall say that we infringe a right of his if and only if we bring about that it is the case. I shall say that we violate a right of his if and only if both we bring about that it is the case and we act wrongly in doing so.' Jarvis Thomson, 'Some Ruminations on Rights', in Parent (ed.), *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986) at 51. See also Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990) at 122. For a critique of the moral implications of the infringement/violation distinction, see Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325.

[34] See Levinson, 'Gewirth on Absolute Rights', supra n 4.

[35] See Dershowitz, supra n 5 at 257.

[36] Foster, supra n 21 at 27. See also Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 161, cited in Feldman, *Civil Liberties and Human Rights*, supra n 21 at 242: 'All that is therefore required to establish a violation…is a finding that the state concerned has failed to comply with its obligation in respect of any one of these modes of conduct: no question of justification can ever arise.'

accepted as the starting point in the theoretical framework on the applicability criterion of absolute rights.

Yet what if the conflicting considerations are also rights? Indeed, normative critics who argue against the existence of absolute moral rights or the recognition of absolute rights in law tend to frame instances of the 'ticking bomb' scenario in the form of a conflict of rights. The debate is relevant in establishing where the applicability criterion stands in such conflict. Gewirth grapples with such an example: the admittedly unlikely scenario whereby a group of political extremists announce that they will use an arsenal of nuclear weapons against a designated large distant city unless Abrams, a politically active lawyer in the city, tortures his mother to death in public. Gewirth recognises that a consequentialist argument might well portray this as a conflict of rights:

> [I]t may be argued that the morally correct description of the alternative confronting Abrams is not simply that it is one of not violating or violating an innocent person's right to life, but rather not violating one innocent person's right to life and thereby violating the right to life of thousands of other innocent persons through being partly responsible for their deaths, or violating one innocent person's right to life and thereby protecting or fulfilling the right to life of thousands of other innocent persons.[37]

Gewirth rejects this analysis of the situation by putting forward the doctrine of *novus actus interveniens*. He posits that:

> According to this principle, when there is a causal connection between some person A's performing some action (or inaction) X and some other person C's incurring a certain harm Z, A's moral responsibility for Z is removed if, between X and Z, there intervenes some other action Y of some person B who knows the relevant circumstances of his action and who intends to produce Z or who produces Z through recklessness. The reason for this removal is that B's intervening action Y is the more direct or proximate cause of Z and, unlike A's action (or inaction), Y is the sufficient condition of Z as it actually occurs.[38]

[37] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 9.
[38] Ibid. at 12.

The problem with this argument is that it appears to contradict Gewirth's recognition that a right can encompass both positive and negative obligations. It addresses the issue in a way that eliminates positive obligations insofar as there is an intervention by a human agent with intent or recklessness. It would mean that the right not to suffer inhuman treatment, for example, does not involve a correlative duty on the State to protect from rape at the hands of a malicious person with the requisite intent.[39] Gewirth himself sets up his definition of an absolute right in a way that captures both negative and positive obligations, as he states that rights are 'justified…entitlements to the carrying out of correlative duties, positive or negative…in the latter, negative case, the requirement constitutes a prohibition'.[40] He considers that absolute rights encompass 'the exceptionless justifiability of performing or not performing those actions as required'.[41] This affirms his assertion that absolute rights 'must be fulfilled without any exceptions'.[42]

Human rights discourse, which centres on the duties owed to individuals by the State, similarly upholds the idea that rights encompass both negative and positive obligations. Fredman posits that: 'all rights, regardless of their nature, can give rise to positive as well as negative obligations on the state. Even a quintessential civil right such as the right to a fair trial requires the state to provide an adequate court system'.[43] Indeed, Shue classifies the correlative duties of rights into three groups: duties of restraint, duties to protect and duties to provide.[44] As Fredman explains, these encompass 'the primary duty whereby the state should not interfere; the secondary duty whereby the state should protect individuals *against other individuals*; and the tertiary duty to facilitate or provide for individuals'.[45] Crucially, also, the ECtHR has a rich body of case law on positive obligations encompassed by Convention rights.[46] Keir Starmer has commented that 'positive obligations are the hallmark of the European Convention on Human Rights'.[47]

This raises the possibility of a conundrum: what if negative and positive obligations that pertain to the same absolute right conflict? Indeed, can the negative and positive

[39] Indeed, this would run counter to the ECtHR's position in *MC v Bulgaria* 2003-XII; 40 EHRR 20.
[40] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 2.
[41] Ibid.
[42] Ibid. and supra n 31.
[43] Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' [2006] *Public Law* 498 at 500.
[44] Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn (Princeton, New Jersey: Princeton University Press, 1996) at 35.
[45] Fredman, supra n 43 at 500 (emphasis added).
[46] See Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
[47] Starmer, 'Positive Obligations Under the Convention', in Jowell and Cooper (eds), *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2001) at 159.

obligations pertaining to the same absolute right conflict without taking away all analytical coherence? If absolute rights can never be overridden and must be fulfilled without exception, how is this conundrum to be addressed? There is a way to save the absolutist's thesis. It can be saved by refuting the idea that there is a clash of absolutes. The proposition is this: there is *no* positive duty to act in a way that constitutes a violation of the negative duty encompassed by an absolute right. Let us take something close to a realistic scenario as an example: the police have arrested a person they know to be involved in the kidnap of a ten-year-old child who may be facing ill-treatment or risk of death at the hands of other kidnappers or a high degree of suffering or risk of death in an unknown location with no food or shelter. In such a scenario, it is difficult to argue that there is *no* positive duty to take action to avert the risk of suffering or death either at the hands of third parties or as the result of his passive situation. In fact, a number of duties including effective investigation and deployment of forces, as well as interrogating the kidnapper, obviously arise. Yet this does not preclude delimiting such duties in a way that excludes taking action that amounts to a violation of the negative duty of an absolute right. This is a matter of specification of positive duties rather than of certain considerations overriding the positive duties under an absolute right: that is, there is no positive duty to torture or use violence against the kidnapper in order to discover the child's whereabouts.[48]

To facilitate the differentiation between the applicability and specification parameters in this context, the discourse can be linked to Kant's idea of perfect and imperfect duties.[49] Rainbolt elaborates on a particular interpretation of the distinction between perfect and imperfect duties, describing it as one between obligations without latitude and obligations with latitude.[50] Rainbolt seeks to show that the distinction is actually one of degree – a 'scalar' rather than 'non-scalar' one[51] – and that on further investigation it can be seen that many obligations that we consider perfect could be labelled as 'imperfect'. His starting point is defining obligation itself:

> Doing act-tokens of type T is obligatory if and only if

[48] Indeed, this appears to be the approach taken by the ECtHR in *Gäfgen v Germany* 52 EHRR 1, examined below.
[49] This distinction is brought up in two key works: see Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (Paton tr/ed, London: Routledge, 1976) at 84; and in Kant, *The Metaphysics of Morals* (Gregor tr/ed, Cambridge: Cambridge University Press, 1996) at 153.
[50] Rainbolt, 'Perfect and Imperfect Obligations', (2000) 98 *Philosophical Studies* 233 at 233.
[51] Ibid. at 242.

1. there is a nonempty set, S, the set of act-tokens of type T such that doing members of S is permitted, and

2. there is a nonempty set, A, the set of all subsets of S such that

a. doing all the act-tokens in any one of the sets in A is morally good, and

b. failing to do all the act-tokens in one of the sets in A is morally wrong.[52]

In his description, 'act-tokens' are, according to a particular strand of action theory, particular concrete acts while an 'act-type' is an act-property,[53] such that 'buying a car' is an act-type, while act-tokens would consist of 'buying a second-hand Citroën C3 on credit from my uncle' and a huge number of other possible concrete acts.[54] A perfect obligation, according to Rainbolt, exists when one has an obligation to do precisely one particular set of act-tokens. All other obligations are, to a degree, imperfect. Distilling Rainbolt's erudite commentary, most obligations to do an act-type are 'imperfect' in the sense that there is a degree of latitude as to how they can be fulfilled. Transposing this to the positive obligations of absolute rights, it can be proposed that, reflecting on Kant's original distinction as analysed by Rainbolt, a positive obligation on the State to protect people from a type of treatment or suffering is, like most positive obligations, imperfect: in the sense that even though protecting people from proscribed harm *is* at all times obligatory, such protection can be fulfilled through variable act-tokens which may be limited – that is, not boundless – in scope.

Can the original formulation of the applicability criterion by Gewirth survive the above analysis? It appears that it can. The fact that the positive obligations encompassed by an absolute right do not include the obligation to act in a way that infringes the negative obligation of an absolute right is a definitional point, and thus a matter of specification rather than of applicability. Indeed, the fact that the positive obligations encompassed by an absolute right are not boundless does not mean that they are displaceable – that is, capable of being overridden. It does mean, however, that setting their boundaries – the process of specification – is a very significant process indeed. Linked to this, the fact that the positive obligations encompassed by an absolute right may involve a degree of variability and uncertainty in the action required to fulfil them does not entail that they are displaceable. At the same time, seeing that the maintenance of the applicability criterion on the negative

[52] Ibid.
[53] Ibid. at 235.
[54] Act-tokens can be 'concretised' further and further: for instance, 'buying a second-hand Citroën C3 on credit from my uncle' could be specified into 'buying a second-hand 2003 Citroën C3 from my uncle Peter Smith for the price of £4000, the transfer of ownership to take place on 24 November 2012, payment to take place in monthly instalments of £200 beginning on 1 November 2012' etc.

obligation(s) encompassed by an absolute right requires a particular specification of the positive obligation(s) encompassed by the same right indicates the potential interplay between the two criteria, which is addressed further below.

What about a clash between an absolute right and a right not considered absolute? In this regard, it can be argued that the concept of an 'absolute right' entails a hierarchy of rights, so that the duties encompassed by an absolute right cannot be displaced by conflicting requirements embodied in non-absolute rights. This is not an uncontroversial proposition, considering the label 'indivisible' given to human rights in the Vienna Declaration,[55] yet academic commentary[56] confirms that the proclaimed 'indivisibility' of human rights is belied by the existence at law of 'non-derogable rights'.[57] Ashworth points out this hierarchy within the ECHR, which is the focus of this article.[58] This is surely right. Non-derogable rights can be viewed as the ultimate trump card[59] in the sense that they cannot be lawfully departed from by virtue of any other considerations: this is, in effect, the applicability parameter of absoluteness. This is contrasted with derogable and 'qualified' rights:[60] these can be displaced by the State in cases of emergency insofar as necessitated by the exigencies of the situation or in the pursuit of a legitimate aim insofar as necessary in a democratic society respectively. Absolute rights, on the applicability criterion, thus reflect exactly this idea of a hierarchy, whose corollary is that an absolute right – being non-displaceable by any other considerations – cannot be 'trumped' by a derogable, or qualified, right, especially considering that the latter allows for interference in pursuit of a legitimate aim.

There is another challenge for the original formulation of the applicability criterion. This comes in the form of what can be labelled the 'practicality' argument. The critique tends to take the following line: in theory, rights labelled as absolute can never be justifiably infringed; but in practice, for all sorts of reasons including unlawful State action, general *de facto* State inaction, failure to investigate effectively, 'failure' by the victims to claim their rights or to take legal action on a violation of their rights, even failure to set out their

[55] Vienna Declaration and Programme of Action 1993, adopted at the Second World Conference on Human Rights on 25 June 1993, UN High Commission for Human Rights, A/CONF.157/23, in *United Nations Action in the Field of Human Rights* (1994) 383.
[56] See Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 *European Journal of International Law* 917; Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' (2002) 65 *Saskatchewan Law Review* 332.
[57] Koji, ibid. at 918-20.
[58] Ashworth, 'Security, Terrorism and the Value of Human Rights', in Goold and Lazarus (eds), *Security and Human Rights* (Oxford: Hart Publishing, 2007) at 212.
[59] Koji, supra n 56 at 921, citing Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).
[60] Ashworth, supra n 58 at 212-3.

pleadings in the requisite manner, the right ends up not being respected. A potent example of lack of enforcement is the problematic situation of Russian prisons, which has been repeatedly highlighted by NGOs such as Amnesty International as an endemic problem.[61] Another article by Addo and Grief[62] exemplifies this critique.

There are two ways to address the above critique. First of all, it appears to equate legal inviolability with physical inviolability. The use of the modal verb 'can' is perhaps the key to this: can and cannot are used interchangeably to mean permission/prohibition as well as possibility/impossibility. These two meanings are distinct. When it is said of a right that it cannot be interfered with, this is not – at least certainly not within this theoretical framework – a reference to 'physical' impossibility. Thus it is inapposite to argue, without more, that the possibility of violation or of a violation being left without redress refutes a prohibition. The prohibition of murder, for example, is no less applicable even if a particularly bloodthirsty and clever serial murderer manages to kill and escape the police on two dozen occasions. Concluding otherwise effectively amounts to committing a form of the 'is' – 'ought' fallacy (in the sense that 'is not' is equated with 'ought not'). At the same time, there is something problematic about limited enforcement in practice of a legally absolute right. It is problematic because the absolute prohibition stems from recognition of the gravity of the infringement. But this gravity is the reason for rendering a right absolute and it is also the reason for seeking high enforcement levels. The applicability parameter is not conceptually affected by practical barriers to enforcement. Yet the need for effective protection of a legally inviolable right should arguably play a role in interpreting the right, in the specification of the duties it encompasses, as suggested below.

The applicability parameter: ECtHR case law

It is now important to examine the Court's approach and whether it is consistent with the theory on the applicability parameter. The Court focuses its discourse on what absoluteness entails on a juxtaposition, looking at it in relation to the 'qualification' of rights: in the form of lawful derogations, exceptions or interferences (as opposed to unlawful violations of rights).

[61] See, for example, Amnesty International, 'Take a Step to Stamp Out Torture' (2000) ACT 40/013/2000, available at: http://www.amnesty.org/en/library/info/ACT40/013/2000/en [last accessed 4 July 2012].
[62] Grief and Addo, 'Some practical issues affecting the notion of absolute right in Article 3 ECHR' (1998) 23 *European Law Review* 17.

The ECtHR's discourse is consistent on this point. The primary and constantly reiterated statement is the following:

> The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols 1 and 4, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.[63]

This reflects the idea, embodied in the applicability criterion, that an absolute right is one that can never be justifiably infringed and must be fulfilled without exception. In response to arguments relating to States' overwhelming need to protect themselves and their citizens from the threat of terrorism, the ECtHR has added:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[64]

Indeed, in what can be described as a real life ticking bomb scenario, the ECtHR's Grand Chamber has recently addressed the subjection of a kidnapper to threats of torture with a view to revealing the whereabouts and potentially saving the life of the kidnapped child (upon which the kidnapper confessed to the murder of the child) and maintained its stance:

> The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. The nature of the offence

[63] *Ireland v United Kingdom*, supra n 12 at para 163.
[64] *Chahal v United Kingdom*, supra n 12 at para 79. See also *Saadi v Italy* 49 EHRR 30 at para 127.

allegedly committed by the applicant is therefore irrelevant for the purposes of art.3.[65]

The ECtHR proceeded to find that the threats of torture amounted to inhuman treatment contrary to Article 3.

The above statements are adopted by the Strasbourg Court in almost the entire body of substantive case law on Article 3 of the ECHR. The ECtHR's approach can be condensed to three main elements. First, Article 3 makes no provision for lawful exceptions – in contrast to other Articles within the ECHR, there is no possibility of lawful interference that is 'necessary in a democratic society'[66] for the fulfilment of a legitimate aim. An infringement of Article 3 is conclusively unlawful. Second, Article 15 ECHR, which governs the derogation from obligations under the ECHR in exceptional and restricted circumstances, does not allow for any derogation from Article 3 even in the event of a public emergency threatening the life of the nation (including the threat of terrorist violence).[67] Lastly, the prohibition of torture and inhuman or degrading treatment or punishment applies irrespective of the victim's conduct – this means that whether the victim or potential victim is an innocent child or a cold-blooded murderer[68] or terrorist,[69] they enjoy the protection of Article 3 alike.

The unqualified terms of Article 3 and the ECtHR's categorical statements thus appear to indicate that Article 3's absoluteness is interpreted consistently with the applicability criterion outlined above: it can never be justifiably infringed. Moreover, its applicability is not conditional on the 'good' behaviour of the victim or potential victim, so that such considerations can never affect its applicability. It is in these two senses that it is 'unqualified'[70] and 'unconditional'.[71]

The statements set out above refer consistently to 'the prohibition' embodied in Article 3, alluding to the negative obligation. Concerning the positive obligation, the ECtHR's approach to the applicability criterion is reflected in its statements in *Z v United Kingdom*:

[65] *Gäfgen v Germany*, supra n 48 at para 87.
[66] See ECHR, Articles 8(2), 9(2), 10(2), 11(2) etc.
[67] Article 15(2) ECHR provides: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 shall be made under this provision.' On this, see *A v United Kingdom* 49 EHRR 29.
[68] *Gäfgen v Germany*, supra n 48.
[69] *Chahal v United Kingdom*, supra n 12.
[70] Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 *Cambridge Law Journal* 438 at 447.
[71] Ibid. at 450.

> The Court re-iterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[72]

The right thus appears to trigger an umbrella duty on States to 'take measures' to protect individuals within their jurisdiction from the proscribed treatment. The Court also makes the following point in *Opuz v Turkey*:

> Nevertheless, it is not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under art.3 of the Convention. Moreover, under art.19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a state's obligation to protect the rights of those under its jurisdiction is adequately discharged.[73]

This discourse indicates significant parallels with the perfect-imperfect duties theory set out above. It suggests that although there is always an umbrella duty to protect, the way to fulfil it may involve a degree of latitude – although, as *Opuz* indicates, with the ultimate check on adequacy lying in the hands of the ECtHR. The positive obligations, once triggered, are thus not capable of being overridden – but what they encompass in each given situation is

[72] *Z v United Kingdom* 2001-V; 34 EHRR 3 at para 73.
[73] *Opuz v Turkey* 50 EHRR 28 at para 165. Article 19 ECHR establishes the ECtHR as a permanent Court.

a matter of specification.

The above analysis suggests that both in theory and in the ECtHR's discourse absoluteness entails that the relevant standard is non-displaceable. In other words, once it is found applicable, the right applies *no matter what*. Infringement of this right is thus conclusively unlawful. Therefore the key question becomes: what amounts to a breach of Article 3? Examining the *content* of the right shows that important questions arise even in relation to the applicability criterion.

The specification parameter: theory

Absoluteness may entail an either-or approach (either there is a breach of Article 3, which is conclusively unlawful, or there is not), but this means that the definitional question – the content of what is non-displaceable – takes centre stage. Hence the focal point here is the specification of such content, meaning the identification of what it encompasses in concrete terms. An obvious but often unstated point is that specification involves defining and delimiting the right. The length of this article does not permit a full coverage of the definition of Article 3, but seeks to highlight the significance of the level of specificity – or abstraction – as well as of the bases of specification of the right, in relation to its absolute nature. A theoretical framework that broadly attempts to reconcile bases of specification with the applicability criterion will be set out before examining the ECtHR's case law.

A useful starting point is, once again, Gewirth, who sets out different levels of 'absolutism'.[74] The reference to absolutism is to 'absolutism' or 'absoluteness' fulfilling the applicability criterion as set out above – that is, he sets up three different levels of abstraction/specification of non-displaceable standards. The three levels of 'absolutism' that he identifies are developed below in an attempt to set up the theoretical framework of specification as it relates to an absolute *right*.

1) Principle Absolutism: this maintains that what is non-displaceable is a very general moral principle, like Kant's Categorical Imperative.[75] Such a principle usually presents the subjects (beneficiaries), respondents (duty-bearers) and objects (the actual entitlement) of the right in a 'relatively undifferentiated way, present[ing] a general formula for all the diverse

[74] See Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 3-5.

[75] Kant's Categorical Imperative is here taken to be: 'Act only in accordance with that maxim through which you can at the same time will that it become a universal law.' See Kant, *Groundwork*, supra n 49 at 84. It must be noted, of course, that although this would be widely accepted as amounting to a general moral principle, it is not necessarily espoused as right, or absolute, by the whole legal/philosophical community.

duties of all respondents…toward all subjects'.[76] The problem is that principles of a high degree of generality, such as the idea that human life and dignity should be respected, are not sufficiently specified to address the operation of specific entitlements and obligations or the resolution of moral dilemmas (including apparent conflicts between rights, the issue raised earlier): for instance, the idea of subjecting a terrorist suspect to inhuman treatment with the aim of saving innocent lives. Hence, even if a principle at this level of generality is non-displaceable in accordance with the applicability criterion, it is difficult – and in practice it is a judicial leap – to distil Hohfeldian rights from it.

2) Individual Absolutism: Gewirth places this on the other end of the spectrum, as it amounts to a highly specified absolute right. It is a particular person's absolute (non-displaceable) entitlement to a particular object in a particular geographic and chronological context and, as Gewirth sees it, when all reasons for overriding the right in the particular case have been overcome.[77] In essence, individual absolutism tells us what someone is entitled to after external considerations have displaced any other potential entitlements and were either irrelevant or not important enough to displace the end result. The right is thus a post-consequentialist residual entitlement. Shafer-Landau appears to accept this in his article 'Specifying Absolute Rights', where he posits that sufficient 'specification' can render all moral rights absolute (on what was described above as the applicability criterion).[78] This involves the 'narrowing' of all rights to encompass a number of exceptive clauses, which he calls, following Thomson, 'full factual specification':[79] 'On this view, there is no right to life *simpliciter*, but rather a right not to be killed except in circumstances A, B, C, etc. On this theory, rights are always absolute, i.e., are of the utmost stringency and can never be morally overridden. Any situation that appears to call for infringement is instead subsumed under one of the exceptive clauses.'[80]

Yet this interpretation of absoluteness reduces the applicability criterion to something virtually meaningless, relating only to a post-consequentialist residue. It therefore stands in stark contrast to the strong anti-consequentialist approach in moral absolutism and in the Strasbourg Court's analysis.

Instead, Gewirth's individual absolutism could be reinterpreted as simply lying at the most context-specific end of a *non*-consequentialist scale. Unfortunately, this takes us away

[76] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 4.
[77] Ibid.
[78] Shafer-Landau, 'Specifying Absolute Rights' (1995) 37 *Arizona Law Review* 209. See also Oberdiek, 'Specifying rights out of necessity' (2008) 28 *Oxford Journal of Legal Studies* 127.
[79] Jarvis Thompson, 'Self-Defense and Rights', in *Rights, Risks and Restitution*, supra n 33 at 37.
[80] Shafer-Landau, supra n 78 at 210.

from any notion of general principle or rule: this arguably renders it inapposite in discourse on absolute human rights, which apply generally to all (or at least all within the legal order in which they are set out). Hare's critique that high degrees of specificity may remove the quality of principles as guides to behaviour[81] is relevant here and indicates the significance of the category of absolutism set out directly below.

3) Rule Absolutism: Gewirth identifies this as the intermediate level. According to Gewirth, at this level what is non-displaceable is a specific rule that describes the content of the entitlement and the correlative duty (or duties):

> At this level, the rights whose absoluteness is in question are characterized in terms of specific objects with possible specification also of subjects and respondents, so that a specific rule can be stated describing the content of the right and the correlative duty. The description will not use proper names and other individual referring expressions, as in the case of Individual Absolutism, nor will it consist only in a general formula applicable to many specifically different kinds of rights and duties and hence of objects, subjects and respondents.[82]

As Gewirth puts it, '[i]t is at this level that one asks whether the right to life of all persons or of all innocent persons is absolute, whether the rights to freedom of speech and of religion are absolute, and so forth'.[83] Indeed, this appears to encapsulate where the discourse on substantive human rights mainly lies,[84] although we cannot neglect that constitutional rights are often formulated in a way that resembles principle absolutism – for instance, the right to dignity in the German Constitution[85] – and that other legal rights are often formulated in a way that more closely resembles individual absolutism: for example, insofar as John (the seller) and Mary (the buyer) have a valid contract for the sale of a car and a valid contractual clause so provides, Mary has a right to take possession of the car upon payment of the price to John, etc.

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[81] Hare, 'The Presidential Address: Principles' (1972-1973) 73 *Proceedings of the Aristotelian Society, New Series* 1 at 3.
[82] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 4.
[83] Ibid.
[84] Cf Green, 'A philosophical taxonomy of European human rights law' (2012) 1 *European Human Rights Law Review* 71.
[85] Supra n 15.

Addo and Grief refer to Gewirth's three levels,[86] stating that:

> 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.[87]

This assessment does not draw the distinction between applicability and specification, although hinting at it, and so does not pinpoint how a potential interplay between the two informs or challenges any conception of absoluteness. Moreover, what is mentioned but largely left unaddressed is that the specification of the standard posited as absolute is significant because it sets the parameters of what is non-displaceable and unconditional: the boundaries of the 'absolute'. The fact that specification sets out these boundaries means that both its degree and its bases are crucial. Their significance can be said to lie in three key elements:

1. Specification has implications for a legal standard's capacity to guide behaviour.
2. Specification determines the scope of the absolute right.
3. The bases of specification are linked to the way absoluteness can be affected by the interplay between applicability and specification.

Each of these aspects will be discussed in turn, in an attempt to set out the ground for rationalising some of the debate and critique surrounding the specification of absolute rights.

Specification's implications for a legal standard's capacity to guide

Generality and specificity are ultimately matters of degree.[88] Indeed, although Gewirth's 'grid' is used as a tool through which to clarify the ECtHR's discourse on Article 3, the use of classification based on that grid is an approximation on what is rather a spectrum of generality/specificity.

[86] Addo and Grief, 'Does Article 3 ECHR Enshrine Absolute Rights?', supra n 8 at 514-5.
[87] Ibid. at 515 (emphasis added).
[88] Hare, supra n 81 at 3.

At the same time, although a matter of degree, the range within the spectrum occupied by rule absolutism carries significance for the concept of a legally recognised human right. Legal theorists have variously described the law as consisting of commands,[89] rules,[90] norms,[91] principles[92] etc, largely assuming or requiring a certain quality in these concepts: at the least a capacity to guide behaviour.[93] This element is arguably a *sine qua non* of any conception of the rule of law, despite significant disagreement on the rule of law's further content. Certainly, this quality also is a matter of degree, but most jurists would probably agree that it is not sufficiently fulfilled at either of the two ends of the generality/specificity spectrum: a very general principle suffers from too much uncertainty and disagreement in its concrete application while a highly specified standard provides little *ex ante* guidance and is not 'teachable and usable'.[94]

This issue is reflected in two of Fuller's eight elements of law that are needed in a society aspiring to the rule of law: generality and clarity.[95] Fuller considered that 'the requirement of generality rests on the truism that to subject human conduct to the control of rules, there must be rules'.[96] His mention of US regulatory agencies as an example of failure in this domain is instructive: 'Like King Rex they were embarked on their careers in the belief that by proceeding at first case by case they would gradually gain an insight which would enable them to develop general standards of decision. In some cases this hope has been almost completely disappointed…'.[97]

This is a requirement easily transposed to a legal order conferring rights to individuals and imposing correlative obligations on the State: general standards are needed to guide both individuals – not least impecunious potential applicants to the ECtHR – and State officials. This is so especially in the context of a right so fundamental as to be absolute. Although for Fuller these are primarily requirements for legislation, his very example indicates that they are virtues necessary also in regulation and adjudication.

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[89] See Austin in Rumble (ed), *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).
[90] See Hart in Bulloch and Raz (eds), *The Concept of Law*, 2nd edn, (Oxford: Clarendon Press, 1997). The idea of law as being made up of rules is also notably espoused by Fuller: see Fuller, *The Morality of Law*, 2nd edn, (New Haven: Yale University Press, 1969).
[91] Kelsen (Knight, trans.), *Pure Theory of Law* (New Jersey: The Lawbook Exchange, 2009).
[92] Dworkin, *Taking Rights Seriously*, supra n 59.
[93] See Jowell, 'The Rule of Law and its Underlying Values', in Jowell and Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007), where he draws on the value of certainty. This value is also one developed by Fuller, supra n 90, and underlying the analysis of principles by Hare, supra n 81.
[94] Hare, supra n 81 at 15.
[95] See Fuller, supra n 90 at ch 2.
[96] Ibid. at 49.
[97] Ibid. at 46.

At the same time, the requirement of clarity pulls towards some degree of specificity. As Fuller states, '[t]he desideratum of clarity represents one of the most essential ingredients of legality'.[98] Although again set in the legislative context, Fuller's analysis ultimately seeks clear standards by either legislators or adjudicators, as he tackles the issue surrounding legal provisions requiring what is 'fair' or 'reasonable': 'A much needed chapter of jurisprudence remains at present largely unwritten. This chapter would devote itself to an analysis of the circumstances under which problems of governmental regulation may safely be assigned to adjudicative decision with a reasonable prospect that *fairly clear standards of decision* will emerge from a case-by-case treatment of controversies as they arise.'[99]

This highlights Fuller's concern with clear standards to guide behaviour. Thus, the analysis indicates that a Court adjudicating on and *specifying* human rights, notably a right that must be fulfilled without exceptions, must carefully tread the line between over-generality and over-specificity to ensure a sufficient level of both generality and clarity. It will be suggested below that the difficulties in treading this line are partly what troubles commentators.[100]

Specification's determination of the scope of a right

It has been pointed out above that specification concretises and delimits the right. A prime basis for the critique of 'specifying absolute rights' in the way Shafer-Landau suggests is linked to the analysis above, on legal standards' capacity to guide behaviour. As Shafer-Landau acknowledges, Feinberg[101] criticises this approach for the uncertainty it involves: nobody can offer a full specification of any right, so that all actors involved are ultimately ignorant about their rights and obligations. This mirrors the rule of law related problems with over-specification raised above in relation to individual-absolutism and high degrees of specificity in general, but also points to another fundamental problem in terms of how specification relates to absoluteness: the indefinite 'narrowing' of the right through specification. This is important: specification can narrow the scope of the right and its

[98] Ibid. at 63.
[99] Ibid. at 65 (emphasis added).
[100] Feldman appears concerned with the 'relativism' involved in the contextual assessment of Article 3 treatment, supra n 21 and n 25; similarly, Addo and Grief raise the problem of 'factual and personal distinctions', supra n 8 and n 10.
[101] Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', in Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, New Jersey: Princeton University Press, 1980) 221 at 228-9.

correlative duty or duties such that what is in fact absolute is ultimately only a 'fraction' of what is at first sight considered such.

As part of what is perhaps one of the most famous theories of the specification of rights – although the word 'specification' is rarely used – Dworkin criticises Berlin's influential idea of negative liberty,[102] arguing that this broad conception of liberty and the idea of a corresponding broad right to liberty are not only inapposite, but absurd: 'Indeed it seems to me absurd to suppose that men and women have any general right to liberty at all, at least as liberty has traditionally been conceived by its champions.'[103] Dworkin means to narrow what we conceive to be our right to liberty in a way that fits within his broader thesis that liberty and equality are not competing values. Letsas interprets this in an instructive way. After setting out that we have a fundamental right not to be deprived of liberty or opportunity 'on the basis of certain considerations' – it is unnecessary to set out these considerations at this point – Letsas posits that: 'Rights thus understood are *absolute*: it can never become justified for the government to restrict my liberty for the reasons just mentioned… When these reasons are absent, we should not say that we have a right which is not absolute and whose limitation is justified. Rather, we should say that we had no right in the first place.'[104]

It is important to note here that theories such as Dworkin's and Letsas', supporting this idea of internal specification of rights rather than an 'external' balancing act, are linked to theorists' particular views on the normative basis and role of human rights and human rights adjudication, the latter balancing act being linked to interest-based theories of rights[105] and the former approach to what Letsas describes as of an 'agent-relative' character.[106] There is insufficient space to cover the disagreement in depth, except to mention that interest-based theories more easily accommodate ideas of balancing – or proportionality, a related concept and relevant in relation to consequentialist reasoning and 'qualified' rights under the ECHR[107] – than agent-relative theories.

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[102] See Berlin, *Liberty* (Hardy ed, Oxford: Oxford University Press, 2002).

[103] Dworkin, supra n 59 at 267. See also ibid. at 261, where he posits that '[t]he more limited the range of a principle, the more plausibly it may be said to be absolute.'

[104] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) at 117.

[105] See Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) at 9; and Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008) at chapter 1.

[106] Letsas, supra n 104 at 102.

[107] On proportionality, see (a minimal selection out of a rich discourse): Goold, Lazarus and Swiney, *Public Protection, Proportionality and the Search for Balance* (Ministry of Justice Research Series, 10/07, September 2007); Cohen-Eliya and Porat, 'American balancing and German proportionality: the historical origins' (2010) 8(2) *International Journal of Constitutional Law* 263; Poole, 'Proportionality in Perspective' LSE Law, Society and Economy Working Papers 16/2010, available at: http://www.lse.ac.uk/collections/law/wps/WPS2010-

What must be highlighted is that the combination of uncertainty, criticised above, and narrowing, means that internal specification carries the wider danger of indefinite narrowing, such that rights we may think we have end up, in practice, being specified *out* of our right in what can be viewed as an *ex post* fashion (usually by the relevant Court). This could be a critique launched against US adjudication on the First Amendment,[108] which admits of no qualifications on its face, and what, to some extent perhaps, Dworkin is seeking to rationalise. It is important therefore to be aware of specification's capacity to *narrow* and to do so in a potentially uncertain manner and to an uncertain degree.

Bases of specification and the interplay between specification and applicability

Compounding the above, another crucial challenge is that regarding the nature and basis of specifications: primarily, setting out what are legitimate and illegitimate specifications and how these are to be determined. Herein lies the potential of specifications bringing in consequentialist considerations *internally* – that is, in the content of the right – in a way that undermines the applicability criterion. This is arguably what is of the utmost concern to commentators such as Feldman in referring to the issue of 'relativism'.[109] Indeed, although this cannot be delved into in depth here, this appears to be a live issue in UK adjudication on Article 3, particularly in relation to deportation and extradition cases and notably *Wellington*, where a 'relativist' approach is adopted by certain judges in specifying the UK's obligations under Article 3 in such contexts, such that a 'heightened standard for contravention of article 3 [is required] in its application to extradition cases'.[110] The issue is also raised by two recent decisions of the Fourth Section of the ECtHR in relation to expulsion.[111]

Gewirth himself recognises that, even at the level of rule absolutism, the rule may come at a different level of specificity: from the right of all persons to life, to 'the right of all innocent persons to an economically secure life'[112] etc. He acknowledges that specifications

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16_Poole.pdf [last accessed 4 July 2012]. On balancing, see Alexy, 'On Balancing and Subsumption' (2003) 16(4) *Ratio Juris* 433.

[108] For a critical overview of this, see Schauer, 'Freedom of Expression Adjudication in Europe and America: a Case Study in Comparative Constitutional Architecture' ((KSG Working Paper No RWP05-019, February 2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668523 [last accessed 4 July 2012].

[109] Supra n 21 and n 25.

[110] *Wellington*, supra n 22 at [36] *per* Lord Hoffmann; cf [37]-[47] *per* Lord Scott; and [85]-[89] *per* Lord Brown.

[111] *Harkins and Edwards v United Kingdom* Application Nos 9146/07 and 32650/07, Merits, 17 January 2012, at para 129; and *Babar Ahmad and Others v United Kingdom* Application Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Merits, 10 April 2012, at para 177.

[112] Gewirth, 'Are There Any Absolute Rights?', supra n 4 at 4.

may be seen as exceptions to the more general right in a way that challenges what I have labelled the applicability criterion of absoluteness. He posits that 'not all specifications of the subjects, objects or respondents of moral rights constitute the kinds of exception whose applicability to a right debars it from being absolute'.[113] In order for specifications not to offend against the applicability criterion, Gewirth suggests that such specifications must fulfil three requirements: they must amount to concepts that are recognisable in ordinary practical thinking, be justifiable through a valid moral principle and exclude reference to the consequences of fulfilling the right.[114] Further analysis of this can help unlock the interplay between legitimate specifications and the applicability criterion.

The first requirement, the need for specifications to be made up of concepts recognisable in ordinary practical thinking, is meant, as far as Gewirth is concerned, to exclude rights that are 'overloaded with exceptions' or based on intricate utilitarian considerations. This requirement appeals rather to certainty and the ideal that the formulation of the right should have the capacity to guide, something that is lost through over-generality and over-specification, as discussed above. Substantive concerns regarding 'exceptions' and consequentialist considerations are examined in relation to the third requirement below.

Gewirth's requirement of justifiability through a valid moral principle appears at first sight more difficult to transpose to a discourse on legally enforced rights. It is impossible to do justice to the wealth of debate surrounding law's links with morality, but suffice it to say that there is significant disagreement on if and how far the law is linked to or imbued with moral principles and, if so, where these can be found and who should have the final say on what they require. Nonetheless, this requirement can be adapted sufficiently, especially in the context of human rights, in a way that gives some idea of what we should be looking for but also highlights the immense difficulties in pinning it down. For Gewirth, the criterion is indissolubly linked with and meant to be a pre-requisite for the moral justifiability of absoluteness (in the sense of the applicability parameter). This may seem at first sight unnecessary for our purposes since what is being dealt with here is a right that *is* recognised as absolute – that is, not capable of being overridden – at law. Yet what must not be neglected is the significance of the reasons why this right is absolute. Indeed, arguably the challenge for the Court in specifying such a right and its correlative duties is to do so in a way that remains loyal to the bases not only for the right's protection, but for its inviolable protection.

[113] Ibid. at 5.
[114] Ibid.

Gewirth, for instance, considers that there is 'a good moral justification for incorporating the restriction of innocence on the subjects of the right not to be killed',[115] but no such similarly sound moral justification for incorporating racial or religious specifications. In the context of Article 3, the ECtHR's statements that the victim's conduct does not affect the applicability of the right set up a different standard, yet serve to highlight that the question of what the legitimate specifications for Article 3 are goes to the root of what it is there to protect and safeguard. Unfortunately, the length of this article does not allow full exploration of this question, but the Strasbourg Court's mindfulness of the need for Article 3's specification to reflect its underlying values and the reasons for its absolute nature, as well as some of the difficulties involved, are highlighted briefly below.

Gewirth's last requirement is that:

> [T]he permissible specification of a right must exclude any reference to the possibly disastrous consequences of fulfilling the right. Since a chief difficulty posed against absolute rights is that for any right there can be cases in which its fulfilment may have disastrous consequences, to put this reference into the very description of the right would remove one of the main grounds for raising the question of absoluteness.[116]

In essence, Gewirth here points out that specification of an absolute right should not remove the applicability criterion through the back door. Indeed, any specifications incorporating consequentialist concerns operate in a way that could be called 'internal displacement' of the right. As such, this constitutes illegitimate interplay between the applicability and the specification parameters of an absolute right. Thus, formulating an allegedly absolute right as the 'right of everyone except a person who has kidnapped a child whose whereabouts are unknown not to be subjected to torture or inhuman treatment' would be an example of such illegitimate interplay. Similarly, an interpretation to the effect that a particular treatment, considered inhuman if inflicted on adults and children alike, is not considered to be inhuman if inflicted on a terrorist or someone subject to a deportation or extradition order, would also amount to illegitimate specification.

The line of legitimate specifications arguably becomes particularly difficult to tread in the realm of positive obligations. Positive obligations cannot logically be without limit, in the

[115] Ibid.
[116] Ibid.

sense that the State cannot sensibly be subject to a 'strict liability':[117] to put it crudely, in the context of Article 3, for example, not every rape or severe beating within its territory could amount to infringement of the right by the State. Moreover, as highlighted above, it is problematic to accept that positive obligations can include taking direct action in violation of the negative obligation of an absolute right. Arguably, positive measures to protect the entitlement encompassed by an absolute right are always required, though they may be of limited – that is, not boundless – scope. As discussed in addressing the issues surrounding the applicability criterion, above, the specification of positive obligations cannot but encompass such fluid wording as 'reasonable steps', reflecting a flexibility and also an inevitable uncertainty in the ways in which individuals may be considered to be protected effectively. At the same time, the question whether such terms as 'reasonable steps' encompass a consequentialist assessment is significant. It highlights the possibility that the process of delimiting positive obligations may be seen as 'internal displacement' of some sort, at odds with the applicability criterion.

Thus, difficult questions arise as to how and on what basis the ECtHR draws the boundaries of positive obligations and how that relates to the applicability criterion of absoluteness. Only some bare indications of the ECtHR's approach can be mentioned below, yet this project is an important follow-up task of the author.

The specification parameter: ECtHR case law

Article 3 is primarily delimited by the specification of the treatment it proscribes. Commentators have described Article 3 as encompassing three 'types' or levels of proscribed treatment,[118] although up to five could be drawn out of the wording of the Article: torture; inhuman treatment; degrading treatment; inhuman punishment; and degrading punishment. The Court does not always clarify precisely which type of treatment has occurred in cases of breach,[119] but the focus tends to lie on the thresholds that separate Article 3 types of treatment from treatment that falls outside the prohibition in Article 3, as well as on the threshold that separates torture from other types of Article 3 treatment.[120] These will be looked at in an effort to assess the Court's specification of what Article 3 proscribes (the negative duty) as it

[117] The term 'strict liability' is used loosely here to denote a regime whereby the State is to be held responsible for every infliction of the proscribed treatment on individuals within its jurisdiction.
[118] See Foster, supra n 21 at 202.
[119] See, for instance, *II v Bulgaria* Application No 44082/98, Merits, 9 June 2005; and *Mayzit v Russia* 43 EHRR 38.
[120] On this, see also Evans and Morgan, *Preventing Torture* (Oxford: Oxford University Press, 1998) at 73-9.

relates to the above framework, followed by a brief outline of the Court's approach to positive obligations.

(i) The threshold(s) between prohibited Article 3 treatment and treatment falling outside the prohibition in Article 3

An oft-quoted test for inhuman treatment is the *'Pretty'* test, which requires '"ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering.'[121] This test draws from the earlier case of *Ireland v United Kingdom*, where the guidance given was that '[t]he assessment of this minimum is, in the nature of things, *relative*; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc'.[122] Reference tends to be made to the 'nature and context of the treatment'[123] as 'circumstances of the case'.

There are two elements to the test. The 'severity of treatment' element appears to focus on the perpetrator's acts and intentions, while the 'intensity of suffering' element purports to focus on the victim and his or her subjective experience of the treatment. The determination of whether the threshold of minimum level of severity of treatment or intensity of suffering has been crossed involves multiple uncertainty: first, the 'intensity of suffering' test is considered by the Court to be one of *degree*, with guidance of how intensity is measured to be found in the Court's assessment of the facts on a case-by-case basis and with no line being drawn – or seemingly capable of being drawn – *ex ante*; secondly, the degree itself depends on open-ended variables including such broad concepts as the 'nature and context' of the treatment, whose role appears often to be crucial despite the significant difficulty in pinning them down. For instance, although the ECtHR has established that the psychological trauma on relatives of people detained and tortured or killed by security forces could amount to inhuman treatment,[124] it has found inhuman treatment to have been suffered in such context by the mother of a victim[125] but not, in similar circumstances, by the brother of a victim.[126] The 'severity of treatment' aspect appears similarly open-ended.

As such, the ECtHR's approach seems to elude Gewirth's favoured intermediate

[121] *Pretty v United Kingdom* 2002-III; 35 EHRR 1 at para 52.
[122] *Ireland v United Kingdom*, supra n 12 at para 162 (emphasis added).
[123] *A v United Kingdom* 1998-VI; 27 EHRR 611 at para 20.
[124] *Kurt v Turkey* 1998-III; 27 EHRR 373.
[125] *Çiçek v Turkey* 37 EHRR 20.
[126] *Çakici v Turkey* 1999-IV; 31 EHRR 5.

concept of 'Rule Absolutism'. The prohibition opens into a number of diverse variables collapsing into uncertain context-specific outcomes, with specification occurring on the ECtHR's assessment of the facts of the particular case. In fact, at the *ex ante* stage, the prohibition resembles more closely the concept of 'Principle Absolutism', with the guidance being general and the actual assessment of facts stated broadly to be relative. On the other hand, at the *ex post facto* stage the right ends up resembling 'Individual Absolutism': the individual complainant is found to have been entitled *not* to be treated in the way he or she was, in the given context, timing and other circumstances. The problems raised are as highlighted in the analysis above, creating significant uncertainty and difficulty in securing *ex ante* respect for an absolute right. Together with the problem of indefinite narrowing, these arguably underline commentators' concerns, raised above.[127]

Given the broad 'relative' assessment involved, an important question is how the line is drawn between what are legitimate factors and what are illegitimate factors to take into account. For example, it is difficult to assess whether and how far punching a handcuffed, powerless adult convicted terrorist is to be differentiated from punching a powerless innocent child and, if so, on what basis. Furthermore, if such a distinction is made, can the difference established by such a distinction be decisive in separating Article 3 proscribed ill-treatment from treatment falling outside the Article 3 prohibition? Presumably it can be. The question then arises – and arguably underlies commentators' scepticism – as to whether such differentiation can offend the applicability criterion of absoluteness as set out by the Court, since the idea is that Article 3 is *applicable no matter what*, disregarding among others any particular characteristic or conduct of the victim.

The following can be said in response to the scepticism outlined above. First, the *applicability* of Article 3 can be distinguished from the 'relative' assessment of whether the *Pretty* threshold has been crossed, which is a matter of specification. The latter assessment can legitimately incorporate certain characteristics of the victim insofar as they impact on the degree of suffering experienced and/or severity of treatment inflicted. Yet if they were to turn into bases of *displacing* fully or to an extent the operation of Article 3 – a crude example would be the suggestion that a higher threshold of suffering must be crossed if the victim is a terrorist – this would offend against the applicability criterion. Herein lies the misconceived 'relativist' approach taken by key members of the UK judiciary in *Wellington* in relation to persons subject to extradition orders:[128] it traverses the distinction between applicability and

[127] See Feldman, supra n 21 and n 25; Fenwick, supra n 27; and Addo and Grief, supra n 8, n 11 and n 100.
[128] See *Wellington*, supra n 22.

specification under Article 3 in a way that undermines the applicability parameter, which goes to the core of its absolute nature. A more pronounced example where this distinction becomes important is in the context of Article 3-proscribed punishment, discussed below.

Degrading treatment is described in *Pretty* as occurring '[w]here treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[129] The Court follows this up with the noncommittal '*may* be characterised as degrading and also fall within the definition of Article 3',[130] despite the fact that this was considered decisive towards the finding of 'degrading treatment' in *Ireland v United Kingdom*.[131] Discrimination which amounts to an 'affront to human dignity' may also constitute 'degrading treatment' proscribed by Article 3, as put forth by the Commission (during its operative years) in the *East African Asians* case,[132] and applied by the ECtHR in *Cyprus v Turkey*.[133] At the same time, the ECtHR appears to have super-imposed a test of degree, so that, in the context of either treatment or punishment, the suffering must 'attain a particular level'[134] and 'must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'.[135]

An attempt to apply the right in light of its underlying values, significant with regard to the analysis on legitimate specification above, is apparent in the Court's repeated allusions to human dignity and with the Court showing sensitivity to individuals' sense of integrity and self-worth. These attempts are important and commendable, given that the Court is grappling with contestable, evaluative standards which it must nonetheless do its best to interpret.[136] Yet it appears from the above excerpts that use of the word 'may' reflects a refusal to ascertain in advance a hard and fast rule as to what treatment will fall within the proscribed Article 3 category of degrading treatment and what will not. Although this retains sufficient flexibility to address a number of diverse situations, the problems of uncertainty and narrowing are again prominent and the category of Rule Absolutism is potentially elided. This could be said to be exacerbated by the fact that concepts such as 'human dignity' are

[129] *Pretty v United Kingdom*, supra n 121 at para 52.
[130] Ibid. (emphasis added).
[131] *Ireland v United Kingdom*, supra n 12 at para 167.
[132] *East African Asians v United Kingdom* 3 EHRR 76 at para 207.
[133] *Cyprus v Turkey* 2001-IV; 35 EHRR 30 at paras 309-11.
[134] *Tyrer v United Kingdom* A 26 (1978); 2 EHRR 1 at para 30.
[135] *A v United Kingdom*, supra n 67 at para 127.
[136] See Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: Oxford University Press, 2012) at chapter 9.

widely viewed as at best open to interpretation and at worst as indeterminate[137] or open to judicial discretion.[138] Most problematically, the Court's allusion to treatment going beyond 'legitimate' treatment/punishment begs the question of legitimate specifications perhaps more than it answers it. This uncertainty is particularly problematic, given that therein lies the potential for the sort of consequentialist reasoning that may undermine the applicability parameter.

Regarding punishment, the ECtHR does not often differentiate between the 'inhuman' and the 'degrading'. In *Soering v United Kingdom* it simply refers to punishment being brought 'within the proscription under Article 3',[139] while in *Keenan v United Kingdom* it largely adopts the tests for inhuman and degrading treatment before finding that a severe disciplinary punishment imposed on a person known to be a suicide risk in those particular circumstances amounted to 'inhuman *and* degrading treatment *and* punishment within the meaning of Article 3 of the Convention'.[140]

Nonetheless, the ECtHR establishes distinctions in *Tyrer v United Kingdom*.[141] It distinguishes 'punishment' from 'treatment'[142] and proceeds to draw a distinction between 'inhuman punishment' and 'degrading punishment', stipulating that 'inhuman punishment' requires that 'the suffering occasioned must attain a particular level',[143] thus incorporating the quantitative test employed for inhuman treatment and finding the birching of the complainant to fall beneath that level. It then adopts an interesting approach to 'degrading punishment'. Acknowledging the element of 'humiliation' potentially inherent in any punishment, it explains that '[i]t would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is "degrading" within the meaning of Article 3',[144] reaffirming the quantitative test employed for degrading *treatment* by suggesting that the humiliation or debasement involved must reach 'a particular level'.[145] The assessment of whether this level has been reached is, 'in the nature of things, *relative*: it depends on all the circumstances of the case and, in particular, on the nature and context of

[137] See Feldman, 'Human Dignity as a Legal Value' Part 1 (1999) *Public Law* 682 at 697. Consider, however, Dworkin's attack on the idea of 'indeterminacy' in Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87.
[138] See McCrudden, 'Human dignity and judicial interpretation of human rights', (2008) 19 *European Journal of International Law* 655 at 720.
[139] *Soering v United Kingdom* A 161 (1989); 11 EHRR 439 at para 101.
[140] *Keenan v United Kingdom* 2001-III; 33 EHRR 38 at para 115 (emphasis added).
[141] *Tyrer v United Kingdom*, supra n 134.
[142] Ibid. at para 29.
[143] Ibid.
[144] Ibid. at para 30.
[145] Ibid.

the punishment itself and the manner and method of its execution',[146] echoing the approach on inhuman treatment.

Crucially, in light of the third requirement for legitimate specifications and the wider issue of interplay between applicability and specification addressed above, the ECtHR rejects the idea that the deterrent effect of the punishment can legitimise it, stating clearly in *Tyrer* that punishments contrary to Article 3 are never permissible regardless of their deterrent effect.[147] This clarifies that consequentialist concerns cannot render conduct that is inhuman or degrading lawful or justified, in other words, they cannot displace the rights and obligations under Article 3, ensuring respect for the applicability criterion.

Nonetheless, in the definition of these crucial terms, the ECtHR's application of its 'nature and context' assessment exposes once again the high number of variables incorporated in the specification parameter of Article 3, leading to a variability of outcomes. For example, in assessing 'all the circumstances', the Court in *Tyrer* places emphasis on the institutional character of the punishment, suggesting that, despite the lack of severe physical suffering, the institutionalised nature of the violence renders the punishment an assault on the complainant's dignity and hence a violation of Article 3: 'his punishment— whereby he was treated as an object in the power of the authorities— constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity.'[148] Since, only paragraphs above, the institutionalised nature of punishment was presented as a generic feature requiring something *more* to amount to 'degrading punishment' under Article 3, it may appear dubious that the institutionalised 'nature and context' of the punishment pushed it above the Article 3 threshold.

At the same time, the ECtHR's efforts – in line with the second legitimate specification requirement, outlined above – to interpret Article 3 in light of its underlying values, especially dignity, are again apparent. As stated above, although underscored by the aforementioned uncertainty surrounding the particular value, this is commendable, as it shows the ECtHR engaging openly with the difficult concepts at hand.

Moreover, it can be argued that the Court's highly contextual approach on whether punishment reaches the Article 3 threshold is inevitable and even necessary. Indeed, in determining whether punishment is inhuman or degrading, the conduct of the victim, and the

[146] Ibid. (emphasis added).
[147] Ibid. at para 31.
[148] Ibid. at para 33.

proportionality of the punishment[149] – a test that is, of course, to be distinguished from the proportionality test in wider human rights discourse – to such conduct, are crucial. Thus, a term of 10 years imprisonment in a standard adult prison meted out to a 30-year-old man convicted of armed robbery and a disabled 70-year-old man convicted of tax evasion are legitimately distinguished. This 'relativism' does not undermine the applicability criterion but lies within the legitimate specification of Article 3. Sceptics must, once again, acknowledge this. At the same time, a comprehensive study on the legitimacy of specifications in the context of punishment proscribed by Article 3 is a vast and difficult endeavour, which cannot be covered in the space of this article, though the discussion above may provide food for thought for the analysis of current case law on the subject.[150]

(ii) The threshold between torture and other forms of proscribed Article 3 treatment

The Court has consistently reiterated the idea that 'the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.[151] In *Ireland v United Kingdom*, the Court suggests that the distinction 'derives principally from a difference in the intensity of the suffering inflicted'.[152] The original differentiation made therefore appears largely quantitative, but contains the added element of intent. This element in the ECtHR's definition of torture appears to encompass deliberate cruelty – that is, an intention to cause suffering. The Court's (perhaps wishful) distinction between deliberate cruelty and the forceful administration of emetics to the applicant in *Jalloh v Germany* is instructive: 'Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.'[153] It can be said that this sets up a clear point of distinction with inhuman and/or degrading treatment, where such intentional cruelty is a notable but not necessary factor.[154]

[149] For an overview of the use of proportionality in a penal context, see Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law Journal* 263.
[150] A notable case that is significant in this area and rich in the wider issues it raises with relation to Article 3 is *Wellington*, supra n 22; see also the recent decision in *Babar Ahmad and others v United Kingdom*, supra n 111.
[151] *Ireland v United Kingdom*, supra n 12 at para 167.
[152] Ibid.
[153] *Jalloh v Germany* 2006-IX; 44 EHRR 32 at para 82 (emphasis added).
[154] In assessing 'degrading treatment', the Grand Chamber has affirmed that 'although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence

Moreover, in line with the UN Convention Against Torture,[155] the Grand Chamber of the ECtHR has recently adopted a further point of distinction, acknowledging 'a purposive element as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment…which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.[156] Thus, there are two layers of intent key to establishing torture: intent to cause suffering and intent to attain a certain end through the causing of such suffering.

The ECtHR has also made it clear that the threshold that separates torture from other forms of proscribed treatment will continue to shift, stating that, given that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions',[157] it considers that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.[158]

There is significant uncertainty, therefore, surrounding this threshold also. The 'severity of treatment'/'intensity of suffering' test appears once again to make an important part of this threshold a question of degree. Moreover, it remains unspecified whether only *institutional* infliction of or involvement in such treatment with such intent is captured by 'torture', the latter being a broad requirement under the UN Convention Against Torture.[159] Lastly, the element of progressive interpretation of the Convention as a living instrument could be said to be a legitimate reflection of the increasingly high standards expected of states in respect for human rights, but nonetheless compounds the uncertainty involved in establishing what is absolutely prohibited and so strongly stigmatised. It also raises the question of what the values underlying the prohibition of torture are and how far they should be linked to State or popular consensus.[160]

At the same time, a broader question surrounding this threshold is the way it relates to

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of any such purpose cannot conclusively rule out a finding of violation of art.3'. See *MSS v Belgium and Greece* 53 EHRR 2 at para 220; and *V v United Kingdom* 30 EHRR 121 at para 71.

[155] See Article 1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, UNTS 1465.

[156] *Salman v Turkey* 2000-VII; 34 EHRR 17 at para 114.

[157] Here the ECtHR draws on previous case law: see *Tyrer v United Kingdom*, supra n 134 at para 31; *Soering v United Kingdom*, supra n 139 at para 102; and *Loizidou v Turkey*, supra n 20 at para 71.

[158] *Selmouni v France* 1999-V; 29 EHRR 403 at para 101.

[159] Supra n 155.

[160] For a critical perspective on the 'living instrument' approach, see Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) at 74; cf Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730.

the applicability parameter. The ECtHR's discourse appears to approach all (five) types of treatment covered by Article 3 as unjustifiable and therefore absolute as per the applicability parameter. Even if they reflect a spectrum of wrongfulness,[161] torture in particular carrying more stigma, they are all prohibited no matter what. Yet the distinction in the approach to admissibility of real evidence obtained by torture as against real evidence obtained through other forms of proscribed Article 3 treatment in *Gäfgen*[162] appears to introduce an impact-loaded hierarchy in the context of Article 3's relationship with Article 6 ECHR, which provides for the right to a fair trial.[163] This raises the question whether the drawing of such hierarchies, which go beyond the mere element of added stigma carried by the label 'torture', undermines the applicability parameter by making 'lesser' forms of ill-treatment appear potentially justifiable, at least in an Article 6 context. The length of this article does not allow further analysis of this but it must be noted as a significant concern for followers of Strasbourg jurisprudence.

(iii) Positive obligations under Article 3

The above indicates that the negative obligation, although approached in a relatively straightforward manner by the ECtHR in regard to the applicability criterion, raises significant problems in the realm of specification. The difficulties multiply in the sphere of positive obligations.

The issue of positive obligations only kicks in when proscribed treatment or suffering is involved. Positive obligations arise, for example, in relation to the adequacy of the criminal law and the criminal justice system in protecting individuals from suffering proscribed treatment at the hands of non-State agents;[164] in relation to conditions of imprisonment and the provision of medical assistance to those in prison;[165] in the requirement to protect

[161] See, on this, Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385.
[162] The Grand Chamber of the ECtHR has suggested that real evidence obtained by torture can never be used against someone in criminal proceedings without violating Article 6 ECHR, whilst the use of real evidence obtained by other Article 3 treatment *may* entail violation of Article 6 ECHR: see *Gäfgen*, supra n 48 at para 167.
[163] This hierarchical approach had already been taken much further by some Law Lords in *Wellington*, where the risk of torture was seen as an immovable barrier to extradition, but the risk of other forms of Article 3 proscribed treatment was seen as subject to Lord Hoffmann's 'relativist' approach. See *Wellington*, supra n 22 at [31] *per* Lord Hoffmann; cf [86] *per* Lord Brown.
[164] See, for example, *A v United Kingdom*, supra n 123; and *MC v Bulgaria*, supra n 39.
[165] See, for example, *Aleksanyan v Russia* 52 EHRR 18.

vulnerable persons at known risk of suffering Article 3 treatment;[166] and in the form of a requirement to investigate plausible complaints of the proscribed treatment.[167] The same concerns regarding the definition of what is proscribed touch positive obligations also. Further problems surround the specification and delimitation of the type and extent of duties triggered.

The procedural positive obligation, the duty of investigation, embodies the recognition of the importance of enforcing the absolute prohibition under Article 3 (on the applicability criterion), a point highlighted in the discussion on applicability above. It is a firm and relatively straightforward aspect of the Court's case law, focusing on effective apportionment of blame and establishment of facts, though its precise parameters merit examination in more detail in a follow-up discussion of positive obligations.

Beyond the procedural duty, several problems arise. A key problem is that of defining the notion of 'adequate measures'[168] or 'reasonable steps'[169] required to fulfil the positive obligation triggered in a given case. These concepts give rise to the clarity-related problems outlined by Fuller[170] and ultimately lead to what is once again an *ex post* contextual assessment. More crucially, they raise the question of how far consequentialist or cost-based concerns should inform the interpretation of what is adequate or reasonable. Certainly, resource-related concerns appear to underlie the ECtHR's approach in *N v United Kingdom*, where the Court alludes to the 'search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[171] They also seem to lie behind the Court's reluctance to take Article 3 duties too far into the socio-economic realm.[172]

Given the above framework and analysis, it is evident that the multiple questions raised in the specification of positive obligations in relation to the interplay between specification and applicability, particularly surrounding consequentialist reasoning, are very significant. Hopefully, this article serves to highlight this significance and spark critical discussion on these questions. Given the breadth of the subject, these questions will be pursued further in a follow-up work.

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[166] *Z v United Kingdom*, supra n 72.
[167] See, for example, *Assenov v Bulgaria* 1998-VIII; 28 EHRR 652.
[168] *Opuz v Turkey*, supra n 73 at para 165.
[169] *Z v United Kingdom*, supra n 72 at para 73.
[170] Supra n 90, n 96 and n 99.
[171] *N v United Kingdom* 47 EHRR 39 at para 44.
[172] Contrast the Court's initial stance in *Airey v Ireland* A 32 2 EHRR 305 at para 26 with *Pancenko v Latvia* Application No 40772/98, Admissibility, 28 October 1999 at para 2.

Conclusion

The above analysis distinguishes between the applicability and specification parameters of an absolute right with a view to clarifying the discourse on this topic and providing a coherent groundwork for exploring the ECtHR's interpretation of Article 3 ECHR as it relates to the right's absolute nature. I suggest that three questions appear to be central in the debate regarding absoluteness, and the theoretical framework I offer is with a view to helping address these. The questions are intertwined in many ways. The first question concerns the key implications of a right's absolute nature on the obligations it encompasses, to which the applicability parameter offers the primary answer: the obligations encompassed by an absolute right cannot be displaced by consequentialist concerns of any sort. In ECtHR analysis, once Article 3 applies, it applies *no matter what*. Herein lies the crux of what it means for a right to be absolute. This, however, highlights the significance of the definitional questions.

The second question, referring to the substance of the obligations encompassed by an absolute right, is addressed by looking at the significance of specification. An attempt has been made to highlight issues of particular significance and difficulty within the parameter of specification, both in theory and in the Strasbourg Court's discourse. Lastly, the question concerning the role of 'relativism' in interpreting an absolute right such as Article 3 is addressed by highlighting the distinction between legitimate and illegitimate specifications, the latter bringing in considerations that undermine the applicability parameter. On the account provided above, a contextual approach does not necessarily constitute illegitimate specification – in fact, sensitivity to the particulars of a situation is necessary in applying concepts such as inhuman and degrading treatment.

Crucially, the above analysis suggests that the specification of Article 3 must remain faithful to the basis of its absolute nature and the importance of safeguarding it, and highlights the ECtHR's attempt to interpret and apply Article 3 in light of its underlying values. In doing so, it seeks to create space for a more conceptually coherent in-depth exploration of the basis for the absolute protection of Article 3 and the ways in which the values that underlie Article 3, as well as its absolute nature, inform and should inform the specification of its content.