4

From Compromise to Absolutism? Gradual Transformation under the Old Court's Watch

This chapter traces how the modern understanding of the norm against torture and inhuman or degrading treatment came to be and how it gradually changed over time under the old Court's watch – operating together with the European Commission of Human Rights (the Commission). Taking the Convention drafters' stated intentions as a baseline, I trace the development of the norm through several landmark judgments. I focus on judgments because they present us with two crucial types of information: First, they provide insights into the specific circumstances that led an applicant to seek justice before the Court. Second, they help us glean information about the historical circumstances and the state of the international legal discourse at the time these judgments were written. Judgments that have transformed the norm are either a reflection of or a reaction to the context in which they were pronounced; they help disentangle the historical, political, and legal developments of the time. Each judgment is a milestone that helps us trace the gradual refashioning of the norm against torture and inhuman or degrading treatment. This is why they are especially helpful yardsticks for charting gradual change and identifying the ideal conditions that can facilitate change.

Moreover, I focus on the judgments in which the old Court found at least one violation and, therefore, aim to glean information about how it could muster audacity when it had a limited zone of discretion. I also analyze how the political context and the special nature of the complaints under review influenced the trade-offs the old Court had to make. Such an assessment arguably reveals more information about the dynamics of legal change than an analysis of no-violation instances – where the old Court or the Commission categorically denied the existence of certain obligations under Article 3. This was the case, for example, when the Court denied to acknowledge the obligation not to separate families under Article 3 in *Berrehab* v. *the Netherlands* in 1988 and *Nyberg* v. *Sweden* in 1990.[1]

[1] *Berrehab* v. *the Netherlands,* application no. 10730/84, ECHR (June 21, 1988), *Nyberg* v. *Sweden,* application no. 12574/86, ECHR (August 31, 1990) (struck out of the list).

The Commission took a similar stand when it came to the obligation not to enforce stringent detention conditions in *Kröcher and Möller* v. *Switzerland* in 1981 and *Dohest* v. *Belgium* in 1987 – two other no-violation decisions.[2] These no-violation decisions surely shed light on which obligations fell outside of the norm's scope at a particular point in time. Yet, they do not reveal much about the conditions under which the old Court felt audacious enough to issue progressive decisions with or without trade-offs.

The Genesis of the Prohibition of Torture under the Convention

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment. (Article 3 of the European Convention, 1950).

The Universal Declaration of Human Rights of 1948 was the first human rights document to specifically outlaw torture.[3] The Geneva Conventions of 1949 – composed of four treaties and three additional protocols that laid the foundations of international humanitarian law – was another international treaty including a prohibition of torture. Article 3, common to all four Geneva Conventions, prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" in times of armed conflict.[4]

The European Convention followed suit and prohibited torture and inhuman or degrading treatment under its own Article 3.[5] This article has an open definition and does not list the types of acts falling under it. The

This changed with *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium,* application no. 13178/03, ECHR (October 12, 2006), where the Court found that the deportation of an unaccompanied minor amounts to degrading treatment.

[2] *Kröcher and Möller* v. *Switzerland*, application no. 84/63/78, European Commission of Human Rights (December 16, 1982). *Dohest* v. *Belgium,* application no. 10448/83, European Commission of Human Rights (May 14, 1987).

[3] Walter Kälin, "The Struggle against Torture," *International Review of the Red Cross* 12, no. 324 (1998): 433–44.

[4] More specifically, torture and inhuman or degrading treatment are prohibited under Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, and Article 32 of the Fourth Convention.

[5] The European Movement, an independent group, proposed a draft text to the Consultative (today Parliamentary) Assembly. This text served as a basis for the Convention's original text. The members of the European Movement comprised pre-eminent statesmen (several former prime ministers and foreign ministers, and a number of ministers in office) and several other main professional figures of Europe. This body was established at the Congress of Nongovernmental Movements in The Hague on May 8, 1948. Ed Bates, "The Birth of the

Convention itself gives no clues as to the kinds of acts the drafters had in mind when formulating this provision. For that, one must turn to the discussions held during the drafting of the Convention as reflected in the preparatory works.

Seymour Cocks from the British delegation played the most active role in drafting this prohibition.[6] Preferring a closed definition, in a meeting on September 7, 1949, Mr Cocks proposed an amendment that read as follows:

> In particular no person shall be subjected to any form of mutilation or sterilisation, or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise, or silence as to cause mental suffering.[7]

On the following day, Mr Cocks moved his amendment to the Consultative Assembly of the Council of Europe (today's Parliamentary Assembly), where he also delivered a moving speech outlining how torture was perceived in different periods of history. He started with Athens, where torture was seen as an "oriental depravity" and then moved on to practices in the Middle Ages, where torture was a "common instrument of power and authority."[8] He then argued that torture disappeared "with the development of civilisation" in the West, only to reappear with the Third Reich:

> Cases occurred in Greece during the Nazi invasion of naked girls being placed on electric stoves and burnt in order to make them disclose the whereabouts of their friends. There was the deliberate infliction upon women of the bacteria of loathsome diseases. All kinds of ghastly mutilations were perpetrated upon thousands of men and women. (…) I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit

European Convention on Human Rights - and the European Court of Human Rights," in *The European Court of Human Rights Between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 20–22.

[6] Sir David Patrick Maxwell-Fyfe and Pierre-Henri Teitgen were the "Convention's two founding fathers," Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford and New York: Oxford University Press, 2010), 76.

[7] Council of Europe, European Commission of Human Rights, "Preparatory Work on Article 3 of the European Convention of Human Rights," DH (56) 5 (Strasbourg, May 22, 1956), 2.

[8] Ibid., 4.

> of man. I say that it is a sin against the Holy Ghost for which there is no forgiveness. I declare that it is incompatible with civilization.[9]

Sir David Patrick Maxwell-Fyfe took the floor and congratulated Mr Cocks for his moving speech, with which he was in full agreement.[10] André Philip and Pierre-Henri Teitgen from the French delegation seconded the speech.[11] The Assembly then discussed whether and how to include Mr Cocks' proposal in the draft Convention. Mr Teitgen delivered the deciding argument. "It is dangerous," he said, "to want to say more, since the effect of the Convention is thereby limited."[12] Arguing for the benefits of not listing the types of acts to prohibit and allowing the next generation to interpret this prohibition in light of their social circumstances, he called for an open definition.

Following the negotiations, Mr Cocks withdrew his amendment, yet submitted a draft resolution that noted: "[t]he Assembly records its abhorrence at the subjection of any person to any form of mutilation or sterilization or beating."[13] The representatives from Denmark, Sweden, and Norway opposed this on the grounds that sterilization was legally used in their countries. The British delegation also raised an objection, noting that corporal punishment still existed in the United Kingdom.[14] Reaching a consensus on the types of acts that should be covered under this provision proved to be difficult. In the end, Mr Cocks' definitions of torture were not included in the draft text. However, his contribution is crucial for understanding what the drafters had in mind. The fact that Mr Cocks' sentiments were not challenged but supported in principle indicates a form of consensus concerning the dominant understanding of the meaning of torture.[15]

From these proposals and the follow-up discussions, we can deduce how the drafters understood the prohibition of torture. First, the prohibition was written in a reactive manner. The drafters were reacting to the abhorrent events that had recently taken place during the Second World War. Their immediate frame of reference was the Nazi atrocities. They firmly believed that *evil is perpetrated by evil men*, namely the Nazis – who

[9] Ibid.
[10] Ibid.
[11] Ibid., 7.
[12] Ibid.
[13] Ibid., 9.
[14] Ibid., 11–13.
[15] This observation is only limited to torture, as there was no direct discussion on inhuman or degrading treatment.

had brought torture back to Europe. They lost their civility and indulged in this barbaric practice. The Nazi reference also influenced the way they described torture. In the course of the discussions of the Assembly, torture was associated with mutilation, beating, and sterilization as well as subjecting an individual to medical experimentation. These were the very acts that the Nazis perpetrated during the war, another indication that Nazi crimes shaped their viewpoint about the scope of the prohibition at that time.

Second, their understanding of what constituted torture had a religious flavour. To them, torture was a crime against humanity because it was a crime against God. There was also a particular emphasis on maiming and mutilating the body. The torture victim was seen as an object, destroyed and deformed. This formulation revolves around the sacredness of the human body, which has roots in the natural law tradition. One of the foundations of this tradition is that the body and soul are in unity, created in God's own image (*imago Dei*).[16] This understanding promotes "the sacredness of the human personality."[17] It grounds human rights in the sacredness that extends to humans from God.[18]

The religious tone carried over from natural law, which had been the dominant paradigm in legal thinking[19] until the emergence of positive law, whose main premise is that "law is law regardless of its content."[20] In reaction to the atrocities committed during the Second World War, natural law was resurrected,[21] and it influenced the drafting of both the European Convention and the Universal Declaration of Human Rights (the UDHR).[22] Mr Teitgen, one of the forefathers of the Convention, confirms this in his report by describing that the Convention's text was

[16] Robert Pasnau, *Thomas Aquinas on Human Nature: A Philosophical Study of Summa Theologiae* (New York: Cambridge University Press, 2002); David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford and New York: Oxford University Press, 2009).

[17] Samuel Moyn, *The Last Utopia* (Cambridge, MA: Harvard University Press, 2010), 75.

[18] Benjamin Gregg, *Human Rights as Social Construction* (New York: Cambridge University Press, 2011), 14.

[19] Moyn, *The Last Utopia*.

[20] According to Vincent Andrew, one of the reasons leading to this outcome was the theory of evolution proposed by Darwin, which undermined the great chain of being and the centrality of human nature. For more, see Andrew Vincent, *The Politics of Human Rights* (Oxford and New York: Oxford University Press, 2010), 80.

[21] Daniel Mirabella, "The Death and Resurrection of Natural Law," *The Western Australian Jurist* 2, no. 1 (2011): 251.

[22] Moyn, *The Last Utopia*, 215.

drafted "in accordance with the principles of natural law, of humanism and of democracy."[23] The connection between natural law and human rights can also be traced to the works of Hersch Lauterpacht, who was the "leading intellectual force" behind the UDHR and, to a great extent, the Convention.[24] According to Lauterpacht, natural law, natural rights, and human rights are cut from the same cloth, and the human rights movement's moral force is grounded in their religious foundations.[25]

The prevailing consensus among scholars is that the return to natural law was a logical reaction to historical events. The destruction generated by the War was attributed to positive (Nazi) law, and the principles of natural law were hailed as an antidote.[26] Referring to the tribunals in the aftermath of the War, David Chandler explains the role of natural law for the global human rights agenda:

> Where the tribunal broke new legal ground was in using natural law to overrule positivist law, to argue that the laws in force at the time in Germany were no defence against the retrospective crime of "waging an aggressive war." This was justified on the grounds that certain acts were held to be such heinous crimes that they were banned by universal principles of humanity. Human rights frameworks were used to undermine positivist law, to cast the winners of the War as moral, not merely militaristic, victors.[27]

The way the drafters conceptualised and defined torture and inhuman or degrading treatment appears to be in line with the theory that human rights discourse underwent a sort of Christianization in the aftermath of the War.[28] Samuel Moyn explains that the European Convention

[23] Bates, *The Evolution of the European Convention on Human Rights*, 2010, 63.

[24] J. Harcourt Barrington, who was involved with drafting the version of the Convention authored by the European Movement, acknowledged "[their] debt to [Lauterpacht] because [they] did quite shamelessly borrow many ideas from his draft Convention on the Rights of Man prepared for the International Law Association in 1948. Hersch Lauterpacht et al., "The Proposed European Court of Human Rights," *Transactions of the Grotius Society* 35 (1949): 25–47.

[25] Hersch Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), 9.

[26] Moyn, *The Last Utopia*, 75.

[27] David Chandler, "The Ideological (Mis)Use of Human Rights," in *Human Rights: Politics and Practice*, ed. Michael Goodhart (Oxford: Oxford University Press, 2009), 118.

[28] There is an ongoing debate about the Christian origins of the European human rights project. For more, see Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), 4–8; Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford and New York: Oxford University Press, 2017); Aryeh Neier, *The International Human Rights Movement: A History* (Princeton: Princeton University Press, 2012).

and the larger European project had conservative Christian origins.[29] The European human rights project, created to re-stabilise "bourgeois Europe," relied on Christian ethics.[30] Some of the founders, such as Robert Schuman, Paul-Henri Spaak, and Pierre-Henri Teitgen, were avowed Christians. This small group of individuals, mostly men, shaped the European human rights regime and determined which rights to include in the Convention.[31] According to Moyn, the Convention's conservative origins were later forgotten, however.[32] The principles that were introduced as Christian concepts came to define Western European identity during the Cold War.[33] In this process, the content and the spirit of human rights were reinvented, and human rights were secularised.[34]

One reason this transformation was successfully achieved, especially regarding this prohibition, was that it did not include indications as to precisely what constitutes torture and inhuman or degrading treatment. This had two benefits: First, the prohibition – with strong moral aspirations and a weak definition – could appeal to all of the member states signing the treaty.[35] Second, the Commission and the old Court were given an important role in redefining and refashioning the norm in line with changing societal needs. It would be these two institutions that would shape the modern understanding of the norm against torture and its subsequent transformation.

The *Greek Case (1969)* and the Modern Understanding of Torture and Inhuman or Degrading Treatment

> The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is

[29] Moyn, *The Last Utopia*, 78–79.
[30] Moyn, *Christian Human Rights*, 170.
[31] Marco Duranti also argues that in comparison to the UN Human Rights Commission, where there were a fair number of women participants, the creation of the European human rights regime was "an overwhelmingly male affair." Duranti, *The Conservative Human Rights Revolution*, 5–6.
[32] Even though the European human rights regime was led by predominantly male Christian Conservatives, they were not the only group shaping the international human rights regime. Politicians and scholars from the Global South and Latin America, some of whom were women, also contributed to the formation of the human rights system currently in place. For more, see Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton: Princeton University Press, 2017).
[33] Moyn, *The Last Utopia*, 76.
[34] Moyn, *Christian Human Rights*, 173.
[35] Bates, *The Evolution of the European Convention on Human Rights*, 2010, 56.

> unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.
>
> (The European Commission of Human Rights, Report of November 5, 1969, *Greek Case*, Yearbook XII (1969), p. 186)

The *Greek Case* was by far the most influential decision concerning the prohibition of torture and inhuman or degrading treatment in the early days of Article 3 jurisprudence, and it remains important to this day. Denmark, Sweden, Norway, and the Netherlands brought this case against the military junta that took over the Greek government on April 21, 1967. What provoked this application was the fact that the military junta suspended the constitutional provisions protecting human rights and arrested dissidents with the purpose of preventing a communist takeover.[36] Appalled by the scale of violations committed against the Greek population, the Scandinavian countries and the Netherlands collectively lodged this interstate case.

The European Commission reviewed the complaint for over two years, carrying out a thorough assessment. The Commissioners heard witness accounts of a wide range of physical and psychological ill-treatment and relied on detention reports issued by the International Red Cross. Having systematically analyzed the complaints, the Commission issued its groundbreaking decision. It was the first decision in which an international tribunal decided that a state had practised torture. It also shaped the understanding of what the prohibition of torture and inhuman or degrading treatment entails. Through this case, the Commissioners established a precise definition for "torture" and "inhuman or degrading treatment," and effectively introduced a scale of severity when it comes to identifying them.[37] This distinction served as the basis of the definitions in the Convention against Torture (CAT) – the most specialised international treaty on torture and other ill-treatment and cruel punishment.[38] The Commissioners also specifically identified the types of acts that would

[36] James Becket, "The Greek Case before the European Human Rights Commission," *Human Rights* 1, no. 1 (1970): 91–117.

[37] The *Greek Case*, Year Book of European Convention on Human Rights Vol. 12, 1969 (The Hague: Martinus Nijhoff Publishers, 1971), p. 186.

[38] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford and New York: Oxford University Press, 2010), 195.

fall under the prohibition.[39] In the Commission's view, torture included severe beatings (particularly on the head or the genital organs), beating of the feet with a club (*falanga*), food and water deprivation, and mock executions. Additionally, they defined torture as an administrative practice conducted or officially tolerated by public officials for the purpose of extracting information or confession.[40]

It is notable that the definition of torture and inhuman or degrading treatment provided in the *Greek Case* differs significantly from that of the drafters of the Convention. On the surface, the difference could be attributed to the fact that this decision was written by lawyers and judges, whereas the Convention was drafted by politicians and state officials.[41] Upon a closer look, however, the difference is not merely a matter of language. The definition in the *Greek Case* relies on a secular understanding that focuses on the psychology of victims and their feelings (i.e., their subjective experience). It excludes religious rationales for prohibiting torture on moral grounds. Its focus extends beyond the victim's physical integrity to centre on the victim's pain and suffering, whether physical or psychological. Different from natural law, which refers to reason or religious morals to establish why certain acts are wrong, this contemporary understanding relies on empathy to make human rights language more inclusive. Such an approach departs from previous codes of ethics, which were exclusive and applied to only a narrow conception of humanity.[42] For example, Christian ethics, which influenced the natural law tradition, did not concern itself with the rights of groups with different belief systems such as Jews, Muslims, or people deemed racially inferior.[43] Modern human rights language has corrected this pathology to a certain extent.

Several scientific developments preceded and accompanied this shift in legal discourse.[44] First, psychology had matured as a discipline, and

[39] For more, see Professor Metin Basoğlu, ed., *Torture and Its Definition in International Law: An Interdisciplinary Approach* (New York: Oxford University Press, 2017); UN Voluntary Fund for Victims of Torture, "Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies," 2011, www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

[40] The *Greek Case*, p. 128.

[41] One should also note that some of the drafters did come from the legal profession as well.

[42] Jack Donnelly, "Normative Versus Taxonomic Humanity: Varieties of Human Dignity in the Western Tradition," *Journal of Human Rights* 14, no. 1 (2015): 1–22.

[43] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 3rd Edition (Philadelphia: University of Pennsylvania Press, 2011), 33.

[44] Mikael Madsen discusses the role of "scientificization" in the development of human rights in Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The

studies conducted by psychologists – such as the Milgram shock experiment and later the Stanford prison experiments – became widely known and publicly discussed. While these experiments sparked interest in human psychology, they also confirmed Hannah Arendt's "Report on the Banality of Evil" thesis.[45] After watching Eichmann's trial in 1961, Arendt argued that what led him to commit heinous crimes was not his fanaticism or sociopathic tendencies. It was his inability to make moral judgments about the routines of the job he obsessively followed.[46] Anyone had the capacity to do evil; hence, heinous acts such as torture could be perpetrated by anyone. This view of "evil" is quite different from the conviction of the drafters, who believed that *evil is done by evil men* – such as the Nazis – and it led to a profound change in understanding torture. No longer was it believed that torture and inhuman or degrading treatment occurred only under extraordinary circumstances. Rather, torture and inhuman or degrading treatment could occur in mundane situations and be committed by ordinary people.

Second, the discipline of psychology started to converge with legal studies in the 1960s. Experimental methods became available to investigate legal issues and to understand the psychology of victims.[47] Through the initiative of several émigré lawyers in the US, the field of victimology emerged.[48] Their study of Holocaust victims laid the groundwork for victimology.[49] And, this new approach to victimhood contributed toward a changed discourse on human psychology and human suffering. The reasoning in the *Greek Case* reflected and added to this newly emerging understanding around a secular and victim-focused approach to the prohibition of torture and inhuman or degrading treatment. This approach remains the prevailing paradigm to this day.

European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law and Social Inquiry* 32, no. 1 (2007): 137–59.

[45] S. Alexander Haslam and Stephen Reicher, "Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny," *Personality and Social Psychology Bulletin* 33, no. 5 (2007): 616.

[46] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 1st edition (New York: Penguin Classics, 2006).

[47] June Louin Tapp, "Psychology and the Law: An Overture," *Annual Review of Psychology* 27, no. 1 (1976): 359–404; Andreas Kapardis, *Psychology and Law: A Critical Introduction* (New York: Cambridge University Press, 2010).

[48] Sandra Walklate, *Imagining the Victim of Crime* (New York: Open University Press, 2007), 2.

[49] James Dignan, *Understanding Victims and Restorative Justice* (New York: Open University Press, 2005), 14.

The *Greek Case* decision was also ahead of its time in many ways and, thus, a sort of exception for the European human rights system. At the time, it presented the European human rights regime with a "most severe challenge."[50] It was the height of the Cold War, and the ideological battle between the East and West extended to human rights.[51] At this point, human rights was more a matter of politics than law,[52] and discrediting Greece, a member of the Western bloc, was an audacious move on the part of the Commission.

The Commission could afford to be this audacious for several reasons: First, the Greek military junta represented the very thing that the human rights regime was created to prevent: totalitarian regimes. Second, the decision was part of a concerted attempt in Europe to address the situation in Greece. The Consultative Assembly of the Council of Europe had called on the Greek government to restore its constitutional democracy. It also called on other member states to refer Greece to the European Commission of Human Rights in a resolution.[53] Denmark, Norway, Sweden, and the Netherlands responded to that call and filed identical complaints. These countries did not harbour ulterior motives – no ethnic ties, territorial, or commercial interests. Their responses represented a common European concern about the developments in Greece.[54] Third, the damage could be controlled to a certain extent. The case was never referred to the Court. Hence, the only decision about this matter was given by the Commission – a quasi-judicial body. The Commission's report was directly sent to the Committee of Ministers. The Committee of Ministers sent the report to Greece together with proposals for a friendly settlement in the spirit of legal diplomacy.[55]

For these reasons, the Commission could afford to give such an audacious ruling without risking a full-blown political pushback from member states. The *Greek Case* still generated a significant impact on the way the norm against torture and inhuman or degrading treatment was understood at the time and is understood today. Arguably, the *Greek Case* represents the modern take on the prohibition of torture and inhuman or

[50] Becket, "The Greek Case before the European Human Rights Commission," 93.
[51] Vincent, *The Politics of Human Rights*, 122.
[52] Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 49.
[53] Parliamentary Assembly, *Resolution 346* (June 23, 1967).
[54] Becket, "The Greek Case before the European Human Rights Commission."
[55] Bates, *The Evolution of the European Convention on Human Rights*, 268.

degrading treatment. Since this 1969 decision, the norm against torture and inhuman or degrading treatment has continued to expand its reach and encompass increasingly high standards of treatment.

The Old Court Setting the Bar after the *Greek Case*

In this section, I will examine two cases that greatly contributed to the transformation of the European jurisprudence on torture prohibition: *Ireland* v. *the United Kingdom* and *Tyrer* v. *the United Kingdom*. Although both complaints were brought against the United Kingdom and both judgments were issued the same year, the Court treated them in significantly different ways. While the former is a cautious forbearing judgment, the latter is one of the most audacious judgments in the entire jurisprudence. Why was this the case?

To explain the Court's varying attitudes in these two rulings, we need to revisit the framework introduced in Chapter 1, which expects that the width of discretionary space largely determines the Court's forbearing or audacious tendencies. In particular, when the Court's zone of discretion is limited, it may be more inclined to be deferent to national interests (e.g., national security concerns) and less willing to hold states accountable for resource-intensive positive obligations or the abuses committed by private individuals. The Court could selectively be audacious, however, especially when addressing issues with lower stakes. That is one of the reasons why the old Court was forbearing when deciding *Ireland* v. *the United Kingdom*, but it could be more audacious when dealing with *Tyrer* v. *the United Kingdom* – a case with lower stakes, involving clear evidence of societal trends in favor of a progressive approach.

Case #1: Ireland *v.* the United Kingdom *(1978) and the Five Techniques*

> The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention 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.
>
> (*Ireland* v. *the United Kingdom*, application no. 5310/71, ECHR (January 18, 1978), §167)

https://doi.org/10.1017/9781009103862.006 Published online by Cambridge University Press

Ireland v. *the United Kingdom* was a landmark decision that set a high bar for identifying torture and inhuman or degrading treatment in the context of emergency situations. As such, it had significant ramifications far beyond the context from which it arose in Northern Ireland.[56] It also showcased the implications of according courts with only narrow discretionary space, as was the case for the old Court. Indeed, the old Court was more cautious about emergency situations where the responding state would feel threatened. Therefore, it carefully balanced states' national security concerns with its mandate to safeguard the protection of rights.

Ireland v. *the United Kingdom* typifies the old Court's mission to balance national security and human rights. It was decided amid an atmosphere of fear in Europe. The late 1960s and 1970s witnessed much upheaval in Western Europe, including left-wing (Marxist-Leninist) terrorism spread by organizations such as the Red Army Faction (RAF) in Western Germany; the Italian Red Brigade; the French Action Direct; and the Belgian Communist Combatant Cells.[57] Soon after, right-wing (or neo-fascist) terrorist networks emerged,[58] and, although their activities remained sporadic in Europe, they added to the instability created by the left-wing terrorist groups.[59] Violent ethnic nationalist groups such as the ETA (Basque Country and Freedom),[60] the IRA (Provisional Irish Republican Army),[61] and the PKK (Kurdistan Workers' Party) were also highly active.[62]

Ireland v. *the United Kingdom* arose from the specific context of "the troubles in Northern Ireland," during which over 1,100 people

[56] Deirdre Donahue, "Human Rights in Northern Ireland: Ireland v. the United Kingdom," *Boston College International and Comparative Law Review* 3, no. 2 (1980): 377–432.

[57] Stefan M. Aubrey, *The New Dimension of International Terrorism* (Zurich: VDF Hochschulverlag AG, 2004), 45.

[58] Ehud Sprinzak, "Right-Wing Terrorism in a Comparative Perspective: The Case of Split Delegitimization," *Terrorism and Political Violence* 7, no. 1 (1995): 25.

[59] Aubrey, *The New Dimension of International Terrorism*, 45.

[60] Robert P. Clark, "Patterns of ETA Violence, 1968–1980," in *Political Violence and Terror: Motifs and Motivations*, ed. Peter H. Merkl (Berkeley: University of California Press, 1986), 135.

[61] Adrian Guelke, "Loyalist and Republican Perceptions of the Northern Ireland Conflict: The UDA and Provisional IRA," in *Political Violence and Terror: Motifs and Motivations*, ed. Peter H. Merkl (Berkeley: University of California Press, 1986), 98.

[62] This conflict has taken more than 30,000 lives since 1984. Svante E. Cornell, "The Kurdish Question in Turkish Politics," in *Dangerous Neighborhood: Contemporary Issues in Turkey's Foreign Relations*, ed. Michael Radu (Oxon and New York: Routledge, 2003), 123; Ersel Aydinli, "Between Security and Liberalization: Decoding Turkey's Struggle with the PKK," *Security Dialogue* 33, no. 2 (2002): 209–25."

had been killed and over 11,500 people injured.[63] This entrenched conflict was sparked by intercommunal violence between the long-divided Protestant and Catholic communities. The Protestants (termed Loyalists or Unionists) constituted nearly two-thirds of the population, with Catholics (known as Republicans or Nationalists) making up the remainder. The Catholic minority had the active support of the IRA. Economic, social, political, and religious differences between these two communities resulted in violent clashes and an upsurge in terrorist activities by the IRA.[64] In an attempt to control the situation, the British authorities in Northern Ireland took to the extrajudicial detention or internment of terrorist suspects, especially suspected members of the IRA and, by association, the Catholic community. The British government saw the IRA operatives as a direct threat to law and order, while viewing Protestant terrorism that targeted the Catholic community (rather than the state itself) as less serious. This affected public discourse as well. While the IRA operatives were portrayed as "terrorists" or "enemies," the Protestant terrorists were considered "criminals" or "hooligans."[65] In this respect, the two groups were treated differently.

"The troubles in Northern Ireland" provided an opportunity to put Article 15 to the test. Ireland submitted the first derogation request in 1957, and the grounds of their request were evaluated in the *Lawless* v. *Ireland* case in 1961. Gerald Richard Lawless, a member of the IRA, complained that the Irish authorities had detained him for five months without bringing him before a judge. Ireland countered that their emergency legislation justified this practice. In its decision, the Court found that Ireland's declaration of public emergency was justified given that there was "a secret army [of IRA operatives] engaged in unconstitutional activities and using violence to attain its purposes," and that there was a "steady and alarming increase in terrorist activities."[66] The Court added that these activities went beyond the territories of the Republic of Ireland and thus posed a threat to the country's relationship with its neighbour. Ireland was thus not in breach of its obligations under the Convention.[67]

Then came *Ireland* v. *United Kingdom*. Ireland lodged a complaint that questioned the legality of the United Kingdom's internment of terrorist

[63] *Ireland* v. *the United Kingdom*, application no. 5310/71, ECHR (January 18, 1978).
[64] *Ireland* v. *the United Kingdom*, § 13–33.
[65] Ibid., § 63.
[66] *Lawless* v. *Ireland (No.3),* application no. 332/57, ECHR (July 1, 1961) §28.
[67] Ibid., § 30.

suspects and complained about their treatment. The complaint particularly concerned the extrajudicial arrest, detention, and internment of suspected terrorists in Northern Ireland between August 1971 and December 1975. This case offered another opportunity to discuss the extent of states' derogation rights. In its 1978 decision, the Court granted the British authorities in Northern Ireland the same derogation right as they had done to Ireland. The Court emphasised that it is up to the member states to determine whether there is indeed a public emergency and what is necessary to overcome it. It reminded them that the Court's role is *subsidiary* and that national judges are in a better position to assess the situation as well as the necessity of the measures to reverse it.[68] In this respect, the Court effectively deferred to the decision of the British authorities and did not find detaining suspects without trial a violation in this instant.

The treatment of the detainees, however, fell outside of this derogation request. The Court reviewed the complaint and found that the United Kingdom committed a violation. More specifically, the Court identified the interrogation methods known as the "five techniques" as constituting inhuman or degrading treatment but not torture: *wall-standing* (forcing detainees to remain in stress positions for long stretches of time); *hooding* (covering the detainees' heads with a dark-coloured bag at all times except during interrogations); *subjection to noise* (playing continuous loud and hissing noise); *deprivation of sleep* (not allowing detainees to sleep); and *deprivation of food and drink* (not offering a sufficient diet). However, two years earlier, when carrying out an initial review of the case, the European Commission had identified these five techniques as torture – modern versions of the techniques used to extract information in previous times. In *Ireland* v. *the United Kingdom,* the Court did not share the Commission's view. It confirmed that these techniques were systematically used to extract information and confession, condemning them on moral grounds. But it did not find them sufficiently brutal to generate suffering as intense and cruel as the word "torture" implies.[69] In doing so, the Court set a high bar for identifying and finding torture.

The judgment was a controversial compromise intended to propitiate the United Kingdom. Judges Zekia, O'Donoghue, Evrigenis, and Matscher criticised the decision in their separate opinions. Civil society groups, as well as the UN Committee against Torture and Special Rapporteur on Torture, later

[68] Ibid., § 207.
[69] Ibid., § 167.

made statements arguing that these techniques should have been classified as torture.[70] Most criticised the judgment for being decided in a way that exonerated the United Kingdom from the stigma of torture and compared it to the very different outcome of the *Greek Case*. According to Michael O'Boyle, former Deputy Registrar at the Court, the reason the Court did not classify these acts as torture – as it had in the *Greek Case* – was due to the difference in the type of regime under consideration. Unlike Greece, the United Kingdom was not a military dictatorship but "an accepted democratic country faced with an armed uprising."[71]

This high bar left a legacy, as discussed in the introductory chapter. Little did the judges know at the time that the George W. Bush administration would use this very case as a legal basis to distinguish torture from other forms of ill-treatment to justify their War on Terror policies in the aftermath of 9/11.[72] In 2002, the US Department of Justice wrote the infamous Torture Memos, where they used the euphemism "enhanced interrogation methods" to carve out large exceptions to the torture definition.[73] They defined torture as an act causing extreme pain that one would associate with organ failure or even death.[74] They deliberately made the target small and high. Anything not falling within these narrow terms was considered a valid interrogation method. However, as we will see in Chapter 5, the European Court would reverse this compromise made in *Ireland* v. *the United Kingdom* later on and attempt to amend its unintended consequences in future cases.

Case #2: Tyrer *v.* the United Kingdom *(1978) and the Living Instrument Principle*

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of

[70] Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (New York: Oxford University Press, 2009), 101–5.

[71] Michael O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. the United Kingdom," *American Journal of International Law* 71 (1977): 689.

[72] For more, see Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge and New York: Cambridge University Press, 2006), 362.

[73] This memorandum is known as the Yoo-Bybee memorandum, as it was drafted by John Yoo, then Deputy Assistant Attorney General of the US, and signed in by Jay S. Bybee, then the head of Office of Legal Counsel of the US Department of Justice.

[74] Memorandum for Alberto R. Gonzales Council to the Present (August 1, 2002) – Washington D.C. 20530, p. 28–29.

> present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.
>
> (*Tyrer* v. *the United Kingdom,* application no. 5856/72, ECHR (April 25, 1978), §31)

Tyrer v. *the United Kingdom* differs from the *Greek Case* and *Ireland* v. *the United Kingdom* not only because it was not an interstate complaint but also because its stakes were lower. It concerned a fifteen-year-old boy, Anthony Tyrer, who had been subjected to judicial corporal punishment (i.e., corporal punishment ordered by a court of law). Tyrer lodged this case with the support of the National Council for Civil Liberties (today, Liberty) – an NGO based in London.[75] Upon assessing the complaint, the Court held that the punishment did not cause serious or lasting physical damage. Yet, it also found that the treatment objectified Tyrer, impaired his dignity and physical integrity, and constituted degrading treatment.[76]

At first glance, this may appear as a straightforward and simple finding, but *Tyrer* has exercised significant influence on later jurisprudence. *Tyrer* represents a drastic change in the type of acts covered under Article 3. As explained in earlier in this chapter, corporal punishment had been discussed during the drafting of the Convention, but the British delegation raised objections against listing it as a prohibited act under Article 3. When the drafters learned that corporal punishment was legally used in the United Kingdom at the time, they dropped the idea of including it. But twenty-nine years later, the Court declared judicial corporal punishment a violation of Article 3. The *Tyrer* judgment thus represents a change from the dominant mindset at the time of the drafting of the Convention and a break from prior conceptualizations of the prohibition.

Tyrer also heralded the progressive interpretation that would be used to refine the prohibition in future cases. Here, in this case, the Court introduced "the living instrument principle," which essentially means that the Convention principles are to be interpreted in light of evolving human rights standards, improved ethical codes, and social and scientific changes.[77] Reviewing *Tyrer* in this spirit, the Court found that applying

[75] *Tyrer* v. *the United Kingdom*, application no. 5856/72, ECHR (April 25, 1978), §33. This was an early example of participation from civil society in human rights litigation, which became a more frequent practice later on.

[76] *Tyrer* v. *the United Kingdom*, §33.

[77] George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer," *European Journal of International Law* 21, no. 3 (2010): 527.

judicial corporal punishment amounted to degrading treatment. But even beyond the specifics of this case, it also signalled something bigger – henceforth, the Court may adopt higher standards when assessing complaints regarding torture and other forms of ill-treatment.

The sitting British judge, Sir Gerald Fitzmaurice, criticised the decision in his separate opinion. Acknowledging that he himself was subjected to corporal punishment, Judge Fitzmaurice claimed that the decision ran the risk of being a penal reform.[78] Although *Tyrer* spurred some debates in the United Kingdom, it did not immediately lead to any real penal reform. The United Kingdom government introduced changes following another corporal punishment case, *Campbell and Cosans* v. *the United Kingdom* (1982).[79] Following that case, the United Kingdom introduced the Education Act (No. 2) in 1986, which abolished corporal punishment in British public schools.[80]

A number of changes made a ruling like *Tyrer* possible in 1978, despite the risk of criticism like that raised by Judge Fitzmaurice. First, forbearance was beginning to pay off. The Court's cautious approach gave member states the signal that it was willing to operate at a lower sovereignty cost. As a result, by the 1970s, the number of member states subscribing to the Court's jurisdiction had increased, and the Court began to have more authority. Second, the *détente* period (1969–1979) allowed some breathing room for human rights. The 1975 Helsinki Accords brought the Western and Eastern blocs closer and reduced tensions between them. The Accords generated political and sociological changes that transformed the international human rights agenda in Europe and beyond.[81] The Helsinki Declaration, which came out of the Accords, also formally acknowledged the international human rights agenda as a post-Second World War "historical reality."[82]

Although the Helsinki Declaration was merely a nonbinding declaration of intent, it shaped the relationship between the East and the West. It encouraged transnational contact between civil society organizations,

[78] *Tyrer* v. *the United Kingdom* (separate opinion of Judge Sir Gerald Fitzmaurice), §14.
[79] *Campbell and Cosans* v. *the United Kingdom,* application no. 7511/76;7743/76, ECHR (25 February 1982).
[80] Barry Phillips, "The Case for Corporal Punishment in the United Kingdom. Beaten into Submission in Europe?," *International and Comparative Law Quarterly* 43, no. 1 (1994): 156.
[81] Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001).
[82] G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2001), 227.

activists, journalists, diplomats, and politicians on both sides.[83] The emergence of a transnational network of activists across ideological blocs worked toward increasing awareness about human rights in the East and the West alike.[84] The Helsinki Accords in particular paved the way for the transformation of European societies and the European integration project,[85] which would become interwoven with a heightened interest in human rights.[86]

Tyrer channelled the spirit of this moment by showing that the European Court could be the leader of the rights revolution in Europe. The specific traits of this case also made it easy for the Court to assume this role. This complaint's central concern – judicial corporal punishment – was not a matter of high politics or national security, and it was only still practised in the United Kingdom.[87] Because the trend in Europe had long been against judicial corporal punishment, finding corporal punishment incompatible with the prohibition of torture and inhuman or degrading treatment was not likely to raise red flags or scare other member states away. Europe was ready to eradicate judicial corporal punishment.

Despite its progressive spirit, the *Tyrer* decision was limited in some respects. The Court did not stick to this resolve about corporal punishment throughout. The fact that the punishment was ordered by a court (i.e., the state) was the reason the European Court could view this treatment contrary to Article 3. For example, the same Court found that corporal punishment ordered by a headmaster did not constitute a violation of Article 3 in *Costello-Roberts* v. *the United Kingdom* in 1993.[88] The main

[83] Sarah B. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2011), 8.

[84] According to scholars such as Daniel Thomas and Sarah Snyder, this brought the end of the Cold War. Snyder, *Human Rights Activism and the End of the Cold War,* 2. For more on the influence of the Helsinki Final Act on the demise of communism in the region, see Thomas, *The Helsinki Effect*.

[85] Mikael Rask Madsen, "International Human Rights and the Transformation of European Society: From 'Free Europe' to the Europe of Human Rights," in *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*, ed. Mikael Rask Madsen and Chris Thornhill (Cambridge University Press, 2014), 259.

[86] The Copenhagen criteria introduced in 1993 stipulated respecting human rights and the rule of law as a condition for membership – attesting to the constitutive role of human rights for the European project. Christos Kassimeris and Lina Tsoumpanou, "The Impact of the European Convention on the Protection of Human Rights and Fundamental Freedoms on Turkey's EU Candidacy," *The International Journal of Human Rights* 12, no. 3 (2008): 332. See also Andrew Williams, *EU Human Rights Policies: A Study in Irony*, Oxford Studies in European Law (Oxford and New York: Oxford University Press, 2004).

[87] Phillips, "The Case for Corporal Punishment in the United Kingdom," 156.

[88] *Costello-Roberts* v. *the United Kingdom,* application no. 13134/87, ECHR (March 25, 1993).

differense between these two cases was that while in *Tyrer* the punishment was ordered by the state (i.e., a vertical violation), in *Costello-Roberts*, it was ordered by a private individual (i.e., a horizontal violation).[89] It appears that the old Court was not entirely ready to acknowledge horizontal violations – violations perpetrated by private individuals, as we see in the case of Nahide.

What Comes after *Tyrer*? The Old Court's Cautious Audacity in *Soering*

> In the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.
>
> (*Soering* v. *United Kingdom*, application no. 14038/88, ECHR (July 7, 1989), §111)

Although the living instrument principle equipped the Court with the ability to lower the thresholds to find violations, the Court referred to this principle only once more in the context of Article 3. In 1989, the Court issued *Soering* v. *United Kingdom*, where it recognised the *non-refoulement* principle under Article 3. Specifically, the Court argued that extraditing a fugitive to another state where he may be subject to torture "would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom, and the rule of law' to which the preamble refers."[90] The Court also acknowledged that "the death row phenomenon" – the emotional distress felt by prisoners waiting to be executed – is a form of inhuman treatment. It then found that extraditing Jens Soering to the United States, where he would experience the death row phenomenon, would violate Article 3. In so doing, the Court departed from the Commission's earlier decision about the same case, where the Commission did not find a violation of Article 3.[91]

In arriving at this conclusion, the Court relied on the UN Convention on Torture, which specifically states, "no State Party shall … extradite a

[89] Michael K. Addo and Nicholas Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?," *European Journal of International Law* 9, no. 3 (1998): 518.

[90] *Soering* v. *United Kingdom*, application no. 14038/88, ECHR (7 July 1989), §88.

[91] Ibid., §76–78.

person where there are substantial grounds for believing that he would be in danger of being subjected to torture." But what provided the Court with the judicial courage to arrive at such a conclusion was the existence of a new protocol to the Convention: Protocol 6 prohibiting capital punishment in times of peace, adopted by the Committee of Ministers in 1982.[92] The Protocol was signed by sixteen member states at the time when *Soering* was under review. The signatories were Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland. The countries that did not sign Protocol 6 were in the minority – Cyprus, Ireland, Liechtenstein, Malta, the United Kingdom, and Turkey. The Court rightly interpreted this development as the majority of the Council of Europe member states intending to abolish the death penalty and justified its decision about death row constituting a violation of Article 3 based on this interpretation.[93]

Amnesty International intervened in this case and argued that considering the Western European countries' evolving standards, the death penalty in itself should be considered a form of inhuman or degrading treatment.[94] The Court did not go as far as agreeing with Amnesty's claim and prohibiting the death penalty itself, however. Instead, the Court underlined that capital punishment is permitted under Article 2 of the Convention, which reads as follows: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The Court reasoned that the original drafters could not possibly have intended a general prohibition of the death penalty. It stressed that Article 3 should be in harmony with Article 2 instead of nullifying it.[95] Therefore, the death penalty would not breach Article 3, even though the Convention is interpreted as a living document and even though capital punishment is not in congruity with "regional standards of justice."[96]

This decision did not prohibit capital punishment,[97] but at least ensured that Jens Soering would not receive the death penalty upon his extradition

[92] Ibid., §104.
[93] Ibid., §103.
[94] Ibid., §101.
[95] Ibid., §103.
[96] Ibid., §102.
[97] This would change later when the Court ruled that evolving state practice indicated that the death penalty is prohibited in Europe. See *Al-Saadoon and Mufdhi* v. *the United Kingdom*, application no. 61498/08, ECHR (March 2, 2010).

to the United States.[98] Beyond *Soering*, the Court's decision about the speculative ill-treatment of a fugitive fortified the basis of the principle that the prohibition of torture is absolute.[99] The old Court would reiterate this conviction in 1996 in *Chahal* v. *the United Kingdom*, where it established that torture and ill-treatment are prohibited regardless of the victim's conduct.[100] These two decisions played a part in the norm's gradual transformation under the old Court's watch.

Indeed, the old Court had progressive instincts, yet it could not always act on them. The old Court's narrow discretionary space did not leave it much room to engage in audacity; instead, the old Court often felt the need to offer compromises when it came to cases involving national security concerns (as seen in *Ireland* v. *the United Kingdom*) or violations committed by private individuals (as seen in *Costello-Roberts* v. *the United Kingdom*). Despite such hesitations, the old Court made a colossal contribution to the norm's evolution, planting the seeds of progress by introducing the living instrument principle. As we see in Chapter 5, the new Court would take this principle to an even higher level and certify the absoluteness of the prohibition of torture, which cannot be justified even in self-defence.

Conclusion

This chapter has provided an overview of how the modern understanding of the norm against torture and inhuman and degrading treatment came to be and discussed its subsequent gradual transformation. Taking the Convention drafters' stated intentions as a baseline, it has traced the development of the norm through several landmark judgments. Relying on legal analysis, I have noted that the bounds of the norm against torture were initially limited to appease member states during the time of the old Court. The old Court could expand the norm only when it was safe to do so – when the stakes were low and there was an emerging consensus around an issue. This constraint influenced the way the norm against torture and inhuman or degrading treatment developed in the early days of the European human rights regime. Chapter 5 offers an account of the norm's transformation during the time of the new Court, which came to enjoy a wider discretionary space.

[98] Susan Marks, "Yes, Virginia, Extradition May Breach the European Convention of Human Rights," *The Cambridge Law Journal* 49, no. 2 (1990): 197.

[99] Addo and Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?," 522.

[100] *Chahal* v. *United Kingdom*, application no. 22414/93, ECHR[GC] (November 15, 1996), §79.